United States Court of Appeals

for the

First Circuit

Case No. 21-1069

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN; ARNOLD HENRIQUEZ; MICHAEL T. COHN; WILLIAM R. TAYLOR; RICHARD A. SUTHERLAND,

Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC; DOES 1-20,

Defendants,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Interested Party-Appellant,

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER ROHRBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP

Interested Parties-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN CASE NOS. 1:11-CV-10230-MLW; 1:11-CV-12049-MLW; AND 1:12-CV-11698-MLW
HON. MARK L. WOLF, U.S. DISTRICT JUDGE

INTERESTED PARTY-APPELLANT'S APPENDIX
Volume 1 of 3 (Pages A1 to A358)

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APPEAL,CONSOLIDATED,LEAD,STAYED

United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:11-cv-10230-MLW

Arkansas Teacher Retirement System v. State Street Corporation et al
Assigned to: Judge Mark L. Wolf
Demand: $5,000,000
related Case: 1:11-cv-12049-MLW
Case in other court: USCA for the First Circuit - Mandamus Petition, 18-01651
USCA - First Circuit, 20-01365
Cause: 28:1332 Diversity-(Citizenship)

Date Filed: 02/10/2011
Date Terminated: 06/23/2014
Jury Demand: Plaintiff
Nature of Suit: 370 Other Fraud
Jurisdiction: Diversity

Special Master

Hon. Gerald E. Rosen

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Date Filed	#	Docket Text
02/10/2011	1	COMPLAINT against All Defendants Filing fee: $ 350, receipt number 0101-3265126 (Fee Status: Filing Fee paid), filed by Arkansas Teacher Retirement System. (Attachments: # 1 Civil Cover Sheet Civil Action Cover Sheet, # 2 Category Form)(Bradley, Garrett) (Entered: 02/10/2011)
02/10/2011		ELECTRONIC NOTICE of Case Assignment. Chief Judge Mark L. Wolf assigned to case. If the trial Judge issues an Order of Reference of any matter in this case to a Magistrate Judge, the matter will be transmitted to Magistrate Judge Marianne B. Bowler. (Gaudet, Jennifer) (Entered: 02/10/2011)

02/10/2011	2	Summons Issued as to State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. **Counsel receiving this notice electronically should download this summons, complete one for each defendant and serve it in accordance with Fed.R.Civ.P. 4 and LR 4.1. Summons will be mailed to plaintiff(s) not receiving notice electronically for completion of service.** (Gaudet, Jennifer) (Entered: 02/10/2011)
03/29/2011	3	MOTION for Leave to Appear Pro Hac Vice for admission of David J. Goldsmith Filing fee: $ 50, receipt number 0101-3335553 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit)(Bradley, Garrett) (Entered: 03/29/2011)
03/29/2011	4	MOTION for Leave to Appear Pro Hac Vice for admission of Paul J. Scarlato Filing fee: $ 50, receipt number 0101-3335579 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit)(Bradley, Garrett) (Entered: 03/29/2011)
03/29/2011	5	MOTION for Leave to Appear Pro Hac Vice for admission of Michael H. Rogers Filing fee: $ 50, receipt number 0101-3335595 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit)(Bradley, Garrett) (Entered: 03/29/2011)
03/29/2011	6	MOTION for Leave to Appear Pro Hac Vice for admission of Joel H. Bernstein Filing fee: $ 50, receipt number 0101-3335609 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit)(Bradley, Garrett) (Entered: 03/29/2011)
04/07/2011	7	Assented to MOTION to Appoint Counsel *For the Proposed Class* by Arkansas Teacher Retirement System.(Bradley, Garrett) (Main Document 7 replaced on 6/13/2011) (Boyce, Kathy). (Additional attachment(s) added on 6/13/2011: # 1 Exhibit Proposed order for appointment of interim lead counsel) (Boyce, Kathy). Modified on 6/13/2011 to replace former document as the proposed order was included in the filing as one document. Proposed Order has been attached (Boyce, Kathy). (Entered: 04/07/2011)
04/07/2011	8	MEMORANDUM in Support re 7 Assented to MOTION to Appoint Counsel *For the Proposed Class* filed by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit Declaration of Garrett J. Bradley In Support of Motion, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(Bradley, Garrett) (Entered: 04/07/2011)
04/15/2011	9	NOTICE of Appearance by William H. Paine on behalf of State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC (Paine, William) (Entered: 04/15/2011)
04/15/2011	10	AMENDED COMPLAINT against All Defendants, filed by Arkansas Teacher Retirement System.(Bradley, Garrett) (Entered: 04/15/2011)
04/29/2011		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 3 Motion for Leave to Appear Pro Hac Vice Added David J. Goldsmith. **Attorneys admitted Pro Hac Vice must register for electronic filing. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Boyce, Kathy) (Entered: 04/29/2011)
04/29/2011		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 4 Motion for Leave to Appear Pro Hac Vice Added Paul J. Scarlato. **Attorneys admitted Pro Hac Vice must register for electronic filing. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Boyce, Kathy) (Entered: 04/29/2011)
04/29/2011		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 5 Motion for Leave to Appear Pro Hac Vice Added Michael H. Rogers. **Attorneys admitted Pro Hac Vice must register for electronic filing. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Boyce, Kathy) (Entered: 04/29/2011)
04/29/2011		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 6 Motion for Leave to Appear Pro Hac Vice Added Joel H. Bernstein. **Attorneys admitted Pro Hac Vice must register for electronic filing. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Boyce, Kathy) (Entered: 04/29/2011)
05/27/2011	11	NOTICE of Appearance by Jeffrey B. Rudman on behalf of State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC (Rudman, Jeffrey) (Entered: 05/27/2011)
05/27/2011	12	NOTICE of Appearance by Daniel W. Halston on behalf of State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC (Halston, Daniel) (Entered: 05/27/2011)
05/27/2011	13	NOTICE of Appearance by Beth E. Bookwalter on behalf of State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC (Bookwalter, Beth) (Entered: 05/27/2011)
05/27/2011	14	NOTICE of Appearance by Andrew R. Golden on behalf of State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC (Golden, Andrew) (Entered: 05/27/2011)
05/27/2011	15	NOTICE of Appearance by Adam Hornstine on behalf of State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC (Hornstine, Adam) (Entered: 05/27/2011)
05/27/2011	16	CORPORATE DISCLOSURE STATEMENT by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Hornstine, Adam) (Entered: 05/27/2011)
05/27/2011	17	Joint MOTION for Leave to File Excess Pages *for Memoranda of Law Relating to Defendants Motion to Dismiss* by Arkansas Teacher Retirement System, State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC.(Hornstine, Adam) (Entered: 05/27/2011)
06/03/2011	18	MOTION to Dismiss by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC.(Hornstine, Adam) (Entered: 06/03/2011)
06/03/2011	19	MEMORANDUM in Support re 18 MOTION to Dismiss filed by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Hornstine, Adam) (Entered: 06/03/2011)
06/03/2011	20	DECLARATION re 18 MOTION to Dismiss by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B Part 1, # 3 Exhibit B Part 2, # 4 Exhibit B Part 3, # 5 Exhibit B Part 4, # 6 Exhibit B Part 5, # 7 Exhibit B Part 6, # 8 Exhibit B Part 7, # 9 Exhibit C Part 1, # 10 Exhibit C Part 2, # 11 Exhibit C Part 3, # 12 Exhibit D, # 13 Exhibit E, # 14 Exhibit F, # 15 Exhibit G, # 16 Exhibit H, # 17 Exhibit I, # 18 Exhibit J, # 19 Exhibit K, # 20 Exhibit L, # 21 Exhibit M, # 22 Exhibit N, # 23 Exhibit O Part 1, # 24 Exhibit O Part 2)(Hornstine, Adam) (Entered: 06/03/2011)
06/07/2011	21	MOTION for Leave to Appear Pro Hac Vice for admission of Daniel P. Chiplock Filing fee: $ 50, receipt number 0101-3441420 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit of Garrett J. Bradley)(Bradley, Garrett) (Entered: 06/07/2011)

07/20/2011	22	MEMORANDUM in Opposition re 18 MOTION to Dismiss filed by Arkansas Teacher Retirement System. (Bernstein, Joel) (Entered: 07/20/2011)
07/20/2011	23	AFFIDAVIT of Joel H. Bernstein in Opposition re 18 MOTION to Dismiss filed by Arkansas Teacher Retirement System. (Attachments: # 1 Exhibit A)(Bernstein, Joel) (Entered: 07/20/2011)
08/08/2011	24	Notice of Supplemental Authorities re 18 MOTION to Dismiss (Attachments: # 1 Exhibit A)(Bernstein, Joel) (Entered: 08/08/2011)
08/19/2011	25	Assented to MOTION for Leave to File *A Reply Brief In Support Of Defendants' Motion To Dismiss* by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Attachments: # 1 Exhibit A)(Hornstine, Adam) (Entered: 08/19/2011)
10/14/2011		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 21 Motion for Leave to Appear Pro Hac Vice Added Daniel P. Chiplock. **Attorneys admitted Pro Hac Vice must register for electronic filing. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (MacDonald, Gail) (Entered: 10/14/2011)
10/19/2011	26	AFFIDAVIT in Support re 21 MOTION for Leave to Appear Pro Hac Vice for admission of Daniel P. Chiplock Filing fee: $ 50, receipt number 0101-3441420. (Bradley, Garrett) (Entered: 10/19/2011)
12/16/2011		DOCKETING ERROR PLEASE DISREGARD NOTICE. (Entered: 12/16/2011)
12/16/2011		Reopen Document 25 Assented to MOTION for Leave to File *A Reply Brief In Support Of Defendants' Motion To Dismiss*, 17 Joint MOTION for Leave to File Excess Pages *for Memoranda of Law Relating to Defendants Motion to Dismiss* Reason: Docketing error. (Hohler, Daniel) (Entered: 12/16/2011)
01/11/2012	27	Chief Judge Mark L. Wolf: ENDORSED ORDER entered granting 25 Motion for Leave to File Document. "ALLOWED." ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Hohler, Daniel) (Entered: 01/12/2012)
01/12/2012	28	Chief Judge Mark L. Wolf: MEMORANDUM AND ORDER entered. (Hohler, Daniel) (Entered: 01/12/2012)
01/12/2012		ELECTRONIC NOTICE Setting Hearing on Motion 18 MOTION to Dismiss : Motion Hearing set for 2/24/2012 03:00 PM in Courtroom 10 before Chief Judge Mark L. Wolf. (Hohler, Daniel) (Entered: 01/12/2012)
01/12/2012	29	REPLY to Response to 18 MOTION to Dismiss filed by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Hornstine, Adam) (Entered: 01/12/2012)
02/15/2012	30	Second Notice of Supplemental Authorities re 18 MOTION to Dismiss (Attachments: # 1 Exhibit A)(Bernstein, Joel) (Entered: 02/15/2012)
02/16/2012		ELECTRONIC NOTICE Canceling Hearing. The hearing scheduled 2/24/2012 has been CANCELED. No new hearing date has been set. (Hohler, Daniel) (Entered: 02/16/2012)
02/28/2012	31	Response by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC to 30 Notice of Supplemental Authorities . (Hornstine, Adam) (Entered: 02/28/2012)
04/13/2012		ELECTRONIC NOTICE Setting Hearing on Motion 18 MOTION to Dismiss : Motion Hearing set for 5/8/2012 11:00 AM in Courtroom 10 before Chief Judge Mark L. Wolf. (Hohler, Daniel) (Entered: 04/13/2012)
04/30/2012	32	MOTION for Leave to Appear Pro Hac Vice for admission of Robert L. Lieff Filing fee: $ 100, receipt number 0101-3922151 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit Affidavit of Robert L. Lieff, # 2 Certificate of Service)(Bradley, Garrett) (Entered: 04/30/2012)
05/08/2012		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 32 Motion for Leave to Appear Pro Hac Vice Added Robert L. Lieff. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (MacDonald, Gail) (Entered: 05/08/2012)
05/08/2012		Clerk's Notes for proceedings held before Chief Judge Mark L. Wolf: Motion Hearing held on 5/8/2012 re 18 MOTION to Dismiss filed by State Street Global Markets, LLC, State Street Corporation, State Street Bank & Trust Company. Court is in session. Court hears argument on motions to dismiss. Court is in recess. Court is back in session. State Street Bank Global Markets is dismissed without prejudice. Motion to dismiss against State Street Corporation is allowed. Motion to dismiss denied as to State Street Bank & Trust. Court provides rationale of decision. Separate Order to issue. Lobby conference held. Court is in recess. (Court Reporter: Richard Romanow at bulldog@richromanow.com.)(Attorneys present: Various) (Hohler, Daniel) (Entered: 05/09/2012)
05/08/2012	33	Chief Judge Mark L. Wolf: ORDER entered granting in part and denying in part 18 Motion to Dismiss For the reasons described in detail in court on May 8, 2012, it is hereby ORDERED that: 1. Defendants' Motion to Dismiss (Docket No. 18) is ALLOWED to the extent that the claims against defendant State Street Corporation are DISMISSED and, by agreement of the parties, the claims against defendant State Street Global Markets, LLC are DISMISSED without prejudice. The Motion to Dismiss is DENIED with regard to the claims against defendant State Street Bank & Trust Company. 2. By July 13, 2012, representatives of the parties and their counsel shall meet at least once to discuss the possibility of settling this case; report, jointly if possible but separately if necessary, concerning whether they have reached an agreement to do so; and, if not, report whether they both wish to engage in mediation, either privately or before a magistrate judge. 3. If case is not settled and there is no agreement to engage in mediation, by August 30, 2012, the parties shall respond to the attached Notice of Scheduling Conference. 4. If necessary, a scheduling conference shall be held on September 18, 2012, at 3:00 p.m. Representatives of the parties with settlement authority shall attend. (Attachments: # 1 Notice of Scheduling Conference) (Hohler, Daniel) (Entered: 05/09/2012)
05/09/2012	34	NOTICE of Scheduling Conference Scheduling Conference set for 9/18/2012 03:00 PM in Courtroom 10 before Chief Judge Mark L. Wolf. See attached notice.(Hohler, Daniel) (Entered: 05/09/2012)
05/15/2012	35	Assented to MOTION for Extension of Time to June 12, 2012 to File Answer re 10 Amended Complaint by State Street Bank & Trust Company. (Hornstine, Adam) (Entered: 05/15/2012)
05/16/2012		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 35 Motion for Extension of Time to Answer All Defendants. Response due 6/12/2012 (Hohler, Daniel) (Entered: 05/16/2012)

05/17/2012	36	Transcript of Motion to Dismiss Hearing held on May 8, 2012, before Chief Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 6/7/2012. Redacted Transcript Deadline set for 6/18/2012. Release of Transcript Restriction set for 8/15/2012. (Scalfani, Deborah) (Entered: 05/17/2012)
05/17/2012		NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 05/17/2012)
06/07/2012	37	Assented to MOTION for Extension of Time to 9/13/2012 to File Answer re 10 Amended Complaint by State Street Bank & Trust Company. (Hornstine, Adam) (Entered: 06/07/2012)
06/11/2012		Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 37 Motion for Extension of Time to Answer All Defendants. (Hohler, Daniel) (Entered: 06/11/2012)
07/13/2012	38	Joint MOTION to Seal *Joint Status Report* by State Street Bank & Trust Company.(Golden, Andrew) (Entered: 07/13/2012)
07/13/2012	39	NOTICE OF MANUAL FILING by State Street Bank & Trust Company *Joint Status Report* (Golden, Andrew) (Entered: 07/13/2012)
07/13/2012	40	SEALED DOCUMENT: Joint Status Report (referred to in document 38). (MacDonald, Gail) (Entered: 07/16/2012)
07/30/2012	41	Chief Judge Mark L. Wolf: ENDORSED ORDER entered denying 38 Motion to Seal. The Joint Motion to File Status Report Under Seal (Docket No. 38) is hereby denied and the report shall be unsealed. The parties shall, by August 30, 2012, inform the court of the date of the mediation, or explain the efforts that have been made to schedule it and request a brief extension. However, if a date has not been agreed upon, they shall also then respond to the Notice of Scheduling Conference. (Hohler, Daniel) Modified on 7/31/2012 (Hohler, Daniel). (Entered: 07/31/2012)
08/17/2012	42	STATUS REPORT by State Street Bank & Trust Company. (Golden, Andrew) (Entered: 08/17/2012)
08/21/2012	43	ELECTRONIC NOTICE Canceling Hearing. The Scheduling Conference previously scheduled for 09/18/2012 is canceled. No new hearing date has been set. The parties shall report on the results of the mediation by by 11/2/2012.(Hohler, Daniel) (Entered: 08/21/2012)
08/22/2012	44	MOTION for Leave to Appear Pro Hac Vice for admission of Lawrence A. Sucharow Filing fee: $ 100, receipt number 0101-4082250 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit)(Bradley, Garrett) (Entered: 08/22/2012)
08/31/2012	45	Assented to MOTION for Extension of Time to November 9, 2012 to File Answer re 10 Amended Complaint by State Street Bank & Trust Company.(Hornstine, Adam) (Entered: 08/31/2012)
09/12/2012	46	Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 45 Motion for Extension of Time to Answer (Hohler, Daniel) (Entered: 09/12/2012)
09/14/2012	47	Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 44 Motion for Leave to Appear Pro Hac Vice Added Lawrence A. Sucharow. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Hohler, Daniel) (Entered: 09/14/2012)
11/02/2012	48	Assented to MOTION for Extension of Time to 11/30/2012 to File Answer re 10 Amended Complaint by State Street Bank & Trust Company. (Hornstine, Adam) (Entered: 11/02/2012)
11/02/2012	49	Letter/request (non-motion) from all parties . (Rudman, Jeffrey) (Entered: 11/02/2012)
11/02/2012	50	STATUS REPORT by Arkansas Teacher Retirement System, State Street Bank & Trust Company. (Rudman, Jeffrey) (Entered: 11/02/2012)
11/08/2012	51	ELECTRONIC NOTICE of Hearing. As requested by the parties, a status conference is set for 11/15/2012 02:00 PM in Courtroom 10 before Chief Judge Mark L. Wolf in civil matters 1:11-cv-12049-MLW, 1:11-cv-10230-MLW, 1:12-cv-11698-MLW. The parties shall file a report jointly if possible, but separately if necessary, as to the items to be addressed at the status conference by 11/13/2012. Associated Cases: 1:11-cv-12049-MLW, 1:11-cv-10230-MLW, 1:12-cv-11698-MLW(Hohler, Daniel) (Entered: 11/08/2012)
11/08/2012	52	Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 48 Motion for Extension of Time to Answer All Defendants. (Hohler, Daniel) (Entered: 11/08/2012)
11/13/2012	53	NOTICE of Appearance by Michael A. Lesser on behalf of Arkansas Teacher Retirement System (Attachments: # 1 Certificate of Service)(Lesser, Michael) (Entered: 11/13/2012)
11/13/2012	54	NOTICE of Appearance by Michael P. Thornton on behalf of Arkansas Teacher Retirement System (Attachments: # 1 Certificate of Service) (Thornton, Michael) (Entered: 11/13/2012)
11/13/2012	55	NOTICE of Appearance by Evan R. Hoffman on behalf of Arkansas Teacher Retirement System (Attachments: # 1 Certificate of Service) (Hoffman, Evan) (Entered: 11/13/2012)
11/13/2012	56	STATUS REPORT by Arkansas Teacher Retirement System, State Street Bank & Trust Company. (Rudman, Jeffrey) (Entered: 11/13/2012)
11/14/2012	57	Joint MOTION for Protective Order *and Stipulation* by Arkansas Teacher Retirement System, State Street Bank & Trust Company.(Rudman, Jeffrey) (Entered: 11/14/2012)
11/15/2012	60	ELECTRONIC Clerk's Notes for proceedings held before Chief Judge Mark L. Wolf: Status Conference held on 11/15/2012. Status conference held. (Court Reporter: Richard Romanow at bulldog@richromanow.com.) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Hohler, Daniel) (Entered: 11/19/2012)
11/16/2012	58	Joint MOTION for Protective Order *and Stipulation* by Arkansas Teacher Retirement System, State Street Bank & Trust Company.(Rudman, Jeffrey) (Entered: 11/16/2012)
11/16/2012	59	Joint MOTION to Stay by Arkansas Teacher Retirement System, State Street Bank & Trust Company.(Rudman, Jeffrey) (Entered: 11/16/2012)

11/19/2012	61	Chief Judge Mark L. Wolf: ORDER entered granting 58 Motion for Protective Order. (MacDonald, Gail) (Entered: 11/20/2012)
11/19/2012	62	Chief Judge Mark L. Wolf: ORDER entered granting 59 Motion to Stay. (MacDonald, Gail) (Entered: 11/20/2012)
11/19/2012	63	Chief Judge Mark L. Wolf: ELECTRONIC ORDER entered. ORDER consolidating cases for pre-trial purposes. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (MacDonald, Gail) (Entered: 11/20/2012)
11/29/2012	64	Transcript of Lobby Conference held on November 15, 2012, before Chief Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Richard Romanow at bulldog@richromanow.com Redaction Request due 12/20/2012. Redacted Transcript Deadline set for 12/31/2012. Release of Transcript Restriction set for 2/27/2013. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 11/29/2012)
11/29/2012	65	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 11/29/2012)
11/18/2013	66	Joint MOTION to Stay by State Street Bank & Trust Company, State Street Corporation.(Rudman, Jeffrey) (Entered: 11/18/2013)
12/26/2013	70	Judge Mark L. Wolf: ENDORSED ORDER entered granting (66) Motion to Stay in case 1:11-cv-10230-MLW "ALLOWED AND SO ORDERED. the parties asshall by June 1, 2014 inform the court whether the stay to that date should be extended and, if not, propose a schedule for this case." Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Hohler, Daniel) (Entered: 12/26/2013)
05/30/2014	71	Joint MOTION to Stay *and Stipulation* by State Street Bank & Trust Company.(Halston, Daniel) (Entered: 05/30/2014)
06/21/2014	72	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Hohler, Daniel) (Entered: 06/23/2014)
06/23/2014	73	Judge Mark L. Wolf: ORDER OF ADMINISTRATIVE CLOSING entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Hohler, Daniel) (Entered: 06/23/2014)
08/26/2014	74	NOTICE of Change of Address or Firm Name by Evan R. Hoffman (Hoffman, Evan) (Entered: 08/26/2014)
01/21/2015	75	Joint MOTION to Stay by State Street Bank & Trust Company.(Hornstine, Adam) (Entered: 01/21/2015)
06/06/2016	76	Joint Letter (non-motion) from parties in connection with resolving claims. (Franklin, Yvonne) (Entered: 06/06/2016)
06/06/2016	77	ELECTRONIC NOTICE of Hearing. Status Conference set for 6/23/2016 01:00 PM in Courtroom 10 before Judge Mark L. Wolf. The parties shall file a status report, joint if possible, by June 15, 2016, to update the court as to any motion for preliminary approval of the class action settlement as referenced in 76 Letter. (Bartlett, Timothy) (Entered: 06/06/2016)
06/08/2016	78	MOTION to Withdraw as Attorney *Adam Hornstine* by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC.(Halston, Daniel) (Entered: 06/08/2016)
06/15/2016	79	Letter/request (non-motion). (Bartlett, Timothy) (Entered: 06/15/2016)
06/17/2016	80	Letter/request (non-motion). (Bartlett, Timothy) (Entered: 06/17/2016)
06/21/2016	81	STATUS REPORT *(Joint)* by Arkansas Teacher Retirement System. (Sucharow, Lawrence) (Entered: 06/21/2016)
06/23/2016	82	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Status Conference held on 6/23/2016. Order to follow. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.) (Attorneys present: Goldsmith, Bradley, Chiplock, Paine, Halston) (Bartlett, Timothy) (Entered: 06/24/2016)
06/24/2016	83	Judge Mark L. Wolf: ORDER entered. (Bartlett, Timothy) (Entered: 06/24/2016)
06/24/2016	84	ELECTRONIC NOTICE of Hearings, per 83 ORDER: Hearing set for 8/8/2016 03:00 PM in Courtroom 10 before Judge Mark L. Wolf. Hearing set for 10/25/2016 02:00 PM in Courtroom 10 before Judge Mark L. Wolf. (Bartlett, Timothy) (Entered: 06/24/2016)
07/01/2016	85	Transcript of Status Conference held on June 23, 2016, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Redaction Request due 7/22/2016. Redacted Transcript Deadline set for 8/1/2016. Release of Transcript Restriction set for 9/29/2016. (Scalfani, Deborah) (Entered: 07/01/2016)
07/01/2016	86	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 07/01/2016)
07/12/2016	87	MOTION for Leave to Appear Pro Hac Vice for admission of Nicole M. Zeiss Filing fee: $ 100, receipt number 0101-6199025 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit of Garrett J. Bradley)(Bradley, Garrett) (Entered: 07/12/2016)
07/12/2016	88	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 87 Motion for Leave to Appear Pro Hac Vice Added Nicole M. Zeiss. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Franklin, Yvonne) (Entered: 07/12/2016)
07/26/2016	89	SETTLEMENT AGREEMENT *Stipulation and Agreement of Settlement* by Arkansas Teacher Retirement System. (Sucharow, Lawrence) (Entered: 07/26/2016)
07/26/2016	90	MOTION for Settlement *PLAINTIFFS ASSENTED-TO MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PROPOSED FORM AND MANNER OF CLASS NOTICE AND REQUEST FOR ORAL ARGUMENT* by Arkansas Teacher Retirement System. (Attachments: # 1 Proposed Preliminary Approval Order) (Sucharow, Lawrence) (Entered: 07/26/2016)

07/26/2016	91	MEMORANDUM in Support re 90 MOTION for Settlement *PLAINTIFFS ASSENTED-TO MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PROPOSED FORM AND MANNER OF CLASS NOTICE AND REQUEST FOR ORAL ARGUMENT* filed by Arkansas Teacher Retirement System. (Sucharow, Lawrence) (Entered: 07/26/2016)
07/26/2016	92	AFFIDAVIT of LAWRENCE A. SUCHAROW in Support re 90 MOTION for Settlement *PLAINTIFFS ASSENTED-TO MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS SETTLEMENT, PRELIMINARY CERTIFICATION OF SETTLEMENT CLASS, AND APPROVAL OF PROPOSED FORM AND MANNER OF CLASS NOTICE AND REQUEST FOR ORAL ARGUMENT* filed by Arkansas Teacher Retirement System. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Sucharow, Lawrence) (Entered: 07/26/2016)
08/08/2016	96	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Preliminary Class Settlement Conference held on 8/8/2016. Court certified proposed class for settlement purposes. Final Class Settlement hearing set November 2, 2016 at 2 p.m. (Court Reporter: Kelly Mortellite at mortellite@gmail.com) (Attorneys present: Goldsmith, Thornton, Chiplock, Kravitz, McTigue, Paine, Halston) (Bartlett, Timothy) (Entered: 08/11/2016)
08/08/2016	98	ELECTRONIC NOTICE of Hearing. Final Approval Hearing set for 11/2/2016 02:00 PM in Courtroom 10 before Judge Mark L. Wolf. (Bartlett, Timothy) (Entered: 08/11/2016)
08/09/2016	93	Transcript of Hearing held on August 8, 2016, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Redaction Request due 8/30/2016. Redacted Transcript Deadline set for 9/9/2016. Release of Transcript Restriction set for 11/7/2016. (Scalfani, Deborah) (Entered: 08/09/2016)
08/09/2016	94	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 08/09/2016)
08/10/2016	95	Proposed Document(s) submitted by Arkansas Teacher Retirement System. Document received: Proposed Revised Preliminary Approval Order and Class Notices. (Attachments: # 1 Exhibit A - Revised Preliminary Approval Order, # 2 Exhibit B - Redline of Revised Preliminary Approval Order, # 3 Exhibit C - Revised Long-Form Notice, # 4 Exhibit D - Redline of Revised Long-Form Notice, # 5 Exhibit E - Revised Summary Notice, # 6 Exhibit F - Redline of Revised Summary Notice)(Sucharow, Lawrence) (Entered: 08/10/2016)
08/11/2016	97	Judge Mark L. Wolf: ORDER entered. (Final Approval Hearing set for 11/2/2016 02:00 PM in Courtroom 10 before Judge Mark L. Wolf.) (Bartlett, Timothy) (Entered: 08/11/2016)
09/15/2016	99	MEMORANDUM OF LAW by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Paine, William) (Entered: 09/15/2016)
09/15/2016	100	Assented to MOTION for Settlement *Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class* by Arkansas Teacher Retirement System.(Sucharow, Lawrence) (Entered: 09/15/2016)
09/15/2016	101	Assented to MOTION for Leave to File Excess Pages *regarding Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement* by Arkansas Teacher Retirement System. (Attachments: # 1 Proposed Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class) (Sucharow, Lawrence) (Entered: 09/15/2016)
09/15/2016	102	MOTION for Attorney Fees , *Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* by Arkansas Teacher Retirement System.(Sucharow, Lawrence) (Entered: 09/15/2016)
09/15/2016	103	Assented to MOTION for Leave to File Excess Pages *regarding Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees* by Arkansas Teacher Retirement System. (Attachments: # 1 Proposed Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs)(Sucharow, Lawrence) (Entered: 09/15/2016)
09/15/2016	104	DECLARATION re 100 Assented to MOTION for Settlement *Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class*, 102 MOTION for Attorney Fees , *Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* by Arkansas Teacher Retirement System. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32)(Sucharow, Lawrence) (Entered: 09/15/2016)
09/16/2016	105	Letter/request (non-motion) from Atty. Hoffman, for the Plaintiffs'. Courtesy copy of listed documents have been delivered to chambers. (Franklin, Yvonne) (Entered: 09/16/2016)
10/19/2016	106	STATUS REPORT *(Defendant's Statement Reporting Status of Class Action Settlement)* by State Street Bank & Trust Company, State Street Corporation, State Street Global Markets, LLC. (Paine, William) (Entered: 10/19/2016)
10/21/2016	107	ELECTRONIC NOTICE Canceling Hearing. Hearing 10/25/2016 is terminated. (Hohler, Daniel) (Entered: 10/21/2016)
10/21/2016	108	MEMORANDUM in Support re 102 MOTION for Attorney Fees , *Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs*, 100 Assented to MOTION for Settlement *Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class Reply Memorandum of Law in Further Support of (A) Plaintiffs Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsels Motion for an Award of Attorneys Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* filed by Arkansas Teacher Retirement System. (Attachments: # 1 Text of Proposed Order Final Order and Judgment, # 2 Text of Proposed Order Approving Plan of Allocation, # 3 Text of Proposed Order Awarding Attorneys' Fees and Expenses)(Goldsmith, David) (Entered: 10/21/2016)
10/21/2016	109	AFFIDAVIT of Eric J. Miller re 102 MOTION for Attorney Fees , *Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs*, 108 Memorandum in Support of Motion,,, 100 Assented to MOTION for Settlement *Final Approval of Proposed Class Settlement and Plan of*

		Allocation and Final Certification of Settlement Class on Behalf of A.B. Data Regarding Mailing of Notice to Settlement Class Members and Requests for Exclusion by Arkansas Teacher Retirement System. (Goldsmith, David) (Entered: 10/21/2016)
11/02/2016	110	Judge Mark L. Wolf: ORDER entered. JUDGMENT (Hohler, Daniel) (Entered: 11/02/2016)
11/02/2016	111	Judge Mark L. Wolf: ORDER entered. (Hohler, Daniel) (Entered: 11/02/2016)
11/02/2016	112	Judge Mark L. Wolf: ORDER entered. (Hohler, Daniel) (Entered: 11/02/2016)
11/02/2016	113	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Motion Hearing held on 11/2/2016 re 102 MOTION for Attorney Fees , *Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* filed by Arkansas Teacher Retirement System, 100 Assented to MOTION for Settlement *Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class* filed by Arkansas Teacher Retirement System. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.)(Attorneys present: various) (Hohler, Daniel) (Entered: 11/02/2016)
11/07/2016	114	Transcript of Hearing held on November 2, 2016, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Redaction Request due 11/28/2016. Redacted Transcript Deadline set for 12/8/2016. Release of Transcript Restriction set for 2/6/2017. (Scalfani, Deborah) (Entered: 11/07/2016)
11/07/2016	115	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 11/07/2016)
11/10/2016	116	Letter/request (non-motion) from David J. Goldsmith *to the Court*. (Goldsmith, David) (Entered: 11/10/2016)
02/06/2017	117	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER.(Bono, Christine) (Entered: 02/06/2017)
02/06/2017	118	ELECTRONIC NOTICE of Hearing.Hearing set for 3/7/2017 10:00 AM in Courtroom 10 before Judge Mark L. Wolf. See D.E. 117 .(Bono, Christine) (Entered: 02/06/2017)
02/16/2017	119	MOTION Plaintiff James Pehoushek-Stangeland for Leave to Participate Telephonically at Hearing re 117 Memorandum & ORDER *[Unopposed]* by James Pehoushek-Stangeland, Andover Companies Employee Savings and Profit Sharing Plan. (Attachments: # 1 Text of Proposed Order) (Sarko, Lynn) (Entered: 02/16/2017)
02/17/2017	120	Judge Mark L. Wolf: "ALLOWED. Mr. Pehoushek-Stangeland may participate by telephone."ORDER entered granting 119 Motion (Bono, Christine) (Entered: 02/17/2017)
02/17/2017	121	MOTION for Leave to Appear Pro Hac Vice for admission of Richard M. Heimann Filing fee: $ 100, receipt number 0101-6499996 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit Evan R. Hoffman)(Hoffman, Evan) (Entered: 02/17/2017)
02/17/2017	122	AFFIDAVIT of Richard M. Heimann in Support re 121 MOTION for Leave to Appear Pro Hac Vice for admission of Richard M. Heimann Filing fee: $ 100, receipt number 0101-6499996 filed by Arkansas Teacher Retirement System. (Hoffman, Evan) (Entered: 02/17/2017)
02/17/2017	123	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 121 Motion for Leave to Appear Pro Hac Vice Added Richard M. Heimann. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Franklin, Yvonne) (Entered: 02/17/2017)
02/17/2017	124	NOTICE of Appearance by Ellen R. Tanowitz on behalf of Competitive Enterprise Institute (Tanowitz, Ellen) Modified on 2/17/2017 to correct docket text (Franklin, Yvonne). (Entered: 02/17/2017)
02/17/2017	125	MOTION for Leave to Appear Pro Hac Vice for admission of Theodore H. Frank Filing fee: $ 100, receipt number 0101-6500785 by Competitive Enterprise Institute. (Attachments: # 1 Affidavit of Theodore Frank, # 2 Exhibit 1 to Affidavit,)(Tanowitz, Ellen) Modified on 2/17/2017 to correct docket text (Franklin, Yvonne). Modified on 2/21/2017 (Paine, Matthew). (Entered: 02/17/2017)
02/17/2017	126	MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master by Competitive Enterprise Institute. (Attachments: # 1 Exhibit Proposed Brief)(Tanowitz, Ellen) Modified on 2/17/2017 to correct docket text (Franklin, Yvonne). (Entered: 02/17/2017)
02/17/2017	127	MEMORANDUM in Support re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master filed by Competitive Enterprise Institute. (Tanowitz, Ellen) Modified on 2/17/2017 to correct docket text (Franklin, Yvonne). (Entered: 02/17/2017)
02/17/2017	128	MEMORANDUM OF LAW by Arkansas Teacher Retirement System to 117 Memorandum & ORDER. (Heimann, Richard) (Entered: 02/17/2017)
02/17/2017	129	BRIEF by Labaton Sucharow LLP *Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master*. (Attachments: # 1 Exhibit A - Phillips Biography, # 2 Exhibit B - Phillips Declaration)(Lukey, Joan) (Entered: 02/17/2017)
02/17/2017	130	NOTICE of Appearance by Brian T. Kelly on behalf of Thornton Law Firm LLP (Kelly, Brian) (Entered: 02/17/2017)
02/17/2017	131	BRIEF by Thornton Law Firm LLP *Consenting to Appointment of Special Master and Concurring with Proposal Filed as [Dkt. 129]*. (Kelly, Brian) (Entered: 02/17/2017)
02/18/2017	132	NOTICE of Appearance by Joan A. Lukey on behalf of Labaton Sucharow LLP (Lukey, Joan) (Main Document 132 replaced on 2/21/2017) (Paine, Matthew). (Entered: 02/18/2017)
02/21/2017	133	Judge Mark L. Wolf: "It is hereby ORDERED that class counsel shall, by February 27, 2017, respond to the Competitive Enteirprise Institute's Center for Class Action Fairness's Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and for Leave to Participate as Guardian Ad Litem for Class or Amicus in Front of Special Master (Docket No. 126). Any reply shall be filed by March 2, 2017." ORDER entered. (Bono, Christine) (Entered: 02/21/2017)
02/21/2017	134	CORPORATE DISCLOSURE STATEMENT by Competitive Enterprise Institute identifying other Affiliate Center for Class Action Fairness for

		Competitive Enterprise Institute. (Franklin, Yvonne) (Entered: 02/21/2017)
02/21/2017	135	Notice of correction to docket made by Court staff. Correction: D.E. #125, Attachment #3 incorrectly filed because: Corporate disclosure removed and filed correctly as a separate event and docket text corrected. (Entered: 02/21/2017)
02/21/2017	136	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 125 Motion for Leave to Appear Pro Hac Vice Added Theodore H. Frank. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Franklin, Yvonne) (Entered: 02/21/2017)
02/22/2017	137	RESPONSE TO COURT ORDER Filed 2/17/17 by Arnold Henriquez Zuckerman Spaeder LLP's Response to the Court's February 6, 2017 Memorandum and Order. (Carl Kravitz) re 117 Memorandum & Order. (Franklin, Yvonne) Modified on 2/22/2017 to refile response in lead case. (Entered: 02/22/2017)
02/22/2017	138	RESPONSE TO COURT ORDER Filed 2/20/17 by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor re 117 Memorandum & ORDER. (Attachments: # 1 Declaration of J. Brian McTigue, # 2 Exhibit 1, # 3 Exhibit 2) Modified on 2/22/2017 to refile response in lead case. (Franklin, Yvonne). (Entered: 02/22/2017)
02/22/2017	139	RESPONSE TO COURT ORDER Filed 2/21/17 by Arnold Henriquez (CORRECTED)Zuckerman Spaeder LLP's Response to the Court's February 6, 2017 Memorandum and Order (Carl Kravitz) re 117 Memorandum & Order. Modified on 2/22/2017 to refile response in lead case. (Entered: 02/22/2017)
02/22/2017	140	RESPONSE TO COURT ORDER by Arnold Henriquez Filed 2/21/17 to the Court's February 6, 2017 Memorandum and Order (Catherine Campbell) re 117 Memorandum & Order. Modified on 2/22/2017 to refile response in lead case. (Franklin, Yvonne). (Entered: 02/22/2017)
02/22/2017	141	RESPONSE TO COURT ORDER by Arnold Henriquez (Jonathan Axelrod) re 117 Memorandum & Order. Modified on 2/22/2017 to refile response in lead case. (Franklin, Yvonne). (Entered: 02/22/2017)
02/22/2017	142	RESPONSE TO COURT ORDER by Arkansas Teacher Retirement System re 117 Memorandum & ORDER *filed February 6, 2017*. (Palmer, Kimberly) (Entered: 02/22/2017)
02/23/2017	144	MOTION FOR LEAVE TO REQUEST AN ORDER PERMITTING Henriquez PLAINTIFFS TO ATTEND THE MARCH 7, 2017 HEARING TELEPHONICALLY *[UNOPPOSED]* by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor. (Attachments: # 1 Text of Proposed Order)(McTigue, J.) (Entered: 02/23/2017)
02/27/2017	145	Opposition re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 02/27/2017)
02/27/2017	146	MEMORANDUM in Opposition re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master filed by Arnold Henriquez. (Kravitz, Carl) (Entered: 02/27/2017)
02/27/2017	147	Opposition re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master *[joining in Opposition filed by Labaton Sucharow LLP 145]* filed by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 02/27/2017)
02/27/2017	148	RESPONSE to Motion re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master filed by Andover Companies Employee Savings and Profit Sharing Plan, James Pehoushek-Stangeland. (Sarko, Lynn) (Entered: 02/27/2017)
02/27/2017	149	Opposition re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master *[joining in Opposition filed by Labaton Sucharow, LLP, ECF No. 145]* filed by Arkansas Teacher Retirement System. (Palmer, Kimberly) (Entered: 02/27/2017)
02/27/2017	150	NOTICE by Thornton Law Firm LLP *of Joinder to [ECF No. 145] Labaton Sucharow LLP's Opposition to Competitive Enterprise Institute's Center for Class Action Fairness's Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and for Leave to Participate as Guardian Ad Litem for Class or Amicus in Front of Special Master [ECF No. 126]* (Kelly, Brian) (Entered: 02/27/2017)
02/27/2017	151	NOTICE of Appearance by M. Frank Bednarz on behalf of Competitive Enterprise Institute (CEI) (Bednarz, M.) (Entered: 02/27/2017)
02/28/2017	152	Judge Mark L. Wolf: "This motion with regard to Arnold Henriquez is hereby DENIED. This motion with regard to the other plaintiffs is hereby DENIED without prejudice to possible reconsideration if, by March 2, 2017, affidavits, as required by Local Rule 7.1(b)(1), are filed, with letters from each plaintiff's treating physician."ORDER entered denying 144 Motion (Bono, Christine) (Entered: 02/28/2017)
03/02/2017	154	REPLY to Response to 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master filed by Competitive Enterprise Institute (CEI). (Bednarz, M.) (Entered: 03/02/2017)
03/02/2017	155	MOTION for Reconsideration re 152 Order on Motion for Miscellaneous Relief, *MOTION FOR PARTIAL RECONSIDERATION FOR LEAVE TO REQUEST AN ORDER PERMITTING PLAINTIFFS RICHARD A. SUTHERLAND AND WILLIAM R. TAYLOR TO ATTEND THE MARCH 7, 2017 HEARING TELEPHONICALLY* by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor. (Attachments: # 1 Declaration of J. Brian McTigue, # 2 Exhibit A - Physician's Letter)(McTigue, J.) (Entered: 03/02/2017)
03/02/2017	156	MEMORANDUM in Support re 155 MOTION for Reconsideration re 152 Order on Motion for Miscellaneous Relief, *MOTION FOR PARTIAL RECONSIDERATION FOR LEAVE TO REQUEST AN ORDER PERMITTING PLAINTIFFS RICHARD A. SUTHERLAND AND WILLIAM R. TAYLOR TO ATTEND THE MARCH 7, 2017 HEARIN filed by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor. (McTigue, J.) (Entered: 03/02/2017)*
03/03/2017	157	Second AFFIDAVIT in Support re 155 MOTION for Reconsideration re 152 Order on Motion for Miscellaneous Relief, *MOTION FOR PARTIAL RECONSIDERATION FOR LEAVE TO REQUEST AN ORDER PERMITTING PLAINTIFFS RICHARD A. SUTHERLAND AND WILLIAM R. TAYLOR TO ATTEND THE MARCH 7, 2017 HEARIN filed by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor. (Attachments: # 1 Exhibit A Physicians Note, # 2 Exhibit B Physicians Note)(McTigue, J.) (Entered: 03/03/2017)*

03/03/2017	158	Judge Mark L. Wolf: "ALLOWED. As Mr. Taylor is not scheduled for knee surgery on March 7, 2017, he as well as Mr. Sutherland shall participate by telephone. The Clerk will provide their counsel with the telephone number to be called." ORDER entered granting 155 Motion for Reconsideration (Bono, Christine) (Entered: 03/03/2017)
03/06/2017	160	NOTICE of Appearance by Justin J. Wolosz on behalf of Labaton Sucharow LLP (Wolosz, Justin) (Main Document 160 replaced on 3/6/2017) (Franklin, Yvonne). (Entered: 03/06/2017)
03/06/2017	161	MOTION for Leave to Appear Pro Hac Vice for admission of Jonathan D. Selbin Filing fee: $ 100, receipt number 0101-6521097 by Arkansas Teacher Retirement System. (Attachments: # 1 Affidavit Jonathn D. Selbin, # 2 Affidavit Evan R. Hoffman)(Hoffman, Evan) (Entered: 03/06/2017)
03/06/2017	162	Judge Mark L. Wolf: "The court has noticed that there is an incorrect cite toUnited States v. Sampson on page 12 of the February 6, 2017Memorandum and Order. Attached is an amended version with thecorrect citation, United States v. Sampson, 148 F. Supp. 3d 75,85-88 (D. Mass. 2015)." ORDER entered. re 117 Memorandum & ORDER (Bono, Christine) (Entered: 03/06/2017)
03/06/2017	163	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 161 Motion for Leave to Appear Pro Hac Vice Added Jonathan D. Selbin. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Franklin, Yvonne) (Entered: 03/06/2017)
03/06/2017	166	MOTION for Leave to File *Surreply to Competitive Enterprise Institute's Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and for Leave to Participate as Guardian Ad Litem for Class or Amicus in Front of Special Master* by Lieff Cabraser Heimann & Bernstein, LLP. (Attachments: # 1 Exhibit A to Motion - [Proposed] Surreply, # 2 Declaration of Richard M. Heimann in Support of Motion for Leave to File Surreply, # 3 Exhibit A to Heimann Declaration, # 4 Exhibit B to Heimann Declaration, # 5 Exhibit C to Heimann Declaration, # 6 Exhibit D to Heimann Declaration)(Heimann, Richard) (Entered: 03/06/2017)
03/06/2017	167	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 166 Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Bono, Christine) (Entered: 03/06/2017)
03/06/2017	168	SUR-REPLY to Motion re 126 MOTION Motion for Leave to File Amicus Curiae Response to Court's Order of February 6 and For Leave to Participate as Guardian ad Litem for Class or Amicus in Front of Special Master *[Leave to file granted on March 6, 2017]* filed by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 03/06/2017)
03/06/2017	169	CERTIFICATE OF SERVICE pursuant to LR 5.2 by Lieff Cabraser Heimann & Bernstein, LLP re 168 Sur-Reply to Motion, . (Heimann, Richard) (Entered: 03/06/2017)
03/07/2017	170	Judge Mark L. Wolf: "ALLOWED (and signed on 3/5/17) for the purpose of allowing Mr. Frank to appear as amicus on March 7, 2017, and in the future if authorized by the Court." ENDORSED ORDER entered. re 125 MOTION for Leave to Appear Pro Hac Vice for admission of Theodore H. Frank Filing fee: $ 100, receipt number 0101-6500785 filed by Competitive Enterprise Institute (CEI) (Bono, Christine) Modified on 3/13/2017 (Franklin, Yvonne). (Entered: 03/07/2017)
03/07/2017	171	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Hearing re Special Master Appointment and related issues held on 3/7/2017. (Court Reporter: Catherine Handel at hhcatherine2@yahoo.com.)(Attorneys present: Sucharow, Lukey, Wolosz, Chiplock, Heimann, Bradley, G., Bradley, M., Kelly, Kravitz, Campbell, McTigue, Axelrod, Palmer, Sarko, Payne, Halston, Frank) (Bono, Christine) (Entered: 03/07/2017)
03/08/2017	172	Judge Mark L. Wolf: "1. The Competitive Enterprise Institute's Motion for Leave to File Amicus Curiae Response to the Court's Order of February 6 (Docket No. 126) is ALLOWED. The Competitive Enterprise Institute's Motion for Leave to Participate as Guardian ad Litem for the Class or Amicus in Front of the Special Master (Docket No. 126) is taken under advisement. 2. Class counsel shall, by March 13, 2017, file a motion memorializing their March 7, 2017 oral motion for relief from final judgment under Federal Rule of Civil Procedure 60(b). The Rule 60(b) motion is taken under advisement. 3. Class counsel shall, by March 13, 2017, file a proposed notice to be sent to the class describing the issues that have emerged and the events that have occurred since the court ordered awards of attorneys' fees, expenses, and service awards at the November 2, 2017 hearing. The notice shall advise the class that the final judgment has been reopened, describe how the relevant records are available for review, and provide 45 days for any class member to object to the awards previously made. Class counsel shall explain to the court how this notice will be distributed in a manner comparable to the notice of the preliminary approval of the class settlement. 4. Labaton Sucharow LLP and Thornton Law Firm LLP's motion to appoint Retired Judge Layn Phillips as co-special master (Docket Nos. 129 and 131) is DENIED. 5. McTigue Law's motion to appoint Retired Judge James Rosenbaum as special master (Docket No. 138) is WITHDRAWN. To the extent, if any, that they were not withdrawn, McTigue Law's objections to the scope of the special master's duties and to the appointment of Retired Judge Gerald Rosen as special master are DENIED. 6. Class counsel shall, by March 13, 2017, identify which firm or firms will serve as liaison counsel to the special master. 7. Class counsel shall order the transcript of the March 7, 2017 hearing." ORDER entered. (Bono, Christine) (Entered: 03/08/2017)
03/08/2017	173	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. (Bono, Christine) (Entered: 03/08/2017)
03/08/2017	174	AMICUS BRIEF filed by Competitive Enterprise Institute (CEI) *with leave to file granted March 8, 2017* 172 . (Bednarz, M.) (Entered: 03/08/2017)
03/10/2017	175	RECEIPT: Receipt # 580004 for monies received on 03/08/2017 in amount of $ $2,000,000.00, re: 173 Memorandum & ORDER.. (Adam, Lucien) (Entered: 03/10/2017)
03/13/2017	176	Transcript of Hearing held on March 7, 2017, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Catherine Handel at hhcatherine2@yahoo.com Redaction Request due 4/3/2017. Redacted Transcript Deadline set for 4/13/2017. Release of Transcript Restriction set for 6/12/2017. (Scalfani, Deborah) (Entered: 03/13/2017)
03/13/2017	177	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 03/13/2017)
03/13/2017	178	MOTION *Pursuant to Fed. R. Civ. P. 60(b)(1) For Relief From Order Awarding Fees, Expenses, and Service Awards* by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 03/13/2017)

03/13/2017	179	MEMORANDUM in Support re 178 MOTION *Pursuant to Fed. R. Civ. P. 60(b)(1) For Relief From Order Awarding Fees, Expenses, and Service Awards* filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 03/13/2017)
03/13/2017	180	RESPONSE TO COURT ORDER by Labaton Sucharow LLP *Submission With Respect to Proposed Supplemental Notice to the Settlement Class Regarding Attorneys' Fees, Litigation Expenses, and Service Awards*. (Lukey, Joan) # 1 Exhibit A - Supplemental Notice of Further Proceedings, # 2 Exhibit B - Declaration of Erik Miller, # 3 Text of Proposed Order) (Main Document 180 replaced on 3/15/2017) Modified on 3/15/2017 to separate exhibits from main document and refile correctly. (Franklin, Yvonne). (Main Document 180 replaced on 3/17/2017) (adminn,). (Attachment 1 replaced on 3/17/2017) (adminn,). (Attachment 1 replaced on 3/20/2017) (Bono, Christine). (Attachment 2 replaced on 3/20/2017) Modified on 3/20/2017 by request of counsel to correct document order, title and docket text(Franklin, Yvonne). Modified on 3/20/2017 (Franklin, Yvonne). (Entered: 03/13/2017)
03/13/2017	181	MOTION for Joinder *Zuckerman Spaeder LLP's Joinder in Labaton Sucharow's Rule 60(b)(1) Motion Filed at the Court's Request to Confirm Its Continuing Jurisdiction Over the Fee Order* by Arnold Henriquez.(Kravitz, Carl) (Entered: 03/13/2017)
03/13/2017	182	MOTION for Joinder *in Labaton Sucharow's Rule 60(b)(1) Motion* by Andover Companies Employee Savings and Profit Sharing Plan, James Pehoushek-Stangeland.(Sarko, Lynn) (Entered: 03/13/2017)
03/13/2017	183	MOTION for Joinder *RPWB's Joinder in Labaton Sucharow's Rule 60(b)(1) Motion* by Arnold Henriquez.(Palmer, Kimberly) (Entered: 03/13/2017)
03/13/2017	184	MOTION for Joinder *IN LABATON SUCHAROWS RULE 60(b)(1) MOTION FILED AT THE COURTS REQUEST TO CONFIRM ITS CONTINUING JURISDICTION OVER THE FEE ORDER* by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor. (McTigue, J.) (Entered: 03/13/2017)
03/20/2017	185	Notice of correction to docket made by Court staff. Correction: D.E. #180 corrected because: By request of counsel Ex. B pages were increased reducing entries from 5 to 4. No substantive information was changed in any way. (Franklin, Yvonne) (Entered: 03/20/2017)
03/20/2017	186	MOTION for Leave to File *Response to Labaton Sucharow LLP's Filings* by Competitive Enterprise Institute (CEI). (Attachments: # 1 Proposed Response to Labaton Sucharow LLP's Proposed Supplemental Notice 180 and its Motion Pursuant to Fed. R. Civ. P. 60(b)(1) 178 and Proposed Form of Notice)(Bednarz, M.) (Entered: 03/20/2017)
03/24/2017	187	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER (Bono, Christine) (Entered: 03/24/2017)
03/27/2017	188	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 187 Memorandum & ORDER . (Attachments: # 1 Exhibit Ex. A - Revised Proposed Supplemental Notice)(Lukey, Joan) (Entered: 03/27/2017)
03/27/2017	189	RESPONSE TO COURT ORDER by Competitive Enterprise Institute (CEI) re 187 Memorandum & ORDER . (Bednarz, M.) (Entered: 03/27/2017)
03/29/2017	190	Opposition re 186 MOTION for Leave to File *Response to Labaton Sucharow LLP's Filings* filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 03/29/2017)
03/29/2017	191	ORDER of Special Master Entered. Limited Protective Order of the Special Master Relating to Attorney/Client Privileged and Work Product Documents and Information Being Provided to the Special Master. (Bono, Christine) (Entered: 03/30/2017)
03/31/2017	192	Judge Mark L. Wolf: MEMORANDUM & ORDER entered taking under advisement 178 Motion ; granting 186 Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Attachments: # 1 Ex. A - Notice) (Bono, Christine) (Entered: 03/31/2017)
03/31/2017	193	Order of Special Master on a Motion. Motions terminated:. (Sinnott, William) (Entered: 03/31/2017)
04/01/2017	194	Objection by Labaton Sucharow LLP , *Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm LLP to Proposed Appointment of John W. Toothman as Expert in Proceedings Before the Special Master Pursuant to the March 31, 2017 Order of the Court*. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G)(Lukey, Joan) (Entered: 04/01/2017)
04/03/2017	195	Emergency MOTION to Stay re 192 Order on Motion for Miscellaneous Relief,, Order on Motion for Leave to File, , Emergency MOTION for Reconsideration re 192 Order on Motion for Miscellaneous Relief,, Order on Motion for Leave to File, (Responses due by 4/17/2017) by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 04/03/2017)
04/03/2017	196	MEMORANDUM in Support re 195 Emergency MOTION to Stay re 192 Order on Motion for Miscellaneous Relief,, Order on Motion for Leave to File, Emergency MOTION for Reconsideration re 192 Order on Motion for Miscellaneous Relief,, Order on Motion for Leave to File, filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 04/03/2017)
04/05/2017	197	Judge Mark L. Wolf: "It is hereby ORDERED that the March 31, 2017 Order (Docket No. 192) is STAYED until the court rules on Labaton Sucharow's Emergency Motion for Stay of March 31, 2017 Memorandum and Order and for Limited Reconsideration Regarding Supplemental Notice to the Class (Docket No. 195)." ELECTRONIC ORDER entered. (Bono, Christine) (Entered: 04/05/2017)
04/06/2017	198	NOTICE of Withdrawal of Appearance by Andrew R. Golden (Golden, Andrew) (Entered: 04/06/2017)
04/06/2017	199	Objection to 193 Order of Special Master on a Motion by Labaton Sucharow LLP . (Lukey, Joan) (Entered: 04/06/2017)
04/11/2017	200	Judge Mark L. Wolf: MEMORANDUM AND ORDER entered granting in part and denying in part 195 Emergency Motion for Stay and Motion for Reconsideration. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Bono, Christine) (Entered: 04/11/2017)
04/25/2017	202	DECLARATION re 192 Order on Motion for Miscellaneous Relief,, Order on Motion for Leave to File, 200 Order on Motion to Stay, Order on Motion for Reconsideration *Declaration of Eric J. Miller on Behalf of A.B. Data, LTD. Regarding Mailing and Emailing of Supplemental Notice to Settlement Class Members and/or Their Counsel* by Arkansas Teacher Retirement System. (Goldsmith, David) (Entered: 04/25/2017)
04/26/2017	203	Judge Mark L. Wolf: ENDORSED ORDER entered. In view of the foregoing, it is hereby ORDERED that Labaton Sucharow LLP shall, by May 4, 2017, file one or more affidavits addressing: how, when, and by whom the email addresses were obtained; and why the representation that "the Firm [did] not have email addresses for class members" was not false or misleading. (Franklin, Yvonne) (Entered: 04/26/2017)

05/02/2017	204	Judge Mark L. Wolf: MEMORANDUM AND ORDER entered re: Docket Entry 199 . (Bono, Christine) (Entered: 05/02/2017)
05/04/2017	205	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 203 Order, . (Attachments: # 1 Exhibit A - Declaration of Nicole Zeiss, # 2 Exhibit B - Declaration of Eric Miller)(Lukey, Joan) (Entered: 05/04/2017)
05/25/2017	206	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. (Bono, Christine) (Entered: 05/25/2017)
10/02/2017	207	Judge Mark L. Wolf: "The court has received the attached September 29, 2017 letter from the Master, Retired United States District Judge Gerald Rosen. The Master requests an extension to December 15, 2017 to submit his Report and Recommendation pursuant to the March 8, 2017 Order. The court is satisfied that the Master has been working diligently and that the request is justified. It is, therefore, hereby ALLOWED." ORDER entered. (Attachments: # 1 Letter of Special Master)(Bono, Christine) (Entered: 10/02/2017)
10/24/2017	208	Judge Mark L. Wolf: ORDER entered. (Attachments: # 1 Exhibit Letter of Special Master)(Bono, Christine) (Entered: 10/24/2017)
11/02/2017	209	Assented to MOTION for Disbursement of Funds *PLAINTIFFS ASSENTED-TO MOTION FOR AUTHORIZATION TO DISTRIBUTE TO ELIGIBLE REGISTERED INVESTMENT COMPANY CLASS MEMBERS* by Arkansas Teacher Retirement System. (Attachments: # 1 Text of Proposed Order [PROPOSED] ORDER AUTHORIZING DISTRIBUTION TO RIC CLASS MEMBERS)(Goldsmith, David) (Entered: 11/02/2017)
11/02/2017	210	MEMORANDUM in Support re 209 Assented to MOTION for Disbursement of Funds *PLAINTIFFS ASSENTED-TO MOTION FOR AUTHORIZATION TO DISTRIBUTE TO ELIGIBLE REGISTERED INVESTMENT COMPANY CLASS MEMBERS* filed by Arkansas Teacher Retirement System. (Goldsmith, David) (Entered: 11/02/2017)
11/02/2017	211	DECLARATION re 209 Assented to MOTION for Disbursement of Funds *PLAINTIFFS ASSENTED-TO MOTION FOR AUTHORIZATION TO DISTRIBUTE TO ELIGIBLE REGISTERED INVESTMENT COMPANY CLASS MEMBERS DECLARATION OF ERIC J. MILLER ON BEHALF OF A.B. DATA, LTD. IN SUPPORT OF MOTION FOR AUTHORIZATION TO DISTRIBUTE TO ELIGIBLE REGISTERED INVESTMENT COMPANY CLASS MEMBERS* by Arkansas Teacher Retirement System. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6)(Goldsmith, David) (Entered: 11/02/2017)
11/03/2017	212	NOTICE OF MANUAL FILING: Two courtesy copies of D.E. #209, #210, #211. (Franklin, Yvonne) (Entered: 11/03/2017)
12/13/2017	213	Judge Mark L. Wolf: ENDORSED ORDER entered (ALLOWED) granting 209 Motion for Disbursement of Funds (Attachments: # 1 Allowed Order) (Franklin, Yvonne) (Entered: 12/13/2017)
12/14/2017	214	Judge Mark L. Wolf: "The court has received the attached December 12, 2017 letter from the Master, Retired United States District Judge Gerald Rosen. The Master requests an extension to March 15, 2018 to submit his Report and Recommendation pursuant to the March 8, 2017 Order. The court continues to be satisfied that the Master has been working diligently and finds that the request is justified. It is, therefore, hereby ALLOWED." ORDER entered. (Attachments: # 1 Letter of Special Master)(Bono, Christine) (Entered: 12/14/2017)
02/06/2018	215	NOTICE of Withdrawal of Appearance by Ellen R. Tanowitz (Tanowitz, Ellen) (Entered: 02/06/2018)
03/01/2018	216	Judge Mark L. Wolf: ORDER entered. (Attachments: # 1 Special Master Letter)(Bono, Christine) (Entered: 03/01/2018)
04/23/2018	217	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. The Master shall file his Report and Recommendation by May 14, 2018, and may request reasonable additional time to file the complete record of the related evidence. See Mar. 8, 2017 Order (Docket No. 173), 4, 11; Mar. 1, 2018 Order (Docket No. 216). 2. The Master's request for an additional $800,000 is ALLOWED. Labaton Sucharow LLP shall, pursuant to paragraph 13 and 14 of the March 8, 2017 Order, pay $800,000 to the Clerk of the United States District Court for the District of Massachusetts by May 11, 2018." ORDER entered. (Attachments: # 1 Special Master Letter)(Bono, Christine) (Entered: 04/23/2018)
04/25/2018	218	NOTICE of Appearance by Stuart M. Glass on behalf of Labaton Sucharow LLP (Glass, Stuart) (Entered: 04/25/2018)
05/14/2018	219	MOTION to Seal by Gerald E. Rosen.(Sinnott, William) (Entered: 05/14/2018)
05/14/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 219 Motion to Seal. (Bono, Christine) (Entered: 05/14/2018)
05/15/2018	220	Judge Mark L. Wolf: "Pursuant to the October 24, 2017 Order (Docket No. 208), the Special Master's Report and Recommendation and Executive Summary are hereby SEALED temporarily to permit the parties to propose redactions and the court to decide what redactions, if any, are justified." ENDORSED ORDER entered. re 219 MOTION to Seal filed by Gerald E. Rosen (Bono, Christine) (Entered: 05/15/2018)
05/15/2018	221	BRIEF by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP *Customer Class Counsels' Reservation of Rights Regarding Payment to the Court on Friday, May 11, 2018*. (Wolosz, Justin) (Entered: 05/15/2018)
05/15/2018	222	MOTION for Clarification *or Modification of the Court's March 8, 2017 and March 1, 2018 Orders* by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP.(Wolosz, Justin) (Entered: 05/15/2018)
05/16/2018	223	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. The Lawyers shall obtain forthwith from Elizabeth McEvoy, Esq., counsel for the Master, electronic versions of Executive Summary, the Report and Recommendation, and the exhibits referenced in them. 2. The Lawyers shall, by May 31, 2018, file, under seal, any motion for redactions, with documents reflecting the proposed redactions, and supporting affidavits and memoranda in the manner described in this Memorandum. Copies of these submissions shall be served on the Master. Redacted versions of these submissions shall be filed for the public record. 3. After the court decides which, if any, redactions are appropriate, it will provide the Lawyers an opportunity to propose redactions to the rest of the record that are consistent with the court's rulings. 4. Any objections to the Report and Recommendation, or any requests to adopt or modify it, shall be filed no later than seven days after the court rules on the proposed redactions." ORDER entered. MEMORANDUM AND ORDER(Bono, Christine) (Entered: 05/16/2018)
05/17/2018	225	Judge Mark L. Wolf:"...[I]t is hereby ORDERED that State Street shall obtain these documents from counsel for the Master, Elizabeth McAvoy, Esq., and respond to the attached May 16, 2018 Memorandum and Order." ORDER entered. (Attachments: # 1 5/16/2018 Memorandum & Order)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/17/2018)
05/17/2018	226	Judge Mark L. Wolf: "It is, therefore, hereby ORDERED that: 1. Customer Class Counsel shall confer concerning the Motion with all other counsel, including counsel for the Master, and report, by May 24, 2018, jointly if possible but separately if necessary, their respective views on the Motion. 2. All counsel shall also discuss and include in their report(s) their respective views concerning which motions, if any, should be subject to

		the pre-filing conference requirement of Local Rule 7.1(a)(2)." ORDER entered. MEMORANDUM AND ORDER. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/17/2018)
05/17/2018	227	Objection to 225 Order, by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP *on an Emergency Basis*. (Lukey, Joan) (Entered: 05/17/2018)
05/17/2018	228	Judge Mark L. Wolf: "In view of this Motion, the May 17, 2018 Order concerning State Street (Docket No. 225) is hereby VACATED, at least temporarily. As the court may not be fully informed of relevant representations made by the Master to State Street, among others, it is hereby ORDERED that counsel for the parties and for the Master shall confer and, by May 24, 2018, report their respective views on the process proposed in this Motion and how to address any concerns concerning confidentiality of information State Street submitted that it or its counsel may have." ENDORSED ORDER entered. re (227 in 1:11-cv-10230-MLW) Objection filed by Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP, Labaton Sucharow LLP Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/17/2018)
05/24/2018	229	MOTION to Set Revised Schedule for Requested Redactions and the Unsealing of the Special Master's Report and Recommendation by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP, Keller Rorhback L.L.P., Zucker Spaeder LLP. (Attachments: # 1 Text of Proposed Order to Set Revised Schedule for Requested Redactions)(Lukey, Joan) (Entered: 05/24/2018)
05/24/2018	230	RESPONSE TO COURT ORDER by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP re 226 Memorandum & ORDER,, . (Lukey, Joan) (Entered: 05/24/2018)
05/24/2018	231	REPORT of the Special Master by Gerald E. Rosen re 226 Memorandum & ORDER,,.. (Sinnott, William) (Entered: 05/24/2018)
05/25/2018	232	MOTION for Leave to File *Memorandum in Support of Motion for Clarification or Modification Regarding the Filing of All Documents Produced in Discovery with the Court* by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Attachments: # 1 Exhibit A - Memorandum in Support of Motion for Clarification or Modification of the Court's March 8, 2017 and March 1, 2018 Orders to Eliminate the Requirement for the Master to File All Documents Produced in Discovery with the Court)(Lukey, Joan) (Entered: 05/25/2018)
05/25/2018	233	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. As agreed by the parties, counsel for the Special Master shall provide the Report and Recommendations, Executive Summary, and exhibits to counsel for State Street Bank and Trust Company ("State Street") forthwith subject to the following conditions: Counsel for State Street at WilmerHale, LLP shall maintain these materials on an "attorneys' eyes only" basis, and shall not share the documents or the contents thereof with their client. The provision of these documents shall not constitute a waiver of the attorney-client privilege, work product, or any other privilege or protection. 2. The deadline for responding to the May 16, 2018 Memorandum and Order concerning proposed redactions (Docket No. 223) is extended to June 5, 2018, without prejudice to a possible further extension to June 11, 2018, as requested in the Motion. 3. A hearing on the Motion shall be held on May 30, 2018, at 2:00 p.m. Counsel for the Special Master shall attend. In addition, George Hopkins, Executive Director of Arkansas Teacher Retirement System ("ATRS"), and anyone else required to act for ATRS in this case shall attend. The Master's Report and Recommendations (Docket No. 224 under seal), including pages 89 to 124 and 368 to 371, and Executive Summary (Docket No. 224-1 under seal), including pages 25 to 29 and 50 to 51, raise questions concerning; whether ATRS properly discharged its duties as Lead Plaintiff, see, e.g., Garbowski v. Tokai Pharma., Inc., 2018 WL 1370522 (D. Mass. 2018)(Wolf, D.J.); whether ATRS should be replaced as Lead Plaintiff; whether there is now a conflict between the interests of Customer Class Counsel^ and the class; and whether new class counsel should be appointed to provide independent advice to the class whether or not ATRS continues as Lead Plaintiff. Mr. Hopkins and any other representatives of ATRS shall be prepared to discuss these issues at the May 30, 2018 hearing. 4. The responses to the May 17, 2018 Order concerning Customer Class Counsel's Motion for Clarification (Docket No. 226} regarding the record to be filed by the Master shall also be addressed at the May 30, 2018 hearing." ORDER entered. MEMORANDUM AND ORDER. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/25/2018)
05/25/2018		ELECTRONIC NOTICE Setting Hearing on Motion (229 in 1:11-cv-10230-MLW) MOTION to Set Revised Schedule for Requested Redactions and the Unsealing of the Special Master's Report and Recommendation : Motion Hearing set for 5/30/2018 02:00 PM in Courtroom 10 before Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/25/2018)
05/27/2018	234	Assented to MOTION For Leave to Appear Telephonically at Hearing by Andover Companies Employee Savings and Profit Sharing Plan, James Pehoushek-Stangeland. (Attachments: # 1 Text of Proposed Order)(Gerber, Laura) (Entered: 05/27/2018)
05/29/2018	235	Judge Mark L. Wolf: ENDORSED ORDER entered granting 234 Motion. Dial-in instructions will be provided to Keller Rohrback, L.L.P. by the deputy clerk via e-mail. (Bono, Christine) (Entered: 05/29/2018)
05/30/2018	236	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Motion Hearing held on 5/30/2018 re 229 MOTION to Set Revised Schedule for Requested Redactions and the Unsealing of the Special Master's Report and Recommendation filed by Lieff Cabraser Heimann & Bernstein, LLP, Zucker Spaeder LLP, Keller Rorhback L.L.P., Thornton Law Firm LLP, Labaton Sucharow LLP. George Hopkins is sworn and gives testimony. It is Ordered that the parties shall order the transcript on an expedited basis. (Court Reporter: James Gibbons at jmsgibbons@yahoo.com.)(Attorneys present: Sinnott, McEvoy, Lukey, Wolosz, Heimann, Kelly, Halston, Paine, McTigue, Kravitz, Gerber) (Bono, Christine) (Entered: 05/31/2018)
05/31/2018	237	Judge Mark L. Wolf: ORDER entered. (Bono, Christine) (Entered: 05/31/2018)
05/31/2018	238	NOTICE of Appearance by Joshua C.H. Sharp on behalf of Thornton Law Firm LLP (Sharp, Joshua) (Entered: 05/31/2018)
05/31/2018	239	Joint MOTION to Receive Sealed Transcript by Keller Rorhback L.L.P., Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP, Zucker Spaeder LLP, McTigue Law, LLP, WilmerHale, LLP, Barret & Singal, P.C.. (Attachments: # 1 Text of Proposed Order to Receive Sealed Transcript)(Wolosz, Justin) (Entered: 05/31/2018)
06/01/2018	240	Judge Mark L. Wolf: ELECTRONIC ORDER entered ALLOWING 239 Motion to Receive Sealed Transcript. (Franklin, Yvonne) (Entered: 06/01/2018)
06/01/2018	241	NOTICE of Appearance by William F. Sinnott on behalf of Gerald E. Rosen (Sinnott, William) (Entered: 06/01/2018)
06/01/2018	242	NOTICE of Appearance by Elizabeth J. McEvoy on behalf of Gerald E. Rosen (McEvoy, Elizabeth) (Entered: 06/01/2018)
06/04/2018	243	Transcript of Motion Hearing held on May 30, 2018, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: James Gibbons at

		jmsgibbons@yahoo.com Redaction Request due 6/25/2018. Redacted Transcript Deadline set for 7/5/2018. Release of Transcript Restriction set for 9/4/2018. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/04/2018)
06/04/2018	244	SEALED Transcript of Sidebar Conference held on May 30, 2018, before Judge Mark L. Wolf. Court Reporter Name and Contact Information: James Gibbons at jmsgibbons@yahoo.com Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/04/2018)
06/04/2018	245	SEALED Transcript of Lobby Conference held on May 30, 2018, before Judge Mark L. Wolf. Court Reporter Name and Contact Information: James Gibbons at jmsgibbons@yahoo.com Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/04/2018)
06/04/2018	246	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/04/2018)
06/05/2018	247	MOTION Sealing of Work Product Information And Information Governed By The Court's November 2012 Protective Order by Thornton Law Firm LLP.(Sharp, Joshua) (Entered: 06/05/2018)
06/05/2018	248	MOTION re 237 Order *Henriquez ERISA Plaintiffs' Requested Redaction Categories for Special Master's Report and Recommendation* by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(McTigue, J.) (Entered: 06/05/2018)
06/05/2018	249	MOTION Proposed Redaction Categories re 237 Order by Keller Rorhback L.L.P., Zucker Spaeder LLP.(Gerber, Laura) (Entered: 06/05/2018)
06/05/2018	250	MOTION Proposed Redaction Categories re 237 Order by Lieff Cabraser Heimann & Bernstein, LLP.(Heimann, Richard) (Entered: 06/05/2018)
06/05/2018	251	MOTION To seal document. by State Street Bank & Trust Company. (Attachments: # 1 Exhibit Redacted Motion)(Franklin, Yvonne) (Entered: 06/06/2018)
06/05/2018	252	SEALED UNREDACTED DOCUMENT RE. 251 by State Street. (Franklin, Yvonne) (Entered: 06/06/2018)
06/05/2018	254	SEALED MOTION To Redact and Retain under Seal by Labaton Sucharow LLP. (Attachments: # 1 Memorandum in Support of Motion, # 2 Declaration of Jonathan Gardner in Support)(Franklin, Yvonne) (Entered: 06/06/2018)
06/05/2018	255	SEALED MOTION To Redact and/or Strike Statements in Special Master's Report by Labaton Sucharow LLP. (Attachments: # 1 Memorandum of Law to Redact and/or Strike)(Franklin, Yvonne) (Attachment 1 replaced with correct document 6/8/2018) (Franklin, Yvonne). (Entered: 06/06/2018)
06/06/2018	256	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that Labaton shall file, by 9:00 a.m. on June 7, 2018, versions of its submissions with redactions consistent with the standards discussed in the May 16, 2018 Order in this case, see Docket No. 223, and any other jurisprudence which Labaton cites with its June 7, 2018 submissions. Any failure to submit a properly redacted version of the June 5, 2018 submissions may, among other things, result in the denial of Labaton's motion to impound." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/06/2018)
06/06/2018	257	SEALED REDACTED DOCUMENT by Labaton. (Attachments: # 1 Declaration of Jonathan Gardner)(Franklin, Yvonne) (Entered: 06/06/2018)
06/06/2018	258	AFFIDAVIT of George Hopkins by Arkansas Teacher Retirement System. (Kearney, Kristen) (Entered: 06/06/2018)
06/06/2018	259	RESPONSE TO COURT ORDER by Barret & Singal, P.C., Keller Rorhback L.L.P., Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, McTigue Law, LLP, Thornton Law Firm LLP, WilmerHale, LLP, Zucker Spaeder LLP re 237 Order *Regarding Additional Documents from the Record*. (Wolosz, Justin) (Entered: 06/06/2018)
06/07/2018	260	MOTION to Seal *Special Master's Responses (Under Seal) to Various Motions of Plaintiffs' Counsel on Redaction and Related Issues* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/07/2018)
06/07/2018	261	SEALED DOCUMENT RE: ECF 256 by Labaton. (Attachments: Redacted Motion to Impound 6/5/18 filings # 1 Exhibit, Unredacted Response to Court Order of 6/6/18, # 2 Exhibit, Redacted Response to Court Order of 6/6/18, # 3 Exhibit, Redacted Motion to Redact or Strike Statements in Special Master Report, # 4 Exhibit, Redacted Memo in Support of Motion to Redact or Strike Statements)(Franklin, Yvonne) (Entered: 06/07/2018)
06/08/2018	263	MOTION for Extension of Time to June 12, 2018 *for Filing Response to Law Firms' Proposal for Categories for Redaction* by Gerald E. Rosen. (Sinnott, William) (Entered: 06/08/2018)
06/08/2018	264	Judge Mark L. Wolf: "This motion should have been filed before June 8, 2018, the day on which the submission had been ordered to be filed. It was the court's intention that the other parties have the Master's submission before filing the documents with their proposed redactions on June 11, 2018. Although the court does not intend to otherwise alter the existing schedule, as a practical matter it must allow this Motion and hereby does. In the future, a party shall file any request for an extension far enough in advance of a due date to respond properly if the Motion is DENIED." ENDORSED ORDER entered granting 263 Motion for Extension of Time (Bono, Christine) (Entered: 06/08/2018)
06/08/2018	265	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. Labaton Sucharow LLP's ("Labaton's") Motion to Impound its June 5 Filings (Docket No. 261 under seal), which requests that the court seal Labaton's submissions made on June 5 and 7, 2018, is ALLOWED. Docket Nos. 257, 257-1, 261, 261-2, 261-3, and 261-4, which are sealed redacted versions of Labaton's June 5 and 7, 2018 submissions (Docket Nos. 254-1, 254-2, 253, 255, 255-1, 261-1 under seal), shall be made part of the public record. Labaton's Motion to Redact and Retain under Seal (Docket No. 254) shall also be made public. 2. State Street's Motion to Seal (Docket No. 251) their June 5, 2018 submission is ALLOWED. Docket No. 251, the Motion to Seal, and Docket No. 251-1, which is a sealed redacted version of State Street's June 5, 2018 submission (Docket No. 252 under seal), shall be made part of the public record." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/08/2018)
06/08/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 251 Motion. See 265 for reference. (Bono, Christine) (Entered: 06/08/2018)
06/08/2018	266	MOTION for Extension of Time *of Deadlines Set Forth in the Court's May 31, 2018 Order* by State Street Bank & Trust Company, State Street Global Markets, LLC.(Paine, William) (Entered: 06/08/2018)

06/08/2018	267	MOTION to Impound its Motion to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery by Labaton Sucharow LLP.(Bono, Christine) (Entered: 06/08/2018)
06/08/2018	268	SEALED MOTION to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery by Labaton Sucharow LLP.(Bono, Christine) (Entered: 06/08/2018)
06/08/2018	269	MEMORANDUM in Support re 268 SEALED MOTION to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery filed by Labaton Sucharow LLP. (Bono, Christine) (Entered: 06/08/2018)
06/08/2018	270	DECLARATION of Stuart M. Glass in Support re 268 SEALED MOTION to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery by Labaton Sucharow LLP. (Bono, Christine) (Main Document 270 replaced on 6/8/2018) (Bono, Christine). (Additional attachment(s) added on 6/8/2018: # 1 Exhibit 1) (Bono, Christine). (Entered: 06/08/2018)
06/08/2018	271	SEALED DOCUMENT. REDACTED version of 268 , Motion of Labaton Sucharow LLP to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery (Bono, Christine) (Entered: 06/08/2018)
06/08/2018	272	SEALED DOCUMENT. REDACTED version of 269 , Memo in Support of Labaton Sucharow LLP's Motion to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery. (Bono, Christine) (Entered: 06/08/2018)
06/08/2018	273	SEALED DOCUMENT. REDACTED version of 270 Declaration of Stuart M. Glass in Support of Labaton Sucharow's Motion to Strike Supplemental Report of Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery. (Attachments: # 1 Exhibit 1)(Bono, Christine) (Entered: 06/08/2018)
06/08/2018	274	MOTION to Impound Labaton Sucharow LLP's Motion Concerning Issue Raised at May 30 Hearing, by Labaton Sucharow LLP.(Bono, Christine) (Entered: 06/08/2018)
06/08/2018	275	SEALED MOTION, Labaton Sucharow LLP's Motion Concerning Issue Raised at May 30 Hearing, by Labaton Sucharow LLP.(Bono, Christine) (Entered: 06/08/2018)
06/08/2018	276	MEMORANDUM in Support re 275 SEALED MOTION, Labaton Sucharow LLP's Motion Concerning Issue Raised at May 30 Hearing, filed by Labaton Sucharow LLP. (Bono, Christine) (Entered: 06/08/2018)
06/09/2018	279	Judge Mark L. Wolf: ORDER entered denying (266) Motion for Extension of Time in case 1:11-cv-10230-MLW "It is hereby ORDERED that, in view of the Special Master's June 7, 2018 "pre-filing position" on the parties' proposed categories of redactions (Docket No. 262-1 under seal) and the importance of the June 22, 2018 hearing date, see Docket No. 237, 9, the Motion to Extend Deadlines (Docket No. 266) is DENIED." Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/09/2018)
06/11/2018	280	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/11/2018)
06/11/2018	282	MOTION Redaction of Special Master Report and Exhibits re 237 Order by Michael T. Cohn, Arnold Henriquez, McTigue Law, LLP, Richard A. Sutherland, William R. Taylor. (Attachments: # 1 Exhibit A (Under Seal))(Moore, James) (Entered: 06/11/2018)
06/11/2018	284	MOTION to Seal *Special Master's Motion Seeking Court Guidance* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/11/2018)
06/11/2018	286	Emergency MOTION to Supplement Labaton Sucharow's Proposed Redactions to the Master's Submission when the Clerk's Office Re-Opens on June 12, 2018 by Labaton Sucharow LLP. (Attachments: # 1 Text of Proposed Order Allowing Labaton Sucharow to Supplement its Proposed Redactions to the Master's Submission)(Wolosz, Justin) (Entered: 06/11/2018)
06/11/2018	291	SEALED MOTION: by State Street Bank & Trust Company. (Attachments: # 1 Exhibit Redacted Memorandum of Law, # 2 Exhibit Unredacted Memorandum of Law, # 3 Affidavit Daniel W. Halston)(# 4 Cover Letter) (Additional attachment(s) added on 6/14/2018: # 5 Exhibit Final Report and Recommendations, # 6 Exhibit 2, # 7 Exhibit 4, # 8 Exhibit 10, # 9 Exhibit 11, # 10 Exhibit 16, # 11 Exhibit 17, # 12 Exhibit 20, # 13 Exhibit 21, # 14 Exhibit 25, # 15 Exhibit 26, # 16 Exhibit 28, # 17 Exhibit 35, # 18 Exhibit 37) # 19 Exhibit 41, # 20 Exhibit 42, # 21 Exhibit 43, # 22 Exhibit 54, # 23 Exhibit 55, # 24 Exhibit 57, # 25 Exhibit 58, # 26 Exhibit 59, # 27 Exhibit 60, # 28 Exhibit 62, # 29 Exhibit 63, # 30 Exhibit 67, # 31 Exhibit 83, # 32 Exhibit 84, # 33 Exhibit 85, # 34 Exhibit 86, # 35 Exhibit 99, # 36 Exhibit 103, # 37 Exhibit 106, # 38 Exhibit 115, # 39 Exhibit 117, # 40 Exhibit 118) # 41 Exhibit 125, # 42 Exhibit 127, # 43 Exhibit 139, # 44 Exhibit 151, # 45 Exhibit 152, # 46 Exhibit 153, # 47 Exhibit 154, # 48 Exhibit 161, # 49 Exhibit 167, # 50 Exhibit 174, # 51 Exhibit 176, # 52 Exhibit 203, # 53 Exhibit 207, # 54 Exhibit 210, # 55 Exhibit 212, # 56 Exhibit 214, # 57 Exhibit 215, # 58 Exhibit 220, # 59 Exhibit 221, # 60 Exhibit 222, # 61 Exhibit 223, # 62 Exhibit 224, # 63 Exhibit 232 part 1, # 64 Exhibit 232 part 2, # 65 Exhibit 233 part 1, # 66 Exhibit 233 part 2) # 67 Exhibit 245, # 68 Exhibit 246, # 69 Exhibit 247, # 70 Exhibit 249, # 71 Exhibit 250, # 72 Exhibit 260, # 73 Exhibit 264 part 1, # 74 Exhibit 264 part 2, # 75 Exhibit 265 part 1, # 76 Exhibit 265 part 2, # 77 Exhibit 266) # 78 6/13 Cover Letter) Modified on 6/14/2018 to complete filing. (Franklin, Yvonne). (Attachment 2 replaced on 6/18/2018) (Franklin, Yvonne). (Entered: 06/12/2018)
06/12/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 286 Motion. (Bono, Christine) (Entered: 06/12/2018)
06/12/2018	292	SEALED DOCUMENT RE: Labaton's Response to 6/11/18 Memorandum and Order # 280 . (Franklin, Yvonne) (Entered: 06/12/2018)
06/12/2018	293	MOTION to Seal *Special Master's Response to the Law Firms' Various Motions Concerning Proposed Categories for Redaction* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/12/2018)
06/12/2018	294	NOTICE of Withdrawal of Appearance by Joel H. Bernstein (Bernstein, Joel) (Entered: 06/12/2018)
06/13/2018	296	MOTION for Extension of Time to June 21, 2018 *for Filing Response to Law Firms' Proposed Redactions and Objections to Unsealing Proposals* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/13/2018)
06/14/2018	298	Opposition re 296 MOTION for Extension of Time to June 21, 2018 *for Filing Response to Law Firms' Proposed Redactions and Objections to Unsealing Proposals* filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 06/14/2018)

06/15/2018	300	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that:1. Labaton's Motion to Impound its Motion Concerning IssuesRaised at the May 30 Hearing (Docket No. 274) is WITHDRAWN.2. The transcript of the sidebar Conference held on May 30,2018 (Docket No. 244), Labaton's Motion Concerning Issues Raisedat May 30 Hearing (Docket No. 275) and the memorandum in supportof it (Docket No. 276), the June 11, 2018 Memorandum and Order(Docket No. 280), and Labaton's Response (Docket No. 292) areUNSEALED." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/15/2018)
06/15/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered withdrawing 274 Motion to Seal. See Order 300 . (Bono, Christine) (Entered: 06/15/2018)
06/15/2018		ELECTRONIC NOTICE of Hearing. Closed to the Public. See Order 237 . Hearing set for 6/22/2018 02:00 PM in Courtroom 10 before Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/15/2018)
06/19/2018	301	MOTION to Impound Customer Class Counsels' Memorandum and Supporting Declaration in Support of their Motion for an Accounting, and for Clarification that the Master's Role has Concluded by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Lukey, Joan) (Entered: 06/19/2018)
06/19/2018	302	MOTION for an Accounting, and for Clarification that the Master's Role has Concluded by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP.(Lukey, Joan) (Entered: 06/19/2018)
06/19/2018	303	MOTION to Seal *Special Master's Motion for Filing Late Special Master's Response to the Law Firms' Proposed Redactions to the Special Master's Report and Recommendations* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/19/2018)
06/19/2018	304	MOTION to Seal *Special Master's Response to the Law Firms' Proposed Redactions to the Special Master's Report and Recommendations* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/19/2018)
06/19/2018	310	SEALED DOCUMENT RE: # 302 (UNREDACTED) Memorandum of Customer Class Counsel in Support. (Franklin, Yvonne) (Entered: 06/20/2018)
06/20/2018	311	MOTION to Seal *Special Master's Response to Motion to Strike Supplemental Gillers Report Filed Under Seal by Labaton Sucharow on June 8, 2018* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/20/2018)
06/20/2018	312	SEALED MOTION by State Street Bank & Trust Company. (Attachments: # 1 Exhibit State Streets Redacted Reply, # 2 Exhibit State Streets Unredacted Reply, # 3 Cover Letter)(Franklin, Yvonne) (Entered: 06/20/2018)
06/20/2018	313	SEALED DOCUMENT RE: 237 Labaton Sucharow's Reply to Special Master's Response. # 1 cover letter) (Franklin, Yvonne). (Entered: 06/21/2018)
06/21/2018	315	Judge Mark L. Wolf: "For the reasons that will be explained in a forthcoming Memorandum and Order, Labaton Sucharow, LLP's motion seeking my recusal pursuant to 28 U.S.C. 455(a) (Docket No. 275) is hereby DENIED because a reasonable person could not question my impartiality in this case." ORDER entered denying (275) Sealed Motion in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/21/2018)
06/21/2018	316	Judge Mark L. Wolf: "It is hereby ORDERED that: 1. The Master's Motion for Filing Late his Response to the Law Firm's Proposed Redactions to his Report and Recommendations (Under Seal)(Docket No. 305 under seal) is ALLOWED. 2. The Master shall, by June 22, 2018, file redacted versions of: his Response to the Law Firms' Various Motions Concerning Proposed Categories for Redaction (Under Seal) (Docket Nos. 295); his Response to the Law Firms' Proposed Redactions to the Special Master's Report and Recommendations (Under Seal)(Docket No. 306); his response to the proposed redactions to the Report and Recommendations' exhibits, which was previously ordered to be filed by 12:00 noon on June 21, 2018, see June 14, 2018 Sealed Order at 2, and his Response to Motion to Strike Supplemental Gillers Report Filed Under Seal by Labaton Sucharow on June 8, 2018 (Under Seal), for the public record." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/21/2018)
06/21/2018	317	MOTION to Seal *Special Master's Response to the Law Firms' Proposed Redactions to the Executive Summary to the Special Master's Report and Recommendations* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/21/2018)
06/21/2018	318	MOTION to Seal *Special Master's Response to the Law Firms' Proposed Redactions to the First Set of Exhibits to the Report and Recommendations* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/21/2018)
06/21/2018	319	MOTION for Leave to Appear Pro Hac Vice for admission of Michael R Smith Filing fee: $ 100, receipt number 0101-7196275 by Arnold Henriquez. (Attachments: # 1 Certification of Michael R Smith)(Kravitz, Carl) (Entered: 06/21/2018)
06/21/2018	320	MOTION for Leave to File *Reply to Special Master's Response to Motion to Strike Supplemental Gillers Report* by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 06/21/2018)
06/21/2018	321	MOTION to Impound Proposed Reply to Special Master's Response to Motion to Strike Supplemental Gillers Report [Exhibit A to Labaton's Motion for Leave to File Reply to Special Master's Response to Motion to Strike Supplemental Gillers Report] by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 06/21/2018)
06/21/2018	322	SEALED DOCUMENT RE: 321 by Labaton Sucharows' (UNREDACTED) Proposed Reply to Special Master's Response to Motion to Strike. (Franklin, Yvonne) (Entered: 06/21/2018)
06/21/2018	323	SEALED DOCUMENT RE: 321 Labaton Sucharows' (REDACTED) Proposed Reply to Special Master's Response to Motion to Strike. (Franklin, Yvonne) (Entered: 06/21/2018)
06/21/2018	324	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 319 Motion for Leave to Appear Pro Hac Vice Added Michael R. Smith. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Franklin, Yvonne) (Entered: 06/21/2018)
06/21/2018	327	MOTION to Seal *Special Master's Letter Submitted to Court* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/21/2018)
06/21/2018	328	MOTION for Leave to File *Letter with Court (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/21/2018)
06/21/2018	329	SEALED DOCUMENT RE: 327 Special Master's Letter (Attachments: # 1 Exhibit A-Unredacted)(Franklin, Yvonne) (Entered: 06/22/2018)

06/22/2018	331	Judge Mark L. Wolf: ORDER entered granting (178) Motion in case 1:11-cv-10230-MLW. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/22/2018)
06/22/2018	332	MOTION to Seal *Special Master's Response to the Law Firms' Proposed Redactions to the Second Set of Exhibits to the Report and Recommendations* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/22/2018)
06/22/2018	333	MOTION to Impound Exhibit 1 to Motion for Order Directing Master to Respond to Inquiry Regarding Ex Parte Communications with Court by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 06/22/2018)
06/22/2018	334	MOTION for Order to Direct Master to Respond to Inquiry Regarding Ex Parte Communications with the Court by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 06/22/2018)
06/22/2018	335	Judge Mark L. Wolf: "This motion is hereby ALLOWED. The June 21, 2018 letter (Docket No. 329-1) shall be sealed, without prejudice to possible unsealing. The attached redacted version of the letter (Docket No. 330-1) shall be made part of the public record." ELECTRONIC ORDER entered granting (327) Motion to Seal; granting (328) Motion for Leave to File Document. in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/22/2018)
06/22/2018	339	SEALED DOCUMENT RE: 295 . (REDACTED) Special Master's Response to Law Firms' Various Motions Concerning Proposed Categories for Redaction. (Franklin, Yvonne) (Entered: 06/25/2018)
06/22/2018	340	SEALED DOCUMENT RE: 306 . (REDACTED) Special Master's Response to the Law Firms' Proposed Redactions to the Special Master's Report and Recommendations. (Franklin, Yvonne) (Entered: 06/25/2018)
06/22/2018	341	SEALED DOCUMENT RE: 314 . (REDACTED) Special Master's Response to Motion to Strike Supplemental Gillers Report Filed by Labaton Sucharow. (Franklin, Yvonne) (Entered: 06/25/2018)
06/22/2018	342	SEALED DOCUMENT RE: 325 . (REDACTED) Special Master's Response to the Law firms' Proposed Redactions to the Executive Summary to Special Master's Report and Recommendations. (Franklin, Yvonne) (Entered: 06/25/2018)
06/22/2018	348	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Hearing held on 6/22/2018. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.)(Attorneys present: Sinnott, McEvoy, Lukey, Wolosz, Heimann, Kelly, Sharp, Smith, McTigue, Halston, Paine, Bookwalter, Copley) (Bono, Christine) (Entered: 06/26/2018)
06/25/2018	338	SEALED Transcript of Sealed Hearing held on June 22, 2018, before Judge Mark L. Wolf. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/25/2018)
06/25/2018	343	MOTION to Seal *Special Master's Letter Submitted to Court* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/25/2018)
06/25/2018	344	MOTION for Leave to File *Letter with Court (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/25/2018)
06/25/2018	345	SEALED DOCUMENT RE: # 344 Special Master's Motion for Leave to File. (Attachments: # 1 Exhibit A-Unredacted, # 2 Exhibit A-Redacted) (Franklin, Yvonne) (Entered: 06/26/2018)
06/26/2018	349	MOTION *of Customer Class Counsel for Process Associated with Release of Report Before Release of Exhibits* by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP.(Lukey, Joan) (Entered: 06/26/2018)
06/26/2018	350	MOTION *to Impound the Opposition of Labaton Sucharow LLP to Special Masters Motion for Leave to File Letter with Court (Under Seal)* by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 06/26/2018)
06/26/2018	351	MOTION to Seal *Statement of Professor Stephen Gillers' Availability for Additional Deposition Testimony And/Or Participation (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 06/26/2018)
06/26/2018	353	SEALED DOCUMENT RE: # 350 Opposition of Labaton Sucharow to Special Master's Leave to File Letter. (Attachments: (UNREDACTED) # 1 (REDACTED))(Franklin, Yvonne) (Entered: 06/27/2018)
06/28/2018	356	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/28/2018)
06/28/2018	357	REPORT of the Special Master. Special Master's Report and Recommendations (with redactions). (Attachments: # 1 Executive Summary)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/28/2018)
06/28/2018	358	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/28/2018)
06/28/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered denying 254 Sealed Motion. See Memorandum and Order 356 . (Bono, Christine) (Entered: 06/28/2018)
06/28/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered denying 255 Sealed Motion. See Memorandum and Order 356 . (Bono, Christine) (Entered: 06/28/2018)
06/28/2018	359	Objection by Labaton Sucharow LLP *to Special Master's Report and Recommendations*. (Lukey, Joan) (Entered: 06/28/2018)
06/28/2018	360	MOTION to Seal *Unredacted Objections to Report and Recommendations* by Thornton Law Firm LLP.(Sharp, Joshua) (Entered: 06/28/2018)
06/28/2018	361	Objection by Thornton Law Firm LLP *to Special Master's Report and Recommendations [REDACTED]*. (Sharp, Joshua) (Entered: 06/28/2018)
06/28/2018	362	AFFIDAVIT in Support re 359 Objection . (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X, # 25 Exhibit Y)(Lukey, Joan) (Entered: 06/28/2018)
06/28/2018	363	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. The request to clarify the record made in the Master's June 21, 2018 letter to the court

		(Docket No. 329-1) (under seal) is DENIED. 2. Labaton's Motion for Order Directing Master to Respond to Inquiry Regarding Ex Parte Communications With The Court (Docket No. 334) is DENIED." ORDER entered. (Bono, Christine) (Entered: 06/28/2018)
06/28/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered denying 334 Motion for Order. See Order, 363 . (Bono, Christine) (Entered: 06/28/2018)
06/28/2018	364	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 06/28/2018)
06/28/2018	365	MOTION to Impound Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations and the Transmittal Declaration of Justin J. Wolosz in Support of Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 06/28/2018)
06/29/2018	366	MOTION for Clarification by Gerald E. Rosen.(Sinnott, William) (Entered: 06/29/2018)
06/29/2018	367	Objection to 357 Report of the Special Master by Lieff Cabraser Heimann & Bernstein, LLP . (Attachments: # 1 Appendix A, # 2 Appendix B, # 3 Appendix C)(Fineman, Steven) (Entered: 06/29/2018)
06/29/2018	368	DECLARATION re 357 Report of the Special Master *by William B. Rubenstein* by Lieff Cabraser Heimann & Bernstein, LLP. (Fineman, Steven) (Entered: 06/29/2018)
06/29/2018	369	DECLARATION re 357 Report of the Special Master *by Steven E. Fineman* by Lieff Cabraser Heimann & Bernstein, LLP. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P)(Fineman, Steven) (Entered: 06/29/2018)
06/29/2018	372	Judge Mark L. Wolf: "This Motion is hereby ALLOWED and the Master's proposal is hereby ADOPTED." ENDORSED ORDER entered granting 366 Motion for Clarification (Bono, Christine) (Entered: 06/29/2018)
06/29/2018	373	MOTION To Impound One Exhibit to The Declaration Of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Masters Report and Recommendations re 369 Declaration, by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 06/29/2018)
07/02/2018	374	Letter/request (non-motion) from Lieff Cabraser Heimann & Bernstein, LLP . (Heimann, Richard) (Entered: 07/02/2018)
07/03/2018	376	MOTION to Seal *Special Master's Response to Customer Class Counsels' Motion for an Accounting, and For Clarification that the Master's Role Has Concluded Filed Under Seal on June 19, 2018 (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 07/03/2018)
07/03/2018	377	SEALED DOCUMENT RE: 376 & 302 . (UNREDACTED) Special Master's Response to Customer Class Counsels' Motion for an Accounting, and for Clarification that the Master's Role has Concluded. (Franklin, Yvonne) (Entered: 07/05/2018)
07/05/2018	379	Objection to 357 Report of the Special Master by Labaton Sucharow LLP *Supplemental*. (Lukey, Joan) (Entered: 07/05/2018)
07/05/2018	380	Assented to MOTION for Extension of Time *to Comply with the Court's June 28, 2018 Order* by State Street Bank & Trust Company, State Street Global Markets, LLC.(Halston, Daniel) Modified on 7/9/2018 to correct event. (Franklin, Yvonne). (Entered: 07/05/2018)
07/06/2018	381	MOTION for Leave to File *Letter with Court (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 07/06/2018)
07/06/2018	382	MOTION to Seal *Special Master's Letter Submitted to Court (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 07/06/2018)
07/06/2018	383	SEALED DOCUMENT RE: 382 Special Master's Letter to Court. (Franklin, Yvonne) (Entered: 07/09/2018)
07/09/2018	384	Judge Mark L. Wolf: ELECTRONIC ORDER entered Granting 380 Motion for Extension of Time to File Response/Reply to Comply with the Court's June 28, 2018 Order by State Street Bank & Trust Company, State Street Global Markets, LLC.(Halston, Daniel). Responses due by 7/20/2018. (Franklin, Yvonne) (Entered: 07/09/2018)
07/09/2018	385	Judge Mark L. Wolf: ENDORSED ORDER entered **ALLOWING 381** Motion for Leave to File Document ; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document.; **DENYING 382** Motion to Seal. (Franklin, Yvonne) (Entered: 07/09/2018)
07/10/2018	386	MOTION to Seal Document *MOTION TO IMPOUND KELLER ROHRBACK'S NOTICE OF EXCEPTIONS TO ECF 359 AND ECF 361* by Andover Companies Employee Savings and Profit Sharing Plan, James Pehoushek-Stangeland.(Sarko, Lynn) (Entered: 07/10/2018)
07/10/2018	387	Objection to 359 Objection, 361 Objection by Andover Companies Employee Savings and Profit Sharing Plan, James Pehoushek-Stangeland *KELLER ROHRBACK'S NOTICE OF EXCEPTIONS TO ECF 359 AND ECF 361*. (Sarko, Lynn) (Entered: 07/10/2018)
07/11/2018		Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 386 Motion to Seal Document. (Bono, Christine) (Entered: 07/11/2018)
07/11/2018	388	USCA CASE OPENING NOTICE and ORIGINAL PROCEEDING docketed. Petition for a writ of mandamus filed by Petitioner Labaton Sucharow LLP. USCA Number Assigned 18-1651 (Paine, Matthew) (Entered: 07/12/2018)
07/12/2018	389	SEALED DOCUMENT RE: 386 Keller Rohrback's Notice of Exceptions to ECF 359 and ECF 361. (Franklin, Yvonne) (Entered: 07/12/2018)
07/12/2018	390	MOTION to Seal Document *Motion to Impound Zuckerman Spaeder's Notice of Exception to ECF 359, ECF 361 and ECF 367* by Arnold Henriquez.(Kravitz, Carl) (Entered: 07/12/2018)
07/12/2018	391	NOTICE by Arnold Henriquez *Zuckerman Spaeder LLP's Notice of Exception to ECF 359, ECF 361, and ECF 367 [REDACTED]* (Kravitz, Carl) Modified on 7/13/2018) Correction made to seal (unredacted) document due to filer error. (Franklin, Yvonne). (Entered: 07/12/2018)
07/13/2018	392	NOTICE by Arnold Henriquez *Zuckerman Spaeder LLP's Notice of Exception to ECF 359, ECF 361, and ECF 367 [REDACTED]* (Kravitz, Carl) (Entered: 07/13/2018)
07/13/2018	393	MOTION for Leave to File *Customer Class Counsels' Reply to Special Master's Response to their Motion for an Accounting, and for Clarification that the Master's Role has Concluded* by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Attachments: # 1 Exhibit A)(Lukey, Joan) (Entered: 07/13/2018)

07/13/2018	394	MOTION to Impound Customer Class Counsels' Reply to Special Master's Response to their Motion for an Accounting, and for Clarification that the Master's Role has Concluded by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP.(Lukey, Joan) (Entered: 07/13/2018)
07/13/2018	395	MOTION to Stay *Pending Resolution of Petition for Writ of Mandamus* by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 07/13/2018)
07/13/2018	396	MEMORANDUM in Support re 395 MOTION to Stay *Pending Resolution of Petition for Writ of Mandamus* filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 07/13/2018)
07/13/2018	397	SEALED DOCUMENT RE: # 393 Exhibit A to Customer Class Counsels' Motion for Leave to File Reply. (Franklin, Yvonne) (Entered: 07/13/2018)
07/19/2018	398	NOTICE by Michael T. Cohn, Arnold Henriquez, McTigue Law, LLP, Richard A. Sutherland, William R. Taylor re 359 Objection, 361 Objection *McTigue Law LLP's Notice of Exceptions to the Objections of Labaton Sucharow LLP and Thornton Law Firm LLP to the Special Master's Report and Recommendation* (McTigue, J.) (Entered: 07/19/2018)
07/20/2018	399	NOTICE by Gerald E. Rosen *Special Master's Submission of the Final Redacted Exhibits to the Master's Report & Recommendations* (Sinnott, William) (Entered: 07/20/2018)
07/20/2018	400	Opposition re 395 MOTION to Stay *Pending Resolution of Petition for Writ of Mandamus* filed by Gerald E. Rosen. (Sinnott, William) (Entered: 07/20/2018)
07/23/2018	401	EXHIBIT re 399 Notice (Other) *Special Master's Submission of the Final Redacted Exhibits to the Master's Report & Recommendations* by Gerald E. Rosen. (Attachments: # 1 Exhibit 2, # 2 Exhibit 3, # 3 Exhibit 4, # 4 Exhibit 5, # 5 Exhibit 6, # 6 Exhibit 7, # 7 Exhibit 8, # 8 Exhibit 9, # 9 Exhibit 10, # 10 Exhibit 11, # 11 Exhibit 12, # 12 Exhibit 13, # 13 Exhibit 14, # 14 Exhibit 15, # 15 Exhibit 16, # 16 Exhibit 17, # 17 Exhibit 18, # 18 Exhibit 19, # 19 Exhibit 20, # 20 Exhibit 21, # 21 Exhibit 22, # 22 Exhibit 23, # 23 Exhibit 24, # 24 Exhibit 25, # 25 Exhibit 26, # 26 Exhibit 27, # 27 Exhibit 28, # 28 Exhibit 29, # 29 Exhibit 30, # 30 Exhibit 31, # 31 Exhibit 32, # 32 Exhibit 33, # 33 Exhibit 34, # 34 Exhibit 35, # 35 Exhibit 36, # 36 Exhibit 37, # 37 Exhibit 38, # 38 Exhibit 39, # 39 Exhibit 40, # 40 Exhibit 41, # 41 Exhibit 42, # 42 Exhibit 43, # 43 Exhibit 44, # 44 Exhibit 45, # 45 Exhibit 46, # 46 Exhibit 47, # 47 Exhibit 48, # 48 Exhibit 49, # 49 Exhibit 50, # 50 Exhibit 51, # 51 Exhibit 52, # 52 Exhibit 53, # 53 Exhibit 54, # 54 Exhibit 55, # 55 Exhibit 56, # 56 Exhibit 57, # 57 Exhibit 58, # 58 Exhibit 59, # 59 Exhibit 60, # 60 Exhibit 61, # 61 Exhibit 62, # 62 Exhibit 63, # 63 Exhibit 64, # 64 Exhibit 65, # 65 Exhibit 66, # 66 Exhibit 67, # 67 Exhibit 68, # 68 Exhibit 69, # 69 Exhibit 70, # 70 Exhibit 71, # 71 Exhibit 72, # 72 Exhibit 73, # 73 Exhibit 74, # 74 Exhibit 75, # 75 Exhibit 76, # 76 Exhibit 77, # 77 Exhibit 78, # 78 Exhibit 79, # 79 Exhibit 80, # 80 Exhibit 81, # 81 Exhibit 82, # 82 Exhibit 83, # 83 Exhibit 84, # 84 Exhibit 85, # 85 Exhibit 86, # 86 Exhibit 87, # 87 Exhibit 88, # 88 Exhibit 89, # 89 Exhibit 90, # 90 Exhibit 91, # 91 Exhibit 92, # 92 Exhibit 93, # 93 Exhibit 94, # 94 Exhibit 95, # 95 Exhibit 96, # 96 Exhibit 97, # 97 Exhibit 98, # 98 Exhibit 99, # 99 Exhibit 100, # 100 Exhibit 101, # 101 Exhibit 102, # 102 Exhibit 103, # 103 Exhibit 104, # 104 Exhibit 105, # 105 Exhibit 106, # 106 Exhibit 107, # 107 Exhibit 108, # 108 Exhibit 109, # 109 Exhibit 110, # 110 Exhibit 111, # 111 Exhibit 112, # 112 Exhibit 113, # 113 Exhibit 114, # 114 Exhibit 115, # 115 Exhibit 116, # 116 Exhibit 117, # 117 Exhibit 118, # 118 Exhibit 119, # 119 Exhibit 120, # 120 Exhibit 121, # 121 Exhibit 122, # 122 Exhibit 123, # 123 Exhibit 124, # 124 Exhibit 125, # 125 Exhibit 126, # 126 Exhibit 127, # 127 Exhibit 128, # 128 Exhibit 129, # 129 Exhibit 130, # 130 Exhibit 131, # 131 Exhibit 132, # 132 Exhibit 133, # 133 Exhibit 134, # 134 Exhibit 135, # 135 Exhibit 136, # 136 Exhibit 137, # 137 Exhibit 138, # 138 Exhibit 139, # 139 Exhibit 140, # 140 Exhibit 141, # 141 Exhibit 142, # 142 Exhibit 143, # 143 Exhibit 144, # 144 Exhibit 145, # 145 Exhibit 146, # 146 Exhibit 147, # 147 Exhibit 148, # 148 Exhibit 149, # 149 Exhibit 150, # 150 Exhibit 151, # 151 Exhibit 152, # 152 Exhibit 153, # 153 Exhibit 154, # 154 Exhibit 155, # 155 Exhibit 156, # 156 Exhibit 157, # 157 Exhibit 158, # 158 Exhibit 159, # 159 Exhibit 160, # 160 Exhibit 161, # 161 Exhibit 162, # 162 Exhibit 163, # 163 Exhibit 164, # 164 Exhibit 165, # 165 Exhibit 166, # 166 Exhibit 167, # 167 Exhibit 168, # 168 Exhibit 169, # 169 Exhibit 170, # 170 Exhibit 171, # 171 Exhibit 172, # 172 Exhibit 173, # 173 Exhibit 174, # 174 Exhibit 175, # 175 Exhibit 176, # 176 Exhibit 177, # 177 Exhibit 178, # 178 Exhibit 179, # 179 Exhibit 180, # 180 Exhibit 181, # 181 Exhibit 182, # 182 Exhibit 183, # 183 Exhibit 184, # 184 Exhibit 185, # 185 Exhibit 186, # 186 Exhibit 187, # 187 Exhibit 188, # 188 Exhibit 189, # 189 Exhibit 190, # 190 Exhibit 191, # 191 Exhibit 192, # 192 Exhibit 193, # 193 Exhibit 194, # 194 Exhibit 195, # 195 Exhibit 196, # 196 Exhibit 197, # 197 Exhibit 198, # 198 Exhibit 199, # 199 Exhibit 200, # 200 Exhibit 201, # 201 Exhibit 202, # 202 Exhibit 203, # 203 Exhibit 204, # 204 Exhibit 205, # 205 Exhibit 206, # 206 Exhibit 207, # 207 Exhibit 208, # 208 Exhibit 209, # 209 Exhibit 210 Part 1, # 210 Exhibit 210 Part 2, # 211 Exhibit 211, # 212 Exhibit 212 Part 1, # 213 Exhibit 212 Part 2, # 214 Exhibit 212 Part 3, # 215 Exhibit 213, # 216 Exhibit 214, # 217 Exhibit 215, # 218 Exhibit 216, # 219 Exhibit 217, # 220 Exhibit 218, # 221 Exhibit 219, # 222 Exhibit 220, # 223 Exhibit 221, # 224 Exhibit 222, # 225 Exhibit 223, # 226 Exhibit 224, # 227 Exhibit 225, # 228 Exhibit 226, # 229 Exhibit 227, # 230 Exhibit 228, # 231 Exhibit 229, # 232 Exhibit 230, # 233 Exhibit 231, # 234 Exhibit 232 Part 1, # 235 Exhibit 232 Part 2, # 236 Exhibit 232 Part 3, # 237 Exhibit 233 Part 1, # 238 Exhibit 233 Part 2, # 239 Exhibit 233 Part 3, # 240 Exhibit 233 Part 4, # 241 Exhibit 233 Part 5, # 242 Exhibit 234, # 243 Exhibit 235, # 244 Exhibit 236, # 245 Exhibit 237, # 246 Exhibit 238, # 247 Exhibit 239, # 248 Exhibit 240, # 249 Exhibit 241, # 250 Exhibit 242, # 251 Exhibit 243, # 252 Exhibit 244, # 253 Exhibit 245 Part 1, # 254 Exhibit 245 Part 2, # 255 Exhibit 245 Part 3, # 256 Exhibit 245 Part 4, # 257 Exhibit 246, # 258 Exhibit 247, # 259 Exhibit 248, # 260 Exhibit 249, # 261 Exhibit 250, # 262 Exhibit 251, # 263 Exhibit 252, # 264 Exhibit 253, # 265 Exhibit 254, # 266 Exhibit 255, # 267 Exhibit 256, # 268 Exhibit 257, # 269 Exhibit 258, # 270 Exhibit 259, # 271 Exhibit 260, # 272 Exhibit 261, # 273 Exhibit 262, # 274 Exhibit 263, # 275 Exhibit 264 Part 1, # 276 Exhibit 264 Part 2, # 277 Exhibit 265, # 278 Exhibit 266)(Sinnott, William) (Entered: 07/23/2018)
07/25/2018	402	JUDGMENT of the USCA (18-1651) Petition for Mandamus: The petition is DENIED. (Paine, Matthew) (Entered: 07/25/2018)
07/25/2018	403	NOTICE by Labaton Sucharow LLP *of Filing of Expanded Exhibit 125* (Attachments: # 1 Exhibit 125 - Expanded)(Wolosz, Justin) (Entered: 07/25/2018)
07/26/2018		ELECTRONIC NOTICE Setting Hearing on Motion 302 MOTION for an Accounting, and for Clarification that the Master's Role has Concluded : Motion Hearing set for 8/9/2018 10:00 AM in Courtroom 10 before Judge Mark L. Wolf. (Bono, Christine) (Entered: 07/26/2018)
07/26/2018	404	Objection by Labaton Sucharow LLP *Second Supplemental to Special Master's Report and Recommendations*. (Lukey, Joan) (Entered: 07/26/2018)
07/26/2018	405	AFFIDAVIT in Support re 404 Objection *by Stuart M. Glass*. (Attachments: # 1 Exhibit A - Redacted, # 2 Exhibit B - Redacted, # 3 Exhibit C - Redacted, # 4 Exhibit D - Redacted, # 5 Exhibit E - Redacted)(Lukey, Joan) (Entered: 07/26/2018)
07/26/2018	406	MOTION to Impound Second Supplemental Objections to Special Master's Report and Recommendations and the Transmittal Declaration of Stuart M. Glass in Support of Labaton's Second Supplemental Objections by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 07/26/2018)
07/27/2018	408	AFFIDAVIT in Support re 404 Objection *[CORRECTED] by Stuart M. Glass*. (Attachments: # 1 Exhibit A - New York Times Article, # 2 Exhibit B - Redacted, # 3 Exhibit C - Redacted, # 4 Exhibit D - Redacted, # 5 Exhibit E - Redacted)(Lukey, Joan) (Entered: 07/27/2018)
07/31/2018	409	MOTION to Seal *Special Master's Letter Submitted to Court (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 07/31/2018)

07/31/2018	410	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. The Lawyers are informed that the court may, if necessary, amend the Order appointing the Master to authorize him to respond to the objections to the Report and to address related issues. See Fed. R. Civ. P. 53(b) (4). 2. The Lawyers and the Master shall, by 12:00 noon on August 6, 2018, supplement their submissions to address the Court's authority to permit the Master to address objections to his Report and related issues. 3. CCAF shall, by 12:00 noon on August 6, 2018: (a) State whether it remains willing and able to serve as a guardian ad litem or amicus; (b) If so, the financial and other terms on which it proposes to serve; (c) Supplement its motion to participate (Docket No. 126) to address the current circumstances of the case; and (d) Respond to paragraph 2 hereinabove. 4. If CCAF still seeks a role in this case, any opposition to its request shall be filed by August 7, 2018." ORDER entered. MEMORANDUM AND ORDER(Bono, Christine) (Entered: 07/31/2018)
07/31/2018	411	SEALED DOCUMENT RE: 409 Letter Submitted to Court (under seal)(Franklin, Yvonne) (Entered: 07/31/2018)
08/01/2018	412	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. The July 31, 2018 letter (Docket No. 411 under seal) is UNSEALED. 2. The Master shall provide this Order to anyone requesting documents or information from him." ORDER entered. MEMORANDUM AND ORDER. (Attachments: # 1 Special Master Letter)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/01/2018)
08/01/2018	413	MOTION for Disclosure *of Certain Sealed Documents Necessary to Fully Respond to the Court's Order of July 31, 2018* by Competitive Enterprise Institute (CEI).(Bednarz, M.) (Entered: 08/01/2018)
08/03/2018	414	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. CCAF's Motion for Disclosure of Certain Sealed Documents Necessary to Fully Respond to the Court's Order of July 31, 2018 (Docket No. 413) is ALLOWED in part. The motions to seal the memoranda relating to the Motion for Accounting and Clarification that the Special Master's Role Has Concluded (Docket Nos. 301, 376, 394) are DENIED. The memoranda concerning the Motion for Accounting and Clarification that the Special Master's Role Has Concluded (Docket Nos. 310, 377, and 397), the Master's June 25, 2018 letter (Docket No. 345-1) and Labaton's response (Docket No. 353) are UNSEALED. 2. The Master shall confer with Labaton and, by 4:00 p.m. on August 3, 2018, report whether the unredacted version of the Master's June 21, 2018 letter (Docket No. 329-1) should remain under seal. If either the Master or Labaton seeks to maintain the document under seal, both shall explain their positions. 3. The parties shall be prepared to address at the August 9, 2018 hearing whether there are other documents developed in the Master's investigation, or filed with the court under seal, that should now be made public." MEMORANDUM AND ORDER entered denying (376) Motion to Seal; denying (394) Motion ; granting in part and denying in part (413) Motion for Disclosure; denying (301) Motion in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/03/2018)
08/03/2018	415	MOTION to Seal *Special Master's First Submission of Documents to Supplement the Record (Under Seal)* by Gerald E. Rosen.(Sinnott, William) (Entered: 08/03/2018)
08/03/2018	416	NOTICE by Gerald E. Rosen *Special Master's Response to the Court Concerning Unsealing Special Master's June 21, 2018 Letter to the Court* (Sinnott, William) (Entered: 08/03/2018)
08/03/2018	417	Judge Mark L. Wolf: "On August 3, 2018, the Court ordered the Master to confer with Labaton Sucharow, LLP ("Labaton") and report whether they agree that the unredacted version of the Master's June 21, 2018 letter to the court (Docket No. 329-1) should be made public. The Master and Labaton reported that they agree that the letter should be unsealed. See Docket No. 416. Therefore, it is hereby ORDERED that Docket No. 329-1 is UNSEALED." ORDER entered. MEMORANDUM AND ORDERAssociated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/06/2018)
08/06/2018	418	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 410 Memorandum & ORDER,,,, . (Heimann, Richard) (Entered: 08/06/2018)
08/06/2018	419	MOTION for Extension of Time to 8/13/2018 to File *Supplement to its Motion to Participate Pursuant to the Court's Order of July 31, 2018 (Dkt. 410)* by Competitive Enterprise Institute (CEI).(Bednarz, M.) (Entered: 08/06/2018)
08/06/2018	420	RESPONSE TO COURT ORDER by Competitive Enterprise Institute (CEI) re 410 Memorandum & ORDER,,,, . (Attachments: # 1 Declaration of M. Frank Bednarz and Exhibits)(Bednarz, M.) (Entered: 08/06/2018)
08/06/2018	421	RESPONSE TO COURT ORDER by Labaton Sucharow LLP, Thornton Law Firm LLP re 410 Memorandum & ORDER,,,, . (Lukey, Joan) (Entered: 08/06/2018)
08/06/2018	422	NOTICE by Gerald E. Rosen *Special Master's Supplemental Response to Customer Class Counsel's Motion for Accounting, and Clarification that the Special Master's Role Has Concluded* (Sinnott, William) (Entered: 08/06/2018)
08/06/2018	423	SEALED DOCUMENT RE: # 415 Special Master's First Submission of Documents to Supplement the Record. (Attachments: # 1 Exhibit 411, # 2 Exhibit 414, # 3 Exhibit 417, # 4 Exhibit 421, # 5 Exhibit 432, # 6 Exhibit 435, # 7 Exhibit 437, # 8 Exhibit 442, # 9 Exhibit 7444, # 10 Exhibit 7447, # 11 Exhibit 7449, # 12 Exhibit 7450, # 13 Exhibit 7451, # 14 Exhibit 7453, # 15 Exhibit 7457, # 16 Exhibit 7476, # 17 Exhibit 7479, # 18 Exhibit 7482, # 19 Exhibit 7485, # 20 Exhibit 7486, # 21 Exhibit 7506, # 22 Exhibit 7568, # 23 Exhibit 7580, # 24 Exhibit 7585, # 25 Exhibit 7643, # 26 Exhibit 7756, # 27 Exhibit 7805, # 28 Exhibit 8581, # 29 Exhibit 0328, # 30 Exhibit 0419, # 31 Exhibit 0585, # 32 Exhibit 0586, # 33 Exhibit 0588, # 34 Exhibit 0589, # 35 Exhibit 0590, # 36 Exhibit 0623, # 37 Exhibit 0624, # 38 Exhibit 2641, # 39 Exhibit 2651, # 40 Exhibit 2697)(# 41 Exhibit 2712, # 42 Exhibit 2718, # 43 Exhibit 2719, # 44 Exhibit 2721, # 45 Exhibit 2724, # 46 Exhibit 2730, # 47 Exhibit 2733, # 48 Exhibit 2778, # 49 Exhibit 2779, # 50 Exhibit 2780, # 51 Exhibit 2781, # 52 Exhibit 2790, # 53 Exhibit 2791, # 54 Exhibit 2792, # 55 Exhibit 2793, # 56 Exhibit 2794, # 57 Exhibit 2795, # 58 Exhibit 2796, # 59 Exhibit 2797, # 60 Exhibit 2798, # 61 Exhibit 2799, # 62 Exhibit 2836, # 63 Exhibit 2837, # 64 Exhibit 2838, # 65 Exhibit 2862, # 66 Exhibit 5911, # 67 Exhibit 7107, # 68 Exhibit 7345, # 69 Exhibit 8711, # 70 Exhibit 8713, # 71 Exhibit 9526, # 72 Exhibit 9575) # 73 Exhibit 9576, # 74 Exhibit 9577, # 75 Exhibit 0324, # 76 Exhibit 0325, # 77 Exhibit 0328, # 78 Exhibit 0663, # 79 Exhibit 0669, # 80 Exhibit 0670, # 81 Exhibit 0671, # 82 Exhibit 0688, # 83 Exhibit 0690, # 84 Exhibit 0706, # 85 Exhibit 0852, # 86 Exhibit 0853, # 87 Exhibit 0854, # 88 Exhibit 0876, # 89 Exhibit 0988, # 90 Exhibit 0990, # 91 Exhibit 0993) # 92 Exhibit 1001, # 93 Exhibit 1003, # 94 Exhibit 1170, # 95 Exhibit 1174, # 96 Exhibit 1192, # 97 Exhibit 1193, # 98 Exhibit 1229, # 99 Exhibit 1239, # 100 Exhibit 1240, # 101 Exhibit 1245, # 102 Exhibit 1319, # 103 Exhibit 1328, # 104 Exhibit 1449, # 105 Exhibit 1452, # 106 Exhibit 1458, # 107 Exhibit 1463, # 108 Exhibit 1465, # 109 Exhibit 1471, # 110 Exhibit 1482, # 111 Exhibit 1590, # 112 Exhibit 1595, # 113 Exhibit 1597, # 114 Exhibit 1599, # 115 Exhibit 1603, # 116 Exhibit 1643, # 117 Exhibit 2444, # 118 Exhibit 3089, # 119 Exhibit 3096, # 120 Exhibit 3100, # 121 Exhibit 3187, # 122 Exhibit 3189, # 123 Exhibit 3193, # 124 Exhibit 3395, # 125 Exhibit 4765, # 126 Exhibit 5257, # 127 Exhibit 5448) # 128 Exhibit 35452, # 129 Exhibit 37418, # 130 Exhibit 39487, # 131 Exhibit 39491, # 132 Exhibit 39495, # 133 Exhibit 39499, # 134 Exhibit 39507, # 135 Exhibit 39509, # 136 Exhibit 39527, # 137 Exhibit 39534, # 138 Exhibit 39537, # 139 Exhibit 39538, # 140 Exhibit 39539, # 141 Exhibit 39541, # 142 Exhibit 39550, # 143 Exhibit 39555, # 144 Exhibit 39561, # 145 Exhibit 39572, # 146 Exhibit 39578, # 147 Exhibit 39585, # 148 Exhibit 39600, # 149 Exhibit 39602, # 150

		Exhibit 39603, # 151 Exhibit 39636, # 152 Exhibit 39640, # 153 Exhibit 39642, # 154 Exhibit 39643, # 155 Exhibit 39644, # 156 Exhibit 39654, # 157 Exhibit 40118, # 158 Exhibit 40124, # 159 Exhibit 40132, # 160 Exhibit 40134, # 161 Exhibit 40182, # 162 Exhibit 40243, # 163 Exhibit 40246, # 164 Exhibit 40249, # 165 Exhibit 40259, # 166 Exhibit 40263, # 167 Exhibit 40271, # 168 Exhibit 40295, # 169 Exhibit 40308, # 170 Exhibit 40316, # 171 Exhibit 40331, # 172 Exhibit 40332, # 173 Exhibit 40335, # 174 Exhibit 40343, # 175 Exhibit 40348, # 176 Exhibit 40368, # 177 Exhibit 40369, # 178 Exhibit 40380, # 179 Exhibit 40382) # 180 Exhibit 40402, # 181 Exhibit 40411, # 182 Exhibit 40446, # 183 Exhibit 40498, # 184 Exhibit 40500, # 185 Exhibit 40501, # 186 Exhibit 40509, # 187 Exhibit 40519, # 188 Exhibit 40523-A, # 189 Exhibit 40526, # 190 Exhibit 40529, # 191 Exhibit 40532, # 192 Exhibit 40535, # 193 Exhibit 40556, # 194 Exhibit 40565, # 195 Exhibit 40570, # 196 Exhibit 40572, # 197 Exhibit 40578, # 198 Exhibit 40581, # 199 Exhibit 40583, # 200 Exhibit 41058, # 201 Exhibit 41097, # 202 Exhibit 41099, # 203 Exhibit 41105, # 204 Exhibit TLF-056495, # 205 Exhibit TLF-060550, # 206 Exhibit TLF-060551, # 207 Exhibit TLF-064148, # 208 Exhibit TLF-064322, # 209 Exhibit TLF-075400, # 210 Exhibit TLF-075402, # 211 Exhibit TLF-075782) # 212 Exhibit 40538, # 213 Exhibit 40543) Modified on 8/7/2018 (note 212 & 213 out of sequence) (Franklin, Yvonne). Modified on 8/7/2018 (Franklin, Yvonne). (Entered: 08/06/2018)
08/06/2018	424	NOTICE by Gerald E. Rosen *Special Master's Motion to Appear in Court at August 9, 2018 Hearing* (Sinnott, William) (Entered: 08/06/2018)
08/07/2018	425	Judge Mark L. Wolf: "As there is no objection to this motion and it may be useful for the Master to have the opportunity to confer with counsel during the hearing, the Motion is hereby ALLOWED." ENDORSED ORDER entered. (Bono, Christine) (Entered: 08/07/2018)
08/07/2018	426	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 420 Response to Court Order . (Heimann, Richard) (Entered: 08/07/2018)
08/07/2018	427	Objection to 420 Response to Court Order by Labaton Sucharow LLP, Thornton Law Firm LLP . (Lukey, Joan) (Entered: 08/07/2018)
08/07/2018	428	AFFIDAVIT in Support re 427 Objection *by James W. Johnson*. (Lukey, Joan) (Entered: 08/07/2018)
08/07/2018	429	AFFIDAVIT in Support re 427 Objection *by Nicole M. Zeiss*. (Lukey, Joan) (Entered: 08/07/2018)
08/07/2018	430	Objection to 420 Response to Court Order by Andover Companies Employee Savings and Profit Sharing Plan, Michael T. Cohn, Arnold Henriquez, James Pehoushek-Stangeland, Richard A. Sutherland, William R. Taylor *Keller Rohrback LLP's and Zuckerman Spaeder LLP's Opposition To The Competitive Enterprise Institute's Center For Class Action Fairness's Request To Serve As Guardian Ad Litem For The Class*. (Gerber, Laura) (Entered: 08/07/2018)
08/07/2018	431	Objection to 420 Response to Court Order by Michael T. Cohn, Arnold Henriquez, Richard A. Sutherland, William R. Taylor *McTigue Law LLP's And Beins Axelrod, P.C.s Opposition To The Participation Of The Competitive Enterprise Institute In This Case*. (McTigue, J.) (Entered: 08/07/2018)
08/08/2018	432	Judge Mark L. Wolf: "It is hereby ORDERED that: 1. The Competitive Enterprise Institute's Center for Class Action Fairness's Motion for an Extension of Time to Supplement Its Motion to Participate (Dkt. 126) Pursuant to the Court's Order of July 31, 2018 and Memorandum in Support (Docket No. 419) is ALLOWED. 2. In view of the substantial submissions made on August 1, 2018, the August 9, 2018 hearing will begin at 1:30 p.m., rather than at 10:00 a.m. as previously ordered." ORDER entered granting (419) Motion for Extension of Time to File in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/08/2018)
08/08/2018	433	ELECTRONIC NOTICE Resetting Hearing on Motion *** AS TO TIME ONLY *** (302 in 1:11-cv-10230-MLW) MOTION for an Accounting, and for Clarification that the Master's Role has Concluded : Motion Hearing set for 8/9/2018 01:30 PM in Courtroom 10 before Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/08/2018)
08/08/2018	434	Objection to 357 Report of the Special Master by Labaton Sucharow LLP . (Lukey, Joan) (Entered: 08/08/2018)
08/08/2018	435	AFFIDAVIT in Support re 434 Objection *by Justin J. Wolosz*. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X, # 25 Exhibit Y)(Lukey, Joan) (Entered: 08/08/2018)
08/09/2018	436	MOTION to Seal *the Joint Motion to the Court* by Gerald E. Rosen.(Sinnott, William) (Entered: 08/09/2018)
08/09/2018	437	MOTION to Seal *the Joint Motion to the Court* by Gerald E. Rosen.(Sinnott, William) (Entered: 08/09/2018)
08/09/2018	440	Judge Mark L. Wolf: "This Motion is hereby ALLOWED and the submission, Docket No. 438, shall be sealed at least temporarily. Any future motions to seal, by any party, shall include a statement concerning why impoundment is justified." ENDORSED ORDER entered granting 436 Motion to Seal (Bono, Christine) (Entered: 08/09/2018)
08/09/2018	441	Judge Mark L. Wolf: "This Motion is hereby ALLOWED and the submission, Docket No. 439, shall be sealed at least temporarily. Any future motions to seal, by any party, shall include a statement concerning why impoundment is justified." ELECTRONIC ORDER entered granting 437 Motion to Seal (Bono, Christine) (Entered: 08/09/2018)
08/09/2018	444	NOTICE by Gerald E. Rosen *Special Master's Motion for Chambers Conference with the Court and All Counsel* (Sinnott, William) (Entered: 08/09/2018)
08/09/2018	450	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Hearing re accounting and clarification of Special Master Role and CEI Motion to Intervene, held on 8/9/2018. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: McEvoy, Sinnott, Kelly, Sharp, McTigue, Kravitz, Lukey, Fischer-Groban, Heimann, Halston, Smith, Sarko) (Bono, Christine) (Entered: 08/13/2018)
08/10/2018	445	Judge Mark L. Wolf: ORDER entered denying (302) Motion in case 1:11-cv-10230-MLW. See attached Order. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/10/2018)
08/10/2018	446	NOTICE by Thornton Law Firm LLP *Filing of Objections to Special Master's Report and Recommendations* (Attachments: # 1 Objections to Report and Recommendations, # 2 Ex. 1, # 3 Ex. 2, # 4 Ex. 3, # 5 Ex. 4, # 6 Ex. 5, # 7 Ex. 6, # 8 Ex. 7, # 9 Ex. 8, # 10 Ex. 9, # 11 Ex. 10, # 12 Ex. 11, # 13 Ex. 12, # 14 Ex. 13, # 15 Ex. 14, # 16 Ex. 15, # 17 Ex. 16, # 18 Ex. 17, # 19 Ex. 18, # 20 Ex. 19, # 21 Ex. 20, # 22 Ex. 21, # 23 Ex. 22, # 24 Ex. 23, # 25 Ex. 24, # 26 Ex. 25, # 27 Ex. 26)(Sharp, Joshua) (Entered: 08/10/2018)
08/13/2018	447	SEALED Transcript of Hearing held on August 9, 2018, before Judge Mark L. Wolf. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 08/13/2018)

08/13/2018	448	EXCERPT Transcript of Hearing held on August 9, 2018, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 9/4/2018. Redacted Transcript Deadline set for 9/13/2018. Release of Transcript Restriction set for 11/13/2018. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 08/13/2018)
08/13/2018	449	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 08/13/2018)
08/13/2018	451	RESPONSE TO COURT ORDER by Competitive Enterprise Institute (CEI) re 432 Order on Motion for Extension of Time to File,, 410 Memorandum & ORDER,,,, *Memorandum Amending its Motion to Participate as Guardian Ad Litem or Amicus 126* . (Attachments: # 1 Declaration of Theodore H. Frank, # 2 Exhibit A to Frank Declaration, # 3 Exhibit B to Frank Declaration, # 4 Exhibit C to Frank Declaration, # 5 Exhibit D to Frank Declaration, # 6 Exhibit E to Frank Declaration, # 7 Exhibit F to Frank Declaration, # 8 Declaration of Gary S. Peeples, # 9 Exhibit to Peeples Declaration)(Bednarz, M.) (Entered: 08/13/2018)
08/14/2018	452	Objection to 357 Report of the Special Master by Labaton Sucharow LLP *Second Supplemental*. (Lukey, Joan) (Entered: 08/14/2018)
08/14/2018	453	AFFIDAVIT in Support re 452 Objection *by Stuart M. Glass*. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E)(Lukey, Joan) (Entered: 08/14/2018)
08/16/2018	454	NOTICE by Gerald E. Rosen *Special Master's Response to Court's August 10, 2018 Order* (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Exhibit 10, # 11 Exhibit 11, # 12 Exhibit 12, # 13 Exhibit 13, # 14 Exhibit 14, # 15 Exhibit 15, # 16 Exhibit 16, # 17 Exhibit 17, # 18 Exhibit 18, # 19 Exhibit 19, # 20 Exhibit 20, # 21 Exhibit 21, # 22 Exhibit 22, # 23 Exhibit 23, # 24 Exhibit 24, # 25 Exhibit 25, # 26 Exhibit 26, # 27 Exhibit 27, # 28 Exhibit 28, # 29 Exhibit 29, # 30 Exhibit 30, # 31 Exhibit 31, # 32 Exhibit 32, # 33 Exhibit 33, # 34 Exhibit 34, # 35 Exhibit 35, # 36 Exhibit 36, # 37 Exhibit 37, # 38 Exhibit 38, # 39 Exhibit 39, # 40 Exhibit 40, # 41 Exhibit 41, # 42 Exhibit 42, # 43 Exhibit 43, # 44 Exhibit 44, # 45 Exhibit 45, # 46 Exhibit 46, # 47 Exhibit 47, # 48 Exhibit 48, # 49 Exhibit 49, # 50 Exhibit 50, # 51 Exhibit 51, # 52 Exhibit 52, # 53 Exhibit 53, # 54 Exhibit 54, # 55 Exhibit 55, # 56 Exhibit 56, # 57 Exhibit 57, # 58 Exhibit 58, # 59 Exhibit 59, # 60 Exhibit 60, # 61 Exhibit 61, # 62 Exhibit 62, # 63 Exhibit 63, # 64 Exhibit 64, # 65 Exhibit 65, # 66 Exhibit 66, # 67 Exhibit 67, # 68 Exhibit 68, # 69 Exhibit 69, # 70 Exhibit 70, # 71 Exhibit 71, # 72 Exhibit 72, # 73 Exhibit 73, # 74 Exhibit 74, # 75 Exhibit 75, # 76 Exhibit 76, # 77 Exhibit 77, # 78 Exhibit 78, # 79 Exhibit 79, # 80 Exhibit 80, # 81 Exhibit 81, # 82 Exhibit 82, # 83 Exhibit 83, # 84 Exhibit 84, # 85 Exhibit 85, # 86 Exhibit 86, # 87 Exhibit 87, # 88 Exhibit 88, # 89 Exhibit 89, # 90 Exhibit 90, # 91 Exhibit 91, # 92 Exhibit 92, # 93 Exhibit 93, # 94 Exhibit 94, # 95 Exhibit 95, # 96 Exhibit 96, # 97 Exhibit 97, # 98 Exhibit 98, # 99 Exhibit 99, # 100 Exhibit 100, # 101 Exhibit 101, # 102 Exhibit 102, # 103 Exhibit 103, # 104 Exhibit 104, # 105 Exhibit 105, # 106 Exhibit 106, # 107 Exhibit 107, # 108 Exhibit 108, # 109 Exhibit 109, # 110 Exhibit 110, # 111 Exhibit 111, # 112 Exhibit 112, # 113 Exhibit 113, # 114 Exhibit 114, # 115 Exhibit 115, # 116 Exhibit 116, # 117 Exhibit 117, # 118 Exhibit 118, # 119 Exhibit 119, # 120 Exhibit 120, # 121 Exhibit 121, # 122 Exhibit 122, # 123 Exhibit 123, # 124 Exhibit 124, # 125 Exhibit 125, # 126 Exhibit 126, # 127 Exhibit 127, # 128 Exhibit 128, # 129 Exhibit 129, # 130 Exhibit 130, # 131 Exhibit 131, # 132 Exhibit 132, # 133 Exhibit 133, # 134 Exhibit 134, # 135 Exhibit 135, # 136 Exhibit 136, # 137 Exhibit 137, # 138 Exhibit 138, # 139 Exhibit 139, # 140 Exhibit 140, # 141 Exhibit 141, # 142 Exhibit 142, # 143 Exhibit 143, # 144 Exhibit 144, # 145 Exhibit 145, # 146 Exhibit 146, # 147 Exhibit 147, # 148 Exhibit 148, # 149 Exhibit 149, # 150 Exhibit 150, # 151 Exhibit 151, # 152 Exhibit 152, # 153 Exhibit 153, # 154 Exhibit 154, # 155 Exhibit 155, # 156 Exhibit 156, # 157 Exhibit 157, # 158 Exhibit 158, # 159 Exhibit 159, # 160 Exhibit 160, # 161 Exhibit 161, # 162 Exhibit 162, # 163 Exhibit 163, # 164 Exhibit 164, # 165 Exhibit 165, # 166 Exhibit 166, # 167 Exhibit 167, # 168 Exhibit 168, # 169 Exhibit 169, # 170 Exhibit 170, # 171 Exhibit 171, # 172 Exhibit 172, # 173 Exhibit 173, # 174 Exhibit 174, # 175 Exhibit 175, # 176 Exhibit 176, # 177 Exhibit 177, # 178 Exhibit 178, # 179 Exhibit 179, # 180 Exhibit 180, # 181 Exhibit 181, # 182 Exhibit 182, # 183 Exhibit 183, # 184 Exhibit 184, # 185 Exhibit 185, # 186 Exhibit 186, # 187 Exhibit 187, # 188 Exhibit 188, # 189 Exhibit 189, # 190 Exhibit 190, # 191 Exhibit 191, # 192 Exhibit 192, # 193 Exhibit 193, # 194 Exhibit 194, # 195 Exhibit 195, # 196 Exhibit 196, # 197 Exhibit 197, # 198 Exhibit 198, # 199 Exhibit 199, # 200 Exhibit 200, # 201 Exhibit 201, # 202 Exhibit 202, # 203 Exhibit 203, # 204 Exhibit 204, # 205 Exhibit 205, # 206 Exhibit 206, # 207 Exhibit 207, # 208 Exhibit 208, # 209 Exhibit 209, # 210 Exhibit 210, # 211 Exhibit 211, # 212 Exhibit 212, # 213 Exhibit 213)(Sinnott, William) (Entered: 08/16/2018)
08/16/2018	455	RESPONSE TO COURT ORDER by Arnold Henriquez, Keller Rorhback L.L.P., Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, McTigue Law, LLP, Gerald E. Rosen, State Street Bank & Trust Company, State Street Global Markets, LLC, Thornton Law Firm LLP re 445 Order on Motion for Miscellaneous Relief . (Lukey, Joan) (Entered: 08/16/2018)
08/16/2018	456	MOTION for Extension of Time to August 21, 2018 to File *Motion to Strike* by Labaton Sucharow LLP.(Lukey, Joan) (Entered: 08/16/2018)
08/16/2018	457	AFFIDAVIT in Support re 456 MOTION for Extension of Time to August 21, 2018 to File *Motion to Strike by Justin J. Wolosz*. (Lukey, Joan) (Entered: 08/16/2018)
08/21/2018	458	MOTION to Strike *the Cover Memorandum to the Master's First Submission of Documents to Supplement the Record* by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 08/21/2018)
08/21/2018	459	MEMORANDUM in Support re 458 MOTION to Strike *the Cover Memorandum to the Master's First Submission of Documents to Supplement the Record* filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 08/21/2018)
08/28/2018	460	Judge Mark L. Wolf: "..."[I]t is hereby ORDERED that: 1. The documents listed in the Report Pursuant to Paragraph 5(c) of the Court's August 10, 2018 Order (Docket No. 455), which are numbered 1 through 12, are UNSEALED. 2. Lieff's Motion to Impound One Exhibit (Docket No. 373) is ALLOWED. 3. Thornton's Motion to Impound (Docket No. 360) as modified by Thornton's Notice of Filing Objections (Docket No. 446) is ALLOWED. 4. Labaton's Motion for Extension of Time to File Motion to Strike (Docket No. 456) is ALLOWED. Labaton's Motion to Strike Cover Memorandum (Docket No. 458) is DENIED. Labaton may, by September 7, 2018, file a response to the Cover Memorandum. 5. The Master and the Lawyers shall confer and, by September 6, 2018, report, jointly if possible but separately if necessary, on whether they have agreed to a proposal to resolve some or all of the issues in dispute in this matter, or request additional time to do so. After reviewing this submission, the court will, if necessary, establish a schedule for the Master to respond to the objections to the Report and for the Lawyers to submit replies. 6. CEI's Motion for Leave to Participate as Guardian Ad Litem for the Class (Docket No. 126) shall remain under advisement." ORDER entered granting (360) Motion to Seal; granting (373) Motion ; granting (456) Motion for Extension of Time to File; denying (458) Motion to Strike in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/28/2018)
08/28/2018	461	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. Any objection to the issuance of such an order, and the reasons for it, shall be filed by September 7, 2018. 2. If one or more objections are filed, the Master shall respond by September 17, 2018." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 08/28/2018)

09/05/2018	462	MOTION to Withdraw as Attorney by Labaton Sucharow LLP.(Glass, Stuart) (Entered: 09/05/2018)
09/06/2018	463	NOTICE by Gerald E. Rosen *Joint Response to Court's August 28, 2018 Order* (Sinnott, William) (Entered: 09/06/2018)
09/06/2018	464	RESPONSE TO COURT ORDER by Thornton Law Firm LLP . (Sharp, Joshua) (Entered: 09/06/2018)
09/07/2018	465	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 09/07/2018)
09/18/2018	466	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 461 Order, . (Heimann, Richard) (Entered: 09/18/2018)
09/18/2018	467	RESPONSE TO COURT ORDER by Thornton Law Firm LLP *Response to Proposed Order Regarding Additional Funds for Special Master*. (Sharp, Joshua) (Entered: 09/18/2018)
09/18/2018	468	NOTICE by Gerald E. Rosen *Special Master's Response to Court's September 7, 2018 Order* (Sinnott, William) (Entered: 09/18/2018)
09/20/2018	469	Letter/request (non-motion) from William F. Sinnott, Counsel to the Special Master . (Sinnott, William) (Entered: 09/20/2018)
09/21/2018	470	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. By October 2, 2018: (a) The Master, Labaton, and counsel for the ERISA class shall file, for the public record, their agreement for a proposed resolution concerning matters relating to Labaton and/or to counsel for the ERISA class. If they believe there is a valid basis to seal limited information included in the submission(s), they shall file a motion to seal, see L.R. 7.2, and a redacted version of the submission(s) for the public record. (b) The Master may respond to the objection of Lieff and Thornton to possibly sharing responsibility with Labaton for the proposed additional $750,000 payment to fund the Master's work. 2. Lieff and Thornton shall, by October 9, 2018, submit any additional information or argument in support of their objections to possibly sharing responsibility for the proposed payment. 3. A hearing to address pending issues and to schedule future events shall be held on October 15, 2018, at 2:00 p.m. Lawrence Sucharow, Esq., of Labaton and George Hopkins, Executive Director of Arkansas Teachers Retirement System, shall attend." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 09/21/2018)
09/21/2018	471	ELECTRONIC NOTICE of Hearing. Scheduling Conference set for 10/15/2018 02:00 PM in Courtroom 10 before Judge Mark L. Wolf. See Order 470 Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 09/21/2018)
09/25/2018	472	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that the attached Cover Memorandum, Docket No. 423 (under seal), is UNSEALED and made part of the public record." ORDER entered. (Attachments: # 1 Cover Memorandum)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 09/25/2018)
09/25/2018	473	MOTION to Continue the hearing currently scheduled for October 15, 2018 to October 18, 2018 or later by Lieff Cabraser Heimann & Bernstein, LLP.(Chiplock, Daniel) (Entered: 09/25/2018)
09/25/2018	474	Opposition re 473 MOTION to Continue the hearing currently scheduled for October 15, 2018 to October 18, 2018 or later filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 09/25/2018)
09/26/2018	475	Judge Mark L. Wolf: "As the court is not available on October 29 or November 1, 2018, this motion is hereby DENIED. Mr. Heimann may participate by telephone if Mr. Fineman attends the hearing." ENDORSED ORDER entered denying 473 Motion to Continue (Bono, Christine) (Entered: 09/26/2018)
10/01/2018	478	MOTION by Gerald E. Rosen *Special Master's Motion to Appear in Court at October 15, 2018 Hearing* (Sinnott, William) Modified on 10/3/2018 to indicate correct event type. "NOTICE" changed to "MOTION". (Bono, Christine). (Entered: 10/01/2018)
10/02/2018	479	Joint MOTION for Extension of Time *to Extend the Deadline for Filing the Proposed Partial Resolution of Issues for the Court's Consideration* by Gerald E. Rosen.(Sinnott, William) (Entered: 10/02/2018)
10/03/2018	480	Judge Mark L. Wolf: "ALLOWED. The Master shall, by October 9, 2018, file a further report." ENDORSED ORDER entered granting 479 Motion for Extension of Time (Bono, Christine) (Entered: 10/03/2018)
10/03/2018	481	Judge Mark L. Wolf: "ALLOWED." ENDORSED ORDER entered granting 478 Motion (Bono, Christine) (Entered: 10/03/2018)
10/05/2018	482	MOTION for Extension of Time to October 11, 2018 to Object to Sharing in Additional Proposed Payment to Special Master by Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP.(Heimann, Richard) (Entered: 10/05/2018)
10/08/2018	483	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 482 Motion for Extension of Time (Bono, Christine) (Entered: 10/08/2018)
10/10/2018	484	MOTION by Gerald E. Rosen *Assented to Motion for Filing Late the Proposed Partial Resolution of Issues for the Court's Consideration* (Sinnott, William) Modified on 10/10/2018 to indicate correct event type. "NOTICE" changed to "MOTION". (Bono, Christine). (Entered: 10/10/2018)
10/10/2018	485	NOTICE by Gerald E. Rosen *Special Master's Supplement to His Report and Recommendations and Proposed Partial Resolution of Issues for the Court's Consideration* (Attachments: # 1 Exhibit A)(Sinnott, William) (Entered: 10/10/2018)
10/11/2018	486	NOTICE by Gerald E. Rosen *Special Master's Response to Objections of Lieff Cabraser and Thornton Law Firm to Sharing Responsibility with Labaton for Payment of an Additional $750,000* (Sinnott, William) (Entered: 10/11/2018)
10/11/2018	487	Judge Mark L. Wolf: "ALLOWED. However, any future motion(s) for an extension by any party shall be filed sufficiently in advance of the deadline to permit compliance if the motion is denied." ENDORSED ORDER entered granting 484 Motion (Bono, Christine) (Entered: 10/11/2018)
10/11/2018	488	Judge Mark L. Wolf: "It is hereby ORDERED that the Competitive Enterprise Institute shall, by October 12, 2018, state whether it wishes to participate in the October 15, 2018 hearing in person or, if necessary, by telephone." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 10/11/2018)
10/11/2018	489	*Informational* Letter/request (non-motion) from George Hopkins . (Hoopes, Thomas) (Entered: 10/11/2018)
10/11/2018	490	Objection by Lieff Cabraser Heimann & Bernstein, LLP - *Objection to Sharing Responsibility With Labaton Sucharow LLP For the Proposed Additional Payment to the Special Master, And To Any Further Payments Absent A Full And Final Accounting*. (Heimann, Richard) (Entered: 10/11/2018)

10/11/2018	491	RESPONSE TO COURT ORDER by Thornton Law Firm LLP *Supplemental Response to Proposed Order Regarding Additional Funds for Special Master*. (Sharp, Joshua) (Entered: 10/11/2018)
10/12/2018	492	RESPONSE TO COURT ORDER by Competitive Enterprise Institute (CEI) re 488 Order, . (Frank, Theodore) (Entered: 10/12/2018)
10/15/2018	493	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Scheduling Conference held on 10/15/2018. Parties shall order transcript on an expedited basis. Next hearing on pending issues and scheduling shall take place 11/7/2018 at 10:00 AM. Separate Order shall issue. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.)(Attorneys present: Sinnott, McEvoy, McTigue, Wolosz, Kelly, Kravitz, Paine, Halston, Sharp, Fineman, Keller, Axelrod, Canty, Heimann, Frank) (Bono, Christine) (Entered: 10/16/2018)
10/16/2018	494	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 10/16/2018)
10/17/2018	495	ELECTRONIC NOTICE OF RESCHEDULING (AS TO TIME ONLY). Hearing set per Order 494 for 11/7/2018 02:00 PM in Courtroom 10 before Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 10/17/2018)
10/18/2018	496	Transcript of Hearing held on October 15, 2018, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Redaction Request due 11/8/2018. Redacted Transcript Deadline set for 11/19/2018. Release of Transcript Restriction set for 1/16/2019. (Scalfani, Deborah) (Entered: 10/18/2018)
10/18/2018	497	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Scalfani, Deborah) (Entered: 10/18/2018)
10/18/2018	498	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 494 Order *Submitting Declaration of Michael Canty*. (Attachments: # 1 Exhibit 1 - Declaration of Michael Canty, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C)(Lukey, Joan) (Entered: 10/18/2018)
10/22/2018	499	Letter/request (non-motion) from Hon. Gerald E. Rosen (Ret.), Special Master . (Sinnott, William) (Entered: 10/22/2018)
10/24/2018	500	Joint MOTION for Extension of Time *for Filing Special Master's Memorandum in Support of His Supplement to His Report and Recommendations and Proposed Partial Resolution of Issues* by Gerald E. Rosen.(Sinnott, William) (Entered: 10/24/2018)
10/25/2018	501	RECEIPT: Receipt # 740006 for monies received on 10/24/2018 in amount of $ 1,000,000.00, re: (90 in 1:12-cv-11698-MLW) Order. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Adam, Lucien) (Entered: 10/25/2018)
10/25/2018	502	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (500) Motion for Extension of Time in case 1:11-cv-10230-MLW. No further extension will be granted. Responses by Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP, and, if it wishes, the Competitive Enterprise Institute, shall be filed by 12:00 noon on November 5, 2018. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 10/25/2018)
10/25/2018	503	NOTICE by Gerald E. Rosen *Special Master's Report Concerning Remaining Objections Raised by Lieff Cabraser Heimann & Bernstein and The Thornton Law Firm* (Sinnott, William) (Entered: 10/25/2018)
10/25/2018	504	RESPONSE TO COURT ORDER by Thornton Law Firm LLP re 494 Order . (Sharp, Joshua) (Entered: 10/25/2018)
10/25/2018	505	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 494 Order . (Heimann, Richard) (Entered: 10/25/2018)
10/25/2018	506	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 494 Order *Second Submission of Declarations*. (Attachments: # 1 Exhibit 1 - Declaration of Christopher J. Keller, # 2 Exhibit 2 - Declaration of Eric J. Belfi)(Lukey, Joan) (Entered: 10/25/2018)
10/26/2018	507	MOTION for Leave to Appear Pro Hac Vice for admission of Gary S. Peeples Filing fee: $ 100, receipt number 0101-7383642 by Competitive Enterprise Institute (CEI). (Attachments: # 1 Declaration of Gary S. Peeples)(Bednarz, M.) (Entered: 10/26/2018)
10/30/2018	508	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 507 Motion for Leave to Appear Pro Hac Vice Added Gary S. Peeples. **Attorneys admitted Pro Hac Vice must register for electronic filing if the attorney does not already have an ECF account in this district. To register go to the Court website at www.mad.uscourts.gov. Select Case Information, then Electronic Filing (CM/ECF) and go to the CM/ECF Registration Form.** (Montes, Mariliz) (Entered: 10/30/2018)
10/30/2018	509	MEMORANDUM OF LAW by Keller Rorhback L.L.P., McTigue Law, LLP, Zuckerman Spaeder, LLP to 485 Notice (Other). (Gerber, Laura) (Entered: 10/30/2018)
10/30/2018	510	MEMORANDUM OF LAW by Labaton Sucharow LLP to 485 Notice (Other). (Attachments: # 1 Affidavit of Support by Justin J. Wolosz, # 2 Exhibit A)(Lukey, Joan) (Entered: 10/30/2018)
10/30/2018	511	NOTICE by Gerald E. Rosen *Special Master's Memorandum in Support of His Supplement to His Report and Proposed Partial Resolution of Issues for the Court's Consideration* (Attachments: # 1 Exhibit A)(Sinnott, William) (Entered: 10/30/2018)
11/02/2018	512	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 494 Order *Supplemental Declaration of Michael P. Canty*. (Attachments: # 1 Affidavit of Michael Canty)(Lukey, Joan) (Entered: 11/02/2018)
11/05/2018	513	*Response to the Proposed Partial Resolution of Issues* Response by Lieff Cabraser Heimann & Bernstein, LLP to 485 Notice (Other) . (Heimann, Richard) (Entered: 11/05/2018)
11/05/2018	514	*Response to the Proposed Partial Resolution of Issues* Response by Thornton Law Firm LLP to 485 Notice (Other) . (Sharp, Joshua) (Entered: 11/05/2018)
11/05/2018	515	*Response to the Proposed Partial Resolution* Response by Competitive Enterprise Institute (CEI) to 485 Notice (Other) . (Bednarz, M.) (Entered: 11/05/2018)
11/05/2018	516	Judge Mark L. Wolf: "...[I]t is hereby ORDERED that: 1. Judge Brown shall attend the hearing on November 7, 2018, at 2:00 p.m. He shall be prepared to discuss the Cover Memorandum to the Special Master's First Submission of Documents to Supplement the Record (Docket No. 423). 2.

		Judge Holderman is no longer ordered to attend the hearing on November 7, 2018, at 2:00 p.m." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 11/05/2018)
11/07/2018	517	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Scheduling Conference and hearing on pending issues held on 11/7/2018. Exhibits 1 - 10 marked (#1, D.E. 423; #2, D.E. 423-5; #3 D.E. 423-8; #4, D.E. 423-109; #5, D.E. 423-10; #6, D.E. 423-12; #7 D.E. 423-13; #8, D.E. 423-14; #9, D.E. 423-17; and #10, D.E. 423-174.) Separate Order shall issue. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.) (Attorneys present: Sinnott, McEvoy, Lukey, Wolosz, Kelly, Sharp, Heimann, Bednarz, McTigue, Paine, Kravitz, Gerber, Halston) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 11/08/2018)
11/08/2018	518	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 11/08/2018)
11/13/2018	519	Transcript of Hearing held on November 7, 2018, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Redaction Request due 12/4/2018. Redacted Transcript Deadline set for 12/14/2018. Release of Transcript Restriction set for 2/11/2019. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 11/13/2018)
11/13/2018	520	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 11/13/2018)
11/19/2018	521	NOTICE by Thornton Law Firm LLP *Notice of All Parties' Availability for Hearing* (Sharp, Joshua) (Entered: 11/19/2018)
11/20/2018	522	MEMORANDUM OF LAW by Competitive Enterprise Institute (CEI) to 518 Order. (Attachments: # 1 Declaration of M. Frank Bednarz)(Bednarz, M.) (Entered: 11/20/2018)
11/20/2018	523	NOTICE by Gerald E. Rosen *Special Master's Further Response to the Court's Directives at the November 7, 2018 Hearing and in its November 8, 2018 Order* (Sinnott, William) (Entered: 11/20/2018)
11/20/2018	524	NOTICE by Gerald E. Rosen *Special Master's Partially Revised Report & Recommendations Submitted in Response to Lieff Cabraser Heimann & Bernstein's Objections* (Sinnott, William) (Entered: 11/20/2018)
11/20/2018	525	NOTICE by Gerald E. Rosen *Special Master's Partially Revised Report & Recommendations Submitted in Response to Thornton Law Firm's Objections* (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Sinnott, William) (Entered: 11/20/2018)
11/20/2018	526	EXHIBIT re 523 Notice (Other) *Exhibits A-C to Special Master's Further Response to the Court's Directives at the November 7, 2018 Hearing and in its November 8, 2018 Order* by Gerald E. Rosen. (Attachments: # 1 Exhibit B, # 2 Exhibit C)(Sinnott, William) (Entered: 11/20/2018)
11/30/2018	527	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 494 Order . (Attachments: # 1 Exhibit 1 - Declaration of Eric J. Belfi, # 2 Exhibit 2 - Declaration of Christopher J. Keller)(Lukey, Joan) (Entered: 11/30/2018)
12/17/2018	528	MOTION to Unseal Document *Motion For Partial Unsealing of Evan Hoffman's Deposition* by Thornton Law Firm LLP.(Sharp, Joshua) (Entered: 12/17/2018)
12/17/2018	529	Judge Mark L. Wolf: ENDORSED ORDER entered granting 528 Motion to Unseal Document (Bono, Christine) (Entered: 12/17/2018)
12/18/2018	530	NOTICE by Thornton Law Firm LLP re 525 Notice (Other) *Sur-Reply in Support of Objections to the Special Master's Report and Recommendations* (Attachments: # 1 Affidavit of Evan Hoffman, # 2 Affidavit of Emily Harlan, # 3 Affidavit of Joshua Sharp, # 4 Affidavit of Brianna Nassif - PART 1, # 5 Affidavit of Brianna Nassif - PART 2, # 6 Affidavit of Brianna Nassif - PART 3, # 7 Affidavit of Brianna Nassif - PART 4)(Sharp, Joshua) (Entered: 12/18/2018)
12/18/2018	531	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 518 Order . (Attachments: # 1 Exhibit 1 - Un-Redacted Document)(Lukey, Joan) (Entered: 12/18/2018)
12/18/2018	532	MEMORANDUM OF LAW by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Attachments: # 1 Affidavit of William B. Rubenstein, # 2 Exhibit 1 - Declaration of Brian T. Fitzpatrick)(Lukey, Joan) (Entered: 12/18/2018)
12/18/2018	533	Objection to 524 Notice (Other) by Lieff Cabraser Heimann & Bernstein, LLP *, to the Special Master's Partially Revised Report and Recommendations*. (Attachments: # 1 Affidavit of Richard M. Heimann)(Heimann, Richard) (Entered: 12/18/2018)
12/18/2018	534	Response by Lieff Cabraser Heimann & Bernstein, LLP to 522 Memorandum of Law *by CEI Propounding an Alternative Fee Award; and in Response to the Court's Inquiry Regarding Lieff Cabraser's Hourly Rates*. (Heimann, Richard) (Entered: 12/18/2018)
12/28/2018	535	Response by Keller Rorhback L.L.P. to 530 Notice (Other), *Thornton Law Firm LLP's Sur-Reply in Support of Its Objections to the Special Master's Report and Recommendations*. (Gerber, Laura) (Entered: 12/28/2018)
01/08/2019	536	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 518 Order *Submission of Phase I Report of the Honorable Garrett E. Brown, Jr. (Ret.)*. (Attachments: # 1 Hon. Garrett E. Brown Phase I Report, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F, # 8 Exhibit G, # 9 Exhibit H, # 10 Exhibit I, # 11 Exhibit J)(Lukey, Joan) (Entered: 01/08/2019)
02/06/2019	539	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 518 Order *Submission of Amended Phase I Report of the Honorable Garrett E. Brown, Jr. (Ret.)*. (Attachments: # 1 Exhibit 1 - Amended Phase I Report, # 2 Exhibit K to Amended Phase I Report)(Lukey, Joan) (Entered: 02/06/2019)
04/22/2019	540	MOTION to Substitute Party *or Alternatively, to Allow Withdrawal of Competitive Enterprise Institute and Participation of Hamilton Lincoln Law Institute* by Competitive Enterprise Institute (CEI).(Bednarz, M.) (Entered: 04/22/2019)
05/17/2019	541	Judge Mark L. Wolf: "A hearing will begin on June 24, 2019, at 10:00 a.m., andcontinue as necessary on June 25 and June 26, 2019, to addressobjections by Lieff Cabraser Heimann & Bernstein, LLP ("Lieff")and Thornton Law Firm LLP ("Thornton") to the Special Master'sReport and Recommendations, and other pending issues. The courtintends to issue another order with an agenda for that hearing." ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/17/2019)
05/17/2019	542	ELECTRONIC NOTICE of Hearing.Hearing set for 6/24/2019 - 6/26/2019 10:00 AM in Courtroom 10 before Judge Mark L. Wolf. See 541 .

		Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Bono, Christine) (Entered: 05/17/2019)
05/31/2019	543	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 05/31/2019)
05/31/2019	544	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 05/31/2019)
06/07/2019	545	MOTION for Clarification re 543 Order *Regarding Participation by Center for Class Action Fairness* by Competitive Enterprise Institute (CEI). (Attachments: # 1 Affidavit M. Frank Bednarz, # 2 Exhibit A, # 3 Exhibit B)(Bednarz, M.) (Entered: 06/07/2019)
06/11/2019	546	MOTION for Leave to Call Additional Witness at the June 24-26 Hearing by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP.(Heimann, Richard) (Entered: 06/11/2019)
06/13/2019	547	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (540) Motion to Substitute Party in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/13/2019)
06/13/2019	548	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (545) Motion for Clarification re (543 in 1:11-cv-10230-MLW) Order in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/13/2019)
06/13/2019	549	Judge Mark L. Wolf: ORDER entered re (546 in 1:11-cv-10230-MLW) MOTION for Leave to Call Additional Witness at the June 24-26 Hearing filed by Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP, Labaton Sucharow LLP Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/13/2019)
06/17/2019	550	AFFIDAVIT of Brian T. Fitzpatrick in Support re 546 MOTION for Leave to Call Additional Witness at the June 24-26 Hearing filed by Arkansas Teacher Retirement System. (Attachments: # 1 Exhibit 1 - CV of Brian T. Fitzpatrick)(Heimann, Richard) (Entered: 06/17/2019)
06/18/2019	551	MOTION for Leave to File *Amicus Curiae response in opposition* by Hamilton Lincoln Law Institute. (Attachments: # 1 Proposed Amicus Brief) (Bednarz, M.) (Entered: 06/18/2019)
06/19/2019	552	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 551 Motion for Leave to File Document; Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Loret, Magdalena) (Entered: 06/19/2019)
06/19/2019	553	Opposition re 546 MOTION for Leave to Call Additional Witness at the June 24-26 Hearing *and Alternative Motion to Require Compliance with Rule 26 (leave to file granted on June 19, 2019)* filed by Hamilton Lincoln Law Institute. (Bednarz, M.) (Entered: 06/19/2019)
06/20/2019	554	Judge Mark L. Wolf: ORDER entered denying (546) Motion for Leave to Call Additional Witness at the June 24-26 Hearing in case 1:11-cv-10230-MLW. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/20/2019)
06/21/2019	555	Judge Mark L. Wolf: ORDER entered re: Hearing scheduled to begin 6/24/2019. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/21/2019)
06/24/2019	557	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Evidentiary Hearing re: Objections to Special Master's Report and Recommendations and related issues held on 6/24/2019. Special Master Rosen, J. present. Brown, J. present. Witnesses sequestered. Award of Attorneys' Fees vacated. Exhibits A-F marked for identification. Hearing continued to 6/25/19 at 10:30 a.m. Parties directed to order transcript. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Rosen, J., McEvoy, Sinnott, McDonnell, Kravitz, Smith, McTigue, Gerber, Sarko, Bednarz, Paine, Lukey, Wolosz, Kelly, Sharp, Heimann, Chiplock, Halston) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/27/2019)
06/25/2019	556	ELECTRONIC NOTICE OF RESCHEDULING***AS TO TIME ONLY***Hearing re: Objections to Special Master's Report and Recommendations and other pending issues, set for 6/25/2019 at 10:30 AM in Courtroom 10 before Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/25/2019)
06/25/2019	558	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Evidentiary Hearing re: Objections to Special Master's Report and Recommendations and related issues held on 6/25/2019. Special Master Rosen, J. present. Brown, J. present. Exhibits 1-9 admitted. Witnesses Garrett Bradley and Evan Hoffman called. Witnesses sworn and give testimony. Hearing continued to 6/26/19. (Court Reporter: Debra Joyce at joycedebra@gmail.com.)(Attorneys present: Rosen, J., McEvoy, Sinnott, McDonnell, Kravitz, McTigue, Gerber, Sarko, Bednarz, Lukey, Wolosz, Kelly, Sharp, Heimann, Chiplock) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/27/2019)
06/26/2019	559	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Evidentiary Hearing re: Objections to Special Master's Report and Recommendations and related issues held on 6/26/2019. Special Master Rosen, J. present. Brown, J. present. Exhibits 10-19 admitted. Witnesses Eric Belfi, Christopher Keller, Michael Thornton, Michael Lesser, Michael Bradley called. Witnesses sworn and give testimony. Garrett Brown, J. offers testimony re: his Phase I Report and Amended Phase I Report. Parties have until 7/10/19 to make any supplemental filings. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.)(Attorneys present: Rosen, J., McEvoy, Sinnott, McDonnell, Kravitz, McTigue, Gerber, Sarko, Bednarz, Lukey, Wolosz, Kelly, Sharp, Heimann, Chiplock) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 06/27/2019)
06/26/2019	571	Exhibit and Witness List from hearings held on 6/24/19, 6/25/19 and 6/26/19. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 07/03/2019)
06/27/2019	560	Transcript of Hearing held on June 24, 2019, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 7/18/2019. Redacted Transcript Deadline set for 7/29/2019. Release of Transcript Restriction set for 9/25/2019. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/27/2019)
06/27/2019	561	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 06/27/2019)
06/27/2019	562	Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP *to Court's Request Regarding Fee*

		Award Calculation. (Attachments: # 1 Exhibit A - Added to Customer Class Counsels' Share)(Wolosz, Justin) (Entered: 06/27/2019)
06/27/2019	563	RESPONSE TO COURT ORDER by Keller Rorhback L.L.P., McTigue Law, LLP, Zuckerman Spaeder, LLP . (Sarko, Lynn) (Entered: 06/27/2019)
06/28/2019	564	Judge Mark L. Wolf: ORDER entered. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 06/28/2019)
07/01/2019	565	Transcript of Hearing - Day Two held on June 25, 2019, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Debra Joyce at joycedebra@gmail.com Redaction Request due 7/22/2019. Redacted Transcript Deadline set for 8/1/2019. Release of Transcript Restriction set for 9/30/2019. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 07/01/2019)
07/01/2019	566	Transcript of Hearing - Day Three held on June 26, 2019, before Judge Mark L. Wolf. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com Redaction Request due 7/22/2019. Redacted Transcript Deadline set for 8/1/2019. Release of Transcript Restriction set for 9/30/2019. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 07/01/2019)
07/01/2019	567	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Scalfani, Deborah) (Entered: 07/01/2019)
07/02/2019	568	MOTION for Extension of Time *to Submit Memoranda* by Gerald E. Rosen.(Sinnott, William) (Entered: 07/02/2019)
07/02/2019	569	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (568) Motion for Extension of Time to submit memoranda on the implications of the June 24, 25 and 26 hearings to July 17, 2019 in case 1:11-cv-10230-MLW. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 07/02/2019)
07/02/2019	570	Amended MOTION for Extension of Time *to Submit Memoranda* by Gerald E. Rosen.(Sinnott, William) (Entered: 07/02/2019)
07/03/2019	572	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (570) Amended Motion for Extension of Time to submit memoranda on the implications of the June 24, 25 and 26, 2019 hearings to July 17, 2019 in case 1:11-cv-10230-MLW Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 07/03/2019)
07/03/2019	573	Joint MOTION for Clarification re 569 Order on Motion for Extension of Time, *and if Needed, for an Extension of Time to Submit Memoranda in Response to the Court's June 28, 2019 Order* 564 by Hamilton Lincoln Law Institute, Keller Rorhback L.L.P., Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, McTigue Law, LLP, Thornton Law Firm LLP, Zuckerman Spaeder, LLP.(Wolosz, Justin) (Entered: 07/03/2019)
07/03/2019	574	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (573) Motion for Clarification in case 1:11-cv-10230-MLW. ALLOWED. The extension of time to July 17, 2019 shall also apply to Moving Counsel. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) Modified on 7/3/2019 (Garvin, Brendan). (Entered: 07/03/2019)
07/16/2019	575	MOTION to Seal Document *Motion to File Documents Ex Parte and Under Seal As Exhibits to Response to June 28, 2019 Court Order* by Thornton Law Firm LLP.(Sharp, Joshua) (Entered: 07/16/2019)
07/16/2019	576	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting (575) Motion to Seal Document in case 1:11-cv-10230-MLW. ALLOWED, without prejudice to possible future unsealing in response to a motion to unseal or if the court determines that sealing is not justified. In any event, redacted copies shall be filed for the public record, if possible. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 07/16/2019)
07/17/2019	577	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 564 Order . (Attachments: # 1 Declaration of Daniel P. Chiplock, # 2 Exhibit A - Corrected Lodestar, # 3 Exhibit B - Agency Lodestar Assumption)(Heimann, Richard) (Entered: 07/17/2019)
07/17/2019	578	RESPONSE TO COURT ORDER by Thornton Law Firm LLP re 564 Order . (Attachments: # 1 Exhibit A [REDACTED], # 2 Exhibit B [REDACTED])(Sharp, Joshua) (Additional attachment(s) added on 7/22/2019: # 3 Exhibit A (unredacted version), # 4 Exhibit B (unredacted version)) (Montes, Mariliz). (Entered: 07/17/2019)
07/17/2019	579	RESPONSE TO COURT ORDER by Labaton Sucharow LLP *Submission of Labaton Sucharow LLP in Response to the Court's June 28, 2019 Order*. (Lukey, Joan) (Entered: 07/17/2019)
07/17/2019	580	RESPONSE TO COURT ORDER by Keller Rorhback L.L.P., McTigue Law, LLP, Zuckerman Spaeder, LLP re 564 Order . (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Sarko, Lynn) (Entered: 07/17/2019)
07/17/2019	581	DECLARATION re 579 Response to Court Order *Transmittal Declaration of Justin J. Wolosz in Support of the Submission of Labaton Sucharow LLP in Response to the Court's June 28, 2019 Order* by Labaton Sucharow LLP. (Attachments: # 1 Exhibit 1)(Wolosz, Justin) (Entered: 07/17/2019)
07/17/2019	582	MEMORANDUM in Support re 575 MOTION to Seal Document *Motion to File Documents Ex Parte and Under Seal As Exhibits to Response to June 28, 2019 Court Order* filed by Gerald E. Rosen. (Sinnott, William) (Entered: 07/17/2019)
07/17/2019	583	RESPONSE TO COURT ORDER by Hamilton Lincoln Law Institute re 564 Order . (Attachments: # 1 Declaration of M. Frank Bednarz, # 2 Exhibit 1-43 of Bednarz Decl., # 3 Exhibit 44 - Transcript from ATRS v. Bankrate, Inc., # 4 Exhibit 45 - NYCF letter and fee grid)(Bednarz, M.) (Entered: 07/17/2019)
07/18/2019	584	MOTION for Leave to File *Supplemental Exhibit* by Hamilton Lincoln Law Institute. (Attachments: # 1 Stephen J. Choi, Jessica Erickson & A.C. Pritchard, Working Hard or Making Work? Plaintiffs Attorneys Fees in Securities Fraud Class Actions)(Bednarz, M.) (Entered: 07/18/2019)
07/19/2019	585	Opposition re 584 MOTION for Leave to File *Supplemental Exhibit* filed by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 07/19/2019)
07/30/2019	586	MOTION for Leave to File *Response to July 17 Submission by Labaton Sucharow LLP (ECF No. 579)* by Lieff Cabraser Heimann & Bernstein, LLP. (Attachments: # 1 Exhibit A - Proposed Response)(Heimann, Richard) (Entered: 07/30/2019)

08/05/2019	587	Opposition re 586 MOTION for Leave to File *Response to July 17 Submission by Labaton Sucharow LLP (ECF No. 579) in Response to the Court's June 28, 2019 Order* filed by Labaton Sucharow LLP. (Lukey, Joan) (Entered: 08/05/2019)
08/16/2019	588	MOTION for Leave to File *Supplemental Memorandum* by Thornton Law Firm LLP. (Attachments: # 1 Exhibit Proposed Memorandum)(Sharp, Joshua) (Entered: 08/16/2019)
12/26/2019	589	Judge Mark L. Wolf: ORDER entered. It is hereby ORDERED that Labaton Sucharow LLP shall, pursuant to paragraphs 13 and 14 of the March 8, 2019 Order (Docket No. 173), pay to the Clerk of the United States District Court for the District of Massachusetts an additional $50,000, by January 6, 2020. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 12/26/2019)
02/27/2020	590	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. It is hereby ORDERED that: 1. The Proposed Resolution of Labaton's Objections to theSpecial Master's Report (Dkt. No. 485) is DENIED. 2. After hearings and considering de novo all objections to the Master's Findings of Fact and Conclusions of Law, including Labaton's, the Master's Report and Recommendation (Dkt. No. 357) is ADOPTED in part, REJECTED in part, and MODIFIED in the manner described in this Memorandum and Order. See Fed. R. Civ. P. 53(f). More specifically, $60,000,000 is awarded to counsel forplaintiffs as reasonable fees and expenses. From the $60,000,000 a total of $22,202,131.25 shall be paid to Labaton; a total of $13,261,908.10 shall be paid to Thornton; a total of $15,233,397.53 shall be paid to Lieff; a total of $3,978,152.18 shall be paid to Keller Rohrback; a total of $3,439,775.42 shall be paid to McTigue; and a total of $3,298,598.55 shall be paid to Zuckerman Spaeder. 3. Service Awards shall be paid as follows: $15,000 to ATRS, and $10,000 to each of the six ERISA Plaintiffs, Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland. 4. This matter is RESUBMITTED to the Master. The Master shall, by March 23, 2020: (a) Consult Class Counsel, ERISA Counsel, and CCAF, and report concerning whether notice to the class of new awards that have been ordered is legally required or appropriate. If the Master or anyone consulted is of the view that notice to the class should be given, the Master shall submit a proposed form of notice. (b)Report how he proposes to manage the implementation of this Order, including the required recovery from Labaton, Thornton, and Lieff of fees previously awarded, and the reallocation of them to other counsel and the class. (c) Identify and provide advice on any other issues relevant to the implementation of this Order. 5. Labaton and Thornton shall, by March 11, 2020, provide to the Clerk of the United States District Court for the District of Massachusetts an additional $250,000 each to pay past and future reasonable fees and expenses of the Master and any firm, organization, or individual assisting him. 6. The Clerk shall send this Memorandum and Order to the Massachusetts Board of Bar Overseers for whatever action, if any, it deems appropriate. Upon request, the Clerk shall provide the Board any documents in the public record of this case. The Board of Bar Overseers may move for the unsealing of sealed documents. The Board shall report its final actions to the court. (Attachments: # 1 Exhibit A)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 02/27/2020)
02/27/2020	591	Set Deadlines: Per paragraph 5 of the Order: By 3/11/2020 Labaton and Thornton to provide the USDC-MA, with an additional $250,000. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 02/27/2020)
03/12/2020	592	MOTION for Leave to File *Motion for an Extension of Time to File Fee Request* by Hamilton Lincoln Law Institute. (Attachments: # 1 Proposed Motion for an Extension of Time to File Fee Motion, # 2 Declaration of M. Frank Bednarz, # 3 Exhibit 1 - "Labaton's Political Donations Line Up With Pursuit of Client, Records Show", # 4 Exhibit 2 - Campaign Financial Contribution Report, # 5 Exhibit 3 - Campaign Financial Contribution Report)(Bednarz, M.) (Entered: 03/12/2020)
03/23/2020	593	MOTION for Extension of Time *to Submit Response to Court's February 27, 2020 Memorandum and Order* by Gerald E. Rosen.(Sinnott, William) (Entered: 03/23/2020)
03/24/2020	594	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 593 Motion for Extension of Time to Submit Response to Court's February 27, 2020 Memorandum and Order by Gerald E. Rosen. Response shall be due on 4/7/20. (Loret, Magdalena) (Entered: 03/24/2020)
03/26/2020	595	MEMORANDUM in Opposition re 592 MOTION for Leave to File *Motion for an Extension of Time to File Fee Request* filed by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Lukey, Joan) (Entered: 03/26/2020)
03/26/2020	596	NOTICE OF APPEAL as to 590 Memorandum & ORDER,,,,,,,,,, by Lieff Cabraser Heimann & Bernstein, LLP Filing fee: $ 505, receipt number 0101-8172379 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 4/15/2020. (Heimann, Richard) (Entered: 03/26/2020)**
03/27/2020	597	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 596 Notice of Appeal. (Paine, Matthew) (Entered: 03/27/2020)
03/27/2020	598	USCA Case Number 20-1365 for 596 Notice of Appeal filed by Lieff Cabraser Heimann & Bernstein, LLP. (Paine, Matthew) (Entered: 03/27/2020)
04/07/2020	599	RESPONSE TO COURT ORDER by Gerald E. Rosen re 590 Memorandum & ORDER,,,,,,,,,, . (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Sinnott, William) (Entered: 04/07/2020)
04/09/2020	600	*Objections and* Response by Lieff Cabraser Heimann & Bernstein, LLP to 599 Response to Court Order *Special Master's Report and Recommendations*. (Heimann, Richard) (Entered: 04/09/2020)
04/13/2020	601	Judge Mark L. Wolf: ORDER entered. It is hereby ORDERED that: 1. Lieff shall, by April 20, 2020, move for a stay pending appeal and file a

		supporting memorandum addressing the Hilton factors. 2. Any response shall be filed by April 27, 2020. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 04/13/2020)
04/14/2020	602	Reset Deadlines: Motion to Stay and supporting memo due by 4/20/2020; Responses due by 4/27/2020. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 04/14/2020)
04/15/2020	603	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 601 Order, . (Heimann, Richard) (Entered: 04/15/2020)
04/16/2020	604	MOTION for Leave to File *Supplemental Report* by Gerald E. Rosen. (Attachments: # 1 Exhibit A)(Sinnott, William) (Entered: 04/16/2020)
04/22/2020	605	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 604 Special Master's Motion for Leave to File Supplemental Report. Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Loret, Magdalena) (Entered: 04/22/2020)
04/22/2020	606	RESPONSE TO COURT ORDER by Gerald E. Rosen re 605 Order on Motion for Leave to File, *Special Master's Supplemental Report in Response to Court's February 27 Order*. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Sinnott, William) (Entered: 04/22/2020)
04/23/2020	607	Response by Gerald E. Rosen to 601 Order, *Response to Lieff Cabraser Heimann & Bernstein's Response to April 13, 2020 Court Order*. (Sinnott, William) (Entered: 04/23/2020)
04/27/2020	608	MOTION for Leave to File *Reply to Lieff Cabraser* by Hamilton Lincoln Law Institute. (Attachments: # 1 Proposed Amicus Reply to Lieff Cabraser's Filings)(Bednarz, M.) (Entered: 04/27/2020)
04/27/2020	609	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 608 Hamilton Lincoln Law Institute's Motion for Leave to File Reply to Lieff Cabraser. Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Loret, Magdalena) (Entered: 04/27/2020)
04/28/2020	610	Response by Hamilton Lincoln Law Institute to 609 Order on Motion for Leave to File, 600 Response, 603 Response to Court Order . (Bednarz, M.) (Entered: 04/28/2020)

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PACER Login:	lchb0019:2585470:5486516	**Client Code:**	3344-0002
Description:	Docket Report	**Search Criteria:**	1:11-cv-10230-MLW
Billable Pages:	30	**Cost:**	3.00

		Bernstein's Response to April 13, 2020 Court Order. (Sinnott, William) (Entered: 04/23/2020)
04/27/2020	608	MOTION for Leave to File *Reply to Lieff Cabraser* by Hamilton Lincoln Law Institute. (Attachments: # 1 Proposed Amicus Reply to Lieff Cabraser's Filings)(Bednarz, M.) (Entered: 04/27/2020)
04/27/2020	609	Judge Mark L. Wolf: ELECTRONIC ORDER entered granting 608 Hamilton Lincoln Law Institute's Motion for Leave to File Reply to Lieff Cabraser. Counsel using the Electronic Case Filing System should now file the document for which leave to file has been granted in accordance with the CM/ECF Administrative Procedures. Counsel must include - Leave to file granted on (date of order)- in the caption of the document. (Loret, Magdalena) (Entered: 04/27/2020)
04/28/2020	610	Response by Hamilton Lincoln Law Institute to 609 Order on Motion for Leave to File, 600 Response, 603 Response to Court Order . (Bednarz, M.) (Entered: 04/28/2020)
06/18/2020	611	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. The court hereby: 1. REQUESTS that the First Circuit suspend the July 9, 2020 date for the filing of a response to Lieff's appeal, allow counsel retained by this court to file an appearance by that date, and establish a new briefing schedule after retained counsel files its appearance. 2. ORDERS that this Memorandum and Order be transmitted forthwith to the Clerk of the First Circuit. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 06/18/2020)
06/19/2020	612	Supplemental Record on Appeal transmitted to US Court of Appeals re 596 Notice of Appeal. Document included: ECF No. 611 Memorandum and Order. (Pacho, Arnold) (Entered: 06/19/2020)
06/25/2020	613	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. It is hereby ORDERED that: 1. CCAF's Motion for an Extension of Time to File Motion for Attorneys' Fees Award (Dkt. No. 592-1) is ALLOWED. 2. By July 7, 2020, the Master shall confer with Customer Class Counsel and ERISA counsel, and submit: a. A motion for approval of the plan for distribution he proposes and, in an editable word-processing format, a proposed Order for the distribution of the remainder of the settlement fund that is consistent with this Memorandum and Order; and b. A proposed notice to the class, in an editable word-processing format, that is consistent with this Memorandum and Order and the Master's proposed plan of distribution. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 06/25/2020)
06/25/2020	614	Set Deadlines: Per 613 Order: Master shall confer with Customer Class Counsel and ERISA counsel by 7/7/2020 and submit: a. A motion for approval of the plan for distribution he proposes and, in an editable word-processing format, a proposed Order for the distribution of the remainder of the settlement fund that is consistent with this Memorandum and Order; and b. A proposed notice to the class, in an editable word-processing format, that is consistent with this Memorandum and Order and the Master's proposed plan of distribution. (Montes, Mariliz) (Entered: 06/25/2020)
06/29/2020	615	Judge Mark L. Wolf: MEMORANDUM AND ORDER. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 06/29/2020)
06/29/2020	616	Supplemental Record on Appeal transmitted to US Court of Appeals re 596 Notice of Appeal Documents included: ECF No. 615 (Paine, Matthew) (Entered: 06/29/2020)
07/07/2020	617	ORDER of USCA as to 596 Notice of Appeal filed by Lieff Cabraser Heimann & Bernstein, LLP.

		This is an appeal from the February 27, 2020 Memorandum and Order of the district court concerning the conduct of certain law firms and modifying the previously-approved award of attorney fees. Upon review, it appears that this court may not have jurisdiction to consider the appeal because the order in question may not be final. 28 U.S.C. § 1291. Accordingly, the parties to the appeal are ordered to show cause within thirty days of the date of this order why this appeal should not be dismissed for lack of jurisdiction. The briefing schedule is stayed pending this court's receipt of responses. (Paine, Matthew) (Entered: 07/07/2020)
07/07/2020	618	RESPONSE TO COURT ORDER by Gerald E. Rosen re 613 Memorandum & ORDER,,, . (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Sinnott, William) (Entered: 07/07/2020)
07/09/2020	619	Judge Mark L. Wolf: MEMORANDUM AND ORDER. It is hereby ORDERED that: 1. The Special Master's Motion for Approval of the Plan for Distribution of Remainder of Settlement Fund (Dkt. No. 618, Ex. A) is ALLOWED. Therefore, the remainder of the settlement fund shall be distributed on the schedule proposed by the Master (Dkt. No. 618, Ex. A, Attachment 1), which is attached hereto as Exhibit 2. 2. Any objection or comment concerning the form of Notice to the class attached hereto as Exhibit 1 shall be filed by 3:00 p.m. on July 10, 2020. 3. Unless revised by the court, the Master shall insert the dates for objections and the hearing on any objections, and send to the class as promptly as possible the form of Notice attached hereto as Exhibit 1. The Master shall then report to the court the resulting dates for objections and the hearing on any objections. (Attachments: # 1 Exhibit 1: Notice, # 2 Exhibit 2: Payment Schedule) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 07/09/2020)
07/10/2020	620	Set Deadlines: Re. 619 Order: Objection (if any) due by 7/10/2020, by 3:00 PM. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 07/10/2020)
07/10/2020	621	NOTICE of Withdrawal of Appearance by M. Frank Bednarz *of Gary S. Peeples* (Bednarz, M.) (Entered: 07/10/2020)
07/10/2020	622	RESPONSE TO COURT ORDER by Hamilton Lincoln Law Institute re 619 Memorandum & ORDER,,,, *Regarding the Form of Notice*. (Bednarz, M.) (Entered: 07/10/2020)
07/10/2020	623	Judge Mark L. Wolf: ORDER entered. (Attachments: # 1 Exhibit 1: Notice) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 07/10/2020)
07/24/2020	624	RESPONSE TO COURT ORDER by Gerald E. Rosen re 623 Order . (Sinnott, William) (Entered: 07/24/2020)
07/31/2020	625	Letter from UMB Services advising the Court that UMB is not affiliated with Arnold Henriquez and thus have received in error, the notice of further proceedings issued by Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 08/04/2020)
08/27/2020	626	ELECTRONIC NOTICE of Hearing. This hearing will be conducted by video conference. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible.

		Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html. For questions regarding access to hearings, you may refer to the Court's general orders and public notices available on www.mad.uscourts.gov or contact media@mad.uscourts.gov. Hearing on Objections concerning the form of Notice to the class regarding the Special Master's Motion for Approval of the Plan for Distribution of Remainder of Settlement Fund set for 9/22/2020 10:00 AM before Judge Mark L. Wolf. (Loret, Magdalena) (Entered: 08/27/2020)
09/01/2020	627	MOTION for Disbursement of Funds */Plaintiffs' Motion for Authorization to Distribute to Eligible ERISA and Public & Other Class Members* by Arkansas Teacher Retirement System.(Goldsmith, David) (Entered: 09/01/2020)
09/01/2020	628	MEMORANDUM in Support re 627 MOTION for Disbursement of Funds */Plaintiffs' Motion for Authorization to Distribute to Eligible ERISA and Public & Other Class Members* filed by Arkansas Teacher Retirement System. (Goldsmith, David) (Entered: 09/01/2020)
09/01/2020	629	DECLARATION re 627 MOTION for Disbursement of Funds */Plaintiffs' Motion for Authorization to Distribute to Eligible ERISA and Public & Other Class Members / Declaration of Eric J. Miller on behalf of A.B. Data, Ltd.* by Arkansas Teacher Retirement System. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6)(Goldsmith, David) (Entered: 09/01/2020)
09/01/2020	630	Proposed Document(s) submitted by Arkansas Teacher Retirement System. Document received: [Proposed] Order Authorizing Distribution to Eligible ERISA and Public & Other Class Members. (Goldsmith, David) (Entered: 09/01/2020)
09/03/2020	631	USCA Judgment as to 596 Notice of Appeal filed by Lieff Cabraser Heimann & Bernstein, LLP. **Appellant Lieff Cabraser Heimann & Bernstein, LLP, seeks review of the district court's February 27 Memorandum and Order in which the court reduced a previously approved fee award, while contemplating further proceedings. It appearing that the order lacked finality, this court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. Lieff has responded, explaining that, at the time the order issued, it believed that the order was final, despite the fact that the order expressly contemplated further proceedings. Nonetheless, Lieff appears to agree that the jurisdictional question is ambiguous. And, we note that the district court appears to have simultaneously treated its order as both final and non-final; that is, the court sought to retain counsel to file a brief in this court in support of its order and at the same time has issued several post-fee orders, the cumulative effect of which may well be to alter the fee ruling. In light of the latter point and having reviewed the record and Lieff's submission, we dismiss the appeal without prejudice for lack of an appealable order. See Garcia-Rubiera v. Fortuno, 727 F.3d 102, 116 (1st Cir. 2013) ("[a] ruling on attorneys' fees is definitive 'where a dollar-specific order for attorneys' fees has been entered and further action on the main case will not require! revisiting that order.'" (Citing In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 609 n.10 (1st Cir. 1992))).** (Paine, Matthew) (Entered: 09/04/2020)

09/09/2020	632	Judge Mark L. Wolf: ORDER entered Authorizing Distribution to Eligible ERISA and Public and Other Class Members. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 09/09/2020)
09/11/2020	633	NOTICE of Withdrawal of Appearance by David Copley (Copley, David) (Entered: 09/11/2020)
09/14/2020	634	Judge Mark L. Wolf: ORDER entered. It is hereby ORDERED that, by September 17, 2020: 1. The Special Master shall: a) Consult the Claims Administrator, report whether any objections have been received and, if so, file them with the court; b) File a memorandum identifying any issues to be addressed at the September 22, 2020 hearing and stating his views on them; and c) File a proposed Order to be entered after the September 22, 2020 hearing. 2. Any law firm, other organization, or individual which wishes to have its views considered shall file a memorandum identifying and addressing any issues for possible discussion at the September 22, 2020 hearing. Associated Cases: 1:11-cv-12049-MLW, 1:11-cv-10230-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 09/14/2020)
09/15/2020	635	ELECTRONIC NOTICE OF RESCHEDULING ***AS TO TIME ONLY***. This hearing will be conducted by video conference. Counsel of record will receive a video conference invite at the email registered in CM/ECF. If you have technical or compatibility issues with the technology, please notify the session's courtroom deputy as soon as possible. Access to the hearing will be made available to the media and public. In order to gain access to the hearing, you must sign up at the following address: https://forms.mad.uscourts.gov/courtlist.html. For questions regarding access to hearings, you may refer to the Court's general orders and public notices available o n www.mad.uscourts.gov or contact media@mad.uscourts.gov. Hearing on Objections concerning the form of Notice to the class regarding the Special Master's Motion for Approval of the Plan for Distribution of Remainder of Settlement Fund re-set for 9/22/2020 02:00 PM before Judge Mark L. Wolf. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW (Loret, Magdalena) (Entered: 09/15/2020)
09/17/2020	636	RESPONSE TO COURT ORDER by Gerald E. Rosen re 634 Order,,, . (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Sinnott, William) (Entered: 09/17/2020)
09/18/2020	637	Set Deadlines: Per 634 Order, Special Master to file memorandum and proposed Order by 9/17/2020. Any other firm, organization or individual wishing to have its views considered may also file memorandum by 9/17/2020. Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) Modified on 9/21/2020 (Montes, Mariliz). (Entered: 09/18/2020)
09/19/2020	638	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 634 Order,,, . (Heimann, Richard) (Entered: 09/19/2020)
09/21/2020	639	RESPONSE TO COURT ORDER by Keller Rorhback L.L.P., Zuckerman Spaeder, LLP re 637 Set/Reset Motion and R&R Deadlines/Hearings, 636 Response to Court Order, 634 Order,,, . (Gerber, Laura) (Entered: 09/21/2020)
09/21/2020	640	RESPONSE TO COURT ORDER by Hamilton Lincoln Law Institute re 637 Set/Reset

		Motion and R&R Deadlines/Hearings, 636 Response to Court Order, 634 Order,,, 638 Response to Court Order . (Bednarz, M.) (Entered: 09/21/2020)
09/22/2020	641	Electronic Clerk's Notes for proceedings held before Judge Mark L. Wolf: Hearing regarding Objections concerning the form of Notice to the class regarding the Special Master's Motion for Approval of the Plan for Distribution of Remainder of Settlement Fund held on 9/22/2020 via videoconference. Parties present argument. Court takes matter under advisement. Hamilton Lincoln Law Institute shall file its Motion for Attorneys Fees and Appointment as Guardian Ad Litem by 10/7/20. Special Master and other parties shall respond by 10/20/20. Reply by Hamilton, if any, shall be made by 10/27/20. Parties shall order the transcript on an expedited basis. (Court Reporter: Kelly Mortellite at mortellite@gmail.com.)(Attorneys present: McEvoy, McDonnell, Heimann, Chiplock, Lieff, Gerber, Sarko, Lukey, Kelly, Sharp, Canty, Paine, Kravitz, Bednarz, McTigue) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 09/22/2020)
09/23/2020	642	Transcript of Video Conference Hearing held on 09/22/2020, before Judge Mark L. Wolf. COA Case No. 20-1365. The Transcript may be purchased through the Court Reporter, viewed at the public terminal, or viewed through PACER after it is released. Court Reporter Name and Contact Information: Kelly Mortellite at mortellite@gmail.com. Redaction Request due 10/14/2020. Redacted Transcript Deadline set for 10/26/2020. Release of Transcript Restriction set for 12/22/2020. (Coppola, Katelyn) (Entered: 09/23/2020)
09/23/2020	643	NOTICE is hereby given that an official transcript of a proceeding has been filed by the court reporter in the above-captioned matter. Counsel are referred to the Court's Transcript Redaction Policy, available on the court website at http://www.mad.uscourts.gov/attorneys/general-info.htm (Coppola, Katelyn) (Entered: 09/23/2020)
09/24/2020	644	MOTION for Leave to File *Motion in Response to Court's September 22, 2020 Hearing* by Gerald E. Rosen. (Attachments: # 1 Exhibit A)(Sinnott, William) (Entered: 09/24/2020)
09/25/2020	645	MANDATE of USCA as to 596 Notice of Appeal filed by Lieff Cabraser Heimann & Bernstein, LLP. Appeal 596 Terminated (Paine, Matthew) (Entered: 09/26/2020)
09/29/2020	646	Judge Mark L. Wolf: ORDER entered. MEMORANDUM AND ORDER. It is hereby ORDERED that: 1. HLLI shall, by October 7, 2020, file: (a) a motion for an award of attorneys' fees, one or more affidavits and a memorandum in support of the motion, see Feb. 27, 2020 Mem. & Order (Dkt. No. 590) at 33-40; and, if it wishes, (b) a renewed motion to be appointed guardian ad litem for the class. 2. Any responses to HLLI's motions shall be filed by October 20, 2020. 3. Any reply shall be filed by October 27, 2020. (Attachments: # 1 Exhibit A: Revised Payment Plan)Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Loret, Magdalena) (Entered: 09/29/2020)
09/29/2020	647	MOTION for Attorney Fees by Hamilton Lincoln Law Institute. (Attachments: # 1 Declaration of M. Frank Bednarz in Support of Motion)(Bednarz, M.) (Entered: 09/29/2020)
10/05/2020	648	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 646 Memorandum & ORDER,, . (Heimann, Richard) (Entered: 10/05/2020)
10/07/2020	649	MOTION to Appoint Guardian ad Litem *for the class* by Hamilton Lincoln Law Institute. (Bednarz, M.) (Entered: 10/07/2020)
10/20/2020	650	Opposition re 647 MOTION for Attorney Fees filed by Labaton Sucharow LLP, Lieff

		Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Sharp, Joshua) (Entered: 10/20/2020)
10/20/2020	651	Opposition re 649 MOTION to Appoint Guardian ad Litem *for the class* filed by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP. (Heimann, Richard) (Entered: 10/20/2020)
10/20/2020	652	RESPONSE to Motion re 647 MOTION for Attorney Fees , 649 MOTION to Appoint Guardian ad Litem *for the class* filed by Gerald E. Rosen. (Sinnott, William) (Entered: 10/20/2020)
10/27/2020	653	REPLY to Response to 647 MOTION for Attorney Fees filed by Hamilton Lincoln Law Institute. (Bednarz, M.) (Entered: 10/27/2020)
10/27/2020	654	REPLY to Response to 649 MOTION to Appoint Guardian ad Litem *for the class* filed by Hamilton Lincoln Law Institute. (Bednarz, M.) (Entered: 10/27/2020)
12/30/2020	655	NOTICE by Labaton Sucharow LLP, Thornton Law Firm LLP re 646 Memorandum & ORDER,, (Lukey, Joan) (Entered: 12/30/2020)
12/31/2020	656	Objection to 655 Notice (Other) by Keller Rorhback L.L.P., Zuckerman Spaeder, LLP . (Sarko, Lynn) (Entered: 12/31/2020)
01/04/2021	657	Judge Mark L. Wolf: ORDER entered re 655 Notice (Other) filed by Thornton Law Firm LLP, Labaton Sucharow LLP. It is hereby ORDERED that: 1. Class Counsel need not make the first payment into escrow on January 4, 2021. 2. Class Counsel shall be prepared to make the first payment into escrow on January 11, 2021, or soon after. (Loret, Magdalena) (Entered: 01/04/2021)
01/04/2021	658	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 657 Order, . (Heimann, Richard) (Entered: 01/04/2021)
01/05/2021	659	NOTICE of Change of Address or Firm Name by William F. Sinnott (Sinnott, William) (Entered: 01/05/2021)
01/05/2021	660	NOTICE of Change of Address or Firm Name by Elizabeth J. McEvoy (McEvoy, Elizabeth) (Entered: 01/05/2021)
01/07/2021	661	RESPONSE TO COURT ORDER by Gerald E. Rosen re 657 Order, . (Sinnott, William) (Entered: 01/07/2021)
01/19/2021	662	Judge Mark L. Wolf: ORDER entered granting (647) Motion for Attorneys' Fees; denying (649) Motion to Appoint Guardian ad Litem in case 1:11-cv-10230-MLW. It is hereby ORDERED that: 1. CCAF's Motion for Attorneys' Fee Award (Dkt. No. 647) is ALLOWED. CCAF is awarded $60,690, to be paid from the common fund in two installments, on the dates stated in Exhibit 1 hereto. 2. Class Counsel shall make payments into escrow on the dates, and in the amounts, stated in Exhibit 1. 3. Distributions from the funds escrowed by Class Counsel shall be made on the dates, and in the amounts, stated in Exhibit 1. 4. Lieff shall file its appeal and motion to stay in this court by January 27, 2021. 5. Final Judgment concerning the award of attorneys' fees shall enter in accordance with the February 27, 2020 Memorandumand Order (Dkt. No. 590) and, with regard to CCAF, this Order. 6. CCAF's Renewed Motion to be Appointed Guardian Ad Litem for the Class (Dkt. No. 649) is DENIED without prejudice. (Attachments: # 1 Exhibit 1: Second Revised Payment Plan) Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW, 1:21-cv-10067-MLW(Loret, Magdalena) (Entered: 01/19/2021)
01/19/2021	663	Judge Mark L. Wolf: ORDER entered. FINAL JUDGMENT CONCERNING

		ATTORNEYS' FEES AND SERVICE AWARDS.Associated Cases: 1:11-cv-10230-MLW, 1:11-cv-12049-MLW, 1:12-cv-11698-MLW(Montes, Mariliz) (Entered: 01/19/2021)
01/26/2021	664	NOTICE OF APPEAL as to 663 Judgment, 590 Memorandum & ORDER,,,,,,,,,,, 662 Order on Motion for Attorney Fees,,,,, Order on Motion to Appoint Guardian/Attorney ad Litem,,,, by Lieff Cabraser Heimann & Bernstein, LLP Filing fee: $ 505, receipt number 0101-8607891 Fee Status: Not Exempt. NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the First Circuit Court of Appeals web site at http://www.ca1.uscourts.gov MUST be completed and submitted to the Court of Appeals. **Counsel shall register for a First Circuit CM/ECF Appellate Filer Account at http://pacer.psc.uscourts.gov/cmecf. Counsel shall also review the First Circuit requirements for electronic filing by visiting the CM/ECF Information section at http://www.ca1.uscourts.gov/cmecf. US District Court Clerk to deliver official record to Court of Appeals by 2/16/2021. (Heimann, Richard) (Entered: 01/26/2021)**
01/26/2021	665	Certified and Transmitted Abbreviated Electronic Record on Appeal to US Court of Appeals re 664 Notice of Appeal. (Paine, Matthew) (Entered: 01/26/2021)
01/27/2021	666	USCA Case Number 21-1069 for 664 Notice of Appeal, filed by Lieff Cabraser Heimann & Bernstein, LLP. (Paine, Matthew) (Entered: 01/27/2021)
01/27/2021	667	MOTION to Stay *Execution on Judgment, Pending Appeal* by Lieff Cabraser Heimann & Bernstein, LLP.(Heimann, Richard) (Entered: 01/27/2021)
01/27/2021	668	MEMORANDUM in Support re 667 MOTION to Stay *Execution on Judgment, Pending Appeal* filed by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 01/27/2021)
01/27/2021	669	Judge Mark L. Wolf: ORDER entered re 667 MOTION to Stay Execution on Judgment, Pending Appeal filed by Lieff Cabraser Heimann & Bernstein, LLP. It is hereby ORDERED that: 1. By February 3, 2021, the Master shall respond to the Motion by filing a Memorandum and affidavit that address, among other things, whether Lieff is likely to be irreparably harmed if it prevails on appeal. See L. R. 7.l(b)(2). 2. By February 3, 2021, Labaton Sucharow LLP, The Thornton Law Firm, Keller Rohrback LLP, McTigue Law LLP, Zuckerman Spaeder LLP, and the Hamilton Lincoln Law Institute Center for Class Action Fairness ("CCAF") shall respond to the Motion if they wish to do so. 3. Any reply by Lieff shall be filed by 9:00 a.m. on February 8, 2021. (Loret, Magdalena) (Entered: 01/27/2021)
01/29/2021	670	MOTION for Clarification re 662 Order on Motion for Attorney Fees,,,,, Order on Motion to Appoint Guardian/Attorney ad Litem,,,, by Keller Rohrback L.L.P..(Sarko, Lynn) (Entered: 01/29/2021)
01/29/2021	671	MEMORANDUM in Support re 670 MOTION for Clarification re 662 Order on Motion for Attorney Fees,,,,, Order on Motion to Appoint Guardian/Attorney ad Litem,,,, filed by Keller Rohrback L.L.P.. (Sarko, Lynn) (Entered: 01/29/2021)
02/02/2021	672	MOTION for Extension of Time *to Submit Response to Court's January 27, 2021 Order* by Gerald E. Rosen.(Sinnott, William) (Entered: 02/02/2021)
02/04/2021	673	Judge Mark L. Wolf: ORDER entered granting in part and denying in part 672 Motion for Extension of Time to Submit Response to Court's January 27, 2021 Order by Gerald E. Rosen. (Loret, Magdalena) (Entered: 02/04/2021)
02/05/2021	674	RESPONSE TO COURT ORDER by Thornton Law Firm LLP re 673 Order on Motion

		for Extension of Time . (Sharp, Joshua) (Entered: 02/05/2021)
02/05/2021	675	RESPONSE TO COURT ORDER by Labaton Sucharow LLP re 673 Order on Motion for Extension of Time . (Lukey, Joan) (Entered: 02/05/2021)
02/08/2021	676	RESPONSE to Motion re 667 MOTION to Stay *Execution on Judgment, Pending Appeal*, 670 MOTION for Clarification re 662 Order on Motion for Attorney Fees,,,,,, Order on Motion to Appoint Guardian/Attorney ad Litem,,,, filed by Hamilton Lincoln Law Institute. (Bednarz, M.) (Entered: 02/08/2021)
02/08/2021	677	RESPONSE TO COURT ORDER by Gerald E. Rosen re 669 Order,,, *and to Lieff Cabraser Heimann & Bernstein's Motion to Stay Execution on Judgment, Pending Appeal*. (Attachments: # 1 Exhibit A)(Sinnott, William) (Entered: 02/08/2021)
02/18/2021	678	REPLY to Response to 667 MOTION to Stay *Execution on Judgment, Pending Appeal* filed by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 02/18/2021)
03/01/2021	679	Judge Mark L. Wolf: ORDER entered. It is ORDERED that: 1. Class Counsel shall make payments into escrow on the dates, and in the amounts, stated in Exhibit 1. 2. Distributions from the funds escrowed by Class Counsel shall be made on the dates, and in the amounts, stated in Exhibit 1. (Attachments: # 1 Exhibit 1: Revised Payment Schedule) (Loret, Magdalena) (Entered: 03/01/2021)
03/12/2021	680	Judge Mark L. Wolf: MEMORANDUM AND ORDER entered denying 667 Motion to Stay Execution on Judgment, Pending Appeal by Lieff Cabraser Heimann & Bernstein, LLP. It is hereby ORDERED that the Motion of Lieff Cabraser Heimann & Bernstein, LLP for a Partial Stay of Execution on Judgment, Pending Appeal (Dkt. No. 667) is DENIED. However, the court will not order distribution of the funds escrowed by Lieff until at least 14 days after the First Circuit decides any appeal of this decision by Lieff. Lieff shall, by March 22, 2021, state whether it intends to appeal this denial of its request for a stay. (Loret, Magdalena) (Entered: 03/12/2021)
03/18/2021	681	Judge Mark L. Wolf: MEMORANDUM AND ORDER. The court hereby REQUESTS that: (a) the First Circuit invite it to retain counsel to appear on behalf of the court as fiduciary for the class with regard to Lieff's appeal of the February 27, 2020 Order and, if the First Circuit finds it desirable, concerning any appeal of the March 12, 2021 Order denying Lieff's request for a stay pending appeal, cf. Fed. R. App. P. 21(b)(4); (b) provide a reasonable period of time for Mr. Brann to file an appearance and prepare; and (c) order an appropriate briefing schedule. (Loret, Magdalena) (Entered: 03/18/2021)
03/18/2021	682	Supplemental Record on Appeal transmitted to US Court of Appeals re 664 Notice of Appeal, Documents included: ECF Nos. 679, 680, and 681 (Paine, Matthew) (Entered: 03/18/2021)
03/18/2021	683	RESPONSE TO COURT ORDER by Lieff Cabraser Heimann & Bernstein, LLP re 680 Order on Motion to Stay,, . (Heimann, Richard) (Entered: 03/18/2021)
03/22/2021	684	Judge Mark L. Wolf: ORDER entered. It is hereby ORDERED that the First Distribution

		to the Class and ERISA Counsel, including Lieff's escrowed funds, shall, pursuant to the Second Revised Payment Plan in the March 1, 2021 Order attached hereto as Exhibit 1 (Dkt. No. 679-1), be made on April 9, 2021, and the Second Distribution to them shall be made on April 30, 2021. (Attachments: # 1 Exhibit 1: Second Revised Payment Plan) (Loret, Magdalena) (Entered: 03/22/2021)
04/02/2021	685	ORDER of USCA as to 664 Notice of Appeal, filed by Lieff Cabraser Heimann & Bernstein, LLP (Paine, Matthew) **The district court judge has requested that this court "invite it to retain counsel to appear on behalf of the court as fiduciary for the class" in this appeal. This court has the benefit of the district court's opinions, including its decision denying Lieff Cabraser Heimann & Bernstein's motion to stay the decision that is presently on appeal. The district court's request is denied without prejudice to reconsideration by the panel that decides the merits.** (Entered: 04/04/2021)
04/08/2021	686	MOTION for an Accounting and for Clarification That the Special Masters Role Has Concluded by Lieff Cabraser Heimann & Bernstein, LLP.(Heimann, Richard) (Entered: 04/08/2021)
04/08/2021	687	MEMORANDUM in Support re 686 MOTION for an Accounting and for Clarification That the Special Masters Role Has Concluded filed by Lieff Cabraser Heimann & Bernstein, LLP. (Heimann, Richard) (Entered: 04/08/2021)

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Billable Pages:	30	**Cost:**	3.00

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, - against - STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY and STATE STREET GLOBAL MARKETS, LLC, Defendants.	No. 11-CV-10230 (MLW) **AMENDED CLASS ACTION COMPLAINT** Jury Trial Demanded

Plaintiff Arkansas Teacher Retirement System ("ARTRS"), individually and on behalf of all other similarly situated entities, by its undersigned attorneys, for its Amended Class Action Complaint against Defendants State Street Corporation, State Street Bank and Trust Company ("State Street Bank"), and State Street Global Markets, LLC (collectively, "State Street" or "Defendants"), alleges the following upon personal knowledge as to itself and its own acts, and upon information and belief as to all other matters.

I. INTRODUCTION

1. State Street was the custodian bank for ARTRS and the other institutional investors that constitute the Class. A custodian bank is an institution that holds securities on behalf of investors. The responsibilities entrusted to a custodian include the guarding and safekeeping of securities, delivering or accepting traded securities, and collecting principal, interest, and dividend payments on held securities. Custodians may also perform ancillary services for their clients. Custodians are typically used by institutional investors who do not

wish to leave securities on deposit with their broker-dealers or investment managers. By separating these duties, the use of custodians—at least in theory—reduces the risk of fraud or other misconduct. An independent custodian ensures that the investor has unencumbered ownership of the securities other agents represent to have purchased on its behalf.

2. State Street Bank is the nation's second-largest custodian bank, with $21.5 trillion in assets, including $4.7 trillion in pension assets, under custody and administration as of December 31, 2010. State Street charged ARTRS and its other custodial clients hundreds of millions of dollars a year in fees for custodial services.

3. As part of its array of ancillary custodial services, State Street executed foreign currency exchange ("FX") transactions on behalf of its clients in order to facilitate clients' purchases or sales of foreign securities or the repatriation of foreign currency into U.S. dollars. During the past decade, pension funds and other institutional investors have increasingly looked to overseas companies and securities markets in order to diversify their holdings and maximize investment returns. The necessity for pension funds, in particular, to invest in foreign securities in order to properly diversify and meet their funding requirements is well-known to and appreciated by custodians such as State Street, as pension funds' investment guidelines are publicly and readily available.

4. Because foreign investments are bought and sold in the foreign currencies of the nations in which they are issued, U.S.-based investors necessarily must purchase and sell those foreign currencies in order to complete the transactions.

5. ARTRS and the members of the Class reposed a high degree of trust in State Street. ARTRS and Class members authorized State Street to execute FX transactions under conditions in which State Street controlled all aspects of FX trades, including the cost. ARTRS

and Class members depended upon State Street not only to execute FX trades honestly, but also to accurately report the FX rate and generally carry out the trades in a manner consistent with their custodial services contracts ("Custodian Contracts") and State Street's other written representations.

6. ARTRS's Custodian Contracts expressly provided that State Street would execute FX transactions for no additional fees above the substantial annual flat fee ARTRS paid for custodial services. Indeed, while ARTRS's Custodian Contracts with State Street authorized State Street to charge ARTRS for additional fees for certain ancillary services, they did not authorize additional fees for executing FX transactions.

7. In successive "Investment Manager Guides" made available to its custodial clients and their outside investment managers, State Street explained that the pricing of FX trades is ***"based on the market rates at the time the trade is executed."*** Thus, State Street assured its custodial clients, including ARTRS and the Class, that FX rates would reflect only the execution price, without additional fees or mark-ups.

8. Despite these express provisions in the Investment Manager Guides and Custodian Contracts, in addition to the annual flat fees it charged its custodial clients, State Street has undertaken an unfair and deceptive practice since at least 1998 whereby FX transactions were conducted so as to maximize exorbitant and undisclosed profits to State Street at the direct expense of ARTRS and Class members. State Street charged its custodial clients inflated FX rates when buying foreign currency for them, reported deflated FX rates when selling foreign currency for them, and in both cases pocketed the difference between the actual and reported rates. In this regard, State Street charged ARTRS and the Class incorrect and often

fictitious FX rates unrelated to the market-based rates State Street actually paid or received in executing the FX trades.

9. ARTRS and other Class members could not reasonably have detected State Street's deception. Nothing in the FX rates State Street actually reported to its clients indicated that those rates included hidden and unauthorized mark-ups (or mark-downs).

10. State Street's unfair and deceptive FX trading practices, perpetrated on ARTRS and the Class, generated hundreds of millions of dollars in profits annually for State Street. This money was taken directly from the pockets of ARTRS and Class members.

11. ARTRS brings this action as a class action on behalf of all similarly affected custodial clients of State Street during the Class Period defined below, except for those covered by independent *qui tam* actions that have been or that become unsealed during the pendency of this action, in order to recover the proceeds State Street reaped from Class members through its unfair and deceptive FX trading practices.

II. JURISDICTION AND VENUE

12. This Court has subject-matter jurisdiction over this action pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), because this is a class action filed under Rule 23 of the Federal Rules of Civil Procedure; there are hundreds, if not thousands, of proposed Class members; the aggregate amount in controversy exceeds the jurisdictional amount; and many members of the proposed Class, including Plaintiff, are citizens of States other than Massachusetts. This Court also has subject-matter jurisdiction over this action pursuant to 28 U.S.C. § 1332(a) because the action is between citizens of different States and the matter in controversy with respect to the claims of the named Plaintiff exceeds the jurisdictional amount, and pursuant to 28 U.S.C. § 1367(a).

13. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(b)(1) and (2). A substantial part of the acts or omissions giving rise to Plaintiff's claims occurred within this judicial district. Defendants are citizens of the Commonwealth of Massachusetts, and are headquartered in and conduct substantial operations within this judicial district.

III. PARTIES

A. Plaintiff ARTRS

14. ARTRS, based in Little Rock, Arkansas, is a cost-sharing, multiple-employer defined benefit pension plan that provides retirement benefits to public school and other public education-related employees in the State of Arkansas. ARTRS was established by Act 266 of 1937, as an Office of Arkansas State government, for the purpose of providing retirement benefits for employees of any school or other educational agency participating in the system. As of June 30, 2009, ARTRS included 343 participating employers and more than 115,000 members, and had net assets held in trust for pension benefits exceeding $8.8 billion.

15. Like many institutional investors, ARTRS invests some of its net pension assets in foreign securities, referred to by ARTRS as "Global Equity" securities. Global Equity investments are ARTRS's single largest investment asset class. As of September 30, 2009, and consistent with its investment guidelines, ARTRS's Global Equity investments constituted approximately 33% of its net pension assets, worth more than $3.2 billion. That percentage remained consistent through the end of 2010.

16. State Street has been ARTRS's exclusive custodian bank since 1998. ARTRS paid State Street $851,412.83 for disclosed and agreed-upon custodial fees for fiscal year 2009 (July 1, 2008-June 30, 2009). Such fees did not include State Street's hidden and unauthorized FX trading charges.

B. Defendants

17. Defendant State Street Corporation is a Massachusetts corporation headquartered at State Street Financial Center, One Lincoln Street, Boston, Massachusetts 02111.

18. During the Class Period, State Street Corporation provided custodial banking and FX services to ARTRS and other members of the Class through State Street Bank and Trust, and its subsidiaries, agents, employees and co-conspirators. At all relevant times, State Street's FX trading desk was located in Boston.

19. Defendant State Street Bank is a wholly owned subsidiary of State Street Corporation and is similarly headquartered in Boston. During the Class Period, State Street Bank provided custodial banking and FX services to ARTRS and members of the Class.

20. Defendant State Street Global Markets, formerly known as State Street Capital Markets, is a wholly owned subsidiary of State Street Corporation and is similarly headquartered in Boston. During the Class Period, State Street Global Markets provided custodial banking and FX services to ARTRS and members of the Class. In particular, State Street Global Markets provides specialized investment research and trading in foreign exchange, equities, fixed income, and derivatives for State Street's custodial clients.

IV. CLASS ACTION ALLEGATIONS

21. This action is brought and may properly be maintained as a class action pursuant to Rules 23(a)(1)-(4) and 23(b)(3) of the Federal Rules of Civil Procedure and Massachusetts General Laws ch. 93A, §§ 9 and 11. This action satisfies the procedural requirements set forth by Rule 23 and ch. 93A, §§ 9 and 11.

22. This suit is a class action brought for money damages on behalf of a Class defined as all institutional investors in foreign securities, including but not limited to public and private pension funds, mutual funds, endowment funds and investment manager funds, for which State

Street served as the custodial bank and executed FX trades on a "standing-instruction" or "non-negotiated" basis between January 2, 1998 and December 31, 2009, inclusive (the "Class Period"), and which suffered damages as a result of the deceptive acts and practices and other misconduct alleged herein. Excluded from the Class are custodial clients of State Street that are covered by independent *qui tam* actions that have been unsealed or that are unsealed during the pendency of this action. Also excluded from the Class are Defendants, any entity in which Defendants have a controlling interest, and the officers, directors, affiliates, legal representatives, heirs, successors, subsidiaries, and/or assigns of any such entity.

23. The members of the Class are so numerous that joinder of all members individually, in one action or otherwise, is impracticable.

24. There are questions of law and fact common to the Class, including whether:

(a) State Street engaged in unfair and deceptive acts and practices in connection with FX transactions, so as to maximize its own profits at the expense of its custodial clients;

(b) State Street charged and reported to its custodial customers FX rates that did not reflect the actual cost of the FX transaction to State Street, and instead included hidden and unauthorized mark-ups (or mark-downs);

(c) State Street pocketed the difference between the actual, market-based FX rates and the false FX rates reported and charged to its custodial clients;

(d) State Street's acts and omissions with respect to ARTRS and the Class violated the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A;

(e) State Street's acts and omissions with respect to ARTRS and the Class violated Massachusetts state and common law; and

(f) State Street's acts and omissions caused ARTRS and the Class to suffer money damages and, if so, the proper measure of those damages.

25. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff is a member of the Class described herein.

26. Plaintiff is willing and prepared to serve the Court and the proposed Class in a representative capacity with all of the obligations and duties material thereto. Plaintiff will fairly and adequately protect the interests of the Class and has no interests adverse to or which directly and irrevocably conflict with the interests of other members of the class.

27. The interests of the Plaintiff are co-extensive with, and not antagonistic to, those of the absent Class members. Plaintiff will undertake to represent and protect the interests of absent Class members.

28. The undersigned counsel for Plaintiff and the Class are experienced in complex class action litigation, will adequately prosecute this action, and will assert and protect the rights of and otherwise represent Plaintiff and absent Class members.

29. The questions of law and fact common to the Class predominate over any questions affecting only individual members of the Class.

30. A class action is superior to other available methods for the adjudication of this controversy. Individual litigation by all Class members would increase the delay and expense to the parties and the Court given the complex legal and factual issues of the case, and judicial determination of the common legal and factual issues essential to this case would be more fair,

efficient and economical as a class action maintained in this forum than in piecemeal individual determinations.

31. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action. Compared to individual actions by each Class member, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

V. SUBSTANTIVE ALLEGATIONS

A. The Nature of FX Trading

1. The Increasing Necessity of FX Trading in a Global Investment Portfolio

32. During the past decade, in order to meet their investment and funding objectives, U.S.-based institutional investors have found it increasingly necessary to enter the overseas securities markets and expand the global scope of their investment portfolios. ARTRS, for example, held approximately 15% of its investment portfolio in global markets as of mid-2003. By September 2009, however, that percentage had increased to more than 33%.

33. Institutional investors that buy and sell foreign securities, such as ARTRS and other Class members, must engage in FX trading because the purchases, sales, dividends, and interest payments are all transacted in the currency of the nation in which the relevant securities exchange sits.

34. If, for example, a U.S. investor wishes to buy shares of stock in a German company that trades on a German securities exchange, the investor must sell U.S. dollars and purchase euros in order buy those shares. Further, any cash dividends paid on that German stock will be denominated in euros. To "repatriate" those dividends, the investor must sell the euros

received and purchase dollars. Accordingly, FX transactions are the means for converting U.S. dollars into foreign currency and vice versa.

2. How FX Trading Works

35. FX trading takes place around the world on a nearly 24-hour cycle, five-and-a-half days a week. The official FX trading week begins at 7:00 a.m. New Zealand time on Monday, with each subsequent trading day ending at 5:00 p.m. New York City time.

36. For each currency bought and sold during the course of the FX trading day, there will necessarily be a high trade and a low trade, with all other trades falling somewhere in between. This information is determined through trade data monitored and tracked by proprietary services such as, but not limited to, Electronic Brokerage System ("EBS") and Reuters.

37. The difference between the low trade and the high trade is called the "range of the day." More precisely, the "spot range of the day" refers to FX rates as of a specific and prompt settlement date, usually two business days after the trade date. To more accurately measure the trade cost for FX transactions that settle prior to or later than the date for spot trades, participants in the FX market also look to the "forward-adjusted range of the day." Because FX trades do not always settle two days after the trade, the forward-adjusted range of the day is a more conservative and accurate measurement such that it takes into account the interest rate differential that exists at the time of trade between the trade date and settlement date for the underlying currencies.

38. By way of example, assume 100 FX trades in euros-for-dollars (EUR-USD) during the course of one trading day. If the lowest rate trade occurred at $1.25 to buy €1.00, and the highest rate trade occurred at $1.35 to buy €1.00, the range of the day would be $1.25-$1.35.

39. Another useful measure is the daily "mid-rate," which is simply the sum of the forward-adjusted daily high and forward-adjusted daily low, divided by two. This rate reflects the "average" FX rate in a given currency on a given day.

40. The daily mid-rate is significant because of the absence of publicly accessible data showing the precise time of day at which FX trades occur (as exists with stock trading, for example) and because State Street did not disclose such information to its clients. By looking at the mid-rate over a significant period of time, however, one can reasonably estimate the average FX trade cost on any given day. Over the course of a month or years, it is reasonable to expect FX trades to regress to the mid-rate. On any given day, some trades might settle above or below the daily mid-rate, but over increasingly lengthy periods of time, a significant number of FX trades can be expected to occur at or extremely close to the mid-rate.

3. Negotiated vs. Non-Negotiated FX Trades

41. State Street gave ARTRS and other custodial clients a choice with respect to the manner in which FX trades would be conducted. In a "negotiated," or "active," FX trade, a custodial client or its outside investment manager would personally communicate the trade information to a State Street FX trader. The State Street FX trader would then quote a rate, which would be accepted or rejected. If accepted, State Street would execute the FX trade at the agreed-upon price, which could include a modest mark-up.

42. A "non-negotiated" or "standing-instruction" FX trade is essentially the opposite of a negotiated trade. There is no arm's-length negotiation of the price between the parties to the transaction. With non-negotiated or standing-instruction trades, custodial clients and their outside investment managers do not negotiate rates with State Street, and State Street does not quote rates. Instead, as the name "standing-instruction" suggests, custodial clients simply report the desired currency transaction to State Street, and trust and rely upon State Street, using "best

execution" practices, to execute the trade on the client's behalf. According to its Investment Manager Guides, State Street referred to standing-instruction FX transactions as "Indirect Deals" between 2000 and May 2008, and "Institutional Investors FX Trading" between May 2008 and November 2009. Since November 2009, State Street has referred to such trading as "Custody FX."

43. State Street's custodial clients, including ARTRS and the Class, reasonably expected that standing-instruction FX trades would have no mark-ups or fees. This was in view of, among other things, (a) the hefty annual fees custodial clients paid State Street to serve as custodian over their assets, (b) the Custodian Contracts and associated fee schedules that gave no indication that standing-instruction FX trading would incur extra fees or mark ups, and did not authorize any such fees or mark-ups, and (c) State Street's Investment Manager Guides that assured custodial clients and outside investment managers that the price of FX trades was ***"based on the market rates at the time the trade is executed."***

44. Institutional investors typically requested that State Street and other custodians handle the smaller FX transactions, mostly the repatriation of dividend and interest payments, through standing instructions because the amount of each trade rarely justified the time and effort required for a negotiated trade.

B. ARTRS Placed its Trust in State Street as its Custodian Bank, Relying on State Street's Expertise and Loyalty

45. Since at least September 15, 1998, State Street, as ARTRS's custodian bank, executed the majority of ARTRS's FX transactions for its accounts, including purchases and sales of U.S. and foreign currency as well as repatriations of dividends and interest payments into U.S. dollars.

46. ARTRS, like other Class members, reposed a high degree of trust in State Street to execute standing-instruction FX transactions. In conducting these transactions, State Street occupied a superior position to ARTRS due to its control over all aspects of the FX trade, including the timing of the trades, and most importantly, the price at which the trades were executed.

47. ARTRS depended upon State Street not only to execute the FX trades, but also to accurately and honestly report the FX rate and to carry out the trades in accordance with their Custodian Contracts, associated fee schedules, and guidelines as set forth in the Investment Manager Guides.

48. Additionally, separate and apart from the Custodian Contracts and Investment Manager Guides, ARTRS, like State Street's other custodial clients, had a reasonable expectation that the FX rates that State Street charged (or credited) on standing-instruction FX trades would accurately reflect the true rates of those FX trades. There is no reason a custodial client would expect its custodian bank—to which it was paying substantial annual fees for custodial services—to charge (or credit) it in connection with standing-instruction FX trades at any rate other than the actual rate for the FX trade.

C. State Street's Custodian Contracts and Investment Manager Guidelines Were Predicated on No-Cost FX Trading

49. ARTRS's initial Custodian Contract with State Street was dated September 15, 1998. The parties superseded that contract on July 1, 2001 with a new Custodian Contract containing nearly identical terms and provisions. The second contract was superseded by a Custodian Contract signed June 29, 2004, also containing identical provisions. That third contract was eventually superseded by a Custodian Contract dated June 30, 2009, containing identical relevant terms.

50. Each of the Custodian Contracts provided that State Street "shall be entitled to compensation for its services and expenses as Custodian" for ARTRS pursuant to "a written Fee Schedule between the parties."

51. ARTRS and State Street agreed to and executed a series of Fee Schedules covering the following periods:

(a) Effective September 15, 1998 through June 30, 2001;

(b) Effective July 1, 2001 through June 30, 2004;

(c) Effective July 1, 2004 through June 30, 2007;

(d) Effective July 1, 2007 through June 30, 2009 (as revised);

(e) Effective April 1, 2008 through June 30, 2009 (as revised);

(f) Effective November 1, 2008 through June 30, 2009; and

(g) Effective July 1, 2009 through June 30, 2014.

52. The Fee Schedule effective September 15, 1998 provided for an "estimated total annual fee" of $233,534. The remaining Fee Schedules provided for an annual flat fee to be paid by ARTRS to State Street for services as custodian:

(a) $600,000 per year from July 1, 2001 through June 30, 2004;

(b) $500,000 per year from July 1, 2004 through June 30, 2007;

(c) $400,000 per year from July 1, 2007 through June 30, 2009, with a subsequent revision to $320,000 from April 1, 2008 through June 30, 2009; and

(d) $200,000 per year from July 1, 2009 through June 30, 2014.

53. The Fee Schedules also set forth certain categories of ancillary services for which State Street was permitted to charge ARTRS additional fees, including Wire Fees, Reporting Fees, Delivery Fees and Subcustody Fees.

54. None of these particular ancillary service categories relate in any way to FX trading. The Custodian Contracts did not state that those ancillary fees relate to FX trading or that State Street would impose any fees in connection with FX trading.

55. Unlike most of the later Fee Schedules, which were silent as to fees and charges for FX trading, the September 15, 1998 Fee Schedule specifically mentioned FX trading, stating that **"*No Charge*"** would be assessed for any foreign exchange executed through State Street.

56. The July 1, 2009 Fee Schedule also mentions FX trading: State Street specifically stated that "[t]ransaction costs for all foreign exchange trades transacted through State Street ***will be waived*.**" (Emphasis added.)

57. As such, for more than a decade, ARTRS's Custodian Contracts with State Street (a) expressly provided that standing-instruction FX trades would be executed free of charge; or (b) did not list FX transactions among the services for which it was permitted to charge an additional fee or any other cost above the annual flat fee.

58. Substantially similar terms were employed in the Custodian Contracts for other members of the Class during the Class Period.

59. Additionally, during the Class Period, State Street provided Investment Manager Guides to custodial clients and outside investment managers that contained comprehensive information about State Street's custody practices and services, including procedural requirements, costs, and features. The many services described therein included "State Street Foreign Exchange Transactions."

60. During the Class Period, State Street issued no fewer than 15 distinct Investment Manager Guides, including those dated July 9, 2003; August 9, 2005; September 26, 2006; October 17, 2006; November 20, 2006; December 15, 2006; January 25, 2007; October 30, 2007; November 21, 2007; December 19, 2007; January 28, 2008; May 1, 2008; October 31, 2008; December 30, 2008; and January 23, 2009, to custodial clients and outside investment managers.

61. State Street represented in each of these Investment Manager Guides that "State Street Foreign Exchange Transactions . . . are ***priced based on the market rates at the time the trade is executed."*** (Emphasis added.)

D. State Street's Deceptive Scheme Overcharged ARTRS and the Class for Standing-Instruction FX Trades

62. State Street's FX practices diverged from what the Custodian Contracts authorized and what the Investment Manager Guides represented. Despite assurances that FX transactions would be based on market rates, State Street reported and charged ARTRS and the Class FX rates on standing-instruction trades far above what State Street actually paid for foreign currency (or far below what State Street actually received for sales of foreign currency)—oftentimes, at rates that actually fell ***outside of the range of the day.***

63. As such, unbeknownst to ARTRS and the Class, State Street reported FX rates on standing-instruction trades to its clients that did not reflect the actual cost or proceeds of the FX transaction to State Street, and instead included a hidden and unauthorized mark-up. Put simply, State Street invented the FX rates it reported and charged (or credited) to ARTRS and the Class. State Street paid or received one rate for FX, reported to ARTRS and Class members another rate that was either higher (in the case of a purchase) or a lower (in the case of a sale), and pocketed the difference.

64. When custodial clients or their agents requested that State Street execute an FX transaction, the request was routed electronically via State Street's Market Order Management System (MOMS) to a group of "risk traders" working at State Street's FX trading desk who then executed the FX trades by entering trade information that did not reflect the actual rate State Street paid or received.

65. To illustrate the deception, assume again the example set forth above—100 euro-for-dollar trades on a given day that ranged from $1.25 to $1.35 (the "range of the day") to purchase €1.00, with a day's mid-rate of $1.30. On any, and all, standing-instruction euro-for-dollar trades on behalf of its custodian clients, State Street would have paid a rate between $1.25 and $1.35 for those euros, but reported to its clients that it paid more. State Street charged its clients the false higher amount and kept the difference.

66. This conclusion is supported by Plaintiffs' analysis of ten years of FX transactions executed by State Street on behalf of and reported to ARTRS. Between January 3, 2000 and December 31, 2010, ARTRS had a total 10,784 FX transactions with reliable data. Among these 10,784 transactions, 4,216, or 39%, were non-negotiated, standing-instruction trades. These 4,216 FX trades had an aggregate trading volume exceeding $1.2 billion.

67. In conducting the analysis, ARTRS's FX trades were compared to other FX trades logged and tracked in a comprehensive database of more than 2 million buy-side currency trades. By comparing ARTRS's trades in certain currencies with the same currency pair trades in the database, one can estimate the trading cost of ARTRS's standing-instruction FX trades in relation to trades made worldwide. For purposes of this analysis, the trading cost is the difference between the day's mid-rate and the rate that State Street charged (or credited) to ARTRS for standing-instruction FX trades.

68. State Street did not report to ARTRS (or any other Class member) the actual time of execution of any FX trade. Therefore, comparing the day's mid-rate to the standing-instruction FX rates State Street charged (or credited) to ARTRS is the best method of determining whether State Street charged (or credited) ARTRS a rate based on the actual market rate at the time of execution, as State Street represented in its Investment Manager Guides.

69. State Street derived its false FX rates by adding (on purchases) or subtracting (on sales) "basis points" or "pips" from the actual FX rate. A basis point, or pip, is a unit equal to 1/100th of a percentage point. For example, the smallest move the euro/dollar currency pair generally makes is 1/100th of a penny, or one basis point.

70. For the period of January 3, 2000 through December 31, 2010, the FX rates that State Street reported and charged (or credited) to ARTRS on its 4,216 non-negotiated FX trades were, on average, ***17.8 basis points*** above or below the day's mid-rate. In other words, the FX rates that State Street reported and charged (or credited) to ARTRS for standing-instruction FX trades, on average and during this 10-year period, created a trading cost 17.8 basis points higher than the average FX rate (the day's mid-rate).

71. By way of example, assume that the rate State Street actually paid to purchase €1.00 on a given day was $1.31551. If State Street charged ARTRS 17.8 basis points more than it paid, the rate would be $1.31729 ($1.31729 - $1.31551 = 0.00178). For a purchase of €10 million, the undisclosed profit to State Street on that single trade—and the concomitant unknown loss by ARTRS—would be $17,800. Accordingly, the difference in total trading costs between the actual and false rates can be very large.

72. Tellingly, for the same 10-year period, the FX rates that State Street reported and charged (or credited) to ARTRS on its more than 6,500 ***negotiated*** FX trades added, on average,

only ***3.6 basis points*** in trading costs as compared to the day's mid-rate. As such, while the FX trades executed by State Street pursuant to so-called "best execution" practices incurred trading costs of 17.8 basis points on average, the FX trades actively negotiated between State Street and ARTRS or its outside investment managers incurred trading costs of only 3.6 basis points on average.

73. The false or fictitious nature of the FX rates State Street reported and charged (or credited) to ARTRS is further demonstrated when viewing ARTRS's standing-instruction FX trades in the context of the forward-adjusted range of the day. Among ARTRS's 4,216 standing-instruction FX trades, ***2,217, or 53%, fell entirely outside the forward-adjusted range of the day.*** These 2,217 FX trades, with a total volume exceeding $200 million, added trading costs on average of ***64.4 basis points*** over the day's mid-rate—an enormous hidden and unauthorized mark-up. Using the above example of a purchase of €10 million, an undisclosed fee of 64.4 basis points would result in a $64,400 profit to State Street on that single transaction.

74. Rates consistently above (or below) the daily mid-rate alone demonstrate that State Street was not fulfilling its duties as a custodian by charging a hidden mark-up, and they demonstrate a violation of the terms of the Custodian Contracts and the representations in the Investment Manager Guides. But when more than half of all standing-instruction FX trades for a particular custodial client fall ***outside*** the forward-adjusted range of the day, it becomes clear that those reported FX rates were not actual, market-based FX rates, but were instead fictitious and designed solely to gouge the custodial client and, in turn, its beneficiaries. In the case of public pension funds, the beneficiaries include teachers, police officers, firefighters and many other public workers.

75. There is no rational, honest basis for a professional FX market participant like State Street, or indeed any FX market participant, to charge an FX rate outside the forward-adjusted range of the day without disclosing it. The day's range defines the range at which primary dealing banks and custodian banks transacted in FX during that trading day. The fictitious nature of rates assigned outside the forward-adjusted range of the day illustrates, perhaps most starkly, the unfair and deceptive nature of State Street's standing-instruction FX trading practices. In short, these practices were designed to enrich State Street while deceiving and unfairly depriving institutional clients such as ARTRS and the Class of much-needed funds.

E. State Street's Deceptive Acts and Practices Could Not Reasonably Be Detected by ARTRS and the Class

76. Neither ARTRS nor any Class member reasonably could have discovered State Street's deceptive acts and practices concerning FX trading during the Class Period. State Street executed hundreds if not thousands of FX trades on behalf of its custodial clients every month. The periodic reports State Street sent to ARTRS and the Class showed only the rate that State Street charged for its FX trades. The reports did not include the range of the day, the daily mid-rate, or any indication of the time of the day that the trade was executed (known as "time-stamps"). Accordingly, there was no way for ARTRS and the Class to reasonably determine, or even suspect, that State Street was secretly charging more than it actually paid for FX or was paying clients less than it actually received for FX.

77. It was reasonable for ARTRS and the Class to presume that the prices reflected in the reports State Street provided to them were an accurate representation of the true cost of the FX trades. With respect to ARTRS specifically, the Custodian Contracts expressly provided that the "Custodian shall render to the [Plaintiff] a monthly report of all monies received or paid on

behalf of the Fund[.]" Accordingly, State Street had an affirmative obligation to report accurately the amount of money it was paying or receiving for FX.

78. Furthermore, based on the Investment Manager Guides' assurance that FX rates would be "priced based on the market rates at the time the trade is executed," neither ARTRS nor the Class had any reason to suspect that they were being charged (or credited) anything other the rate that State Street itself had paid or received on those standing-instruction FX transactions.

79. Moreover, as alleged above, State Street occupied a position of trust and confidence with respect to its custodial clients. Those clients would not, and did not, suspect that the custodian in which that trust resided, would profit to a gross and undisclosed degree on the services for which they paid a handsome annual fee. Indeed, those custodial clients would, and did, presume that the custodian bank would act in and not against their best interests.

F. Events After October 2009 Begin to Shed Light on State Street's Deceptive Acts and Practices

80. On October 20, 2009, the Attorney General of California filed a Complaint in Intervention for violation of the California False Claims Act, Cal. Gov. Code § 12651, charging State Street with misappropriating more than $56 million from the accounts of California's two largest pension plans—CalPERS and CalSTRS—over a multi-year period in connection with the same unfair and deceptive FX practices alleged herein. *People of the State of Cal. ex rel. Brown v. State Street Corp.*, Case No. 34-2008-00008457-CU-MC-GDS (Cal. Super. Ct. Sacramento County Oct. 20, 2009).

81. The California Attorney General alleges that State Street reported inflated FX rates when buying foreign securities for CalPERS and CalSTRS, reported deflated FX rates when selling foreign securities for them, and pocketed the difference between the reported and actual rates. The Attorney General further alleges that State Street hid its wrongful conduct by

entering incorrect FX exchange rates into State Street's electronic FX trading systems and providing false records to CalPERS and CalSTRS.

82. In the months that followed, State Street dramatically changed its FX trading policies and disclosure and so informed ARTRS and other Class members. Under these new policies, State Street admitted for the first time that it had systematically imposed additional charges for FX trading. For example, in an excerpt from an updated Investment Manager Guide dated November 20, 2009, State Street advised custodial clients that it would post on its website, my.statestreet.com, "current mark-ups and mark-downs used by State Street Global Markets for [standing-instruction] foreign exchange transaction requests."

83. In a similar message sent to custodial clients, State Street admitted that **"*[s]ince December 2009***, State Street has provided to all of its custody clients and their investment managers via our dedicated client portal, my.statestreet.com, comprehensive disclosure of the pricing and execution methodology (including the maximum mark-up or mark-down that may be applied) for each of its Indirect [standing-instruction] FX Services." (Emphasis added.) State Street added that "on the day after a trade is executed, State Street provides for each currency pair the reference interbank rates and the times at which they are obtained, the actual rates, the daily high/low range at the time of pricing (where applicable) and the actual mark-up or mark-down that was applied."

84. State Street altered its practices to allow custodial clients more complete access to FX trading data only after its deceptive acts and practices began to be revealed. State Street's late disclosure that it charged mark-ups and mark-downs on standing-instruction FX trades contradicts its previous repeated assurances that FX rates would be based on market rates at the time the trade is executed.

85. According to a study conducted by an independent FX analyst after the California *qui tam* complaint was unsealed and State Street altered its FX policies, the cost of standing-instruction FX trades dropped by a remarkable ***63%.*** The study analyzed 498,940 FX spot and forward trades (196,280 standing-instruction trades and 302,660 negotiated trades) executed during 2000-2010, and found that investors who had their custodian banks, including State Street, execute FX trades on a standing-instruction basis during 2010 saw an overall 63% drop in trading costs from their average trading costs for the years 2000-2009.

FIRST CLAIM FOR RELIEF

Violation of the Massachusetts Consumer Protection Act, M.G.L. ch. 93A, § 11 (Asserted Against All Defendants on Behalf of Plaintiff ARTRS and the Class)

86. Plaintiff repeats and realleges, as if fully set forth herein at length, each and every allegation contained in the above paragraphs, as well as those in support of the other claims for relief asserted on behalf of the Class, and further alleges:

87. At all relevant times hereto State Street was engaged in trade or commerce.

88. While engaged in trade or commerce, State Street engaged in unfair and deceptive acts and practices, as alleged in this Complaint, in violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, §§ 2, 11, including, without limitation:

(a) Unfairly and deceptively pricing standing-instruction FX trades for custodial clients such as ARTRS and the Class in a manner designed to maximize profits to State Street at the direct and undisclosed expense of those custodial clients;

(b) Unfairly and deceptively reporting false and fictitious FX rates for standing-instruction FX trades to State Street's custodial clients such as ARTRS

and the Class rather than the actual rates at which State Street had effected those trades;

(c) Pocketing the difference between the actual FX rates at which State Street effected custodial clients' standing-instruction FX trades and the false and fictitious rates State Street reported to those custodial clients;

(d) taking undisclosed profits on standing-instruction FX trades from custodial clients such as ARTRS and the Class that grossly exceeded the customary prices at which similar services were readily obtainable in negotiated FX transactions by like Class members; and

(e) Violating Attorney General Regulations, including 940 CMR §§ 3.16(1-2).

89. These acts or practices violated Sections 2 and 11 of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A.

90. State Street's unfair and deceptive acts or practices related to standing-instruction FX transactions occurred primarily and substantially in Massachusetts, where State Street's FX trading desk is located.

91. As a result of the unfair and deceptive conduct of State Street, ARTRS and the Class sustained economic damages in an amount no less than the difference between (a) the actual dollar amounts paid or received by State Street when conducting standing-instruction FX trades for ARTRS and the Class and (b) the false and fictitious dollar amounts charged or credited by State Street to ARTRS and the Class for those same trades.

92. State Street is in a unique position to know the exact amount of damages sustained by ARTRS and the Class as a result of State Street's unfair and deceptive conduct,

because, *inter alia,* throughout the Class Period, State Street did not provide time-stamps to its custodial clients for its standing-instruction FX trades.

93. State Street's unfair and deceptive conduct as described herein was willful and intentional, accordingly entitling Plaintiff and the Class to up to treble, but no less than double, damages, plus costs (including attorneys' fees).

94. Application of Mass. Gen. Laws ch. 93A to all Class members located throughout the United States, regardless of their state or residence, is appropriate because Defendants are located and engage in trade or commerce in Massachusetts and are thus subject to the laws of the Commonwealth. Defendants are registered to do business in Massachusetts, and their principal place of business is located in Massachusetts, from which they controlled and directed the deceptive and unfair practices described herein, including conducting FX trades on behalf of ARTRS and the Class. Further, on information and belief, all employees of Defendants directly involved in the activities complained of herein are based in Massachusetts.

SECOND CLAIM FOR RELIEF

Violation of the Massachusetts Consumer Protection Act, M.G.L. ch. 93A, § 9 (Asserted Against All Defendants on Behalf of Plaintiff ARTRS and the Class)

95. Plaintiff repeats and realleges, as if fully set forth herein at length, each and every allegation contained in the above paragraphs, as well as those in support of the other claims for relief asserted on behalf of the Class, and further alleges:

96. This claim for relief is pleaded in the alternative to the First Claim for Relief on behalf of Plaintiff and those members of the Class who, as not-for-profit entities utilizing State Street to conduct FX transactions, were engaged in the furtherance of their core mission, which includes investing and building retirement funds for public employees.

97. While engaged in trade or commerce, State Street engaged in unfair and deceptive acts and practices, as alleged in this Complaint, in violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A, §§ 2, 9, including, without limitation:

(a) Unfairly and deceptively pricing standing-instruction FX trades for custodial clients such as ARTRS and the Class in a manner designed to maximize profits to State Street at the direct and undisclosed expense of those custodial clients;

(b) Unfairly and deceptively reporting false and fictitious FX rates for standing-instruction FX trades to State Street's custodial clients such as ARTRS and the Class rather than the actual rates at which State Street had effected those trades for those customers;

(c) Pocketing the difference between the actual FX rates at which State Street effected custodial clients' standing-instruction FX trades and the false and fictitious rates State Street reported to those custodial clients;

(d) taking undisclosed profits on standing-instruction FX trades from custodial clients such as ARTRS and the Class that grossly exceeded the customary prices at which similar services were readily obtainable in negotiated FX transactions by like Class members; and

(e) Violating Attorney General Regulations, including 940 CMR §§ 3.16(1-2).

98. These acts or practices violated Sections 2 and 9 of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A.

99. State Street's unfair and deceptive acts or practices related to standing-instruction FX transactions occurred primarily and substantially in Massachusetts, where State Street's FX trading desk is located.

100. As a result of the unfair and deceptive conduct of State Street, Plaintiff ARTRS and the Class sustained economic damages in an amount no less than the difference between (a) the actual dollar amounts paid or received by State Street when conducting standing-instruction FX trades for ARTRS and the Class and (b) the false and fictitious dollar amounts charged or credited by State Street to ARTRS and the Class for those same trades.

101. State Street is in a unique position to know the exact amount of damages sustained by ARTRS and the Class as a result of State Street's unfair and deceptive conduct, because, *inter alia,* throughout the Class Period, State Street did not provide time-stamps to its custodial clients for its standing-instruction FX trades.

102. Pursuant to the Mass. Gen. Laws. Ann. ch. 93A, § 9(3), on February 16, 2011—more than thirty (30) days prior to the filing of this Amended Class Action Complaint, which asserts, for the first time, a claim pursuant to Mass. Gen Laws ch. 93A, § 9—Plaintiff mailed, via certified mail, return receipt requested, a written demand for relief to State Street identifying the claimants and reasonably describing the unfair acts or practices relied upon and the injuries suffered. State Street's response on March 18, 2011 contested Plaintiff's allegations and refused to make a reasonable (or any) offer of relief. The refusal to grant relief was made in bad faith with knowledge or reason to know that the acts of the Defendants violated Mass. Gen. Laws Ann. ch. 93A, § 2.

103. State Street's unfair and deceptive conduct as described herein was willful and intentional, accordingly entitling Plaintiff and the Class to treble damages, plus costs (including attorneys' fees).

104. Application of Mass. Gen. Laws ch. 93A to all Class members located throughout the United States, regardless of their state or residence, is appropriate because Defendants are located and engage in trade or commerce in Massachusetts and are thus subject to the laws of the Commonwealth. Defendants are registered to do business in Massachusetts, and their principal place of business is located in Massachusetts, from which they controlled and directed the deceptive and unfair practices described herein, including conducting FX trades on behalf of ARTRS and the Class. Further, on information and belief, all employees of Defendants directly involved in the activities complained of herein are based in Massachusetts.

THIRD CLAIM FOR RELIEF

Breach of Duty of Trust
(Asserted Against All Defendants on Behalf of Plaintiff ARTRS and the Class)

105. Plaintiff repeats and realleges, as if fully set forth herein at length, each and every allegation contained in the above paragraphs, as well as those in support of the other claims for relief asserted on behalf of the Class, and further alleges:

106. Plaintiff and the members of the Class placed their trust in Defendants to execute standing-instruction FX transactions necessary to facilitate the purchases and sales of foreign securities for the accounts of Plaintiff and the Class.

107. Defendants occupied a superior position to Plaintiff and the Class such that they controlled all aspects of standing-instruction FX trading, including the timing of the FX trades and the prices at which the trades were executed and settled. Plaintiff and the Class were entirely

dependent on Defendants to execute the FX trades and accurately report the price at which FX trades were settled.

108. Defendants understood that Plaintiff and the members of the Class placed their confidence and trust in Defendants to report FX trades accurately.

109. Defendants, by virtue of their superior knowledge and position of control as well as the confidence and trust placed in them by Plaintiff and the Class, owed a duty of loyalty to Plaintiff and the Class in connection with carrying out standing-instruction FX transactions.

110. Defendants, by virtue of their capacity as custodian for Plaintiff and the Class, and their superior knowledge and position of control as well as the confidence and trust placed in them by Plaintiff and the Class, owed a duty of disclosure in connection with carrying out standing-instruction FX transactions.

111. Defendants breached their duty of loyalty to Plaintiff and each of the Class members by: (a) charging Plaintiff and the Class higher FX rates than State Street actually paid when buying foreign currency; (b) paying Plaintiff and the Class lower FX rates than State Street actually received when selling foreign currency; (c) pocketing the difference between State Street's actual costs and the rates charged to Plaintiff and the Class; and (d) hiding their conduct by providing account statements to the Plaintiff and the Class that reported only the date on which standing-instruction FX trades were executed, and the price charged to Plaintiff and the Class, yet omitting important information such as the actual time the trade was executed, and the actual cost of the trade to State Street, that would have enabled Plaintiff and the Class to realize they were paying in excess of State Street's actual costs or receiving less than State Street's actual proceeds.

112. Defendants breached their duty of disclosure to Plaintiff and each of the Class members by providing account statements to the Plaintiff and the Class that omitted the actual cost of the trade to State Street and the actual time the trade was executed.

113. As a result of Defendants' breaches of duty, Plaintiff and the Class sustained damages, including, but not limited to, the difference between the amount of State Street's actual costs and the amounts charged to Plaintiff and the Class when purchasing foreign currency, and the difference between the amounts State Street received and the amounts paid to Plaintiff and the Class when selling foreign currency. Accordingly, Plaintiff and the Class are entitled to an award of money damages in an amount to be determined at trial.

FOURTH CLAIM FOR RELIEF

Negligent Misrepresentation
(Asserted Against All Defendants on
Behalf of Plaintiff ARTRS and the Class)

114. Plaintiff repeats and realleges, as if fully set forth herein at length, each and every allegation contained in the above paragraphs, as well as those in support of the other claims for relief asserted on behalf of the Class, and further alleges:

115. Defendants' activities complained-of herein were performed in the course of State Street's business acting as custodian bank for Plaintiff and the members of the Class.

116. In connection therewith, Defendants supplied Plaintiff and the Class with periodic reports and statements, including monthly reports and trade confirmations, regarding the purchase and sale of foreign currency by State Street on behalf of Plaintiff and the Class. The reports and statements were provided by State Street for the guidance of Plaintiff and the Class in their business transactions.

117. The reports and statements State Street provided to Plaintiff and the Class omitted material information about the actual cost to State Street of the purchases and sales of foreign currency, and omitted to state the actual time the foreign currency was purchased or sold by State Street. Due to State Street's material omissions, Plaintiff and the Class were therefore unable to determine that State Street was charging them in excess of State Street's actual and reasonable costs for FX purchases, and remitting to Plaintiff and the Class less than the amounts State Street received for FX sales.

118. Because of State Street's special position of trust with respect to Plaintiff and the Class, and because of its superior position controlling all aspects of standing-instruction FX trading and reporting, State Street had a duty to disclose the omitted material information to Plaintiff and the Class. State Street's position of trust and superior position creates the duty to disclose.

119. Justifiable reliance is presumed because this Claim for Relief is based on Defendants' material omissions.

120. Defendants failed to exercise reasonable care or competence in obtaining or communicating the allegedly omitted information to Plaintiff and the Class.

121. Defendants' negligent misrepresentations caused pecuniary loss to Plaintiff and the Class.

122. Accordingly, Plaintiff and the Class are entitled to an award of money damages in an amount to be determined at trial.

FIFTH CLAIM FOR RELIEF

Breach of Contract
(Asserted Against Defendant State Street Bank on Behalf of Plaintiff ARTRS Individually)

123. Plaintiff repeats and re-alleges, as if fully set forth herein at length, each and every allegation contained in the above paragraphs and further alleges:

124. Plaintiff brings this Claim for Relief for breach of contract on behalf of itself individually.

125. Plaintiff entered into valid, binding Custodian Contracts with State Street Bank, pursuant to which State Street Bank agreed to, *inter alia*, provide services as custodian of the Plaintiff's assets.

126. The first Custodian Contract was dated September 15, 1998. It was terminated and superseded by a written Custodian Contract dated July 1, 2001, containing nearly identical relevant terms. It, too, was terminated and superseded by a written Custodian Contract dated June 29, 2004, containing identical relevant terms. That Custodian Contract was terminated and superseded by another written Custodian Contact dated June 30, 2009 containing identical relevant terms.

127. This Claim for Relief is brought pursuant to the law of the State of Arkansas. Each Custodian Contract provided that it "shall be construed and the provisions thereof interpreted under and in accordance with the laws of the State of Arkansas to the extent not pre-empted by federal law."

128. One of the services State Street Bank agreed to provide to ARTRS pursuant to the Custodian Contracts is the purchase or sale of FX, including pursuant to "standing instructions": "The Custodian is permitted to pay out of moneys of Plaintiff's account, upon proper

instructions, and which may be 'standing instructions' . . . [f]or the purchase or sale of foreign exchange or foreign exchange contracts for the account of the Fund, including transactions executed with or through the Custodian, its agents or its subcustodians."

129. The Custodian Contracts specified that the amount by which State Street Bank was entitled to be compensated for the services it performs for ARTRS pursuant to the Contracts would be set forth in a written Fee Schedule agreed-to by the parties: "The Custodian shall be entitled to compensation for its services and expenses as Custodian set forth in a written Fee Schedule between the parties hereto until a different compensation shall be in writing agreed upon between the System [ARTRS] and the Custodian."

130. ARTRS and State Street Bank agreed to and executed the following Fee Schedules:

(a) Effective September 15, 1998 through June 30, 2001;

(b) Effective July 1, 2001 through June 30, 2004;

(c) Effective July 1, 2004 through June 30, 2007;

(d) Effective July 1, 2007 through June 30, 2009 (as revised);

(e) Effective April 1, 2008 through June 30, 2009 (as revised);

(f) Effective November 1, 2008 through June 30, 2009; and

(g) Effective July 1, 2009 through June 30, 2014.

131. The Fee Schedules each provided for an annual flat fee to be paid by ARTRS to State Street Bank for its services as custodian, and set forth certain categories of services, such as Domestic Transaction Charges and Global Transaction charges, for which State Street Bank was permitted to charge ARTRS an additional fee.

132. The Fee Schedule dated September 15, 1998 discusses FX trading, stating that "***No charge*** will be assessed for each foreign exchange executed through a third party. Foreign exchange through State Street – ***No Charge.***" (Emphases in original.)

133. The Fee Schedules dated July 1, 2001; July 1, 2004; July 1, 2007; April 1, 2008; and November 1, 2008 do not mention FX trading or list FX trading as one of the services for which State Street Bank is permitted to charge Plaintiff an additional fee. Accordingly, each of these Fee Schedules contemplated that State Street Bank shall not be compensated for the purchase or sale of foreign exchange over and above the annual flat fee.

134. The Fee Schedule dated July 1, 2009 also makes this clear, and expressly states that "[t]ransaction costs for all foreign exchange trades transacted through State Street will be waived." Accordingly, State Street Bank is not permitted to charge ARTRS for the purchase or sale of FX above the annual flat fee under the terms of the Custodian Contract.

135. In the months after the California Attorney General filed its Complaint in Intervention against State Street on October 20, 2009, State Street Bank informed ARTRS of "current mark-ups and mark-downs used by State Street Global Markets for [standing-instruction] foreign exchange transaction requests." These "mark-ups and mark-downs" continue to breach the express terms of the June 29, 2009 Custodian Contract and associated Fee Schedule (effective July 1, 2009 through June 30, 2014), which states that "[t]ransaction costs for all foreign exchange trades transacted through State Street will be waived."

136. State Street's practices, detailed herein, of charging ARTRS inflated FX rates when buying foreign currency, and deflated FX rates when selling foreign currency, constitute a hidden and unauthorized charge to ARTRS above the annual flat fee.

137. By charging ARTRS the hidden and unauthorized fees described herein, State Street Bank has breached the Custodian Contracts, and ARTRS has suffered substantial money damages as a result of that breach.

138. The Custodian Contracts further provided that "[t]he Custodian shall render to the System [ARTRS] a monthly report of all monies received or paid on behalf of the System and an itemized statement of the securities for which it is accountable under this Contract as of the end of each month, as well as a list of all securities transactions that remain unsettled at that time."

139. State Street, however, provided ARTRS with monthly reports that showed only the price being charged to the Plaintiff for standing-instruction FX trades and the date of the trade. State Street omitted important information, such as the time-stamp of the actual time of the trade, and the actual price at which State Street paid for the purchase or sale of foreign exchange so as to hide the fact that ARTRS was being charged a secret profit on the trade.

140. State Street Bank's failure to comply with the Custodian Contracts' reporting requirement constitutes an additional breach of the Contracts, and ARTRS has suffered substantial monetary damages as a result thereof.

141. There is no limitations period that would act as a bar to this Claim for Relief pursuant to the maxim *nullum tempus occurrit regi* recognized under Arkansas law. Notwithstanding, ARTRS could not have discovered State Street Bank's breach even in the exercise of due diligence until the earliest, the unsealing of the California Attorney General complaint against State Street because, *inter alia,* the reports State Street provided to ARTRS showed only the price charged to Plaintiff for standing-instruction FX trades and the date of the trade. By omitting important information, such as a time-stamp and the actual price paid or

received by State Street, Defendants hid or actively concealed their improper conduct. Accordingly, even if a statute of limitations were to apply, it was tolled by State Street's actions.

Prayer for Relief

WHEREFORE, Plaintiff demands judgment for itself and all other members of the proposed Class as follows:

A. With regard to the First Claim for Relief, that the Court certify this action as a class action and enter judgment against Defendants in an amount equal to up to three but no less than two times the amount of damages Plaintiff and the Class have sustained as a result of Defendants' actions, plus costs (including attorneys' fees);

B. With regard to the Second Claim for Relief, that the Court certify this action as a class action and enter judgment against Defendants in an amount equal to three times the amount of damages Plaintiff and the Class have sustained as a result of Defendants' actions, plus costs (including attorneys' fees);

C. With regard to the Third Claim for Relief, that the Court certify this action as a class action, find that Defendants breached their duties of trust to Plaintiff and the Class, and award appropriate compensatory damages to Plaintiff and the Class in an amount to be determined at trial;

D. With regard to the Fourth Claim for Relief, that the Court certify this action as a class action, find that Defendants negligently misrepresented to Plaintiff and the Class the hidden fees charged in connection with FX trading, and award appropriate compensatory damages to Plaintiff and the Class in an amount to be determined at trial;

E. With regard to the Fifth Claim for Relief, that the Court find that Defendant State Street Bank breached each of its Custodian Contracts with Plaintiff, and award appropriate compensatory damages to Plaintiff in an amount to be determined at trial;

F. That the Court award Plaintiff and the Class all costs and expenses of this action, including reasonable attorneys' and experts' fees; and

G. That the Court award Plaintiff and the Class such other relief as the Court deems just and proper.

Demand for Jury Trial

Plaintiff demands a trial by jury of all issues so triable.

Dated: April 15, 2011

THORNTON & NAUMES, LLP

By: */s/ Garrett J. Bradley*

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Attorneys for Plaintiff and the Class

UNITED STATES DISTRICT COURT
FOR THE STATE OF MASSACHUSETTS

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

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Plaintiffs' Amended Class Action Complaint was filed through the ECF System on April 15, 2011 and accordingly will be served electronically upon all registered participants identified on the Notice of Electronic Filing.

/s/ Garrett J. Bradley
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Dated: April 15, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, et al. v. STATE STREET BANK AND TRUST COMPANY	)	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, et al. v. STATE STREET BANK AND TRUST COMPANY, et al.	)	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, et al. v. STATE STREET BANK AND TRUST COMPANY	)	No. 12-cv-11698 MLW

NOTICE OF PENDENCY OF CLASS ACTIONS, PROPOSED CLASS SETTLEMENT, SETTLEMENT HEARING, PLAN OF ALLOCATION, AND ANY MOTION FOR ATTORNEYS' FEES, LITIGATION EXPENSES, AND SERVICE AWARDS

A U.S. Federal Court authorized this Notice. This is not a solicitation from a lawyer.

You Are Receiving this Notice Because Available Information Indicates that You Are a Member of the Settlement Class Defined Below. If this Is Incorrect, Please Contact the Claims Administrator and Lead Counsel Immediately.

This notice ("Notice") is being sent to advise you of the pendency of the above-captioned class action lawsuits (collectively, the "Class Actions") and the proposed settlement of the Class Actions for $300,000,000 (the "Class Settlement Amount") on the terms discussed below (the "Class Settlement").[1] The Class Settlement resolves claims arising from the alleged unfair and deceptive practice of State Street Bank and Trust Company ("SSBT") of charging custody and trust customers of SSBT excessive rates and spreads in connection with certain foreign exchange transactions known as "Indirect FX Transactions"[2] during the period from January 2, 1998 through December 31, 2009, inclusive (the "Class Period"), in violation of SSBT's statutory, contractual, and fiduciary obligations. The Class Actions sought to recover losses on behalf of SSBT's custodial clients based on this alleged unfair and deceptive practice. If approved, the Class Settlement will resolve all claims asserted in the Class Actions.

The Class Settlement is entered into by and among (i) plaintiffs Arkansas Teacher Retirement System ("ARTRS"), Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employees Savings and Profit Sharing Plan, and James Pehoushek-Stangeland (collectively,

[1] All capitalized terms used in this Notice that are not otherwise defined herein have the meanings provided in the Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the "Settlement Agreement"). The Settlement Agreement is available on the website for this Settlement, www.StateStreetIndirectFXClassSettlement.com.

[2] "Indirect FX Transactions/Trading" means Foreign exchange transactions executed with SSBT or SSBT's subcustodians at any time using Indirect FX Methods, including all foreign exchange transactions submitted using Indirect Methods. A transaction submitted or processed using an Indirect Method is an Indirect FX Transaction regardless whether the rate at which the transaction was executed differed from the rates at which other transactions submitted using Indirect Methods were executed. Settlement Agreement ¶ 1(ff).

"Plaintiffs"), on behalf of themselves and each Settlement Class Member, by and through their counsel, and (ii) State Street Bank and Trust Company (the "Settling Defendant" or "SSBT"). Plaintiffs and SSBT are referred to collectively herein as the "Parties."

The Honorable Mark L. Wolf of the United States District Court for the District of Massachusetts ("Court") is presiding over the Class Actions. Judge Wolf has provisionally certified the proposed Settlement Class (as defined below) for purposes of settlement only, has directed that this Notice be mailed to members of the Settlement Class, and has scheduled a Final Approval Hearing ("Final Approval Hearing" or "Settlement Hearing") at which the Court will consider Plaintiffs' motion for final approval of the Class Settlement and approval of the proposed plan for allocating the settlement proceeds to the Settlement Class ("Plan of Allocation"), and Lead Counsel's motion, on behalf of ERISA Counsel and Customer Counsel, for an award of attorneys' fees, payment of Litigation Expenses, and payment of any Service Awards for Plaintiffs. **The Final Approval Hearing will be held on November 2, 2016, at 2:00 p.m. in Courtroom 10 of the John Joseph Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts 02210.** The Class Settlement will become effective once it reaches its "Effective Date," which is after the opportunity to appeal the Court's Judgment has expired or, if there are any appeals, approval of the Class Settlement is upheld; after the Court approves the proposed Plan of Allocation and the order has become Final; and certain other conditions are met.

Additional information regarding the Class Settlement and this Notice may be obtained by contacting the Claims Administrator: *State Street Indirect FX Trading Class Action*, c/o A.B. Data, Ltd., P.O. Box 173000, Milwaukee, WI 53217, 877-240-3540, info@StateStreetIndirectFXClassSettlement.com, www.StateStreetIndirectFXClassSettlement.com; or Lead Counsel: Labaton Sucharow LLP, (888) 219-6877, www.labaton.com, settlementquestions@labaton.com.

DO NOT CALL THE COURT WITH QUESTIONS ABOUT THE CLASS SETTLEMENT.

PLEASE READ THIS NOTICE CAREFULLY AND COMPLETELY. IF YOU ARE A MEMBER OF THE SETTLEMENT CLASS, YOUR LEGAL RIGHTS ARE AFFECTED WHETHER YOU ACT OR DO NOT ACT.

YOUR LEGAL RIGHTS AND OPTIONS UNDER THE CLASS SETTLEMENT	
YOU DO NOT NEED TO TAKE ANY ACTION TO PARTICIPATE IN THE CLASS SETTLEMENT AND RECEIVE A PAYMENT **(If you represent a Group Trust,[3] see page ___ below.)**	If the Class Settlement is approved and you are a member of the Settlement Class, you do not need to take any action to receive a payment. You will be bound by the settlement, unless you take steps to exclude yourself as explained below, and you cannot bring or be part of any other lawsuit or arbitration against Defendants or any of the other Released Defendant Parties based on any Released Class Claim. Your portion of the Net Class Settlement Fund will be calculated as part of the administration of the Class Settlement. An explanation of the manner in which payments to Settlement Class Members will be determined is set forth in the Plan of Allocation,

[3] "Group Trusts" are group trusts that are exempt from tax pursuant to Internal Revenue Service Revenue Ruling 81-100, as amended, that were custody or trust customers of SSBT during any part of the Class Period. *See* Settlement Agreement ¶ 1(bb).

	below. However, Group Trusts, which may include plans or assets governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), need to provide certain information so that their recovery can be properly determined. SSBT has agreed to undertake reasonable efforts to provide the information necessary to determine each Settlement Class Member's portion of the Net Class Settlement Fund. See the Plan of Allocation in the answer to Question 8 below for important information.
EXCLUDE YOURSELF FROM THE SETTLEMENT CLASS BY SUBMITTING A WRITTEN REQUEST FOR EXCLUSION (WHICH MUST BE RECEIVED NO LATER THAN OCTOBER 7, 2016)	If you do not wish to be a member of the Settlement Class, you *must* exclude yourself (as described below in Question 10). If you exclude yourself, you *will not* receive any payment from the Class Settlement. You cannot bring or be part of any other lawsuit or arbitration against Defendants or any of the other Released Defendant Parties based on any Released Class Claim unless you exclude yourself from the Settlement Class.
OBJECT TO THE CLASS SETTLEMENT BY SUBMITTING A WRITTEN OBJECTION (WHICH MUST BE RECEIVED NO LATER THAN OCTOBER 7, 2016)	If you wish to object to any part of the Class Settlement, the Plan of Allocation, or the requests for attorneys' fees, Litigation Expenses, and/or Service Awards, and do not exclude yourself from the Settlement Class, you can write to the Court and counsel and explain what you do not agree with.
ATTEND THE FINAL APPROVAL HEARING (NOVEMBER 2, 2016 AT 2:00 p.m.)	If you have submitted a written objection to the Court and counsel and notice to appear, as explained below, you may (but do not have to) attend the hearing and speak to the Court about your objection.

Please note: The Court has the authority to change any of the above deadlines, for good cause shown.

SUMMARY OF THE CLASS SETTLEMENT

As described in more detail below, and in the complaints filed with the Court, the Class Actions allege that Plaintiffs (or the plans they represent) and/or their investment managers entered into agreements authorizing Defendants to engage in Indirect FX Transactions with their custodial accounts under certain circumstances. Plaintiffs alleged that SSBT priced Indirect FX Transactions in a manner advantageous to Defendants and disadvantageous to Plaintiffs, near or outside the high and low of the daily range of interbank rates, contrary to SSBT's contractual obligations and representations and Defendants' fiduciary and statutory responsibilities. Copies of the operative complaints in the Class Actions are available at www.StateStreetIndirectFXClassSettlement.com.

Pursuant to the Settlement Agreement, a Class Settlement Fund consisting of $300 million in cash, plus any accrued interest, has been established, in exchange for the Settlement Class's release of the Released Class Claims (defined below). Payment by or on behalf of SSBT of the $300 million Class Settlement Amount, and the allocations discussed below in the Plan of Allocation, will also satisfy conditions in two separate settlements

with federal government agencies.[4] SSBT anticipates reaching a settlement with the U.S. Securities and Exchange Commission ("SEC") concerning Indirect FX that relates to Settlement Class Members that are Registered Investment Companies (the "SEC Settlement").[5] SSBT has also reached a settlement with the U.S. Department of Labor ("DOL") concerning Indirect FX that relates to Settlement Class Members that are ERISA Plans (the "DOL Settlement").[6]

Based on information provided by SSBT, the average gross recovery for a class member from the Class Settlement is approximately $200,000 before the deduction of Court-approved fees and expenses. A Settlement Class Member's actual "Recognized Claim" will be calculated in accordance with the Plan of Allocation, explained below, and will depend on, among other things, the Settlement Class Member's volume of Indirect FX Transactions, and whether or not the Settlement Class Member is an ERISA Plan, a Group Trust, a Registered Investment Company, or none of these. A Settlement Class Member's payment will be a portion of the Net Class Settlement Fund, which consists of the Class Settlement Fund, less fees and expenses associated with providing notice to the Settlement Class and administering the Class Settlement ("Notice and Administration Expenses"), Taxes and Tax Expenses, Court-approved attorneys' fees, Litigation Expenses, and any Service Awards to Plaintiffs for the effort and time spent by them in connection with the prosecution of the Class Actions. (*See* Questions 6 and 8 below for details about the Plan of Allocation).

The Settlement Class is defined as follows:

> **All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 2, 1998 through December 31, 2009, inclusive.**

Please Note: There are exceptions to being included in the Settlement Class. A description of those Persons excluded by definition from the Settlement Class is provided below in Question 5.

As with any litigation, the Parties face an uncertain outcome if the Class Actions do not settle and litigation continues. Absent the Class Settlement, orders and appeals on class certification, summary judgment and a trial could result in a judgment or verdict greater or less than the recovery under the Class Settlement, or no recovery at all. Throughout the Class Actions, the Plaintiffs and Defendants have disagreed on both liability and damages, and they do not agree on the amount that would be recoverable even if the Plaintiffs were to prevail at trial. Defendants, among other things: (1) have denied the material allegations of the complaints; (2) have denied any wrongdoing or liability whatsoever; (3) have contested the propriety of class certification; (4)

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[4] SSBT has separately reached a settlement with the U.S. Department of Justice ("DOJ") concerning Indirect FX (the "DOJ Settlement"). The DOJ Settlement requires SSBT to pay money to the federal government.

[5] "Registered Investment Company(ies)" means a mutual fund, closed-end fund, unit investment trust or other entity that is registered with the SEC as an investment company under the Investment Company Act. Settlement Agreement ¶ 1(ww).

[6] "ERISA Plans" means the employee benefit plans as defined in 29 U.S.C. § 1002(3) (also referred to as Section 3(3) of ERISA), that are subject to Part 4 of Subtitle B of Title I of ERISA (including master trusts with respect to multiple such plans within the meaning of Department of Labor Regulation § 2520.103-1(e)), and that were custody or trust customers of SSBT during any part of the Class Period. Settlement Agreement ¶ 1(w).

believe that they acted at all times reasonably and prudently, in full compliance with their contractual obligations, and in accordance with applicable law; and (5) would assert certain other defenses if this Class Settlement is not consummated. SSBT is entering into the Class Settlement solely to avoid the cost, disruption, and uncertainty of continued litigation. The Parties have taken into account the uncertainty and risks inherent in these litigations, particularly their complex natures, and have concluded that it is desirable that the Class Actions be fully and finally settled on the terms and conditions set forth in the Class Settlement.

Lead Counsel, on behalf of ERISA Counsel and Customer Counsel, will apply to the Court for an order awarding attorneys' fees in an amount not to exceed $74,541,250.00 and payment of Litigation Expenses in an amount not to exceed $1,750,000.00, plus interest earned on these amounts. As explained further in the Plan of Allocation set forth in Question 8 below, no more than $10,900,000.00 of the attorneys' fees awarded will be paid out of the ERISA Settlement Allocation (as defined below). The remainder of attorneys' fees awarded will be paid out from the RIC Settlement Allocation and the Public and Other Settlement Allocation (both as defined below). If the Court awards attorneys' fees at an overall percentage rate of more than 18.17%, the RIC Settlement Allocation and the Public and Other Settlement Allocation will each bear fees at a higher percentage rate than the ERISA Settlement Allocation. If the Court awards attorneys' fees at an overall percentage rate of 18.17% or less, the three Settlement Allocations (ERISA, RIC, and Public and Other) will each bear fees at the same rate.

Plaintiffs will share in the allocation of the money paid to members of the Settlement Class on the same basis and to the same extent as all other members of the Settlement Class, except that, in addition thereto, Plaintiffs may apply to the Court for Service Awards of up to $85,000.00 in the aggregate. Any Service Awards granted to Plaintiffs by the Court will be payable from the Class Settlement Fund, and will compensate Plaintiffs for their effort and time spent in connection with the prosecution of the Class Actions.

BASIC INFORMATION

1. Why did I receive this Notice?

You received this Notice because records provided by SSBT indicate that during the Class Period you were a domestic custody customer of SSBT that executed one or more Indirect FX Transactions during the Class Period. The Court has directed that this Notice be sent to you. If the Court approves the Class Settlement, and it becomes effective, the Released Defendant Parties and Released Plaintiff Parties will be released from all Released Class Claims and Released Prosecution Claims, respectively, as explained below. In exchange, the Net Class Settlement Fund will be distributed to Settlement Class Members according to the Court-approved Plan of Allocation.

This Notice explains the Class Actions, the Class Settlement, your legal rights, what benefits are available, who is eligible for them, and how you will receive your portion of the Net Class Settlement Fund. The Final Approval Hearing will be held on November 2, 2016 at 2:00 p.m., before the Hon. Mark L. Wolf in the United States District Court for the District of Massachusetts, John Joseph Moakley United States Courthouse, Courtroom 10, 1 Courthouse Way, Boston, Massachusetts 02210, to determine:

- whether the Class Settlement should be approved as fair, reasonable, and adequate;
- whether the complaints should be dismissed with prejudice pursuant to the terms of the Class Settlement;

- whether the proposed Plan of Allocation for the proceeds of the Class Settlement should be approved; and

- whether the applications for attorneys' fees, payment of Litigation Expenses, and payment of Service Awards to Plaintiffs should be approved.

The issuance of this Notice is not an expression of the Court's opinion of the merits of any claim in the Class Actions, and the Court has not decided whether to approve the Class Settlement. If the Court approves the Class Settlement, payment to Settlement Class Members will be made after all related appeals, if any, are favorably resolved and the regulatory settlements have become final. Please be patient.

2. What are the Class Actions about? What has happened so far?

The Class Actions were commenced in 2011 and 2012 by the filing of three class action complaints. In the Class Actions, Plaintiffs allege, among other things, that Defendants charged custody and trust customers of SSBT excessive rates and spreads in connection with Indirect FX Transactions between January 2, 1998 and December 31, 2009. Plaintiffs allege that by employing this unfair and deceptive practice, Defendants earned higher spreads on Indirect FX Transactions than they should have. Further, Plaintiffs allege that Defendants failed to disclose this pricing. Plaintiffs assert that this alleged unfair and deceptive practice and nondisclosure thereof constituted violations of the Massachusetts Consumer Protection Act, Mass. Gen. Laws Ch. 93A, §§ 2, 9 and 11 ("Chapter 93A"), breach of an alleged fiduciary duty, and negligent misrepresentation, and, with respect to the ERISA Funds, violations of ERISA, 29 U.S.C. § 1106, for engaging in self-interested prohibited transactions and by causing the plans to engage in party in interest prohibited transactions, violations of ERISA, 29 U.S.C. § 1104, for breaching duties of prudence and loyalty, and pursuant to ERISA, 29 U.S.C. § 1105, liability for breaches of co-fiduciary obligations.

Defendants have denied Plaintiffs' allegations. If the Class Actions were to continue, Defendants would raise numerous defenses to liability, including without limitation:

- Defendants acted in accordance with the custody and trust and Indirect FX agreements and did not breach them.

- Defendants either did not owe fiduciary duties or did not breach fiduciary duties owed to certain Settlement Class Members based on state law and the plain language of the agreements that governed Defendants' custodial obligations.

- Defendants made no actionable misrepresentations or omissions, and did not engage in any Chapter 93A violations.

- All of the FX transactions executed with ERISA customers satisfy statutory or regulatory exemptions for FX transactions.

- Plaintiffs and the Settlement Class knew, or should have known, that Defendants were engaged in the Indirect FX pricing practice alleged in the Complaints.

- Plaintiffs and the Settlement Class were not damaged by Defendants' conduct and received the benefit of the bargain for the services that were provided.

On June 3, 2011, Defendants State Street Corporation, SSBT, and SSGM LLC moved to dismiss the amended class action complaint in the ARTRS Action. The motion to dismiss was fully briefed as of February 28, 2012. On April 9, 2012, SSBT and SSGM LLC moved to dismiss the amended class action complaint in the Henriquez Action.

On May 8, 2012, the Court heard oral argument on Defendants' motion to dismiss the ARTRS Action. By order issued from the bench dated the same day, the Court denied the motion in its entirety with regard to the claims against SSBT, but granted the motion with respect to the claims against State Street Corporation. By agreement of the parties, the claims against SSGM LLC were dismissed without prejudice.

On November 16, 2012, the Parties in the Class Actions filed a Stipulation, Joint Motion, and Proposed Order for the Production and Exchange of Confidential Information, which the Court entered on November 20, 2012. Pursuant to the order, the Class Actions were consolidated for pre-trial purposes. Additionally, the order provided that the Parties could engage in formal document discovery until December 1, 2013. The Class Actions were stayed in all other respects until December 1, 2013 and certain motions were withdrawn. At the Parties' request, the stay of proceedings, other than discovery, was subsequently extended by orders of the Court, while the Parties pursued mediation.

The Class Settlement is the product of protracted, arm's-length negotiations between Plaintiffs' Counsel and Defendants' Counsel, facilitated by a nationally recognized mediator with substantial experience mediating complex litigations of this type. Between October 2012 and June 2015, the Parties engaged in sixteen (16) in-person mediation sessions in Boston, New York City, and Washington, D.C. In addition, the Parties met without the mediator and had numerous arm's-length discussions among themselves.

Pursuant to agreements concerning the exchange of formal document discovery, informal material to facilitate the mediation process, and managing the Class Actions, the Parties exchanged more than nine million pages of relevant documents. SSBT also provided a significant amount of data and other information relevant to liability, class certification and damages issues, and Plaintiffs and SSBT each made multiple, detailed presentations (including a presentation by an accounting expert) during the mediation process concerning such issues.

On June 30, 2015, Plaintiffs and SSBT reached an agreement-in-principle to settle the Class Actions, which was memorialized in a term sheet on September 11, 2015, and the Settlement Agreement, dated July 26, 2016.

3. Why is this case a class action?

In a class action, one or more individuals or entities, referred to as "Plaintiffs," sue on behalf of others who have similar claims. All of the Persons on whose behalf Plaintiffs in the Class Actions are suing are members of the "class" referred to in this Notice, and are "Settlement Class Members" or "members of the Settlement Class." Bringing a case as a class action allows the adjudication of many similar claims that might be economically too small to bring individually. One court resolves the issues for all class members, except for those who exclude themselves from the class. The Court will decide whether to finally certify the Settlement Class at the Final Approval Hearing.

4. How do I know whether I am part of the Settlement Class?

The Court has provisionally certified the following Settlement Class:

All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 2, 1998 through December 31, 2009, inclusive.

The "Settlement Class" does not include: Defendants; California Public Employees' Retirement System (CalPERS), California State Teachers' Retirement System (CalSTRS), and the State of Washington Investment Board; the predecessors and affiliates of the foregoing, or any entity in which they have a controlling interest; and the officers, directors, legal representatives, heirs, successors, subsidiaries and/or assigns of any such excluded individual or entity in their capacities as such. For the avoidance of doubt, the Parties have agreed that this definition of the "Settlement Class" is intended to supersede the class definitions in the complaints in the Class Actions.

The "Settlement Class" also does not include any Person who submits a timely and valid request for exclusion meeting the requirements in this Notice (see Question 10 below).

If you are not sure whether you are included, you can ask for assistance. You can call 877-240-3540 or visit www.StateStreetIndirectFXClassSettlement.com for more information.

5. Why is there a Class Settlement?

The Court did not finally decide in favor of Plaintiffs or Defendants. Instead, both sides agreed to a settlement. Plaintiffs and Plaintiffs' Counsel believe that the claims asserted in the Class Actions have merit. They recognize, however, the expense and length of continued proceedings necessary to pursue the claims through trial and appeals, as well as the difficulties in establishing liability. They have considered the uncertain outcome and the risk of any litigation, especially in complex lawsuits like this one, as well as the unique risks here. Defendants have raised a number of arguments and defenses (which they would raise at summary judgment and trial) that could limit or result in the dismissal of the claims and a reduction in any recovery. In the absence of a Settlement, the Parties would present factual and expert testimony on such issues, and there is considerable risk that the Court or jury would resolve the inevitable "battle of the experts" against Plaintiffs and the Settlement Class.

As stated above, the Class Settlement is the product of extensive arm's-length negotiations between Plaintiffs' Counsel and Defendants' Counsel, all of whom are very experienced with respect to complex litigation of this type. The Class Settlement provides substantial benefits now as compared to the risk that a similar or smaller recovery would be achieved after trial and appeals, years in the future, or that no recovery would be achieved at all. In light of the amount of the Class Settlement and the immediate recovery to the Settlement Class, Plaintiffs and Plaintiffs' Counsel believe that the proposed Class Settlement is fair, reasonable and adequate, and in the best interests of the Settlement Class.

6. What does the Class Settlement provide?

In exchange for the Class Settlement and the release of the Released Class Claims (defined below) against the Released Defendant Parties (defined below), SSBT agreed to create a $300,000,000 cash fund. The $300,000,000, plus any interest that accrues on this amount, will be distributed to the Settlement Class after

costs, expenses and fees are deducted, as described herein. The Class Settlement provides for cash payments to Settlement Class Members who do not exclude themselves from the Settlement Class, as explained in the Plan of Allocation in Question 8 below.

The description of the Class Settlement in this Notice is only a summary. The complete terms are set forth in the Settlement Agreement (including its exhibits), which may be obtained at the Class Settlement website, www.StateStreetIndirectFXClassSettlement.com, or Lead Counsel's website, www.labaton.com.

7. What am I giving up to get a payment and by staying in the Settlement Class?

Unless you exclude yourself, you will stay in the Settlement Class, which means that upon the "Effective Date" of the Class Settlement, you will release all "Released Class Claims" (as defined below) against the "Released Defendant Parties" (as defined below) and be subject to a covenant not to sue and a permanent injunction against prosecuting Released Class Claims against Released Defendant Parties.

"Released Class Claims" means any and all claims, demands, losses, costs, interest, penalties, fees, attorneys' fees, expenses, rights, rights of recovery, causes of action, duties, obligations, judgments, actions, debts, sums of money, suits, contracts, agreements, promises, damages, and liabilities of every nature and description, including Unknown Claims, whether known or unknown, direct, representative, class, individual or indirect, asserted or unasserted, matured or unmatured, accrued or unaccrued, foreseen or unforeseen, disclosed or undisclosed, contingent or fixed or vested, accrued or not accrued, at law or equity, whether arising under federal, state, local, foreign, statutory, common, administrative or any other law, statute, rule or regulation that any Releasing Plaintiff: (i) asserted in the Class Actions; (ii) could have asserted in the Class Actions or any other action or in any forum, that arise from or out of, relate to, or are in connection with the claims, allegations, transactions, alleged or actual prohibited transactions or breaches of duty (including fiduciary duty), facts, events, acts, disclosures, matters or occurrences, statements, representations or omissions or failures to act involved, described, set forth, or referred to in the complaints filed in the Class Actions or that arise from or out of, relate to, or are in connection with Indirect FX Methods, Indirect FX Transactions/Trading, StreetFX Methods, StreetFX Transactions, or Rate Comparisons; and (iii) asserted or could assert that arise from or out of, relate to, or are in connection with the defense or settlement of the Class Actions, except for claims relating to enforcement of the Settlement.

"Released Defendant Parties" means SSBT and Defendants; their past, present and future parents, subsidiaries, divisions, and affiliates; the respective past and present officers, directors, trustees, employees, agents, trustees, managers, servants, accountants, auditors, underwriters, financial and investment advisors, consultants, representatives, insurers, co-insurers and reinsurers of each of them; and the heirs, successors and assigns of the foregoing.

"Unknown Claims" means any and all Released Class Claims, which one or more Releasing Plaintiffs does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Defendant Parties, and any Released Prosecution Claims that SSBT or any other Released Defendant Party does not know or suspect to exist in his, her, or its favor at the time of the release of the Released Plaintiff Parties, which if known to him, her, or it might have affected his, her, or its decision(s) with respect to the Class Settlement. With respect to any and all Released Class Claims and Released Prosecution Claims, the Parties stipulate and agree that, upon the Effective Date, Plaintiffs and SSBT shall expressly, and each Releasing Plaintiff and SSBT shall be deemed to have, and by operation of the Judgment or any Alternative Judgment shall have, expressly waived and relinquished any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States or any other jurisdiction, or principle of common law that is, or is similar, comparable, or equivalent to California Civil Code § 1542, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

Releasing Plaintiffs, SSBT, or the other Released Defendant Parties may hereafter discover facts, legal theories, or authorities in addition to or different from those which he, she, or it now knows or believes to be true with respect to the subject matter of the Released Class Claims and the Released Prosecution Claims, but Plaintiffs and SSBT shall expressly, fully, finally, and forever settle and release, and each other Releasing Plaintiff and each other Released Defendant Party shall be deemed to have settled and released, and upon the Effective Date and by operation of the Judgment or any Alternative Judgment shall have settled and released, fully, finally, and forever, any and all Released Class Claims and Released Prosecution Claims as applicable, without regard to the subsequent discovery or existence of such different or additional facts, legal theories, or authorities. The Parties acknowledge, and each other Releasing Plaintiff and Released Defendant Party by operation of law shall be deemed to have acknowledged, that the inclusion of "Unknown Claims" in the definition of Released Class Claims and Released Prosecution Claims was separately bargained for and was a key and material element of the Class Settlement.

The "Effective Date" will occur when, among other things, an Order by the Court approving the Class Settlement becomes Final and is not subject to appeal and when an Order by the Court approving the proposed Plan of Allocation becomes Final and is not subject to appeal, as set out more fully in the Settlement Agreement on file with the Court and available at www.StateStreetIndirectFXClassSettlement.com or www.labaton.com.

If you remain a member of the Settlement Class, all of the Court's orders about the Class Settlement in the Class Actions will apply to you and legally bind you.

8. What will be my share of the Net Class Settlement Fund? How can I get my portion of the recovery?

At the Final Approval Hearing, Lead Counsel will request the Court approve the Plan of Allocation set forth below. The Plan of Allocation describes the manner by which the Net Class Settlement Fund will be allocated among Settlement Class Members. Assuming you do not exclude yourself from the Settlement Class pursuant to Question 10 below, you do not need to take any further action to receive your portion of the recovery. However, as explained on page ___ below, if you represent a Group Trust, you must provide a certification in order to receive a portion of the ERISA Settlement Allocation, rather than a portion of the balance of the Net Class Settlement Fund.

You are not responsible for calculating the amount you may be entitled to receive under the Class Settlement. This calculation will be done by the Claims Administrator as part of the implementation of the Class Settlement, and will be based on reasonably available information obtained from SSBT. You will be notified of your calculated recovery after the Class Settlement is approved and prior to Lead Counsel's motion to the Court requesting approval of a distribution of the Class Settlement proceeds.

PLAN OF ALLOCATION

This Plan of Allocation describes steps that the Claims Administrator will take in order to allocate funds in connection with the Class Settlement, including determining distribution amounts. The Court may approve this Plan of Allocation or modify it without additional notice to the Settlement Class. Any order modifying the Plan of Allocation will be posted on the settlement website at: www.StateStreetIndirectFXClassSettlement.com and at www.labaton.com. Distributions in the manner set forth herein will be deemed conclusive against all claimants. Each Settlement Class Member is deemed to have submitted to the jurisdiction of the United States

District Court for the District of Massachusetts with respect to his, her, or its recovery from the Class Settlement.

Distributions to Authorized Claimants will be based on Recognized Claims (defined below). It is important to understand that the Recognized Claims under this Plan of Allocation are not provable damages but rather are amounts derived from a fair and reasonable methodology (described below) to evaluate each Settlement Class Member's relative stake in the Class Settlement.

The defined terms used herein relate to this Plan of Allocation, and not necessarily to other agreements executed by SSBT or its affiliates with third parties, including governmental agencies, in connection with the Class Settlement. Capitalized terms that are not otherwise defined herein have the same meaning as set forth in the Settlement Agreement.

A. THE ALLOCATION OF SETTLEMENT PROCEEDS

The Net Class Settlement Fund, which shall consist of Three Hundred Million U.S. Dollars ($300,000,000.00), plus any accrued interest, minus all costs and expenses incurred with respect to the fund, including Taxes and Tax Expenses, Notice and Administration Expenses, attorneys' fees, Litigation Expenses, and Service Awards paid from the Class Settlement Fund with the permission of the Court, will be distributed to eligible Settlement Class Members.

After approval by the Court of the Class Settlement, the Class Settlement Fund shall be allocated as set forth below for the benefit of Settlement Class Members.

The ERISA Settlement Allocation (which shall be the source of distributions to ERISA Plans and certain Group Trusts, as set forth below) shall be at least Sixty Million Dollars ($60,000,000.00) of the Class Settlement Fund (twenty percent of the Class Settlement Fund), plus twenty percent (20%) of any interest accrued on the Class Settlement Fund, minus twenty percent (20%) of any Taxes and Tax Expenses, Notice and Administration Expenses, Service Awards, and Litigation Expenses, and minus attorneys' fees, if awarded by the Court, in an amount not to exceed Ten Million Nine Hundred Thousand Dollars ($10,900,000.00).

The remainder of attorneys' fees will be paid out from the RIC Settlement Allocation and the Public and Other Settlement Allocation (both defined below). Because no more than $10,900,000 in fees can be paid out from the ERISA Settlement Allocation, if the Court awards fees at an overall percentage rate of more than 18.17%, then the RIC Settlement Allocation and the Public and Other Settlement Allocation will bear fees at a higher percentage rate than the ERISA Settlement Allocation. For example, if the Court awards the total amount of fees that Lead Counsel intends to request, the RIC Settlement Allocation and the Public and Other Settlement Allocation will each bear fees at a higher percentage rate (26.52%) than the ERISA Settlement Allocation (18.17%). If the Court awards fees at an overall percentage rate of 18.17% or less, the three Settlement Allocations (ERISA, RIC, and Public and Other) will each bear fees at the same percentage rate.

The ERISA Settlement Allocation was negotiated directly among Lead Counsel, ERISA Counsel, and representatives of the DOL. The ERISA Settlement Allocation, even without the $10,900,000 cap on attorneys' fees described above, provides a premium per dollar of Indirect FX Trading Volume for ERISA Plans and eligible Group Trusts in comparison to the allocations to other Settlement Class Members. The precise size of the premium is not known at this time because the amount of ERISA assets within Group Trusts is currently undetermined, as is the amount of attorneys' fees the Court may award. The premium recognizes the relative strength of the fiduciary duty and other claims available to ERISA Plans and eligible Group Trusts under the federal ERISA laws, as ERISA Counsel and the DOL have contended and as described in Question 2 above. The $10,900,000 cap on attorneys' fees was agreed-to by Lead Counsel and ERISA Counsel separately with the

DOL after the Class Settlement Amount was agreed-to by the Parties. The ERISA Settlement Allocation of $60,000,000 and the $10,900,000 cap on attorneys' fees were final, essential conditions for the DOL's support of the Settlement and the conclusion of its own investigation of SSBT. These conditions must be met for the Settlement to be concluded.

The balance of the Class Settlement Fund will be allocated in proportion to the Indirect FX Trading Volume of class members that are not ERISA Plans or eligible Group Trusts (as explained below), specifically to class members that are Registered Investment Companies ("RICs") and class members that are non-ERISA public pension funds, private entities, and other customers ("Public and Other").

After allocation of the ERISA Settlement Allocation, based on information supplied by SSBT, the "RIC Settlement Allocation" will be approximately $142,000,000, on a gross basis before the addition of a proportional amount of any accrued interest and the deduction of proportional attorneys' fees, Litigation Expenses, Service Awards, Notice and Administration Expenses, Taxes and Tax Expenses, and the "Public and Other Settlement Allocation" will be approximately $98,000,000, on a gross basis before interest and the deductions above. These allocations will be adjusted to the extent Indirect FX Trading Volume of Group Trusts is applied to the ERISA Settlement Allocation, as described below.

The Parties have relied on Indirect FX Trading Volume information provided by State Street to develop this Plan of Allocation. The ERISA Settlement Allocation and payment of the Registered Investment Company Minimum Distribution are essential conditions of the Class Settlement, which may be terminated by the Settling Defendant if the minimum allocations set forth in this Plan are not made. The amount of the ERISA Settlement Allocation has been set based on the Indirect FX Trading Volume information provided, including information concerning the total amount of Indirect FX Trading Volume executed during the Class Period by ERISA Plans and Group Trusts. As part of the settlement administration process described below, the Claims Administrator will request information from Group Trusts concerning their ERISA Volume (explained below) during the Class Period.

In light of the fact that the amount of ERISA assets within Group Trusts is currently undetermined, the Parties, with input from the DOL, have agreed that the Plan of Allocation will be modified in the event that the total amount of Group Trusts' ERISA Volume is in excess of 2/3 of the total amount of Group Trusts' Indirect FX Trading Volume, as reported by State Street on July 25, 2016. In that event, the Claims Administrator will use the Indirect FX Trading Volume equal to such excess volume to calculate the net payment amount that would be due with respect to such volume if paid from the Public and Other Settlement Allocation, and will transfer half of that amount to the ERISA Settlement Allocation from each of the RIC Settlement Allocation and the Public and Other Settlement Allocation. (Accordingly, no such modification will be made if actual Group Trusts' ERISA Volume is 2/3 or less of the reported Group Trusts' Indirect FX Trading Volume.)

In the event that the actual total percentage of Indirect FX Trading Volume executed by ERISA Plans and Group Trust exceeds 15.25% of the overall Indirect FX Trading Volume for the Settlement as reported on July 25, 2016, the Claims Administrator will provide notice of the total such percentage to Plaintiffs' Counsel, State Street, and the DOL, and Plaintiffs' Counsel may apply to the Court for modification of this Plan of Allocation, without further notice to the Settlement Class. If the DOL wishes to be heard by the Court on a modification of the Plan of Allocation for this reason, regardless of whether Plaintiffs' Counsel seeks modification, neither State Street nor Plaintiffs' Counsel will object to the DOL's standing to do so.

B. ALLOCATION AMONG SETTLEMENT CLASS MEMBERS

For each Settlement Class Member, the Claims Administrator shall determine that Settlement Class Member's Indirect FX Trading Volume(s) (in U.S. Dollars) during the Class Period, calculate that Settlement Class Member's Recognized Claim, and use those calculations to distribute the Settlement Allocations as set forth herein.

To facilitate this procedure, SSBT has provided the Claims Administrator with: (i) the total Indirect FX Trading Volume (in U.S. Dollars) for each Settlement Class Member during the Class Period; (ii) information concerning whether each Settlement Class Member was an ERISA Plan during the Class Period; (iii) information concerning whether each Settlement Class Member was a Registered Investment Company during the Class Period; and (iv) information concerning whether each Settlement Class Member was a group trust that is exempt from tax pursuant to Internal Revenue Service Revenue Ruling 81-100 ("Group Trust") during the Class Period.

1. Determination of Indirect FX Trading Volumes

The Claims Administrator shall divide each Settlement Class Member's total Indirect FX Trading Volume (in U.S. Dollars) during the Class Period into three parts: (i) Registered Investment Company Indirect FX Trading Volume (in U.S. Dollars) during the Class Period ("RIC Volume"); (ii) ERISA Plan Indirect FX Trading Volume (in U.S. Dollars) during the Class Period ("ERISA Volume"); and (iii) their remaining Indirect FX Trading Volume (in U.S. Dollars) during the Class Period ("Public and Other Volume"). The division shall be determined as follows.

a) Registered Investment Company Settlement Class Members

For each Settlement Class Member that, based on the records supplied by SSBT, was a Registered Investment Company during the Class Period, the RIC Volume shall equal that Settlement Class Member's total Indirect FX Trading Volume during the Class Period. The Settlement Class Member's ERISA Volume and Public and Other Volume shall be zero.

b) ERISA Plan Settlement Class Members

For each Settlement Class Member that, based on the records supplied by SSBT, was solely an ERISA Plan (not including Group Trusts) during the Class Period, the ERISA Volume shall equal that Settlement Class Member's total Indirect FX Trading Volume during the Class Period. The Settlement Class Member's RIC Volume and Public and Other Volume shall be zero.

c) Group Trust Settlement Class Members

SSBT has notified Plaintiffs' Counsel that fifty-five (55) Settlement Class Members represent Group Trusts. For each such Settlement Class Member identified as a Group Trust, ***a letter concerning the Settlement Class Member's identification as a Group Trust accompanies this Notice.*** The Indirect FX Trading Volume during the Class Period (in U.S. Dollars) for Settlement Class Members that are Group Trusts will be categorized pursuant to the following requirements in this subsection.

Each Group Trust shall provide the Claims Administrator with a certification that reports the average proportion of the Group Trust's SSBT custodied assets that were held by an ERISA Plan or Plans during the Class Period and/or the average volume of Indirect FX Trades made by the ERISA Plan(s) during the Class Period, and identifies by name each ERISA Plan within the Group Trust. If a Group Trust does not have the foregoing information for each year of the Class Period, but has a reasonable belief that ERISA assets were held by the Group Trust during those years, the years for which data is available should be reported and the results will be

averaged by applying the average proportion of the years with known ERISA assets and/or Indirect FX Trading Volume to the years with unknown ERISA assets and/or Indirect FX Trading Volume.

The certification must be signed by a plan fiduciary or administrator and state that he, she, or it certifies that the information contained within the certification is accurate based on reasonably available information. The certification must be mailed or delivered so that it is **postmarked or received no later than December 20, 2016,** to:

State Street Indirect FX Trading Class Action
Claims Administrator
c/o A.B. Data, Ltd.
P.O. Box 173000
Milwaukee, WI 53217

Upon request from the Claims Administrator, a Group Trust must promptly provide sufficient information to explain and confirm the certification in order to remain eligible for a share of the ERISA Settlement Allocation as set forth herein.

Using the information provided through the certification process, a Group Trust's ERISA Volume shall equal the volume of Indirect FX Trades made by the ERISA Plan(s) in the Group Trust or, if the information concerning the volume of Indirect FX Trades is insufficient, the proportion of assets that were held by the ERISA Plan(s) in a particular Group Trust. Any Indirect FX Trading Volume of a Group Trust that is not categorized by the Claims Administrator as ERISA Volume shall be categorized as Public and Other Volume. In all instances, the RIC Volume of a Settlement Class Member that is a Group Trust shall be zero.

If a Group Trust does not provide a certification by December 20, 2016, it shall be treated for purposes of an allocation as if it held no ERISA Plan assets and it shall not be entitled to a recovery from the ERISA Settlement Allocation. Instead, its Public and Other Volume shall equal that Settlement Class Member's total Indirect FX Trading Volume during the Class Period. In that instance, the Settlement Class Member's RIC Volume and ERISA Volume shall be zero.

However, in instances where a Group Trust is known by the Parties to have ERISA assets based on previous consultations with the U.S. Department of Labor, but a certification is not submitted or the Group Trust does not provide a certification by December 20, 2016, then the trust's ERISA Volume may be calculated utilizing a methodology at Plaintiffs' Counsel's discretion based on discussions with the U.S. Department of Labor or with the Group Trust in response to any informal inquiry from the Claims Administrator or Plaintiffs' Counsel.

Group Trust Settlement Class Members who claim and receive distributions from the ERISA Settlement Allocation must distribute the ERISA Settlement Allocation only to the ERISA Plans identified in the certification submitted to the Claims Administrator and in the same proportion as set forth in the certification. Such distributions are subject to confirmation by the U.S. Department of Labor and/or Plaintiffs' Counsel.

d) Public and Other Settlement Class Members

For each Settlement Class Member that, based on the records supplied by SSBT, was not an ERISA Plan, Group Trust, or Registered Investment Company during the Class Period, the Public and Other Volume shall equal that Settlement Class Member's total Indirect FX Trading Volume during the Class Period. The Settlement Class Member's ERISA Volume and RIC Volume shall be zero.

2. <u>Methodology for Calculation of Recognized Claims</u>

After calculating the ERISA Volume, RIC Volume, and Public and Other Volume for each Settlement Class Member, the Claims Administrator will sum the ERISA Volumes for the Settlement Class in order to derive the classwide ERISA Volume, will sum the RIC Volume for the Settlement Class, in order to derive the classwide RIC Volume, and will sum the Public and Other Volume for the Settlement Class, in order to derive the classwide Public and Other Volume.

A Settlement Class Member's ERISA Recognized Claim equals that class member's ERISA Volume, divided by the classwide ERISA Volume, multiplied by the amount of the ERISA Settlement Allocation. The result of these calculations will be that a Settlement Class Member having no ERISA Volume will have an ERISA Recognized Claim of zero.

A Settlement Class Member's RIC Recognized Claim equals that class member's RIC Volume, divided by the classwide RIC Volume, multiplied by the amount of the RIC Settlement Allocation. The result of these calculations will be that a Settlement Class Member having no RIC Volume will have a RIC Recognized Claim of zero.

A Settlement Class Member's Public and Other Recognized Claim equals that class member's Public and Other Volume, divided by the classwide Public and Other Volume, multiplied by the amount of the Public and Other Settlement Allocation. The result of these calculations will be that a Settlement Class Member having no Public and Other Volume will have a Public and Other Recognized Claim of zero.

Settlement Class Members shall receive distributions from the ERISA Settlement Allocation on a *pro rata* basis based on their ERISA Recognized Claim amounts, distributions from the RIC Settlement Allocation on a *pro rata* basis based on their RIC Recognized Claim amounts, and distributions from the Public and Other Settlement Allocation on a *pro rata* basis based on their Public and Other Recognized Claim amounts.

A Settlement Class Member's total Recognized Claim equals the sum of that Settlement Class member's ERISA Recognized Claim, RIC Recognized Claim, and/or Public and Other Recognized Claim.

C. DISTRIBUTION OF NET CLASS SETTLEMENT FUND

Prior to the Effective Date, the Net Class Settlement Fund shall remain in an interest-bearing escrow account, except as otherwise provided in the Settlement Agreement. After the Class Settlement reaches its Effective Date, distributions to eligible Settlement Class Members will be made after Settlement Class Members have been notified of their ERISA Recognized Claim, RIC Recognized Claim, and Public and Other Recognized Claim amounts, and the Court has approved the Claims Administrator's determinations.

The Parties will use best efforts to seek Court approval to authorize an initial distribution of the Net Class Settlement Fund, including the RIC Settlement Allocation, within one year following the Effective Date of the Class Settlement. If a judgment is entered in the Class Action approving the Class Settlement, but an appeal is taken relating solely to approval of the requested attorneys' fees, Litigation Expenses, and/or Service Awards, Plaintiffs' Counsel will, subject to Court approval, proceed with an initial distribution of the Net Class Settlement Fund, including the RIC Settlement Allocation.

The Net Class Settlement Fund will be allocated among Class Members whose pro-rated distributions would be $10.00 or greater, given the fees and expenses associated with printing and mailing payments. If the prorated distribution to any Authorized Claimant calculates to less than $10.00, it will not be included in the calculation and no distribution will be made to that Authorized Claimant.

Defendants, their counsel, and all other Released Defendant Parties will have no liability whatsoever for the investment of the Class Settlement Fund, the distribution, or the payment of any claim consistent with the Settlement Agreement and the Court-approved Plan of Allocation. Plaintiffs and Plaintiffs' Counsel likewise will have no liability for their reasonable efforts to execute, administer, and distribute funds consistent with the Settlement Agreement and the Court-approved Plan of Allocation.

After initial distribution(s) of the Net Class Settlement Fund, if there is any balance remaining (whether by reason of tax refunds, uncashed checks or otherwise) after at least six (6) months from the date of prior distribution of the Net Class Settlement Fund, Lead Counsel shall, if feasible and economical, redistribute such balance among Authorized Claimants who have cashed their checks in an equitable and economic fashion until it is no longer economically feasible to do so. Any balance that still remains in the Net Class Settlement Fund after redistribution(s) that is not feasible or economical to reallocate, after payment of Notice and Administration Expenses, Taxes and Tax Expenses, and any other fees and costs approved by the Court, shall be contributed to one or more nonsectarian, not-for-profit, 501(c)(3) organizations serving the public interest approved by the Court.

9. When will I receive a payment?

Payment is conditioned on several matters, including the Court's approval of the Class Settlement (and the Judgment becoming Final), approval of the proposed Plan of Allocation (and that order becoming Final), approval of a distribution, and the DOL, and DOJ Settlements becoming final according to their terms. (They do not require court approval.) It is anticipated that at least a partial distribution will be made within one year of the Effective Date of the Class Settlement. However, a full distribution could take more than a year. Interest accrued on the Class Settlement Fund will be included in the amount allocated and paid to Settlement Class Members.

The Class Settlement may be terminated on several grounds, including if the Court does not approve the Class Settlement or the proposed Plan of Allocation. If the Class Settlement is terminated, there will be no distribution and the Class Actions will proceed as if the Class Settlement had not been reached.

10. Can I exclude myself from the Settlement Class?

If you do not want a payment from this Class Settlement, but you want to keep any right you may have to sue or continue to sue the Defendants and other Released Defendant Parties on your own about the Released Class Claims, then you must take steps to exclude yourself from the Settlement Class. This is called "opting out" of the class. Please note: SSBT may withdraw from and terminate the Class Settlement if Settlement Class Members who have a certain amount of Indirect FX Transactions exclude themselves from the Settlement Class, or a certain number of Settlement Class Members request exclusion.

To exclude yourself from the Settlement Class, you must send a signed letter by mail stating that you request to be "excluded from the Settlement Class in the *State Street Indirect FX Trading Class Action*, No. 11-CV-10230 (D. Mass.)." Your letter must include the following information: (i) the name of the Person that entered into one or more custody or trust agreements with SSBT and is requesting exclusion; (ii) the Person's address; (iii) the Person's telephone number; (iv) the Person's e-mail address; (v) the approximate date(s) of the agreement(s) referenced in (i) above; (vi) the SSBT entity that was the counterparty to the agreement(s) referenced in (i) above; (vii) a list of all current and former accounts, including both the name and account number of such accounts, that held foreign (non-U.S.) assets and were related to the agreement(s) referenced in (i) above; and

(viii) identification (including by case name, court name, and docket number) of all legal actions and claims (if any) that the Person requesting exclusion has brought against any of the Defendants relating to Indirect FX.

You must mail your exclusion request so that it is **received no later than October 7, 2016**, to:

State Street Indirect FX Trading Class Action
Claims Administrator
c/o A.B. Data, Ltd.
P.O. Box 173000
Milwaukee, WI 53217

You cannot exclude yourself by telephone or by e-mail. Your exclusion request must comply with these requirements in order to be valid, provided, however, that a request for exclusion shall not be invalid for failing to include the foregoing (i) - (vii) if SSBT determines it has sufficient information to determine that such Person is a Settlement Class Member and provides that information promptly to Lead Counsel.

If you request to be excluded in accordance with these requirements, you will not get any payment from the Net Class Settlement Fund, and you cannot object to the Class Settlement. However, you will not be legally bound by anything that happens in the Class Actions, and you may be able to sue Defendants and the other Released Defendant Parties in the future.

11. Do I have a lawyer in this case? How will the lawyers be paid?

Labaton Sucharow LLP has been appointed Lead Counsel for the Settlement Class. Lead Counsel, on behalf of ERISA Counsel and Customer Counsel, will apply to the Court for an award of attorneys' fees and payment of Litigation Expenses incurred during the prosecution and resolution of the Class Actions. The application for attorneys' fees will not exceed $74,541,250 (plus any accrued interest), which represents 25% of the $300,000,000 Class Settlement Fund, after first deducting Court-awarded Litigation Expenses (that will not exceed $1,750,000.00) and Court-awarded Service Awards for the seven Plaintiffs (that will not exceed $85,000.00 in the aggregate). You will not be charged directly by Plaintiffs' counsel. However, if you want to be represented by your own lawyer, you may hire one at your own expense.

The written applications for attorneys' fees, Litigation Expenses, and Service Awards of Plaintiffs will be filed with the Court by September 15, 2016, and the Court will consider these applications at the Final Approval Hearing. A copy of the applications will be available at www.StateStreetIndirectFXClassSettlement.com and www.labaton.com or by requesting a copy from Lead Counsel.

To date, none of the Plaintiffs' attorneys have received any payment for their services in prosecuting the Class Actions on behalf of the Settlement Class, nor have counsel been paid for their substantial expenses incurred in connection with litigating the Class Actions. The fee requested by Lead Counsel, on behalf of ERISA Counsel and Customer Counsel, would compensate counsel for their efforts in achieving the Class Settlement for the benefit of the Settlement Class and for their risk in undertaking this representation on a contingency basis. The Court will determine the actual amounts of any awards.

By following the procedures described in the answer to Question 12 below, you can tell the Court if you do not agree with the fees and expenses the attorneys and Plaintiffs intend to seek.

OBJECTIONS

12. How do I tell the Court if I do not like the Class Settlement, the Plan of Allocation, or something about the requests for attorneys' fees and expenses?

Any Settlement Class Member may appear at the Final Approval Hearing and explain why it thinks the Class Settlement should not be approved as fair, reasonable and adequate, why a judgment should not be entered, why the proposed Plan of Allocation should not be approved, why the attorneys' fees and expenses of Plaintiffs' counsel should not be awarded, in whole or in part, or why Plaintiffs should not be awarded Service Awards, in whole or in part. However, no Settlement Class Member shall be heard or entitled to contest these matters unless such Settlement Class Member has filed a written objection with the Court and served it on counsel.

To object, you must send a written statement saying that you object to the Class Settlement, the Plan of Allocation, the attorneys' fee request, expenses, and/or the Service Awards in *State Street Indirect FX Trading Class Action,* No. 11-CV-10230 (D. Mass.). Be sure to include your name, address, telephone number, e-mail address, signature, and a full explanation of all reasons why you object. You must also include the following information in order to confirm your membership in the Settlement Class: (i) the name of the Person that entered into one or more custody or trust agreements with SSBT and is objecting; (ii) the approximate date(s) of the agreement(s) referenced in (i) above; (iii) the SSBT entity that was the counterparty to the agreement(s) referenced in (i) above; (iv) a list of all current and former accounts, including both the name and account number of such accounts, that held foreign (non-U.S.) assets and were related to the agreement(s) referenced in (i) above.

If you cannot provide any of the information required under (i) - (iv), you may still object if you provide a written statement certifying that have undertaken best efforts to provide the missing information and your membership in the Settlement Class can otherwise be confirmed by the Parties.

Your written objection must be filed with the Court, and received by counsel listed below by no later than October 7, 2016:

File with the Clerk of the Court:

Clerk of the Court
United States District Court for the District of Massachusetts
John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Serve copies of all such papers by mail to each of the following:

Lead Counsel	Defendants' Counsel
Lawrence A. Sucharow, Esq. Labaton Sucharow LLP 140 Broadway New York, NY 10005	William H. Paine, Esq. Wilmer Cutler Pickering Hale and Dorr LLP 60 State Street Boston, MA 02109

Unless otherwise ordered by the Court, any Settlement Class Member who does not object in the manner described above will be deemed to have waived any objection and shall be forever foreclosed from making any objection to the proposed Class Settlement and the applications for attorneys' fees, Litigation Expenses, and any Service Awards.

THE COURT'S FINAL APPROVAL HEARING

13. When and where will the Court decide whether to approve the Class Settlement?

The Court will hold a Final Approval Hearing at 2:00 p.m. on November 2, 2016, before the Hon. Mark L. Wolf, at the United States District Court for the District of Massachusetts, John Joseph Moakley United States Courthouse, Courtroom 10, 1 Courthouse Way, Boston, Massachusetts 02210.

At the hearing, the Court will consider whether the Class Settlement is fair, reasonable and adequate. The Court will also consider any motions for attorneys' fees, expenses of Plaintiffs and Plaintiffs' Counsel, and Service Awards for Plaintiffs, as well as for approval of the proposed Plan of Allocation. If there are timely and valid objections, the Court will consider them. We do not know how long decisions on the motions will take.

14. Do I have to come to the hearing?

Lead Counsel will answer any questions that the Court may have about the Class Settlement and related relief at the Final Approval Hearing. You are not required to attend but are welcome to come at your own expense. If you send an objection, you do not have to come to Court to discuss it. As long as you filed your written objection on time, it will be before the Court when the Court considers whether to approve the Class Settlement, the Plan of Allocation, and/or the fee and expense requests. You may also have your own lawyer attend the Final Approval Hearing at your expense, but such attendance is not mandatory.

15. May I speak at the hearing?

If you are a Settlement Class Member and you have filed a timely objection, if you wish to speak, present evidence or present testimony at the Final Approval Hearing, you must state in your objection your intention to appear, and must identify any witnesses you intend to call or evidence you intend to present.

The Final Approval Hearing may be rescheduled by the Court without further notice to the Settlement Class. If you wish to attend the Final Approval Hearing, you should confirm the date and time with Lead Counsel.

IF YOU DO NOTHING

16. What happens if I do nothing at all?

If you do nothing and the Class Settlement is approved, you will be bound by the terms of the Class Settlement, will be deemed to have released all Released Class Claims against all of the Released Defendant Parties, and will receive your *pro rata* payment as described in Questions 7 and 8 above.

GETTING MORE INFORMATION

17. How do I get more information?

This Notice summarizes the proposed Class Settlement. Full details of the Class Settlement are set forth in the Settlement Agreement. Copies of the Settlement Agreement, as well as other litigation and settlement-related documents, may also be viewed at www.StateStreetIndirectFXClassSettlement.com and www.labaton.com.

You may also contact Lead Counsel at the contact information listed above, or the Claims Administrator toll-free at 877-240-3540.

Dated: August ___, 2016

BY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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

mww ~~[PROPOSED]~~ **ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, APPROVING FORM AND MANNER OF NOTICE, AND SETTING DATE FOR HEARING ON FINAL APPROVAL OF SETTLEMENT**

WHEREAS, as of July 26, 2016, (i) plaintiffs Arkansas Teacher Retirement System, Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employees Savings and Profit Sharing Plan and James Pehoushek-Stangeland (collectively, "Plaintiffs"), on behalf of themselves and each Settlement Class Member by and through their counsel, and (ii) State Street Bank and Trust Company (the "Settling Defendant" or "SSBT"), by and through its counsel, entered into a Stipulation and Agreement of Settlement (the "Settlement Agreement") in the above-titled actions (the "Class Actions"), which is subject to review under Rule 23 of the Federal Rules of Civil Procedure and which, together with the exhibits thereto, sets forth the terms and conditions of the proposed settlement of the claims alleged in the Class Actions on the merits and with prejudice (the "Class Settlement"); and

WHEREAS, the Court has reviewed and considered the Settlement Agreement and the accompanying exhibits; and*

WHEREAS, the Parties to the Settlement Agreement have consented to the entry of this order; and

WHEREAS, all capitalized terms used in this Order that are not otherwise defined herein have the meanings defined in the Settlement Agreement;

NOW, THEREFORE, IT IS HEREBY ORDERED, this 11th day of August, 2016 that:

1. The Court has reviewed the Settlement Agreement and preliminarily finds the Class Settlement set forth therein to be fair, reasonable, and adequate, subject to further consideration at the Final Approval Hearing described below.

2. Pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, the Court hereby certifies, for the purposes of the Settlement only, the Settlement Class of: All custody and trust customers of State Street Bank and Trust Company (including customers for

* and discussed the matter with the parties at a hearing on August 8, 2016

which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 2, 1998 through December 31, 2009, inclusive. Excluded from the Settlement Class are: Defendants; California Public Employees' Retirement System (CalPERS), California State Teachers' Retirement System (CalSTRS), and the State of Washington Investment Board; the predecessors and affiliates of the foregoing, or any entity in which they have a controlling interest; and the officers, directors, legal representatives, heirs, successors, subsidiaries and/or assigns of any such excluded individual or entity in their capacities as such. Also excluded from the Settlement Class are any Settlement Class Members who properly exclude themselves by submitting a valid and timely request for exclusion in accordance with the requirements set forth below and in the Notice.

3. The Court finds and concludes that the prerequisites of class action certification under Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedures have been satisfied for the Settlement Class defined herein and for the purposes of the Class Settlement only, in that:

(a) the members of the Settlement Class are so numerous that joinder of all Settlement Class Members is impracticable;

(b) there are questions of law and fact common to the Settlement Class Members;

(c) the claims of Plaintiffs are typical of the Settlement Class's claims;

(d) Plaintiffs and Counsel for the Settlement Class have fairly and adequately represented and protected the interests of the Settlement Class;

(e) the questions of law and fact common to Settlement Class Members predominate over any individual questions; and

(f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy, considering that the claims of Settlement Class Members in the Class Actions are substantially similar and would, if tried, involve substantially identical proofs and may therefore be efficiently litigated and resolved on an aggregate basis as a class action; the amounts of the claims of many of the Settlement Class Members are too small to justify the expense of individual actions; and it does not appear that there is significant interest among Settlement Class Members in individually controlling the litigation of their claims.

4. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Class Settlement only, Plaintiffs are certified as Class Representatives for the Settlement Class. The law firm of Labaton Sucharow LLP is appointed Lead Counsel for the Settlement Class, the law firm of Thornton Law Firm LLP is appointed Liaison Counsel for the Settlement Class, and the law firm of Lieff Cabraser Heimann & Bernstein LLP is appointed additional Counsel for the Settlement Class.

5. A hearing (the "Final Approval Hearing") pursuant to Rule 23(e) of the Federal Rules of Civil Procedure is hereby scheduled to be held before the Court on November 2, 2016, at 2:00 p.m. for the following purposes:

(a) to determine whether the proposed Class Settlement is fair, reasonable and adequate, and should be approved by the Court;

(b) to determine whether the proposed Final Order and Judgment ("Judgment") as provided under the Settlement Agreement should be entered, and to determine

whether the release by the Settlement Class of the Released Class Claims, as set forth in the Settlement Agreement, should be provided to the Released Defendant Parties;

(c) to determine, for purposes of the Class Settlement only, whether the Settlement Class should be finally certified; whether Plaintiffs should be finally certified as Class Representative for the Settlement Class; whether the law firm of Labaton Sucharow LLP should be finally appointed as Lead Counsel for the Settlement Class; whether the law firm of Thornton Law Firm LLP should be finally appointed as Liaison Counsel for the Settlement Class; and whether the law firm of Lieff Cabraser Heimann & Bernstein LLP should be finally appointed as additional Counsel for the Settlement Class.

(d) to determine whether the proposed Plan of Allocation for the proceeds of the Class Settlement is fair and reasonable and should be approved by the Court;

(e) to consider Lead Counsel's application, on behalf of ERISA Counsel and Customer Counsel, for an award of attorneys' fees, Litigation Expenses, and Service Awards to Plaintiffs; and

(f) to rule upon such other matters as the Court may deem appropriate.

6. The Court reserves the right to approve the Class Settlement with or without modification and with or without further notice to the Settlement Class of any kind. The Court further reserves the right to enter the Judgment approving the Class Settlement regardless of whether it has approved the Plan of Allocation or awarded attorneys' fees and/or expenses. The Court may also adjourn the Final Approval Hearing or modify any of the dates herein for good cause shown and without further notice to members of the Settlement Class.

7. The Court approves the form, substance and requirements of the Notice of Pendency of Class Actions, Proposed Settlement, Settlement Hearing, Plan of Allocation, and

any Motion for Attorneys' Fees, Litigation Expenses, and Service Awards (the "Notice"), substantially in the form annexed hereto as Exhibit 1.

8. The Court approves the retention of A.B. Data, Ltd. as the Claims Administrator. The Claims Administrator shall cause the Notice, substantially in the form annexed hereto, to be mailed, by first-class mail, postage prepaid, on or before August 22, 2016 ("Notice Date"), to all Settlement Class Members who can be identified with reasonable effort. SSBT, to the extent it has not already done so, shall use its best efforts to obtain and provide to Lead Counsel, or the Claims Administrator, information in electronic searchable form containing the names and addresses of Settlement Class Members no later than five (5) business days after entry of this Preliminary Approval Order.

9. The Court approves the form of the Summary Notice of Pendency of Class Actions, Proposed Settlement, Settlement Hearing, Plan of Allocation, and any Motion for Attorneys' Fees, Litigation Expenses, and Service Awards ("Publication Notice"), substantially in the form annexed hereto as Exhibit 2, and directs that Lead Counsel shall cause the Publication Notice to be published in *The Wall Street Journal* and be transmitted over *PR Newswire* no later than September 6, 2016.

10. Lead Counsel shall, at or before the Final Approval Hearing, file with the Court proof of mailing of the Notice and publication of the Publication Notice.

11. As set forth in the Notice, Settlement Class Members that are Group Trusts shall submit certifications in compliance with the requirements set forth in the Notice to the Claims Administrator postmarked no later than December 20, 2016. Such deadline may be further extended by Court order or by Lead Counsel in its discretion. Each certification shall be deemed to have been submitted when postmarked (if properly addressed and mailed by first-class or

overnight U.S. mail, postage prepaid) provided such certification is actually received prior to the motion for an order of the Court approving distribution of the Net Class Settlement Fund. Any certification submitted in any other manner shall be deemed to have been submitted when it was actually received at the address designated in the Notice.

12. The form and content of the notice program described herein, and the methods set forth herein of notifying the Settlement Class of the Class Settlement and its terms and conditions, meet the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Constitution of the United States (including the Due Process Clause), the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and all other applicable laws and rules, constitute the best notice practicable under the circumstances, and shall constitute due, adequate, and sufficient notice to all persons and entities entitled thereto.

13. Any Settlement Class Member may enter an appearance in the Class Actions, at his, her or its own expense, individually or through counsel of his, her or its own choice. If any Settlement Class Member does not enter an appearance, he, she or it will be represented by Lead Counsel.

14. Settlement Class Members shall be bound by all orders, determinations and judgments in these Class Actions concerning the Class Settlement, whether favorable or unfavorable, unless such Persons request exclusion from the Settlement Class in a timely and proper manner, as hereinafter provided. A putative Settlement Class Member wishing to make such an exclusion request shall mail the request in written form by first-class mail to the address designated in the Notice for such exclusions, such that it is received no later than October 7, 2016. Such request for exclusion must include the following information: (i) the name of the Person that entered into one or more custody or trust agreements with SSBT and is requesting

exclusion; (ii) the Person's address; (iii) the Person's telephone number; (iv) the Person's e-mail address; (v) the approximate date(s) of the agreement(s) referenced in (i) above; (vi) the SSBT entity that was the counterparty to the agreement(s) referenced in (i) above; (vii) a list of all current and former accounts, including both the name and account number of such accounts, that held foreign (non-U.S.) assets and were related to the agreement(s) referenced in (i) above; (viii) a signed statement that the Person wishes to be excluded from the Settlement Class in the Class Actions; and (ix) identification (including by case name, court name, and docket number) of all legal actions and claims (if any) that the Person requesting exclusion has brought against any of the Defendants relating to Indirect FX. The request for exclusion shall not be effective unless it provides the required information and is made within the time stated above, or the exclusion is otherwise accepted by the Court, provided, however, that a request for exclusion shall not be invalid for failing to include the foregoing (i) - (vii) if the Settling Defendant determines that it has sufficient information to determine that such Person is a Settlement Class Member and provides that information promptly to Lead Counsel.

15. Settlement Class Members requesting exclusion from the Settlement Class shall not be eligible to receive any payment out of the Net Class Settlement Fund, as described in the Settlement Agreement and Notice.

16. The Court will consider any Settlement Class Member's objection to the Class Settlement, the Plan of Allocation, and/or the application for an award of attorneys' fees or expenses only if such Settlement Class Member has served by hand or by mail his, her or its written objection and supporting papers, such that they are received on or before October 7, 2016, upon Lead Counsel: Lawrence A. Sucharow, Labaton Sucharow LLP, 140 Broadway, New York, NY 10005 (who will immediately copy all Plaintiffs' Counsel); and Defendant's

Counsel: William H. Paine, Wilmer Cutler Pickering Hale and Dorr LLP, 60 State Street, Boston, MA 02109 and has filed said objections and supporting papers with the Clerk of the Court, United States District Court for the District of Massachusetts, John Joseph Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts 02210. Any Settlement Class Member who does not make his, her, or its objection in the manner provided for in the Notice shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to any aspect of the Class Settlement, to the Plan of Allocation, or to the request for attorneys' fees and expenses, unless otherwise ordered by the Court, but shall otherwise be bound by the Judgment to be entered and the releases to be given. Attendance at the hearing is not necessary, however, persons wishing to be heard orally in opposition to the approval of the Class Settlement, the Plan of Allocation, and/or the application for an award of attorneys' fees and expenses are required to indicate in their written objection their intention to appear at the hearing. Persons who intend to object to the Class Settlement, the Plan of Allocation, and/or the application for an award of attorneys' fees and expenses and desire to present evidence at the Final Approval Hearing must include in their written objections the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Final Approval Hearing. Settlement Class Members do not need to appear at the hearing or take any other action to indicate their approval.

17. Pending final determination of whether the Class Settlement should be approved, all proceedings in these Class Actions (other than those necessary to effectuate the Settlement) are stayed and Plaintiffs, all Settlement Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence or prosecute any action which asserts Released Class Claims against the Released Defendant Parties.

18. As provided in the Settlement Agreement, prior to the Effective Date, Lead Counsel may pay the Claims Administrator the reasonable fees and costs associated with giving notice to the Settlement Class and the administration of the Class Settlement out of the Class Settlement Fund without further approval from Defendants and without further order of the Court.

19. All papers in support of the Class Settlement, Plan of Allocation, and Lead Counsel's request, on behalf of ERISA Counsel and Customer Counsel, for an award of attorneys' fees and expenses shall be filed with the Court and served on or before September 15, 2016. If reply papers are necessary, they are to be filed with the Court and served no later than October 21, 2016.

20. No later than October 19, 2016, Defendants shall file with the Court and serve a statement reporting whether an option to withdraw from and terminate the Settlement Agreement and Class Settlement has arisen under the terms of the Parties' Supplemental Agreement, and if such option has arisen, reporting Defendants' current intentions with regard thereto. Such statement shall be without prejudice to Defendants' filing with the Court and serving an updated statement if relevant circumstances change.

21. The passage of title and ownership of the Class Settlement Fund to the Escrow Agent in accordance with the terms and obligations of the Settlement Agreement is approved. No person who is not a Settlement Class Member or Plaintiffs' Counsel shall have any right to any portion of, or to any distribution of, the Net Class Settlement Fund unless otherwise ordered by the Court or otherwise provided in the Settlement Agreement.

22. All funds held in escrow shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court until such time as such funds shall be disbursed pursuant to the Settlement Agreement and/or further order of the Court.

23. Except as otherwise provided in the Settlement Agreement, neither Defendants nor their counsel shall have any responsibility for the Plan of Allocation or any application for attorney's fees or expenses submitted by Lead Counsel, on behalf of ERISA Counsel and Customer Counsel, or Plaintiffs, and such matters shall be considered separately from the fairness, reasonableness and adequacy of the Class Settlement.

24. If the Class Settlement fails to become effective as defined in the Settlement Agreement or is terminated, then, in any such event, the Settlement Agreement, including any amendment(s) thereof, except as expressly provided in the Settlement Agreement, and this Preliminary Approval Order shall be null and void, of no further force or effect, and without prejudice to any Party, and may not be introduced as evidence or used in any actions or proceedings by any person or entity against the Parties, and the Parties shall be deemed to have reverted to their respective litigation positions in the Class Actions as of June 29, 2015.

25. The Court retains exclusive jurisdiction over the Class Actions to consider all further matters arising out of or connected with the Class Settlement.

Dated: August 11, 2016

HON. MARK L. WOLF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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

[PROPOSED] MEMORANDUM OF LAW IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, PAYMENT OF LITIGATION EXPENSES, AND PAYMENT OF SERVICE AWARDS TO PLAINTIFFS

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Labaton Sucharow LLP ("Labaton Sucharow"), attorneys for Plaintiff Arkansas Teacher Retirement System ("ARTRS") and Court-appointed Lead Counsel[1] for the Settlement Class, respectfully submits this memorandum of law on behalf of all Plaintiffs' Counsel[2] in support of its motion, pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an award of attorneys' fees, payment of Litigation Expenses, and payment of Service Awards to Plaintiff ARTRS as well as Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland (collectively, the "ERISA Plaintiffs," and together with ARTRS, "Plaintiffs") in connection with the proposed Settlement of these consolidated Class Actions.

Preliminary Statement

The efficient, focused efforts of Plaintiffs' Counsel, pursuant to an innovative mediation and discovery program endorsed by this Court, have produced an extraordinary Settlement in which State Street Bank and Trust Company ("State Street") has agreed to pay $300,000,000 in cash for the benefit of the Settlement Class. The Settlement, which equals approximately 20% of estimated damages, is by far the largest common fund settlement in any case brought under Chapter 93A, and is the third-largest common fund settlement, excluding federal securities actions, to be filed within the First Circuit.

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[1] Unless otherwise indicated, capitalized terms have the same meanings as in the Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the "Settlement Agreement," ECF No. 89).

[2] In addition to Labaton Sucharow, Plaintiffs' Counsel includes Thornton Law Firm LLP ("TLF"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), McTigue Law LLP ("McTigue Law"), and Zuckerman Spaeder LLP ("Zuckerman Spaeder"). Labaton Sucharow, TLF, and Lieff Cabraser are counsel in the *ARTRS* Action, which asserted class claims on behalf of all otherwise eligible custody clients of State Street (including ERISA plans) for violations of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("Chapter 93A"), §§ 9, 11, and for breach of fiduciary duty and negligent misrepresentation. Keller Rohrback and McTigue Law/Zuckerman Spaeder are counsel in the *Andover Companies* and *Henriquez* Actions, respectively, which asserted federal statutory claims under ERISA solely for the benefit of ERISA plan custody clients of State Street.

Lead Counsel, on behalf of all Plaintiffs' Counsel, respectfully seeks an attorneys' fee of $74,541,250, or approximately 24.85% of the Class Settlement Fund, plus any accrued interest.[3] Lead Counsel also respectfully seeks payment of Litigation Expenses in the amount of $1,257,697.94, and Service Awards to Plaintiffs totaling $85,000.

The 24.85% requested fee falls comfortably within the range of fees that courts within this Circuit generally award in class action settlements, and have awarded in "megafund" settlements of $100 million or more. The fee aligns with the mean and median of percentage fees awarded in 444 settlements in all federal courts in 2006 and 2007. The fee is comparable to the 25% fee awarded in the similar Bank of New York Mellon indirect FX class action ("*BNYM FX*"), which recently settled for $335 million in customer class recovery.

Further, the requested fee is reasonable given the risk assumed by Plaintiffs' Counsel in undertaking this factually and legally complex case, before *BNYM FX* was commenced and before the SEC, DOL, and DOJ arrived on the scene; the large average recovery per-Class member achieved here for an atypically small Settlement Class; the time invested in the mediation and discovery process and preparation for potential litigation; and the challenges of negotiating a fair, reasonable and adequate Settlement Agreement and Plan of Allocation acceptable to State Street, DOL, and the SEC as well as Plaintiffs.

Comparison of the requested fee to Plaintiffs' Counsel's lodestar confirms that the fee is reasonable. A lodestar "cross-check" yields a multiplier of 1.8, which is relatively low and appropriate in view of the risk undertaken, the work performed, and the results achieved.

[3] The requested fee is equivalent to 25% of the Class Settlement Fund after deduction of the maximum Litigation Expenses disclosed in the Notice ($1,750,000) and the maximum Service Awards disclosed in the Notice ($85,000). Lead Counsel seeks this fee despite the fact that actual Litigation Expenses are substantially less than $1.75 million (*see* Part III below), and regardless of whether Service Awards are granted in full.

ARGUMENT

I. STANDARDS GOVERNING ATTORNEYS' FEE AWARDS IN COMMON FUND CLASS ACTIONS

A. The Common Fund Doctrine

This Court, having certified the Settlement Class in the Preliminary Approval Order (ECF No. 97, ¶ 3), has discretion to award Lead Counsel "reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h).

Under the common fund doctrine, where counsel succeeds in obtaining a fund that benefits the class, they are entitled to "a reasonable attorney's fee from the fund as a whole. . . . Jurisdiction over the fund involved in the litigation allows a court to prevent . . . inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The doctrine is rooted in "the equitable principle that those who have profited from litigation should share its costs." *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995).

B. The Percentage-of-Fund Method of Determining Attorneys' Fees Prevails in This Circuit

In a common fund case, this Court retains discretion to calculate attorneys' fees either by the percentage-of-fund ("POF") method or the lodestar method. *See Thirteen Appeals*, 56 F.3d at 307. The First Circuit recognized that "use of the POF method in common fund cases is the prevailing praxis," however, and noted the "distinct advantages" of the POF method over the lodestar method. *Id.*

The court explained that because the POF method is result-oriented, whereas the lodestar method is process-oriented, the POF method is less burdensome for the court, it enhances the

efficiency of plaintiffs' counsel, and it "better approximates the workings of the marketplace." *Id.*; *see also Missouri v. Jenkins*, 491 U.S. 274, 285 (1989) (reasonable percentage fee generally should emulate what counsel would receive had they been bargaining for services in the marketplace); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 265 (D.N.H. 2007) ("The POF method is appropriate in common fund cases because it 'rewards counsel for success and penalizes it [counsel] for failure.'") (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995)).

Thus, at least since *Thirteen Appeals*, courts within this Circuit overwhelmingly have applied the POF method in common fund class actions. *See*, *e.g.*, *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 11-MD-02208-MAP, 2014 WL 6968424, at *6-7 (D. Mass. Dec. 9, 2014) (collecting cases); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 458 (D.P.R. 2011) (POF "methodology is favored in this Circuit"); *cf. Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53, 66 (D. Mass. 2015) (using lodestar method in coupon settlement "because using the percentage-of-recovery method would result in a substantial reduction of attorneys' fees from what class counsel has requested, which is unwarranted here").[4]

C. Factors Commonly Considered By Courts Within This Circuit

Although the First Circuit has not set forth a specific list of factors for use in assessing the reasonableness of a fee request, courts within this Circuit generally consider:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations, if any.

[4] In *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819 (D. Mass. 1987) (Wolf, J.), which predates *Thirteen Appeals*, this Court awarded a fee calculated using the lodestar method because it was paid by defendants directly to plaintiffs' counsel. The settlement was not a common fund settlement. *Id.* at 825-26.

E.g., *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 WL 632238, at *8 (D.R.I. Feb. 17, 2016) (quoting *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005)); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014); *Puerto Rican Cabotage*, 815 F. Supp. 2d at 458.

As discussed below, each of these factors supports the requested fee.

II. THE REQUESTED ATTORNEYS' FEE IS REASONABLE AND SHOULD BE AWARDED FROM THE CLASS SETTLEMENT FUND

A. The Requested Fee Is Reasonable When Assessed Under the Relevant Factors

1. The Requested Fee Aligns With the "Benchmark" Fee in This Circuit and Awards in Comparable Settlements

An attorneys' fee of 24.85% falls comfortably within the range of fees regularly awarded by courts within this Circuit. "Within the First Circuit, courts generally award fees 'in the range of 20-30%, with 25% as the benchmark.'" *Bezdek v. Vibram USA, Inc.*, 79 F. Supp. 3d 324, 349-50 (D. Mass.) (quoting *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25, 27 (D. Mass. 2011) (collecting cases)), *aff'd*, 809 F.3d 78 (1st Cir. 2015); *see id.* at 350 ("The plaintiffs' request for 25% of the settlement fund in fees falls squarely within what is recognized in this circuit as the range of reasonable POF amounts."); *Prudential*, 2014 WL 6968424, at *6 ("[T]he requested fees are 24.8% of the total settlement, a percentage that is reasonable in this matter and in line with the general range in this Circuit.").[5] The Court's remarks during the June 23, 2016

[5] *See also*, *e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *5 (D. Mass. Aug. 17, 2005) ("Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent.") (citing cases); *Puerto Rican Cabotage*, 815 F. Supp. 2d at 463 (adopting lead counsel's "concession" that "[c]ourts in this Circuit frequently have recognized that fee awards in common fund cases typically range from 20 to 30 percent"); *Kingsborough v. Sprint Commc'ns Co. L.P.*, Civ. No. 14-12049-NMG, 2015 WL 1605506, at *2 (D. Mass. Apr. 8, 2015) ("At 25% of the common fund, the fee and expense request is reasonable.") (citing cases); *Mazola v. May Dep't Stores Co.*, No. 97 CV 10872-NG, 1999 WL 1261312, at *4 (D. Mass. Jan. 27, 1999) ("The normal percentage awarded by federal courts is 20-30% of the value of the settlement,

Status Conference in this action appear to be in accord.[6]

A fee short of 25% is further shown to be reasonable when compared to POF fees awarded in common fund settlements of comparable size within this Circuit. *See Puerto Rican Cabotage*, 815 F. Supp. 2d at 462 (investigating "fees awarded in other, similar, individual cases within the First Circuit"); *Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 685 (D. Md. 2013) ("In considering awards in similar cases, courts look to cases of similar size, rather than similar subject matter."). For this purpose, Lead Counsel defines "comparable size" as any settlement of $100 million or more. *See Neurontin*, 58 F. Supp. 3d at 170 (referring to class actions yielding settlement funds exceeding $100 million as "megafund" cases).

The following chart sets forth the eight (8) such settlements in descending percentage fee order, with this proposed Settlement and fee added for illustration:

with 25% being a 'benchmark.' [D]istrict court cases . . . show that, in this circuit, percentage fee awards range from 20% to 35% of the fund. This approach mirrors that taken by the federal courts in other jurisdictions.").

[6] *See* June 23, 2016 Status Conf. Transcript, Exhibit 26 to accompanying Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Counsel Declaration" or "Counsel Decl."), at 15:18-16:2. Throughout this brief, citations to "Ex. ___" refer to exhibits to the Counsel Declaration.

Class Action	POF Fee Awarded	Settlement Amount	Lodestar Multiplier
DuPont Plaza (D.P.R. 1995) (mass tort)	**30.9%**	$220 million	n/a[7]
Neurontin (D. Mass. 2014) (drug marketing and sales)	**26.65%**[8]	$325 million	3.32
CVS (D. Mass. 2005) (securities)[9]	**25%**	$110 million	3.27
State Street *(D. Mass. 2016) (unfair and deceptive acts and practices/ERISA)*	***24.85%***	***$300 million***	***1.8***
Lupron (D. Mass. 2005) (drug marketing and sales)	**23.79%**[10]	$150 million	1.41
First Databank (D. Mass. 2009) (drug marketing and sales)[11]	**20%**	$350 million	8.3
Lernout & Hauspie (D. Mass. 2004) (securities)[12]	**20%**	$120.52 million	1.4
Tyco (D.N.H. 2007) (securities)	**14.5%**	$3.2 billion	2.7
Raytheon (D. Mass. 2004) (securities)[13]	**9%**	$460 million	3.15

[7] The lodestar multiplier is unknown because fees were reallocated on appeal between two groups of plaintiffs' counsel. *See Thirteen Appeals*, 56 F.3d at 312.

[8] The total award in *Neurontin* was 28% of the common fund, including $4.38 million in expenses. 56 F. Supp. 3d at 170, 172-73.

[9] Order and Final Judgment, *In re CVS Corp. Sec. Litig.*, Civ. No. 01-11464 JLT (D. Mass. Sept. 8, 2005), ¶ 13 (Ex. 27).

[10] The total award in *Lupron* was 25% of the common fund, including $1.82 million in expenses. 2005 WL 2006833, at *2, 7.

[11] *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, Civ. No. 05-11148-PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009).

[12] Order and Final Judgment, *In re Lernout & Hauspie Sec. Litig.*, No. 01-CV-11589 PBS (D. Mass. Dec. 22, 2004), ¶ 14 (Ex. 28).

[13] Order and Final Judgment, *In re Raytheon Co. Sec. Litig.*, Civ. No. 99-12142-PBS (D. Mass. Dec. 6, 2004), ¶ 14 (Ex. 29).

The requested 24.85% fee is facially reasonable in comparison with those awarded in the *DuPont Plaza* action and in *Neurontin*, *CVS*, and *Lupron*, and, as further discussed in Part II.B below, yields a lodestar multiplier far lower than those approved in *Neurontin* and *CVS* and comparable to the multiplier approved in *Lupron*.

The percentage fees awarded in *First Databank*, *Raytheon*, and *Tyco* do not undermine the reasonableness of the fee sought. In *First Databank*, plaintiffs' counsel requested a fee that represented a multiplier of 10.05. 2009 WL 2408560, at *1. The court, while agreeing that "several factors militate in favor of a significant multiplier," found that multiplier too high under the circumstances and awarded a fee that reduced the multiplier to 8.3. *Id.* at *2. The multiplier yielded by the requested fee here is far smaller than 8.3. *See also Bezdek*, 79 F. Supp. 3d at 351 (similarly citing *First Databank* in awarding 25% fee).

The 9% fee requested and granted in *Raytheon* was a plainly a function of plaintiffs' counsel's *ex ante* retainer agreement with the lead plaintiff New York State Common Retirement Fund, one of the nation's largest public pension funds.[14] Even so, the 3.15 lodestar multiplier reflected in the fee granted in *Raytheon* far exceeds the multiplier sought here.

Tyco is an outlier given that the $3.2 billion gross recovery there is more than nine times larger than this Settlement. *See Tyco*, 535 F. Supp. 2d at 266 (referring to $1 billion-plus settlements as "super mega-fund" cases). At the time, *Tyco* was the second-largest securities class action settlement in history, and it remains the fourth-largest today. Plaintiffs' counsel in *Tyco* requested a 14.5% fee after that percentage was recommended by two retired federal judges, and the court granted the fee because it fell within the range of POF fees awarded in the

[14] *See* Declaration of Alan P. Lebowitz, General Counsel to the Comptroller of the State of New York, *In re Raytheon Co. Sec. Litig.*, Civ. No. 99-12142-PBS (D. Mass. Nov. 23, 2004), ¶ 9 (Ex. 30).

16 largest securities settlements, with recoveries from $400 million to $6.13 billion. *Id.* at 266 & n.13, 267-68. That analysis supports the approach taken above and the reasonableness of the requested 24.85% fee.

Some courts, at least in "megafund" cases, have "lower[ed] the fee award percentage as the size of the settlement increases to avoid giving attorneys a windfall at the plaintiffs' expense." *Neurontin*, 58 F. Supp. 3d at 170 (citing *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374-75 (S.D.N.Y. 2013) (awarding 16% of $730 million settlement)). Other courts have disfavored this practice, however, and courts in this Circuit resist it.

In *Lupron*, for example, the court adopted the Ninth Circuit's conclusion that "the argument for a reduction of the percentage award as the size of a settlement fund increases reflects neither reality nor sound judicial policy," and granted the requested 25% fee and expense award. 2005 WL 2006833, at *6 (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 n.4, 1052 (9th Cir. 2002)).[15] In *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 81 (D. Mass. 2005), the court granted the requested fee of 33-1/3% of $67 million in class recovery, finding that despite "several cases that suggest that the standard percentage is generally lower as the common fund increases . . . , the requested fee is not out of proportion with large class actions."

In *Neurontin*, Chief Judge Saris reduced fees and expenses from the requested 33-1/3% of the $325 million settlement fund to 28%. That was based, however, on an empirical study of class action fee awards (discussed below), not the declining percentage principle, which "[s]ome courts have rejected[.]" 58 F. Supp. 3d at 171-72. Indeed, the 26.65% fee awarded in *Neurontin*

[15] *See also In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 174 (3d Cir. 2006) ("[T]here is no rule that a district court must apply a declining percentage reduction in every settlement involving a sizable fund.") (quoting *In re Rite-Aid Corp. Sec. Litig.*, 396 F.3d 294, 303 (3d Cir. 2005)); *In re Cendant Corp. Litig.*, 264 F.3d 201, 284 n.55 (3d Cir. 2001) (recognizing that declining percentage principle is "criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply").

is higher the 24.85% fee sought here. The fee and $1,257,697.94 in Litigation Expenses requested here together equals 25.27% of the Class Settlement Fund, a percentage that similarly is below the 28% reduced combined award in *Neurontin* and is comparable to the 25% combined award in *Lupron.*[16]

One recent common fund settlement is not only of similar size, but also of the same essential subject matter: *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y.) ("*BNYM FX*"). Following the unsealing of several *qui tam* lawsuits, BNYM's custody clients asserted claims for, *inter alia*, unfair and deceptive acts and practices, violations of ERISA, and breach of fiduciary duty premised on a broadly similar alleged practice of excessive concealed markups on indirect FX transactions. *See International Union of Operating Eng'rs v. The Bank of N.Y. Mellon Corp.*, No. C 11-03620 WHA, 2012 WL 476526 (N.D. Cal. Feb. 14, 2012) ("*IUOE*").

In March 2015, the parties in *BNYM FX*, and various government agencies including the DOJ, SEC, DOL, and New York Attorney General, announced settlements totaling $714 million. This omnibus relief included a $335 million payment by BNYM specifically to settle the private customer class cases. The plaintiffs' counsel sought, and received, a fee of 25% of the $335 million recovery ($83.75 million), plus expenses.[17] The percentage fee requested here is slightly lower, on a comparable class settlement amount. *See* Counsel Decl. ¶¶ 34, 173-174.

Empirical studies also support the requested fee. An in-depth review of all 688 class action settlements in federal courts during 2006 and 2007 found that the mean and median fees

[16] In *Lernout & Hauspie*, Chief Judge Saris reduced the 25% fee requested by plaintiffs' counsel to 20%. The court did not issue an opinion, however, and the record does not otherwise reveal the court's reasoning.

[17] Order Awarding Attorneys' Fees, Service Awards, and Reimbursement of Litigation Expenses, *In re Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Sept. 24, 2015), ¶ 5 (Ex. 14).

awarded in the 444 settlements where the POF method was used (either with or without a lodestar cross-check) were 25.7% and 25.0%, that the mean and median fees awarded in securities cases (233 of 444) were 24.7% and 25.0%, and that the mean and median fees awarded in consumer cases (39 of 444) were 23.5% and 24.6%. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 835 (2010) (Ex. 31); *see also Neurontin*, 58 F. Supp. 3d at 172 (favorably citing this study).[18] The 24.85% fee requested is right in line with Professor Fitzpatrick's findings.

2. Plaintiffs' Counsel Have Achieved a "Mega" Settlement for a "Mini" Class

The result achieved is among the most important factors to be considered in making a fee award. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("[T]he most critical factor is the degree of success obtained."). The $300 million Settlement—which equals approximately 20% of total estimated damages—is by far the largest common fund settlement in any case brought under Chapter 93A,[19] and is the third-largest common fund settlement, excluding federal securities actions, to be filed within the First Circuit. *See First Databank*, 2009 WL 2408560, at *2 ("Several factors militate in favor of a significant multiplier. Plaintiffs point out that they successfully achieved a mega-amount of $350,000,000 . . . ."); Counsel Decl. ¶¶ 6, 122-125.

The requested fee is further supported by the atypically small size of the Settlement Class, which numbers roughly 1,300 custody clients of State Street. Whereas in most megafund

[18] Professor Fitzpatrick also found, consistent with the in-Circuit cases cited above, that the mean and median fees awarded in settlements in the First Circuit (23 of 444) were 27.0% and 25.0%. *Id.* at 836.

[19] *Cf. In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516 (3d Cir. 2004) ($44.5 million settlement in class action asserting claims under all 50 States' deceptive acts and practices and antitrust statutes); Final Order Approving Class Action Settlement, *In re Reebok Easytone Litig.*, No. 10-CV-11977 FDS (D. Mass. Jan. 19, 2012) ($25 million settlement in class action asserting Chapter 93A and other state-law claims) (Ex. 32); *Commonwealth Care Alliance v. Astrazeneca Pharms. L.P.*, Civ. A. No. 05-0269 BLS 2, 2013 WL 6268236 (Mass. Super. Ct. Aug. 5, 2013) ($20 million settlement in Chapter 93A class action).

settlements, the average recovery per class member is modest owing to a "class of not insignificant size," *Medoff*, 2016 WL 632238, at *8, Plaintiffs' Counsel here have obtained a megafund Settlement that, as disclosed in the Notice, will provide each Settlement Class member an average gross recovery of $200,000.

The Plan of Allocation, which is discussed more fully in Plaintiffs' concurrently filed brief in support of final approval of the Settlement, includes certain terms that merit attention here. The Plan divides, or allocates, the $300 million Class Settlement Fund into three necessarily unequal parts, including the ERISA Settlement Allocation, which is $60 million and goes to Class members that are ERISA Plans and eligible Group Trusts. Group Trusts are the 55 Class members that have custodied assets that are governed by ERISA and also assets that are not. The claims of other Class Members are satisfied from the RIC Settlement Allocation and Public and Other Settlement Allocation. *See* Counsel Decl. ¶¶ 132, 134, 140, 142.

ERISA Plans and eligible Group Trusts will receive greater settlement recovery per dollar of Indirect FX Trading Volume than other Class members. This premium results from two provisions of the Plan.

First, ERISA Plans and eligible Group Trusts represent 9%-15% of the total Indirect FX Trading Volume (depending on what portion of the Group Trusts' volume actually falls under ERISA), but they are being allocated 20% ($60 million) of the $300 million gross Class Settlement Fund.

Second, no more than $10.9 million of the attorneys' fees awarded by the Court will be deducted from the ERISA Settlement Allocation. The remainder of the fee will be applied to the RIC Settlement Allocation and Public and Other Settlement Allocation proportionately by volume. If, for example, the Court awards the requested 24.85% fee, ERISA Plans and eligible

Group Trusts will pay fees at a lower percentage rate than other Class members. *See* Counsel Decl. ¶¶ 135-138.

These allocation provisions do not relate to the $300 million common fund created by the efforts of Plaintiffs' Counsel. Nor do they bear on the reasonableness of the requested fee as a percentage of the $300 million Settlement produced as a result of those efforts. Both allocation provisions, the $60 million ERISA Settlement Allocation and the $10.9 million fee cap, were agreed-to after Plaintiffs and State Street had already reached their agreement-in-principle on the $300 million Class Settlement Fund. *See* Declaration of Jonathan B. Marks, Ex. 5, ¶¶ 20-21; Counsel Decl. ¶ 139. Indeed, the fee cap was not even raised by DOL until weeks after the agreement-in-principle. *Id.*

Both allocation provisions, moreover, are (1) the product of arm's-length bargaining and agreement among Lead Counsel, ERISA Counsel, and DOL; (2) reflect the exclusive availability of remedies to ERISA Plans and eligible Group Trusts under the federal ERISA laws (not available to other Class Members); and (3) are necessary conditions of DOL's assent to the entire Settlement. Counsel Decl. ¶¶ 138-139. Without these provisions, DOL would not have resolved its investigation of State Street, and without a resolution of that regulatory matter, State Street would not have proceeded with the Settlement. Counsel Decl. ¶¶ 140-141.

3. Plaintiffs' Counsel Assumed Substantial Contingency Risk

"Many cases recognize that the risk assumed by an attorney is 'perhaps the foremost factor' in determining an appropriate fee award." *Lupron*, 2005 WL 2006833, at *4 (quoting *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 54 (2d Cir. 2000)).

Plaintiffs' Counsel undertook this litigation with no assurance of compensation or recovery of costs, and faced substantial risk from the outset. These Class Actions are atypical

with respect to the nature of the defendant, the subject matter, and the application of the statutory claims, and are in many respects hybrids between consumer, securities, and ERISA actions. Besides State Street, there are only four major U.S. custody banks: BNYM, JPMorgan Chase, Citibank, and Northern Trust. These banks were rarely, if ever, sued in relation to their custody businesses before these indirect FX pricing issues first began to surface. Counsel Decl. ¶¶ 164-166.

This action was the first indirect FX case. The *ARTRS* Action has its origin in an April 2008 *qui tam* complaint filed under seal by Associates Against FX Insider Trading, a Relator represented by Plaintiffs' Counsel TLF and Lieff Cabraser, on behalf of California public pension funds. That lawsuit was unsealed in October 2009 by the intervention of the Attorney General of California, revealing for the first time that State Street was charging its custody clients allegedly large undisclosed markups on Indirect FX transactions. ARTRS retained Lead Counsel to investigate potential claims against State Street shortly thereafter. The first of several sealed *qui tam* complaints against BNYM was not filed until October 2009, and the first government intervention and unsealing occurred in January 2011. *See* Counsel Decl. ¶¶ 24-25, 33, 35-36.

ARTRS's initial Class Action Complaint, filed on February 10, 2011 (ECF No. 1), was thus the first complaint filed publicly against a custody bank concerning indirect FX. The Class Action Complaint preceded the many class action complaints filed against BNYM, all of which were later centralized in the Southern District of New York in 2012 as the *BNYM FX* litigation. ARTRS's operative Amended Complaint, filed April 15, 2011 (ECF No. 10), similarly was filed before all but one of the constituent *BNYM FX* complaints, and predated all the rulings on

motions to dismiss those complaints. *E.g.*, *IUOE*, 2012 WL 476526, at *4, 6-7; *see* Counsel Decl. ¶¶ 34, 37, 39, 43.

Thus, when Plaintiffs' Counsel investigated ARTRS's claims and commenced this action, they were working essentially from a clean slate in terms of analyzing (1) ARTRS's FX trades for *prima facie* evidence of excessive markups, (2) and researching the applicability of Chapter 93A to the alleged Indirect FX Methods, (3) whether a custody bank owes a fiduciary duty to its clients in connection with indirect FX services, and (4) whether a nationwide class of custody clients can be certified and on what claims. Counsel Decl. ¶¶ 35, 166.

Equally important, "[t]his is not a case where plaintiffs' counsel can be cast as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill." *In re Gulf Oil/Cities Servs. Tender Offer Litig.*, 142 F.R.D. 588, 597 (S.D.N.Y. 1992). Private plaintiffs led the charge against State Street. The investigations of State Street by the SEC, DOL, and DOJ have not resulted in any public allegations, factual findings, or consent orders that might have benefitted Plaintiffs in their efforts. To the contrary, DOL and the SEC have benefitted significantly from Plaintiffs' Counsel's efforts in achieving the $300 million Settlement, as key terms of the Plan of Allocation are central to these agencies' settlements with State Street. *See* Counsel Decl. ¶¶ 8, 38, 139-141, 167; *cf. Puerto Rican Cabotage*, 815 F. Supp. 2d at 460-61 (court reduced requested 33-1/3% fee to 23% in part because case followed DOJ investigation and FBI raid).

Further, as discussed in the Counsel Declaration and Plaintiffs' brief for final approval of the Settlement, Plaintiffs faced an array of litigation risks after the Court denied State Street's motion to dismiss ARTRS's Amended Complaint. *See Relafen*, 231 F.R.D. at 80 ("Class Counsel alone bore the risk of the case being dismissed at the pretrial stage, of not prevailing at

trial, or even losing on appeal"); *Medoff*, 2016 WL 632238, at *9 ("significant risk of non-payment" weighed in favor of 30% fee); Counsel Decl. ¶¶ 107-130.

These risks did not evaporate once Plaintiffs entered into mediation. To the contrary, State Street brought these substantive issues to bear throughout the extended process, pressing its contentions on, for example, the individualized nature of Class Members' written agreements and oral communications with State Street; the implicit (and in some cases explicit) awareness and acceptance of indirect FX pricing practices by Class Members and their investment managers; cost accounting issues that supported the markups applied to Indirect FX Transactions; and the changing "real" interbank FX rates on a given currency pair at a given point in time. *See Bezdek*, 79 F. Supp. 3d at 351 (noting favorably that documents and other discovery materials "were used during the course of litigation and settlement preparation"); Counsel Decl. ¶¶ 94-95, 168; Marks Decl., Ex. 5, ¶¶ 23-25.

Moreover, as State Street pointed out at the time, a similar indirect FX class action against JPMorgan, asserting claims under New York's consumer-protection law, was dismissed in its entirety on the ground that the statute did not apply to contracts between sophisticated financial institutions. *See Louisiana Mun. Police Emps. Ret. Sys. v. JPMorgan Chase & Co.*, No. 12 Civ. 6659 (DLC), 2013 WL 3357173, at *17 (S.D.N.Y. July 3, 2013).[20]

The settlement negotiations here were complicated and extended by State Street's tandem discussions with the DOJ, DOL, and SEC. State Street had little interest in settling these Class Actions unless it could secure global peace. *See* Counsel Decl. ¶¶ 100-101. Had the mediation

[20] In ruling on State Street's motion to dismiss, the Court reserved judgment as to whether Plaintiffs' Chapter 93A claims could proceed under Section 9 or Section 11 pending development of a factual record on whether ARTRS was a "consumer" or a "business" for purposes of the statute. Section 11 likely requires a greater showing than Section 9 to establish a violation. *See* May 8, 2012 Hearing Tr., Ex. 3, at 97:3-99:6; *see also In re Pharmaceutical Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20, 80 (D. Mass. 2007), *aff'd*, 582 F.3d 156 (1st Cir. 2009).

process broken down (as it very nearly did), the Parties would have reverted to a traditional litigation posture. The prospects for Settlement would have become remote and the risk of non-payment would have increased considerably. The contingency risk assumed by Plaintiffs' Counsel supports the fee requested.

4. Plaintiffs' Counsel Devoted Substantial Time to This Case While Controlling Costs and Avoiding Judicial Intervention

The Settlement, as further described in the Counsel Declaration and the accompanying individual firm declarations, is the product of considerable time, labor, and resources expended overall by Plaintiffs' Counsel. After the California *qui tam* action was unsealed on October 20, 2009, ARTRS retained Lead Counsel to investigate potential class and individual claims ARTRS might have against State Street. Counsel Decl. ¶¶ 25-26; Declaration of George Hopkins, Executive Director of ARTRS ("Hopkins Decl."), Ex. 1, ¶ 7. Lead Counsel chose to associate with TLF and Lieff Cabraser given, among other considerations, their unique knowledge arising from their representation of the Relator in the *qui tam* lawsuit, and began an investigation. *See* Counsel Decl. ¶ 26.

This investigation, including further substantive research for ARTRS's operative Amended Complaint, comprised numerous tasks. ARTRS's counsel had to educate themselves about the essentials of currency trading, and the nature of negotiated (or direct) and non-negotiated (or standing-instruction or indirect) FX trades, and how they work in the context of custody banking. Counsel engaged FX Transparency LLC, a Massachusetts-based currency trading expert, to consult regarding the FX markets and to assist in extracting and analyzing ARTRS's global trading data. FX Transparency conducted several preliminary and final analyses as counsel's investigation proceeded. Ultimately, FX Transparency identified more than 4,200 indirect FX trades executed by State Street for ARTRS's account during 2000-2010,

with an aggregate trading volume of more than $1.2 billion. FX Transparency compared these trades to other FX trades logged and tracked in a comprehensive database of more than 2 million buy-side currency trades. By comparing ARTRS's trades in certain currencies with the same currency pair trades in the database, FX Transparency estimated the trading cost of ARTRS's indirect FX trades in relation to trades made worldwide. *See* Counsel Decl. ¶¶ 27-28.

Further, counsel for ARTRS reviewed and analyzed an array of pertinent documents, including ARTRS's Custodian Contracts and Fee Schedules, the monthly custodial reports and invoices received from State Street, other communications from State Street, and State Street's periodically updated Investment Manager Guides. Counsel researched the applicable law on Chapter 93A, fiduciary duty, and negligent misrepresentation, and reviewed the *qui tam* indirect FX lawsuits against BNYM that had been unsealed. *See* Counsel Decl. ¶¶ 29-30.

Additionally, on September 9, 2010, Lead Counsel, TLF, and George Hopkins, Executive Director of ARTRS, met in Chicago with representatives of Ennis Knupp, a consultant engaged by ARTRS to oversee its investment managers, to discuss FX issues and potential claims against State Street. *See* Counsel Decl. ¶ 31; Hopkins Decl., Ex. 1, ¶ 9.

Because ARTRS has been a custody client of State Street since 1998, and commencing litigation against one's custodian is not a routine matter, ARTRS sought to meet with State Street before filing suit. On December 20, 2010, Mr. Hopkins, Lead Counsel, and TLF met in Boston with State Street's outside counsel and in-house legal and business representatives. *See* Counsel Decl. ¶ 32; Hopkins Decl., Ex. 1, ¶ 10.

The meeting was ultimately unproductive, and counsel for ARTRS commenced this action on February 10, 2011. On April 15, 2011, counsel filed a broader and more detailed Amended Complaint, a centerpiece of which was the analysis conducted by FX Transparency,

asserting class claims for violations of Chapter 93A, §§ 9, 11, breach of fiduciary duty, negligent misrepresentation, and an individual breach of contract claim. *See* Counsel Decl. ¶¶ 33, 39, 43.

ARTRS filed a 65-page brief in opposition to State Street's motion to dismiss. The May 8, 2012 hearing on the motion, including the Court's recitation of its ruling upholding the claims as against State Street Bank and Trust Company, lasted nearly three hours. During a lobby conference immediately following the hearing, and in an ensuing Order, the Court directed ARTRS and State Street to meet to discuss the possibility of settlement and whether they may wish to engage in mediation. *See* Counsel Decl. ¶¶ 46, 52-53, 169-170.

ARTRS and State Street did so and, together with the ERISA Plaintiffs who had filed actions in November 2011 and September 2012, subsequently attended a two-day mediation session in October 2012. Counsel Decl. ¶ 91. Lead Counsel believed that a practical, "business-like" approach to resolving these Class Actions—assuming State Street's cooperation—would ultimately produce an excellent settlement while controlling litigation costs and saving party, third-party, and judicial resources. Counsel Decl. ¶ 86. No settlement was reached in October 2012, but the Parties agreed, subject to the Court's approval, on an innovative framework for exchanging certain discovery and other information and managing the cases with the mediator's assistance. *See* Counsel Decl. ¶¶ 63-64.

During a status conference held on November 15, 2012, the Parties presented their proposed plan for exchanging certain document discovery and other information, having the mediator resolve any disputes, and continuing mediated settlement negotiations. The Court

endorsed this approach, and issued stays of the proceedings followed by an Order of Administrative Closing to enable the Parties' efforts.[21] *See* Counsel Decl. ¶¶ 67-68.

The mediation process was comprehensive and protracted, involving 15 in-person negotiation sessions before Mr. Marks before an agreement-in-principle was reached in June 2015. Numerous sessions included presentations by the Parties on class certification, merits or damages issues. State Street produced, and counsel for ARTRS reviewed and closely analyzed, more than nine million pages of nonpublic documents in response to requests made by Plaintiffs' Counsel. Counsel for ARTRS produced more than 73,000 pages of documents to State Street. Counsel for the ERISA Plaintiffs collectively produced more than 3,600 pages of documents to State Street. Counsel's overall work in preparing for mediation and negotiating the Settlement was coupled with substantial additional work preparing for litigation, including contested discovery, depositions and motion practice, in the event the mediation process broke down. Counsel Decl. ¶¶ 88-99, 171.

Recently, in *Bezdek v. Vibram USA*, Judge Woodlock awarded plaintiffs' counsel's requested 25% fee in a consumer class action asserting claims under Chapter 93A, § 9 and other provisions. An objector "assert[ed] with some specificity her concerns that plaintiffs' counsel did not do enough to earn the percentage they have requested[.]" 79 F. Supp. 3d at 351 n.23. There is no indication that the court considered or approved an alternative dispute process. Regardless, Judge Woodlock's reasoning is apt here:

> This action began . . . with Plaintiff Bezdek, and has expanded to include other plaintiffs and other counsel over time. The case has involved some significant motion practice, including motions to dismiss in each of the three actions, as well as an attempt at

[21] *See* Nov. 15, 2012 Lobby Conference Tr., Ex. 4, at 13:18-14:21, 22:2-10, 25:6-16; ECF Nos. 63, 70, 72, 73; *see also* Fed. R. Civ. P. 1 (rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding").

> mediation . . . . I acknowledge counsels' representations that the parties engaged in extensive fact discovery, which led to Vibram's production of over 40,000 pages of documents as well as other discovery materials which were used during the course of litigation and settlement preparation. Although a proposed settlement was reached prior to identification to the court of a class certification expert or a motion to certify the class, prior to the deposition of any witnesses including the named plaintiffs themselves, and prior to the more substantial summary judgment motion practice that I often see in a case such as this, I find that plaintiffs' counsel engaged in intensive efforts to move the case forward to a favorable result for the class members, without incurring the additional expense and time of conducting depositions and expert discovery.

Id. at 350-51. The First Circuit soundly rejected the objectors' appeal. *Bezdek*, 809 F.3d at 85.

After the agreement-in-principle was reached, negotiating the Settlement Agreement and exhibits took more than a year, and was complicated considerably by State Street's ongoing discussions with the SEC, DOL, and DOJ. In sum, Lead Counsel submits that the time spent litigating these Class Actions and bringing about the Settlement supports the requested fee.[22]

5. These Actions Were Complex and Challenging to Settle

The complexity of these Class Actions also supports the requested attorneys' fee. State Street's alleged unfair and deceptive acts and practices, breaches of fiduciary duty, negligent misrepresentations, and violations of ERISA occurred over a 12-year Class Period in multiple locations, and concerned an opaque market and a little-understood area of the financial services industry.

[22] To be sure, all Plaintiffs support the requested attorneys' fee as well as the Litigation Expenses for which Plaintiffs' Counsel seek payment. *See* Hopkins Decl., Ex. 1, ¶¶ 19-21; Declaration of Michael T. Cohn ("Cohn Decl."), Ex. 7, ¶ 10; Declaration of Arnold Henriquez ("Henriquez Decl."), Ex. 8, ¶ 10; Declaration of James Pehoushek-Stangeland ("Pehoushek-Stangeland Decl."), Ex. 9, ¶¶ 5-6; Declaration of Richard A. Sutherland ("Sutherland Decl."), Ex. 10, ¶ 10; Declaration of William R. Taylor ("Taylor Decl."), Ex. 11, ¶ 10; Declaration of Janet A. Wallace, Trustee of The Andover Companies Employee Savings and Profit Sharing Plan ("Wallace Decl."), Ex. 12, ¶¶ 6-7.

The motion to dismiss ARTRS's Amended Complaint raised thorny and sharply disputed factual and legal questions over, among other things, the nature and extent of State Street's duties to its custody clients in providing indirect FX services; whether State Street acted as a fiduciary, and whether custody clients that are sophisticated institutional investors but not-for-profit are "consumers" entitled to recover under Chapter 93A. The complexity of these issues was generally reflected in the raft of documents reviewed and analyzed in discovery. *See Medoff*, 2016 WL 2016 WL 632238, at *9 ("extensive discovery" and "some complex issues of law and fact" supported 30% fee); *cf. Puerto Rican Cabotage*, 815 F. Supp. 2d at 459 (23% reduced fee awarded in part because case "settled fully without necessitating any discovery").

Many of these issues were hotly debated during the extended mediation process, and absent this Settlement, most if not all of them, plus others raised in further discovery, would come before the Court on summary judgment and at trial. Class certification was also discussed by the Parties during the mediation process, and, as explained in Plaintiffs' brief in support of the Settlement, would have raised a host of additional challenging issues. *See also* Counsel Decl. ¶¶ 94-95.

An additional complexity was the presence of the federal agencies, particularly the SEC and DOL, conducting their own pre-filing investigations. The financial terms of State Street's separate settlement with the SEC will be satisfied in part through the RIC Settlement Allocation within the overall Plan of Allocation. Because the financial terms of State Street's separate settlement with DOL will be satisfied through the ERISA Settlement Allocation, Plaintiffs' Counsel had to negotiate and coordinate with DOL with respect to the Settlement Agreement, the Notice, and the Plan of Allocation. Negotiating the Plan of Allocation and other aspects of the

Settlement with State Street and DOL simultaneously was a challenging and often complicated task. *See* Counsel Decl. ¶¶ 100-101, 106, 172.

6. Plaintiffs' Counsel Have Represented the Settlement Class Skillfully and Efficiently, Against Capable Defense Counsel

Lead Counsel submits that it, and all Plaintiffs' Counsel, have represented the Settlement Class skillfully and efficiently in prosecuting the claims and achieving this valuable Settlement. *See Bezdek*, 79 F. Supp. 3d at 350 ("Weighing in favor of the requested fee is the skill of the attorneys involved . . . . I also credit the efforts that plaintiffs' counsel has made during the course of this litigation."); *Relafen*, 231 F.R.D. at 80 (noting excellent lawyering and results produced by class counsel).

Moreover, State Street was ably represented here by one of Boston's (and the nation's) largest law firms. Defendants' counsel benefited from State Street's considerable resources, and mounted an aggressive, vigorous defense from the outset that permeated the extended settlement negotiations. *See Lupron*, 2005 WL 2006833, at *4 (noting that "[c]ounsel are among the most experienced lawyers the national bar has to offer in the prosecution and defense of significant class actions").

7. Public Policy Considerations Support the Requested Fee

Finally, the requested attorneys' fee furthers the important policy goal of encouraging common fund cases asserting claims in the public interest. The public interest is well-served here by State Street's disgorgement of proceeds of its alleged unfair and deceptive Indirect FX practices to its custody clients. Many of these custody clients in particular, like ARTRS, are public pension funds in Massachusetts and other States that provide retirement benefits to tens of thousands of public employees. Many other custody clients, like the ERISA Plaintiffs, are company savings and retirement plans in Massachusetts and elsewhere that similarly benefit tens

of thousands of private-sector employees. *See Feeney v. Dell Inc.*, 454 Mass. 192, 200 (2009) ("[T]he public policy of the Commonwealth strongly favors G.L. c. 93A class actions."); *Lupron*, 2005 WL 2006833, at *6 ("The public interest is . . . served by the defendants' disgorgement of the proceeds of predatory marketplace behavior.").[23]

B. A Lodestar Cross-Check Supports the Reasonableness of the Requested Fee

The Court is not required to cross-check the requested fee against Plaintiffs' Counsel's lodestar in determining whether the fee is reasonable. *See Relafen*, 231 F.R.D. at 81 (citing *Thirteen Appeals*, 56 F.3d at 307). When a lodestar is used for a cross-check, however, the focus is not on the "necessity and reasonableness of every hour" of the lodestar, but rather on whether the fee broadly reflects the degree of time and effort expended by counsel. *Tyco*, 535 F. Supp. 2d at 270 (quoting *Thirteen Appeals*, 56 F.3d at 307); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 299-300, 306 (3d Cir. 2005) (no abuse of discretion in awarding fee with "fairly common" multiplier of 4.07: "The lodestar cross-check calculation need entail neither mathematical precision nor bean counting."). The use of current rather than historical billing rates is appropriate in examining the lodestar because current rates more adequately compensate for inflation and loss of use of funds. *See Jenkins*, 491 U.S. at 283-84.

Plaintiffs' Counsel collectively devoted 86,113.70 hours to the prosecution and settlement of this litigation as of the date hereof, resulting in a total lodestar of $41,323,895.75. *See* Master Chart, Ex. 24, and Firm Declarations, Exs. 15-23. This lodestar yields a multiplier of 1.8. Counsel Decl. ¶¶ 177-178. Given the number of hours invested by counsel at competitive

[23] Courts also consider the reaction of the class. *See, e.g.*, *Medoff*, 2016 WL 632238, at *9 (noting lack of objections to fee request); *Relafen*, 231 F.R.D. at 79-80 (overruling objections). To date, no Settlement Class member has objected to the requested fee, Litigation Expenses or Service Awards. The deadline for objections is October 7, 2016. Lead Counsel will file a response to any objections no later than October 21, 2016. *See* Preliminary Approval Order (ECF No. 97) ¶¶ 16, 19.

billing rates, the risks undertaken and the results achieved, this multiplier is reasonable and well within (if not below) the range of multipliers found reasonable for "cross-check" purposes in common fund cases within this Circuit.

A 1.8 lodestar multiplier is significantly lower than the multipliers found reasonable in most of the First Circuit "megafund" settlements in the chart in Part II.A.1 above—namely, *Neurontin* (3.32), *CVS* (3.27), *First Databank* (8.3), *Tyco* (2.7), and *Raytheon* (3.15). These courts had little difficulty approving fees yielding these multipliers. In *Neurontin*, the court found that a reduced fee of 28% "would yield a multiplier of 3.32, which is well within the range." 58 F. Supp. 3d at 172 (citing *In re Federal Nat'l Mortg. Ass'n Sec., Derivative, and "ERISA" Litig.*, 4 F. Supp. 3d 94, 113 n.20 (D.D.C. 2013) ("Generally, multipliers from 1-3 are the norm.") (quoting treatise)). In awarding a $70 million fee in *First Databank*, "which represent[ed] a multiplier of about 8.3 times lodestar," the court cited, *inter alia*, *In re Rite Aid Corp. Securities Litigation*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001), which concluded that a cross-check multiplier of 4.5-8.5 was "unquestionably reasonable." The court in *Tyco* referred to a 2.7 multiplier as "relatively low." 535 F. Supp. 2d at 271; *see also Relafen*, 231 F.R.D. at 82 (2.02 multiplier on 33-1/3% fee "appropriate"). A 1.8 multiplier is also comparable to the multipliers yielded by the fees awarded in *Lupron* (1.41) and *Lernout & Hauspie* (1.4).

Plaintiffs' Counsel have achieved an excellent result for the Class through a focused and efficient litigation and settlement strategy that, with the Court's imprimatur, avoided unnecessary expenditure of judicial and private resources. Lead Counsel respectfully submits that the enhancement of Plaintiffs' Counsel's lodestar represented by a 24.85% fee is well-supported by the results obtained and fees awarded in comparable cases, and should be approved.

III. THE LITIGATION EXPENSES INCURRED BY PLAINTIFFS' COUNSEL ARE REASONABLE

In addition to an award of attorneys' fees, counsel who create a common fund for the benefit of a class are entitled to payment of reasonable litigation expenses. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("[L]aw firms are not eleemosynary institutions, and lawyers whose efforts succeed in creating a common fund are entitled not only to reasonable fees, but also to recover from the fund, as a general matter, expenses, reasonable in amount, that were necessary to bring the action to a climax.").

Lead Counsel respectfully seeks payment in the amount of $1,257,697.94 for litigation expenses reasonably incurred in connection with the prosecution and settlement of this action. These expenses are set forth in the individual firm declarations from counsel submitted herewith as Exhibits 15-23 to the Counsel Declaration, and are of the type generally approved by courts. These declarations itemize the categories of expenses incurred, which collectively include, among others, expert fees, mediation fees, document hosting fees, electronic legal research, and travel. Lead Counsel submits that these expenses were reasonable and necessary to prosecuting the claims and achieving the Settlement. *See Medoff*, 2016 WL 632238, at *9; *Bezdek*, 79 F. Supp. 3d at 351-52.

The Notice advised the Settlement Class that Lead Counsel would seek payment of Litigation Expenses of no more than $1,750,000. The expenses sought are below that amount, and there have been no objections to the expenses to date. Lead Counsel respectfully requests that the Litigation Expenses be awarded.

IV. THE REQUESTED SERVICE AWARDS TO PLAINTIFFS ARE APPROPRIATE

Lead Counsel respectfully requests that the Court grant Service Awards of $25,000 to Plaintiff ARTRS and $10,000 to each of the six ERISA Plaintiffs—totaling 0.028% of the Class Settlement Fund—in view of their service as class representatives. "Incentive awards serve to promote class action settlements by encouraging named plaintiffs to participate actively in the litigation in exchange for reimbursement for their pursuits on behalf of the class overall." *Bezdek*, 79 F. Supp. 3d at 352; *see also Lupron*, 2005 WL 2006833, at *7 ("Courts 'routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.'") (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002)); *Neurontin*, 58 F. Supp. 3d at 173 (granting $25,000 each to four named plaintiffs).

Service Awards to the Plaintiffs are justified here. Plaintiff ARTRS, after conducting appropriate due diligence, stepped forward and took a risk to sue its custody bank, and consistently worked thereafter to support the prosecution of this case and the mediation process. ARTRS's Executive Director, for example, attended the hearing on Defendants' motion to dismiss and subsequent lobby conference as well as multiple mediation sessions in Boston and elsewhere. ARTRS also made a complete document production in response to State Street's requests. Hopkins Decl., Ex. 1, ¶¶ 11-16; Counsel Decl. ¶ 97.

The ERISA Plaintiffs also produced documents and monitored and supported the litigation and mediation process. Cohn Decl., Ex. 7, ¶¶ 3-6, 9-10; Henriquez Decl., Ex. 8, ¶¶ 3-6, 9-10; Pehoushek-Stangeland Decl., Ex. 9, ¶¶ 3-4, 6; Sutherland Decl., Ex. 10, ¶¶ 3-6, 9-10; Taylor Decl., Ex. 11, ¶¶ 3-6, 9-10; Wallace Decl., Ex. 12, ¶¶ 3-4, 7; *see also Relafen*, 231 F.R.D.

at 82 (granting service awards where plaintiffs, among other things, reviewed complaints and other litigation documents and provided requested discovery).

The Notice advised the Settlement Class that Lead Counsel would seek Service Awards to Plaintiffs of no more than $85,000, and there have been no objections to the proposed Service Awards to date. Lead Counsel respectfully requests that the Service Awards be granted.

Conclusion

For the foregoing reasons, Lead Counsel Labaton Sucharow LLP, on behalf of all Plaintiffs' Counsel, respectfully requests that this Court (a) award attorneys' fees in the amount of $74,541,250.00, plus any accrued interest; (b) order payment of Litigation Expenses in the amount of $1,257,697.94; (c) grant a Service Award of $25,000.00 to Plaintiff ARTRS; and (d) grant Service Awards of $10,000.00 to each of the six ERISA Plaintiffs.

Dated: September 15, 2016

Respectfully submitted,

LABATON SUCHAROW LLP

By: */s/ Lawrence A. Sucharow*

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, *et al.*, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF LAWRENCE A. SUCHAROW IN SUPPORT OF (A) PLAINTIFFS' ASSENTED-TO MOTION FOR FINAL APPROVAL OF PROPOSED CLASS SETTLEMENT AND PLAN OF ALLOCATION AND FINAL CERTIFICATION OF SETTLEMENT CLASS AND (B) LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES, PAYMENT OF LITIGATION EXPENSES, AND PAYMENT OF SERVICE AWARDS TO PLAINTIFFS

LAWRENCE A. SUCHAROW declares as follows pursuant to 28 U.S.C. § 1746:

1. I am a member and Chairman of the law firm of Labaton Sucharow LLP ("Labaton Sucharow"), attorneys for Plaintiff Arkansas Teacher Retirement System ("ARTRS") and Court-appointed Lead Counsel[1] for the Settlement Class in the above-titled consolidated Class Actions. I am admitted to practice before this Court *pro hac vice*.

2. I respectfully submit this declaration in support of the assented-to motion of Plaintiff ARTRS and Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland (collectively, the "ERISA Plaintiffs," and together with ARTRS, "Plaintiffs"), individually and on behalf of the Settlement Class, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for final approval of the proposed Class Settlement of these consolidated Class Actions (the "Settlement") and for approval of the Plan of Allocation of the Net Class Settlement Fund (the "Plan of Allocation").

3. I also respectfully submit this declaration in support of Lead Counsel's motion, on behalf of all Plaintiffs' Counsel,[2] pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, for an award of attorneys' fees, payment of Litigation Expenses, and payment of Service Awards to Plaintiffs.

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[1] Unless otherwise indicated, capitalized terms have the same meanings as in the Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the "Settlement Agreement," ECF No. 89).

[2] In addition to Labaton Sucharow, Plaintiffs' Counsel includes Thornton Law Firm LLP ("TLF"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), McTigue Law LLP ("McTigue Law"), and Zuckerman Spaeder LLP ("Zuckerman Spaeder"). Labaton Sucharow, TLF, and Lieff Cabraser are counsel in the *ARTRS* Action, No. 11-cv-10230, which asserted class claims on behalf of all otherwise eligible custody clients of State Street (including ERISA plans) for violations of the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A ("Chapter 93A"), §§ 9, 11, and for breach of fiduciary duty and negligent misrepresentation. Keller Rohrback and McTigue Law/Zuckerman Spaeder are counsel in the *Andover Companies* Action (No. 11-cv-12049) and *Henriquez* Action (No. 12-cv-11698), respectively, which asserted federal statutory claims under the Employee Retirement Income Security Act of 1974 ("ERISA") solely for the benefit of ERISA plan custody clients of State Street.

A. Benefits of the Settlement to the Settlement Class

4. The Settlement Agreement provides that Defendant State Street Bank and Trust Company ("State Street" or the "Bank") will pay or cause to be paid a total of Three Hundred Million Dollars ($300,000,000.00) in cash (the "Class Settlement Amount") into an interest-bearing escrow account for the benefit of the Settlement Class.

5. Pursuant to the terms of the Settlement, the Class Escrow Account has been fully funded and earning interest for the benefit of the Settlement Class since September 6, 2016.

6. To my knowledge, the Settlement is by far the largest common fund settlement in any case brought under Chapter 93A, and is the third-largest common fund settlement, excluding federal securities actions, to be filed within the First Circuit.

7. The Settlement consideration and any accrued interest, after the deduction of attorneys' fees, Litigation Expenses, and any Service Awards awarded by the Court, Notice and Administration Expenses, and Taxes and Tax Expenses (the "Net Class Settlement Fund"), will be distributed among Settlement Class Members pursuant to the Plan of Allocation.

8. As further described below, the proposed Plan of Allocation is itself an essential term of the Settlement because allocations of settlement monies to certain categories of Class Members will satisfy the financial terms of State Street's tandem regulatory settlements with the U.S. Department of Labor ("DOL") and the U.S. Securities and Exchange Commission ("SEC"). State Street has also entered into a separate regulatory settlement with the U.S. Department of Justice ("DOJ").

9. In exchange for payment of the Settlement Amount, the Settlement Class will release all Released Class Claims against the Released Defendant Parties upon the Effective Date of the Settlement. Settlement Agmt. ¶¶ 1(yy), 1(zz). The Effective Date will be reached once

the Class Settlement has been approved, the Judgment has been entered and become Final, the DOJ Settlement and DOL Settlement are final, State Street has submitted an offer of settlement to the SEC (which will happen two business days after the Judgment becomes Final), and the order approving the proposed Plan of Allocation has become Final. Settlement Agmt. ¶ 55.

10. The Settlement Class, which the Court has preliminarily certified for settlement purposes, is defined as all custody and trust customers of State Street (including customers for which State Street served as directed trustee, ERISA Plans, and Group Trusts), reflected in State Street's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with State Street and/or its subcustodians during the period from January 2, 1998 through December 31, 2009, inclusive (the "Class Period").

11. Excluded from the Settlement Class are Defendants; California Public Employees' Retirement System (CalPERS), California State Teachers' Retirement System (CalSTRS), and the State of Washington Investment Board; the predecessors and affiliates of the foregoing, or any entity in which they have a controlling interest; and the officers, directors, legal representatives, heirs, successors, subsidiaries and/or assigns of any such excluded individual or entity in their capacities as such. Also excluded from the Settlement Class is any Person who submits a timely and valid request for exclusion in accordance with the requirements set forth in the Notice. Settlement Agmt. ¶ 1(hhh).

B. Summary of Plaintiffs' Allegations and Claims

12. These Class Actions arise from State Street's allegedly unfair and deceptive practice of charging its custody and trust customers excessive rates and spreads in connection with certain foreign exchange ("FX") transactions, in violation of State Street's statutory, contractual, and fiduciary obligations.

13. State Street, headquartered in Boston, has long been one of the two or three largest U.S. custody banks. A custody bank is a specialized financial institution that holds and services securities and other assets on behalf of investors. Custodians are typically used by institutional investors that do not want to leave securities on deposit with their external investment managers ("IMs") or broker-dealers. By separating these duties, the use of custodians—at least in theory—reduces the risk of fraud or other misconduct. An independent custodian ensures that the investor has unencumbered ownership of the securities that other agents represent to have purchased on the investor's behalf.

14. The custody bank's responsibilities include the guarding and safekeeping of securities, delivering or accepting traded securities, and collecting principal, interest, and dividend payments on held securities. Custody banks also generally provide a variety of ancillary services for their custody clients, and communicate with investment managers and others on the client's behalf. In essence, custody banks can and do virtually everything for their custody clients other than make investment decisions. And custody clients trust and rely upon their custodian to do those things properly.

15. During the Class Period, U.S.-based public pension funds and other institutional investors increasingly looked to overseas securities markets in order to diversify their portfolios and maximize investment returns. Such investors had to buy and sell foreign currency in order to carry out trades in foreign securities and to "repatriate" foreign-denominated dividend and interest payments into U.S. dollars.

16. State Street executed hundreds of thousands of FX trades on behalf of Plaintiffs and Class Members during the Class Period. These FX trades fell into two principal categories. In "direct" (or "negotiated") FX trades, custody clients or their IMs personally communicated

with State Street's FX trading desk. State Street would quote an exchange rate, bargaining would ensue, and a rate would be agreed to, often with a modest markup over the interbank rate in the case of a purchase, or a markdown in the case of a sale.

17. "Indirect" (or "standing-instruction") FX trades—the trades at issue here—did not involve arm's-length negotiation of the price. Custody clients and IMs did not negotiate rates with State Street in indirect trades, nor did State Street quote rates. Rather, as the name suggests, custody clients (or their IMs) engaged State Street to provide ongoing custody FX services in accordance with standing instructions, and relied upon State Street to execute those FX trades on their behalf. State Street's indirect FX services to custody clients—referred to as "Indirect FX Methods" for purposes of the Settlement—were a major profit center for the Bank during the Class Period.[3]

18. The FX trading day covers nearly 24 hours and plays out worldwide in countless numbers of currency trades. For each currency pair transaction during the course of the trading day, there is a high and a low trade, with all other trades falling in-between. The difference between the low and the high rates, called the "range of the day," allegedly defines the range at which custody banks and other FX market participants purchased and sold foreign exchange that day. ARTRS alleged that reported trades at rates that fall outside the range of the day did not bear a reasonable relationship to the interbank rate or other prevailing market prices.

[3] "Indirect FX Methods" means the methods at any time for submitting, processing, pricing, aggregating, netting, and/or executing foreign exchange transaction requests pursuant to instructions from custody or trust customers of SSBT [State Street] (or their investment managers) instructing SSBT or SSBT's subcustodians to execute such transactions at rates or spreads, which rates or spreads prior to December 2009 were not widely disclosed to the customers or investment managers prior to execution, including, but not limited to, the methods of executing foreign exchange transactions that are or were at any time known as Indirect FX, standing instruction foreign exchange, custody FX, Automatic Income Repatriation, Automated Dividend and Interest Income Repatriation Service, or Security Settlements and Holdings Foreign Exchange Service or Hourly Pricing Foreign Exchange Service. Settlement Agmt. ¶ 1(ee).

19. Plaintiffs contended that custody clients, based on State Street's representations in its Custodian Contract with ARTRS governing the bank-client relationship, associated Fee Schedules governing State Street's compensation from custody services (which included hefty flat annual fees), and disclosure in State Street's Investment Manager Guides, were entitled to receive FX pricing on indirect FX trades that, at a minimum, was equivalent to the interbank rate and that was no less advantageous than the pricing on a comparable direct trade.

20. Plaintiffs also contended that State Street's Indirect FX Methods were designed to ensure maximum profits for the Bank to Class Members' direct detriment. State Street generally applied large markups and markdowns across the board that, for Indirect FX Transactions[4] relating to purchases and sales of foreign securities (referred to as Securities Settlement and Handling, or "SSH"), were subject only to the high or low of the range of the day. For Indirect FX Transactions to repatriate dividend and income payments, referred to as Automated Income Repatriation, or "AIR," markups and markdowns were not so limited.

21. Based in part on an empirical analysis of ARTRS's Indirect FX trades during the Class Period, ARTRS alleged that State Street's markups and markdowns on Indirect FX Transactions were undisclosed and excessive, such that they tended to exceed the spread expected on direct trades and often fell outside the range of the day.

22. The ERISA Plaintiffs made similar allegations on behalf of custody clients that are plans governed by ERISA.

[4] "Indirect FX Transactions/Trading" means foreign exchange transactions executed with SSBT [State Street] or SSBT's subcustodians at any time using Indirect FX Methods, including all foreign exchange transactions submitted using Indirect Methods. A transaction submitted or processed using an Indirect Method is an Indirect FX Transaction regardless of whether the rate at which the transaction was executed differed from the rates at which other transactions submitted using Indirect Methods were executed. Settlement Agmt. ¶ 1(ff). "Indirect FX" means Indirect FX Methods and Indirect FX Transactions/Trading. Settlement Agmt. ¶ 1(dd).

23. Plaintiffs collectively asserted that State Street's alleged unfair and deceptive Indirect FX Methods and nondisclosure thereof constituted violations of Sections 2, 9, and 11 of Chapter 93A; breach of alleged fiduciary duties owed by State Street to the Class Members; negligent misrepresentation by State Street; breach of ARTRS's Custodian Contract; violations of ERISA, 29 U.S.C. § 1106, for engaging in self-interested prohibited transactions and by causing the ERISA Plans to engage in party in interest prohibited transactions; violations of ERISA, 29 U.S.C. § 1104, for breaching duties of prudence and loyalty; and pursuant to ERISA, 29 U.S.C. § 1105, liability for breaches of co-fiduciary obligations.

C. ARTRS's and its Counsel's Due Diligence and Pre-Filing Investigation

24. The *ARTRS* Action has its origin in a *qui tam* complaint filed under seal on April 14, 2008 by Associates Against FX Insider Trading, a Relator represented by Plaintiffs' Counsel TLF and Lieff Cabraser, on behalf of California public pension funds.

25. That lawsuit was unsealed on October 20, 2009, when the Attorney General of California filed a Complaint-in-Intervention charging State Street with misappropriating more than $56 million from California's two largest public pension funds, the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS). The Complaint-in-Intervention was the first public indication of State Street's allegedly unfair and deceptive acts and practices concerning Indirect FX.

26. ARTRS retained Lead Counsel to investigate potential class and individual claims against State Street shortly thereafter. *See also* Declaration of George Hopkins, Executive Director of ARTRS ("Hopkins Decl."), Exhibit 1 hereto, ¶ 7. With ARTRS's approval, Lead Counsel chose to associate with TLF and Lieff Cabraser given, among other considerations, their

unique knowledge arising from their representation of the Relator, and began an investigation. Hopkins Decl., Ex. 1, ¶ 8.

27. This investigation comprised numerous tasks. ARTRS's counsel had to educate themselves about the essentials of currency trading, and the nature of negotiated (or direct) and non-negotiated (or standing-instruction or indirect) FX trades, and how they work in the context of custody banking. Counsel engaged FX Transparency LLC, a Massachusetts-based currency trading expert, to consult regarding the FX markets and to assist in extracting and analyzing ARTRS's global trading data.

28. FX Transparency conducted several preliminary and final analyses as counsel's investigation proceeded. Ultimately, FX Transparency identified more than 4,200 indirect FX trades executed by State Street for ARTRS's account during 2000-2010, with an aggregate trading volume of more than $1.2 billion. FX Transparency compared these trades to other FX trades logged and tracked in a comprehensive database of more than 2 million buy-side currency trades. By comparing ARTRS's trades in certain currencies with the same currency pair trades in the database, FX Transparency estimated the trading cost of ARTRS's indirect FX trades in relation to trades made worldwide.

29. Further, counsel for ARTRS reviewed an array of pertinent documents, including ARTRS's Custodian Contracts and Fee Schedules, monthly custodial reports and invoices received from State Street, other communications from State Street, and State Street's periodically updated Investment Manager Guides.

30. Further, counsel researched the applicable law on Chapter 93A, fiduciary duty, and negligent misrepresentation, and also reviewed various *qui tam* lawsuits that had been

unsealed against The Bank of New York Mellon Corp. ("BNYM"), a major U.S. custody bank and State Street's primary competitor, concerning BNYM's indirect FX practices.

31. Ennis Knupp & Associates ("Ennis Knupp") was a consultant engaged by ARTRS to oversee its investment managers and the performance of its investment portfolios. On September 9, 2010, Lead Counsel, TLF, and George Hopkins, Executive Director of ARTRS, met in Chicago with representatives of Ennis Knupp to discuss FX issues and potential claims against State Street. The discussion during the meeting generally supported the belief that ARTRS had claims against State Street concerning FX. *See also* Hopkins Decl., Ex. 1, ¶ 9.

32. Additionally, because ARTRS has been a custody client of State Street since 1998, and commencing litigation against one's custodian is not a routine matter, ARTRS sought to meet with State Street before filing an action. On December 20, 2010, Lead Counsel, TLF, and Mr. Hopkins met in Boston with State Street's outside counsel and in-house legal and business personnel. *See also id.* ¶ 10.

33. The meeting was ultimately unproductive, and ARTRS authorized Lead Counsel to commence this Action. *Id.*

D. The *ARTRS* Action Was the First Indirect FX Case

34. As the Court may be aware, a similar class action against BNYM was filed in 2012 and settled in September 2015 for a comparable $335 million in recovery to the class of BNYM custody clients, plus fines and penalties paid to various government agencies. *In re The Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y.) ("*BNYM FX*").

35. This action was the first indirect FX case brought, however. In investigating the claims, counsel for ARTRS worked essentially from a clean slate in terms of analyzing ARTRS's FX trades for prima facie evidence of excessive markups, researching the applicability

of Chapter 93A to State Street's Indirect FX Methods, analyzing whether a custody bank owes a fiduciary duty to its clients in connection with indirect FX services, and analyzing whether a nationwide class of custody clients can be certified and on what claims.

36. Notably, the first of several sealed *qui tam* complaints against BNYM was filed in October 2009, the month the California Attorney General intervened in the State Street *qui tam* lawsuit. The first government intervention and unsealing in connection with BNYM did not occur until January 2011.

37. ARTRS's initial Complaint, filed in February 2011 as noted below, was the first complaint publicly filed against a custody bank concerning indirect FX. ARTRS's Amended Complaint was filed before all but one of the constituent *BNYM FX* complaints, and predated all of the rulings on motions to dismiss those complaints.

38. Additionally, ARTRS investigated its claims and commenced its action without the benefit of regulatory or investigative action by the SEC, DOL or DOJ. To date, these agencies have not issued any public allegations, factual findings, or consent orders that might have benefitted ARTRS or the ERISA Plaintiffs in their efforts against State Street.

E. Procedural History of the Class Actions

39. On February 10, 2011, ARTRS filed a Class Action Complaint in this Court against State Street Bank and Trust Company, State Street Corporation ("SSC"), and State Street Global Markets, LLC ("SSGM"), alleging unfair and deceptive acts and practices in connection with Indirect FX and asserting claims for violations of Chapter 93A, § 2, 11, breach of duty of loyalty, and declaratory relief, on behalf of a class defined similarly to the Settlement Class. ECF No. 1.

40. On February 16, 2011, pursuant to Chapter 93A, § 9(3), ARTRS mailed a written demand for relief to State Street identifying the claimants and reasonably describing the unfair acts or practices relied upon and the injuries suffered.

41. On March 18, 2011, counsel for State Street sent a written response, annexed hereto as Exhibit 2, contesting ARTRS's allegations and declining to make an offer of relief.

42. On April 7, 2011, ARTRS filed an assented-to motion, pursuant to Rule 23(g)(3), to appoint Labaton Sucharow as Interim Lead Counsel for the proposed Class, designate TLF as liaison counsel for ARTRS and the proposed Class, and designate Lieff Cabraser as additional attorneys for plaintiffs and the proposed Class. ECF Nos. 7-8.

43. On April 15, 2011, ARTRS filed an Amended Class Action Complaint ("Amended Complaint"), again naming State Street, SSC and SSGM as Defendants and alleging unfair and deceptive acts and practices in connection with Indirect FX. The Amended Complaint added detailed allegations, including analyses of ARTRS's trades conducted by FX Transparency. The Amended Complaint asserted class claims for violations of Chapter 93A, §§ 2, 9, and 11, breach of fiduciary duty, and negligent misrepresentation, on behalf of a class defined similarly to the Settlement Class, and an individual claim for breach of contract on behalf of ARTRS. ECF No. 10.

44. On June 3, 2011, Defendants moved to dismiss the Amended Complaint. ECF Nos. 18-20. Defendants argued that ARTRS's fiduciary duty claim should fail because the parties' custody contracts defined and limited the scope of the parties' relationship, which was not fiduciary in nature. These contracts, according to Defendants, did not require State Street to execute FX transactions, to do so at a particular rate, or to disclose its margin on FX transactions.

Instead, the contracts required State Street to hold assets and provide administrative services to ARTRS. Defendants argued that Plaintiffs' contract claim should fail for the same reasons.

45. Defendants argued that ARTRS's claims under Chapter 93A and for negligent misrepresentation should fail because nothing unfair or deceptive occurs when the buyer or seller of a commodity does not disclose its margin on a purchase or sale. According to Defendants, State Street had no more duty to disclose the mark up on FX transactions than would any other merchant as to any other commodity. Moreover, Defendants asserted, Plaintiff cannot plausibly assert that ARTRS and its sophisticated IMs were unaware that the rates for its FX transactions were marked up from market rates. Defendants also argued that all of ARTRS's claims, which sought relief for events dating back to 1998, are in part barred by the applicable statutes of limitations.

46. On July 20, 2011, ARTRS filed a 65-page brief in opposition and accompanying submissions. ECF Nos. 22-23.

47. The motion to dismiss was fully briefed as of January 12, 2012. ECF No. 29. ARTRS filed notices of supplemental authority, to which Defendants responded. ECF Nos. 24, 30-31.

48. Also on January 12, 2012, the Court issued an Order appointing Labaton Sucharow as Interim Lead Counsel and designating TLF and Lieff Cabraser as liaison and additional counsel. ECF No. 28.

49. On November 18, 2011, Arnold Henriquez, on behalf of the Waste Management Retirement Savings Plan and its participants and beneficiaries, filed a class action complaint in this Court against State Street, SSGM, and Does 1-20. The *Henriquez* Action asserted claims of engaging in self-interested prohibited transactions under Section 406 of ERISA, 29 U.S.C.

§ 1106, breach of duties of prudence and loyalty under Section 404 of ERISA, 29 U.S.C. § 1104, and breach of co-fiduciary duties under Section 405 of ERISA, 29 U.S.C. § 1105, on behalf of a class of State Street custody clients that are ERISA plans.

50. On February 24, 2012, Henriquez filed an amended class action complaint, adding as plaintiffs Michael T. Cohn, on behalf of the Citigroup 401(k) Plan, and William R. Taylor and Richard A. Sutherland, on behalf the Retirement Plan of Johnson & Johnson.

51. On April 9, 2012, State Street and SSGM moved to dismiss the *Henriquez* Action.

52. On May 8, 2012, the Court heard oral argument on Defendants' motion to dismiss ARTRS's Amended Complaint. The hearing lasted nearly three hours, exclusive of a lunch break. In a detailed bench ruling followed by a written Order dated May 8, 2012, the Court denied the motion in its entirety as against State Street, dismissed the claims as against SSC and, by agreement of the parties, dismissed the claims as against SSGM without prejudice. ECF No. 33. The Court reserved judgment on whether ARTRS's Chapter 93A claims could proceed under Section 9 or Section 11 pending development of a factual record on whether ARTRS was a "consumer" or a "business" for purposes of the statute. *See* Transcript of May 8, 2012 Hearing, Exhibit 3 hereto, at 97:3-99:6.

53. The Court held a lobby conference immediately following the hearing. During the conference, and in the same Order dated May 8, 2012, the Court directed ARTRS and State Street to meet to discuss the possibility of settlement and participation in mediation, and to report back to the Court by July 13, 2012. The Order also directed the parties, in the absence of an agreement to engage in mediation (or a settlement agreement), to respond to an attached Notice of Scheduling Conference by August 30, 2012 and attend a scheduling conference on September 18, 2012. ECF No. 33.

54. On May 16, 2012, the Court granted State Street an extension to June 12, 2012 to answer ARTRS's Amended Complaint.

55. On June 11, 2012, the Court granted State Street a further extension to September 13, 2012 to answer ARTRS's Amended Complaint.

56. On July 13, 2012, ARTRS and State Street filed a Joint Status Report under seal advising that they met on June 22, 2012 to discuss the possibility of settling this case and agreed to engage in mediation with a mediator to be agreed upon. ECF Nos. 38-40.

57. On July 30, 2012, the Court ordered that the Joint Status Report be unsealed. ECF No. 41.

58. On August 17, 2012, ARTRS and State Street filed a further Joint Status Report advising that they had agreed to a mediation before a private mediator that is currently scheduled to conclude on October 25, 2012. ECF No. 42.

59. On August 21, 2012, the Court took the September 18, 2012 Scheduling Conference off calendar and directed the parties to report on the results of the mediation by November 2, 2012. ECF No. 43.

60. On September 12, 2012, Alan Kober, on behalf of The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland, as a participant and beneficiary of The Boeing Company Voluntary Investment Plan, filed a class action complaint in this Court against State Street and SSGM. The *Andover Companies* complaint asserted claims for breach of duties of prudence and loyalty under Section 404 of ERISA, 29 U.S.C. § 1104, and prohibited transactions under Section 406 of ERISA, 29 U.S.C. § 1106, on behalf of a class of State Street custody clients that are ERISA plans.

61. Also on September 12, 2012, the Court granted State Street a further extension to November 9, 2012 to answer ARTRS's Amended Complaint. ECF No. 46.

62. On October 18, 2012, plaintiffs in the *Andover Companies* Action filed an amended class action complaint, and voluntarily dismissed SSGM from the action.

63. On November 2, 2012, ARTRS and State Street filed a further Joint Status Report advising that they attended a mediation with a private mediator on October 23 and 24, 2012, and were unable to settle the case. The parties further advised that they agreed, subject to the Court's approval, on a framework for conducting discovery and managing this case, and requested a status conference to discuss their proposed plan. ECF No. 50.

64. State Street's transmittal letter filed with the Joint Status Report requested that a status conference include the ERISA Plaintiffs as well as ARTRS. ECF No. 49.

65. Also on November 2, 2012, the Court granted State Street a further extension to November 30, 2012 to answer ARTRS's Amended Complaint. ECF No. 48.

66. On November 8, 2012, the Court scheduled a status conference for November 15, 2012 in the three Class Actions, and directed the Parties to file a report by November 13, 2012 on the items to be addressed at the status conference. ECF No. 51.

67. On November 13, 2012, the Parties filed a Joint Status Report stating their intention to discuss, at the status conference, the Parties' plan for coordinating all three Class Actions, subject to the approval of the Court; the Parties' plan for exchanging certain document discovery (including extensive informal informational exchanges), subject to the approval of the Court; the Parties' plan to obtain the assistance of the mediator to avoid disputes and to facilitate efficient information exchanges; the Parties' plan to submit motions for a protective order to govern the exchange of confidential information in these cases, subject to the approval of the

Court; and the Parties' proposed schedule for these cases, subject to the approval of the Court. ECF No. 56.

68. During the status conference held on November 15, 2012, the Parties presented and discussed these issues in detail. The Court endorsed the Parties' cooperative approach toward exploring a resolution of the Class Actions through mediation and extensive informational exchanges. *See* Transcript of Nov. 15, 2012 Lobby Conference, Exhibit 4 hereto, at 13:18-14:21, 22:2-10, 25:6-16, 26:9-10.

69. On November 19, 2012, further to the Parties' presentations and the Court's remarks and directives during the status conference, the Court issued three Orders:

70. *First*, the Court approved the Parties' Stipulation, Joint Motion, and Proposed Order for the Production and Exchange of Confidential Information. ECF No. 61.

71. *Second*, the Court consolidated the three Class Actions for pretrial purposes. ECF Nos. 62-63.

72. *Third*, the Court approved the Parties' Stipulation and Joint Motion to Stay, which provided that the Parties will engage in informational exchanges, including formal document discovery where necessary, until December 1, 2013, during which time the Parties could also seek document discovery from and issue subpoenas to non-parties. The Stipulation provided further that the Parties reserved all rights with respect to formal discovery, including seeking relief from the Court where necessary, but prior to presenting any issue to the Court, the parties would use their best efforts in cooperation with the mediator to resolve any dispute concerning information exchange or discovery. The Stipulation stayed the Class Actions in all other respects until December 1, 2013, and provided for modification of the stay by the Court or the

Parties. Finally, the Stipulation withdrew the pending motion to dismiss filed in the *Henriquez* Action and certain other pending procedural motions without prejudice. ECF No. 62.

73. On December 26, 2013, the Court granted the Parties' request, filed on November 18, 2013 with the support of the mediator, to extend the stay to June 1, 2014. ECF No. 70.

74. On June 21, 2014, the Court granted the Parties' request, filed on May 30, 2014 with the support of the mediator, to further extend the stay to December 31, 2014. ECF No. 72.

75. On June 23, 2014, the Court issued an Order of Administrative Closing. ECF No. 73.

76. On June 2, 2016, ARTRS and State Street filed a letter with the Court advising that the Parties had agreed to resolve the Class Actions subject to resolution of State Street's ongoing discussions with various regulatory agencies, that these discussions were near conclusion, and requesting a status conference. Counsel indicated that they would make efforts to file a settlement agreement and motion for preliminary approval as soon as possible. ECF No. 76.

77. On June 6, 2016, the Court scheduled a status conference for June 23, 2016, and directed the Parties to file a status report by June 15, 2016 to update the Court as to any motion for preliminary approval of the settlement. ECF No. 77.

78. The Parties subsequently requested extensions of time to June 21, 2016 to file a Joint Status Report. ECF Nos. 79, 80.

79. On June 21, 2016, the Parties filed a Joint Status Report that set forth a summary of the procedural history of the Class Actions and the mediation and discovery efforts to date, and the general status of the settlement discussions. ECF No. 81.

80. On June 23, 2016, the Court held a status conference to discuss the matters set forth in the Joint Status Report.

81. On June 24, 2016, following the status conference, the Court (a) directed the Parties to file, by July 27, 2016, a joint motion for class certification and preliminary approval of a proposed settlement or a motion for an extension of time to do so; (b) scheduled a hearing on that motion for August 8, 2016; and (c) tentatively scheduled a hearing on final approval of a proposed settlement for October 25, 2016. ECF No. 83.

82. On July 26, 2016, Plaintiffs filed the fully executed Stipulation and Agreement of Settlement with exhibits (ECF No. 89), and an assented-to motion for preliminary approval of the Settlement, preliminary certification of the Settlement Class, and approval of the proposed form and matter of class notice. ECF Nos. 90-92.

83. On August 8, 2016, the Court held a hearing on the preliminary approval motion.

84. On August 10, 2016, pursuant to the Court's directives during the hearing, Plaintiffs submitted a proposed revised Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement ("Preliminary Approval Order"), Notice, and Summary Notice. ECF No. 95.

85. On August 11, 2016, the Court issued the Preliminary Approval Order. ECF No. 97. In the Preliminary Approval Order, the Court, *inter alia*:

(i) preliminarily found the Settlement to be fair, reasonable, and adequate, subject to further consideration at the Final Approval Hearing;

(ii) preliminarily certified the Settlement Class pursuant to Rules 23(a) and (b)(3);

(iii) appointed Labaton Sucharow as Lead Counsel, TLF as Liaison Counsel, and Lieff Cabraser as additional Counsel for the Settlement Class pursuant to Rule 23(g);

(iv) scheduled a Final Approval Hearing for November 2, 2016, at 2:00 p.m., to consider, among other things, whether to approve the Settlement and Plan of Allocation, whether to finally certify the Settlement Class, and whether to grant the motion of Lead Counsel, on behalf of all Plaintiffs' Counsel, for an award of attorneys' fees, payment of Litigation Expenses to Plaintiffs' Counsel, and payment of Service Awards to Plaintiffs;

(v) approved the form, substance and requirements of the Notice and Summary Notice;

(vi) approved the retention of A.B. Data, Ltd. ("A.B. Data"), an independent settlement and claims administrator recommended by Lead Counsel, as the Claims Administrator;

(vii) approved the proposed program for disseminating notice to the Settlement Class as meeting the requirements of Rule 23, the United States Constitution (including the Due Process Clause), and the Class Action Fairness Act of 2005, 28 U.S.C. § 1715;

(viii) set deadlines and procedures for serving and filing objections to the matters to be considered at the Final Approval Hearing;

(ix) set deadlines and procedures for requesting exclusion from the Settlement Class; and

(x) set deadlines for filing papers in support of the matters to be considered at the Final Approval Hearing and in response to any objections.

F. The Court-Endorsed Mediation and Discovery Process

86. After the Court substantially denied State Street's motion to dismiss ARTRS's Amended Complaint, Lead Counsel approached these Class Actions with the firm belief that a practical, "business-like" approach to resolving them—assuming State Street's cooperation—would ultimately produce an excellent settlement while controlling litigation costs and saving party, third-party, and judicial resources.

87. Lead Counsel submits that this approach has been fully vindicated by the proposed Settlement here. *See also* Declaration of Jonathan B. Marks ("Marks Decl."), Exhibit 5 hereto, ¶¶ 25-30. The groundwork for this was laid during the first Court-ordered exploratory settlement discussion on June 22, 2012, during which ARTRS and State Street agreed to participate in private mediation. Thereafter, the Parties and their counsel committed themselves to the innovative mediation and discovery framework approved by the Court after the November 15, 2012 status conference.

88. The Parties' arm's-length negotiations before Jonathan B. Marks, Esq. of MarksADR, LLC, an experienced and nationally recognized mediator of complex financial disputes, were protracted, intensive, and well-informed, and resulted in a valuable proposed Settlement that Plaintiffs and their counsel submit is eminently fair, reasonable, and adequate.

89. The Parties retained Mr. Marks on August 2, 2012, after the May 8, 2012 hearing on the motion to dismiss and subsequent lobby conference. *See also* Marks Decl., Ex. 5, ¶ 6.

90. Between August and October 2012, Mr. Marks held preparatory conference calls with the Parties, separate half-day in-person pre-mediation sessions with representatives of each side, and a full-day in-person pre-mediation session with both sides. *See also id.* ¶¶ 9-13.

91. These initial efforts culminated in a two-day in-person mediation in Boston on October 23-24, 2012, attended by numerous attorneys and Party representatives including Mr. Hopkins of ARTRS and the Chief Legal Officer of State Street. *See also* Marks Decl. ¶ 14; Hopkins Decl., Ex. 1, ¶ 14.

92. No settlement was reached in October 2012, but, as described above, the Parties developed a specific framework for exchanging certain discovery and managing the cases, which the Court endorsed.

93. Thereafter, Mr. Marks conducted 14 additional in-person mediation sessions in Boston, New York City, and Washington, D.C., some of which were *ex parte* and some were joint. The dates of these sessions were January 24, 2013; July 9, 2013; September 17, 2013; November 13, 2013; March 4, 2014; May 9, 2014; January 5, 2015; February 4, 2015; February 26, 2015; April 30, 2015; June 2, 2015; June 9, 2015; June 26, 2015; and June 30, 2015. Mr. Hopkins and State Street's Chief Legal Officer attended several of these mediation sessions. *See also* Marks Decl., Ex. 5, ¶ 16; Hopkins Decl., Ex. 1, ¶ 14.

94. The mediation sessions and additional discussions included extensive exchanges of views on the merits, in which each side worked to persuade the other to modify positions based on reevaluation of risks faced if the case did not settle. These extensive exchanges of views included presentations by both sides on certain class certification, liability and damages

issues, as well as a detailed presentation by a cost accounting expert engaged by State Street. *See also* Marks Decl., Ex. 5, ¶¶ 23-24.

95. Between mediation sessions, Mr. Marks conducted numerous, often lengthy, telephone calls with counsel for the Parties to understand the perspectives of the Parties and to gauge the distance between the Parties' respective positions. Additionally, the Parties and Mr. Marks exchanged hundreds of e-mails. *See also id.* ¶ 17.

96. The mediation sessions were informed by substantial discovery. In response to ARTRS's counsel's requests, State Street produced, and counsel for ARTRS reviewed, more than nine million pages of confidential documents. These documents included, among other categories, e-mails, presentation decks and other internal communications concerning Indirect FX pricing strategy and policy; documents concerning State Street's revenue derived from Indirect FX; FX pricing summaries and breakdowns for custodial clients; Investment Manager Guides; Product and Services Manuals; marketing presentations to prospective custodial clients; State Street's responses to Requests for Proposal from prospective custodial clients; and inquiries from custodial clients and their representatives concerning Indirect FX and State Street's responses thereto.

97. Further, in response to State Street's requests, ARTRS produced more than 3,500 documents, exceeding 73,000 pages, concerning the full scope of ARTRS's custodial relationship with State Street, as well as its relationship with relevant IMs and a consultant responsible for overseeing the IMs. The ERISA Plaintiffs also collectively produced more than 3,600 pages of documents relevant to their relationship with State Street.

98. In addition to objectively and subjectively coding all documents, counsel for ARTRS sorted probative documents by topic areas and key State Street witnesses. Counsel also

prepared various detailed factual memoranda to assist the mediation process and for use in targeted deposition discovery and readiness for trial. Topic areas broadly included historical margins from SSH and AIR Indirect FX Trades, Indirect FX costs to State Street, State Street's responses to Requests for Proposal from prospective custody clients, ARTRS's relationship with State Street, complaints and inquiries to State Street from custody clients or IMs, time-stamping of Indirect FX Transactions, the California Attorney General lawsuit, and changes to IM guidelines over time.

99. As such, counsel's work preparing for mediation and negotiation of the Settlement was coupled with substantial work "behind the scenes" preparing for litigation, including contested offensive and defensive discovery, depositions, and motion practice, in the event the mediation process broke down.

100. The settlement discussions were lengthened and complicated considerably by State Street's regulatory issues. State Street took a consistent position that any settlement with the Plaintiffs would have to occur simultaneously with settlements between the Bank and the DOL, SEC, and DOJ, each of which was investigating State Street's Indirect FX Methods.

101. Ultimately, the formal mediation sessions and follow-up mediated telephonic negotiations resulted in an agreement-in-principle to a monetary settlement of $300 million on June 30, 2015. The agreement-in-principle, however, was subject to State Street's final resolution of the investigations by the DOL, SEC, and DOJ. *See also* Marks Decl., Ex. 5, ¶ 18.

102. Mr. Marks has confirmed that the terms of the Settlement represent a compromise of the Parties' initial positions, and that these compromises are the product of the Parties' assessment of the perceived strengths and weaknesses of their positions, and the risks inherent in

continued litigation as well as State Street's desire to reach finality with the government regulators. *Id.* ¶ 25.

103. Mr. Marks has further confirmed that the Settlement is consistent with the judgments he himself reached about the strengths and weaknesses of the Parties' cases. *Id.* ¶ 26.

104. Between June 30, 2015 and September 2015, as State Street's discussions with the regulators continued, the Parties focused on memorializing the terms of the Settlement in a term sheet. The term sheet went through multiple iterations, given the number of interested parties and constituencies involved. The final Term Sheet was signed on September 11, 2015.

105. During this time, Lead Counsel also undertook to prepare drafts of the formal settlement documentation, including the Settlement Agreement (with multiple exhibits relating to draft orders and notices), and an initial draft of a plan of allocation.

106. Negotiation of the Settlement Agreement and related documents was lengthy and complicated considerably by State Street's ongoing and fluid discussions with the federal agencies. Dozens of drafts were circulated before the final Settlement Agreement was signed and filed with the Court on July 26, 2016.

G. Risks, Costs and Duration of Continued Litigation

107. Plaintiffs and their counsel submit that the proposed $300 million Settlement is eminently fair, reasonable, and adequate. Because, as described above, the Settlement is the product of arm's-length negotiations among sophisticated counsel facilitated by an experienced mediator, and Plaintiffs undertook substantial discovery, a presumption of fairness applies.

108. Plaintiffs and their counsel submit that there is nothing to rebut that presumption. The Settlement provides a certain and robust recovery for the Class in light of the risks, costs, and duration of continued litigation.

109. Based on Plaintiffs' Counsel's analysis of nonpublic data and information received from State Street on a confidential basis during the mediation process, the $300 million Settlement equals approximately 20% of the estimated aggregate overcharges to Class Members on Indirect FX Transactions during the Class Period, as further described below. Further, as disclosed in the Notice, the $300 million Settlement represents an average gross recovery of $200,000 per Class Member.

110. This 20% metric is comparable to the percentage of estimated damages recovered in the similar *BNYM FX* class action. The plaintiffs asserted there that the $335 million payment by BNYM to settle the customer class action equaled "nearly 24%" of plaintiffs' damages. Mem. of Law in Supp. of Lead Plaintiffs' Unopposed Mot. for (1) Provisional Certification of Settlement Class, etc., *In re The Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Mar. 27, 2015), at 27 n.43 (excerpt annexed as Exhibit 6).[5]

111. While Plaintiffs believed their claims had merit, they and Plaintiffs' Counsel recognized that proceeding with litigation carried substantial risk and additional costs, and would entail significant delay. The risks, costs, and duration of continued litigation support the proposed Settlement.

112. **Violation of Massachusetts Consumer Protection Act.** Plaintiffs faced a risk that Chapter 93A did not reach the conduct at issue, and that the Court would thus grant summary judgment or judgment as a matter of law at trial to State Street. State Street would also argue that the facts do not show that Plaintiffs or other Class Members were deceived by the alleged misconduct, and would point to, among other things, the fact that ARTRS and other

[5] An additional payment by BNYM of $155 million, to be distributed to class members over and above the $335 million customer class payment, was attributed to the settlement of a separate action brought by the New York Attorney General ("NYAG"), which was not subject to attorneys' fees. *See id.*

Class Members continued to engage in Indirect FX Transactions with the Bank after its Indirect FX Methods were revealed.

113. Further, in ruling on State Street's motion to dismiss, the Court reserved judgment as to whether ARTRS's Chapter 93A claims could proceed under Section 9 or Section 11 pending development of a factual record as to whether ARTRS was a "consumer" or a "business" for purposes of the statute. Section 11 likely requires a greater showing to establish a violation. *See* May 8, 2012 Hearing Tr., Ex. 3, at 97:3-99:6.

114. **Breach of Fiduciary Duty.** Plaintiffs' common law fiduciary-duty claim, arising from an agent's duty of trust or obligation to provide full disclosure to its beneficiaries, also raised challenging questions of law. Plaintiffs would have to prove both that State Street served as a fiduciary to its custody clients, and that in its fiduciary capacity, the Bank had a duty to fully disclose its Indirect FX practices to them. Those prerequisites to liability carried risk for Plaintiffs and other Class Members.

115. **Negligent Misrepresentation.** State Street would no doubt assert that Plaintiffs could not prove that (1) the Bank made any actionable misrepresentations, (2) they relied on any alleged misrepresentations, or (3) the alleged misrepresentations were material. State Street would likely further contend that Plaintiffs could not prove they suffered any injury, because (in the Bank's view) they could have used information readily available to them to determine at any time during the Class Period how much they were allegedly being overcharged for Indirect FX Transactions. State Street also would have likely challenged Plaintiffs' negligent misrepresentation and other claims on statute of limitations grounds.

116. **ERISA.** Likewise, litigation of Plaintiffs' ERISA claims presented certain risks. State Street does business using numerous wholly owned subsidiaries and operating entities,

allowing it to argue that even if one State Street entity is an ERISA fiduciary, other State Street entities are not. Even within a single entity, State Street sometimes offers different products and services, allowing it to argue that even if it acts as a fiduciary for certain purposes, it is not a fiduciary for other purposes. This different corporate relationships can lead to confusion and litigation risk. In addition, State Street's liability depends on a number of fairly technical liability theories, including prohibited transactions under ERISA § 406(b), 29 U.S.C. § 1106(b), prohibited party-in-interest transactions under ERISA § 406(a), 29 U.S.C. § 1106(a), exceptions to the prohibited transaction rules under ERISA § 408(18), 29 U.S.C. § 1108(18), Prohibited Transaction Exemptions 94-20 and 98-54, and basic fiduciary obligations of loyalty, care, prudence, diligence, and monitoring under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1).

117. **Class Certification.** Class certification also presented complexities, which would have entailed a more extensive Rule 23 inquiry—and thus greater uncertainty and risk—than cases brought, for example, under the federal securities laws. In mediation, State Street contended that Plaintiffs would face insuperable hurdles to class certification because, in the Bank's view, among other things, (1) Massachusetts law, in particular Chapter 93A, could not be applied to a nationwide class; and (2) State Street would be able to demonstrate that Class Members possessed varying levels of knowledge with respect to the Indirect FX Methods, precluding a showing of predominance under Rule 23(b)(3).

118. Regarding the first point, Plaintiffs would have to show either that (i) Massachusetts law should generally apply to Class Members' claims, or (ii) if the laws of various states were to apply, a trial would be manageable. Presenting sufficient evidence to demonstrate the manageability of a trial under the laws of several states would have required Plaintiffs to detail the relevant states' laws, including any material differences among them, and prepare a

trial plan. While Plaintiffs believed a multistate class or subclasses could have been certified, obtaining certification would have been challenging and time-consuming.

119. Additionally, Plaintiffs would have devoted significant time and resources to refuting State Street's argument that individual issues predominated because (in the Bank's view) Class Members had disparate levels of knowledge regarding the Indirect FX Methods. State Street likely would have sought to depose numerous Class Members and their agents, as The Bank of New York Mellon did in the *BNYM FX* customer class cases. The parties also likely would present conflicting expert analysis on customer expectations within the FX market, heightening the costs and risks of litigation. Class certification is often granted in ERISA litigation, but State Street certainly would have waged a vigorous opposition. Success can never be assumed, and certification of the ERISA claims alone would have provided no relief to a majority of Class Members.

120. Even were Plaintiffs to obtain class certification in whole or in part, the class might have been decertified before or during trial, or on appeal. The risk of decertification is real where, as here, the Court might need to assess the manageability of a trial involving the laws of at least several states.

121. **Damages.** Further contributing to the risks Plaintiffs faced, the appropriate measure of damages was contested during the Parties' lengthy mediation process and would have been a focus of the litigation. Plaintiffs thus faced the risk that the damages now forming the basis of Class Members' recovery through this Settlement could never be proven at trial or would be greatly offset.

122. Plaintiffs' Counsel used the following basic methodology to estimate aggregate classwide damages. State Street applied fixed markups or markdowns, measured by basis points,

to its SSH and AIR Indirect FX Trades during the Class Period. The application of the fixed spreads was limited in two circumstances. First, State Street would "net" all of an IM's SSH trades in a given currency prior to execution, reducing the amount of currency traded, and, therefore, the total markup or markdown applied to the IM's clients' trades. Second, for SSH trades, the fixed spread markups and markdowns were limited by the high or low of the range of the day. Thus, if the difference between the starting point of the indirect pricing process and the high or low of the day was less than the fixed spread, State Street only applied a markup or markdown to the extent of the high or low rate and not beyond. State Street referred to the spread achieved on Indirect FX Trades after the application of such "netting" and "capping" as the "effective" spread.

123. Plaintiffs' Counsel began with the dollar volume of SSH Indirect FX Trades for each year for 1998 through 2009. The average effective markup across all currency pairs for SSH trades for 2009 was a narrow basis point range. Plaintiffs' Counsel multiplied the sum total of SSH volume for 1998-2009 by the high end of State Street's stated range of effective markups, to estimate damages on SSH trades at approximately $1.177 billion.

124. Plaintiffs' Counsel then took the dollar volume of AIR Indirect FX Trades for each year for 1998 through 2009. The volume is a small fraction of the SSH volume. Plaintiffs' Counsel multiplied the annual AIR volume for 1998-2009 by the known markups for each year to estimate damages on AIR trades at approximately $314.49 million.

125. Plaintiffs' Counsel thus estimates total damages at approximately $1.49 billion, of which the Class Settlement Amount would constitute 20 percent.

126. State Street would no doubt dispute this $1.49 billion damages estimate, contending, among other things, that it (a) materially overstates the effective spread for each year

during a long Class Period, (b) assumes that every fraction of penny of markup is an improper overcharge where custody clients willingly pay a spread on direct FX trades, and (c) ignores the actual costs to State Street of providing Indirect FX services.

127. In any event, the complexities relating to class certification, liability and damages, as well as the sheer volume of evidence, virtually ensured that continuing to litigate would have entailed millions more dollars in lodestar and expenses for Plaintiffs' Counsel, with an uncertain outcome.

128. As described herein, when the Settlement was reached, Plaintiffs and their counsel had a well-founded and realistic understanding of the strengths and weaknesses of the merits and value of the claims. On this score, Lead Counsel had the particular benefit of associating with TLF and Lieff Cabraser, both of which were directly involved in the *BNYM FX* litigation. TLF's and Lieff Cabraser's experience litigating *BNYM FX* at or about the same time as the mediation process here afforded valuable insight when balancing the certainty of the Settlement recovery against both the prospect of massive additional discovery and the risks attendant to trying these cases.

129. Plaintiffs support the Settlement. *See* Hopkins Decl., Ex. 1, ¶¶ 17-18, 21; Declaration of Michael T. Cohn ("Cohn Decl."), Exhibit 7 hereto, ¶ 10; Declaration of Arnold Henriquez ("Henriquez Decl."), Exhibit 8 hereto, ¶ 10; Declaration of James Pehoushek-Stangeland ("Pehoushek-Stangeland Decl."), Exhibit 9 hereto, ¶¶ 4, 6; Declaration of Richard A. Sutherland ("Sutherland Decl."), Exhibit 10 hereto, ¶ 10; Declaration of William R. Taylor ("Taylor Decl."), Exhibit 11 hereto, ¶ 10; Declaration of Janet A. Wallace, Trustee of The Andover Companies Employee Savings and Profit Sharing Plan ("Wallace Decl."), Exhibit 12 hereto, ¶¶ 5, 7.

130. In sum, the Settlement eliminates significant litigation risk and guarantees the Settlement Class a substantial cash recovery. Settling the Class Actions for $300 million, now, is in the best interests of the Settlement Class.

H. The Plan of Allocation of the Net Class Settlement Fund

131. Pursuant to the proposed Plan of Allocation, which is set forth in full in the Notice, A.B. Data will calculate each Settlement Class Member's Recognized Claim using information supplied by State Street, including Indirect FX Trading Volume data and classifications of each Class Member.

132. The Plan is based on transaction data maintained by State Street with respect to custodial clients that engaged in Indirect FX Transactions with the Bank during the Class Period. The Net Class Settlement Fund will be allocated to each participating Class Member based primarily on the Class Member's volume of Indirect FX Transactions during the Class Period and whether the Class Member is (a) an ERISA Plan; (b) a Group Trust, *i.e.*, an entity that has or had both ERISA-governed and non-ERISA assets; (c) an RIC (Registered Investment Company), most of which are mutual funds; or (d) entities not falling within those categories, including ARTRS and other public pension funds as well as private customers ("Public and Other").

133. The parties have relied on Indirect FX Trading Volume information provided by State Street to develop this Plan of Allocation. The respective allocations to each group of Class Members are summarized below.

134. **ERISA Plans and Eligible Group Trusts.** ERISA Plan and certain Group Trust Class Members will be allocated $60 million (the "ERISA Settlement Allocation"), on a gross basis, from the Class Settlement Fund, (i) plus 20% of any interest accrued on the Class Settlement Fund; (ii) minus 20% of any Taxes and Tax Expenses, Notice and Administration

Expenses, Service Awards, and Litigation Expenses; and (iii) minus attorneys' fees, if awarded by the Court, in an amount not to exceed $10,900,000.

135. ERISA Plans and eligible Group Trusts represent approximately 9%-15% of the total Indirect FX Trading Volume, depending on what portion of the Group Trusts' volume actually falls under ERISA.

136. The $10.9 million cap of attorneys' fees deductible from the ERISA Settlement Allocation means that if, for example, the Court awards the requested 24.85% fee, ERISA Plans and eligible Group Trusts will pay fees at a lower percentage rate than other Class members.

137. The ERISA Settlement Allocation was set based on the Indirect FX Trading Volume provided by State Street, including information concerning the total amount of Indirect FX Trading Volume executed during the Class Period by ERISA Plans and Group Trusts. In the course of administering the Settlement, A.B. Data will request information from Group Trusts concerning their ERISA Volume during the Class Period.

138. This allocation was negotiated directly between Lead Counsel, ERISA Counsel, and DOL representatives and, in light of claims available under ERISA, provides a premium per dollar of Indirect FX Trading Volume for ERISA Plans and eligible Group Trusts in comparison to allocations to other Settlement Class Members. The disparity between the recovery to ERISA Plans/eligible Group Trusts and other Settlement Class Members reasonably derives from differences in the remedies available to those respective entities.

139. Both the $60 million ERISA Settlement Allocation and the $10.9 million cap on fees deductible therefrom were agreed-to after Plaintiffs and State Street reached an agreement-in-principle on the $300 million Class Settlement Fund. *See also* Marks Decl., Ex. 5, ¶¶ 20-21. Further, DOL first proposed a cap on fees to Plaintiffs' Counsel in mid-July 2015, weeks after

the ERISA Settlement Allocation had been agreed-to, as a further condition for DOL's support of the entire Settlement. Plaintiffs' Counsel and DOL did not reach agreement on the $10.9 million amount until late August 2015.

140. **RICs.** Based on information provided by State Street, after the ERISA Settlement Allocation, the allocation to RICs will be approximately $142 million, on a gross basis. This amount, unlike the ERISA Settlement Allocation, does not reflect any premium and is derived solely from the RICs' percentage of total Indirect FX Trading Volume (taking into account the ERISA Settlement Allocation). The RIC Settlement Allocation (assuming payment of a certain amount of attorneys' fees, Litigation Expenses, Service Awards, and Notice and Administration Expenses) will meet the required Registered Investment Company Minimum Distribution of $92,369,416.51, which is an essential condition of State Street's settlement with the SEC.

141. That minimum distribution to RICs, like the ERISA Settlement Allocation, is also an essential condition of this Settlement, which State Street can terminate if those allocations are not made.

142. **Public and Other.** The Public and Other Settlement Allocation will be approximately $98 million, on a gross basis. The Public and Other Settlement Allocation, like the RIC Settlement Allocation, is derived solely from the Public and Other percentage of total Indirect FX Trading Volume, taking into account the ERISA Settlement Allocation.

143. Using information provided about each Class Member's Indirect FX Trading Volume(s) during the Class Period, A.B. Data will calculate the Class Member's Recognized Claim, and use those calculations to make the Settlement Allocations in accordance with the Settlement Agreement. To facilitate that process, State Street has provided A.B. Data with (1) the total Indirect FX Trading Volume for each Class Member during the Class Period; and (2)

information concerning whether each Class Member was an ERISA Plan, RIC, or Group Trust during the Class Period.

144. Under the allocation methodology described above, determining each Settlement Class Member's Recognized Claim will involve a two-step analysis:

145. *First*, A.B. Data will divide the Class Member's total Indirect FX Trading Volume during the Class Period into (i) RIC Volume, (ii) ERISA Volume, and (iii) Public and Other Volume, depending on whether the Class Member falls into the RIC, ERISA Plan, or Public and Other category. A.B. Data will then determine, based on the records provided by State Street, the respective amounts of each Class Member's RIC Volume, ERISA Volume, and Public and Other Volume.

146. For RICs, ERISA Plans, or entities falling into the Public and Other category, those Class Members' total Indirect FX Trading Volume during the Class Period will simply equal its RIC Volume, ERISA Volume, or Public and Other Volume, respectively. Because Group Trusts, on the other hand, may fall within more than one of the above categories, further scrutiny of their Indirect FX Transactions will be required.

147. Specifically, each Group Trust must provide A.B. Data with a certification (as set forth in the Notice) reporting the average proportion of the Group Trust's State Street-custodied assets held by an ERISA Plan or Plans during the Class Period or the average volume of Indirect FX Trades made by the ERISA Plan(s) during the Class Period, and identifying by name each ERISA Plan within the Group Trust. If the Group Trust does not have that information for each year of the Class Period but reasonably believes it held ERISA assets during the Class Period, it should report the years for which data is available and the results will be averaged by applying

the average proportion of the years with known ERISA assets or Indirect FX Trading Volume to the years with unknown ERISA assets or Indirect FX Trading Volume.

148. Using the information provided by the Group Trust, its ERISA Volume will equal the volume of Indirect FX Trades made by the ERISA Plan(s) in the Group Trust, or, if the information concerning the volume of Indirect FX Trades is insufficient, the proportion of assets held by the ERISA Plan(s) in a particular Group Trust. A.B. Data will categorize any non-ERISA Volume as Public and Other Volume (and its RIC Volume will be zero).

149. Any Group Trust that does not provide the required certification by December 20, 2016 will be treated for allocation purposes as if it held no ERISA Plan assets and will not be entitled to a recovery from the ERISA Settlement Allocation. Rather, its total Indirect FX Trading Volume during the Class Period will be categorized as Public and Other Volume (and its RIC Volume will be zero). The Plan of Allocation provides for an exception with respect to Group Trusts that do not provide certifications but are known by the parties to have ERISA assets based on previous consultations with the DOL, as set forth in the Notice.

150. *Second*, after calculating each Settlement Class Member's ERISA Volume, RIC Volume, and Public and Other Volume, A.B. Data will calculate the ERISA, RIC, and Public and Other Volumes for the entire Settlement Class. A Class Member's ERISA Recognized Claim will equal the Class Member's ERISA Volume divided by the Classwide ERISA Volume, multiplied by the amount of the ERISA Settlement Allocation. The same calculations will follow to determine the Class Member's RIC Recognized Claim and Public and Other Recognized Claim. Again, with the exception of Group Trusts, a Class Member will have only an ERISA Recognized Claim, an RIC Recognized Claim, or a Public and Other Recognized Claim, corresponding to the category into which that Class Member falls.

151. The Net Class Settlement Fund will be allocated among Class Members whose prorated distributions would be $10.00 or greater, given the fees and expenses associated with printing and mailing payments. Plaintiffs and State Street will use their best efforts to cause an initial distribution of the Net Class Settlement Fund, including the RIC Settlement Allocation, within one year after the Settlement's Effective Date, including by seeking the Court's authorization.

152. Class Members are not required to submit claims. In developing the Plan of Allocation, Plaintiffs took reasonable steps to ensure that State Street identified every custodial client of State Street, based on the Bank's records, which had a U.S. tax address and entered into an Indirect FX Transaction with the Bank during the Class Period. Upon final approval of the Settlement, each Class Member that does not opt out will simply receive a check or wire transfer in the amount of the Class Member's net recovery.

153. The Plan of Allocation reflects the considered judgment of Plaintiffs' Counsel, and has been reviewed and approved by the SEC and DOL. Plaintiffs respectfully submit that it should be approved.

I. Compliance With the Court's Preliminary Approval Order

154. The Preliminary Approval Order, among other things, approved the form and manner of individual and publication notice to the Settlement Class, and authorized Lead Counsel to retain A.B. Data as the Claims Administrator to supervise and administer the notice procedure for the Settlement. Preliminary Approval Order ¶¶ 7-9, 12.

155. In accordance therewith, Lead Counsel instructed A.B. Data to: (i) mail, on August 22, 2016, the Court-approved Notice by first-class mail to the Class Members identified in State Street's records; (ii) mail a cover sheet to Class Members that have been identified as Group Trusts to alert them of the certification requirement; and (iii) publish, on September 6,

2016, the Court-approved Summary Notice in the *Wall Street Journal* and over the PR Newswire. *Id.* ¶ 9; *see also* Declaration of Eric J. Miller of A.B. Data, Ltd. ("Miller Decl."), Exhibit 13 hereto, ¶¶ 2-8.

156. A.B. Data has complied with the notice mailing and publication requirements in the Preliminary Approval Order. *Id.* & Exs. A-C thereto.

157. Lead Counsel also worked with A.B. Data to establish a settlement-specific website, www.StateStreetIndirectFXClassSettlement.com. The website provides Class Members and other interested parties with information concerning the Settlement and the important dates and deadlines in connection with the Settlement, as well as access to downloadable copies of the Notice, the Settlement Agreement, the Preliminary Approval Order, and the Complaints in the Class Actions. *See* Miller Decl., Ex. 13, ¶ 11.

158. Additionally, A.B. Data established and maintains a toll-free telephone number and interactive voice-response system to respond to inquiries regarding the Settlement. *Id.* ¶ 9. Class Members can also contact A.B. Data by sending an e-mail to info@StateStreet IndirectFXClassSettlement.com. *See* Miller Decl. Ex. A at 1.

159. The deadline set forth in the Preliminary Approval Order for Class Members to file objections to the Settlement, Plan of Allocation, or application for attorneys' fees and expenses or to submit requests for exclusion from the Settlement Class is October 7, 2016. Preliminary Approval Order ¶¶ 14, 16.

160. As of the date hereof, no objections to any of these matters have been received, and A.B. Data has received no requests for exclusion. Miller Decl., Ex. 13, ¶ 12.

J. Request for an Award of Attorneys' Fees

161. Lead Counsel, on behalf of all Plaintiffs' Counsel, respectfully requests an award of attorneys' fees in the amount of Seventy-Four Million Five Hundred Forty-One Thousand Two Hundred Fifty Dollars ($74,541,250.00), to be paid out of the Class Settlement Fund.

162. The requested fee is approximately 24.85% of the $300 million Class Settlement Fund, and is equivalent to 25% of the Class Settlement Fund after deduction of the maximum Litigation Expenses disclosed in the Notice ($1,750,000) and the maximum Service Awards disclosed in the Notice ($85,000). Lead Counsel seeks this fee despite the fact that actual Litigation Expenses are substantially less than $1.75 million as described below, and regardless of whether Service Awards, also described below, are granted in full.

163. Lead Counsel submits that the fee request is supported by the fact that Plaintiffs' Counsel undertook these Class Actions with no assurance of compensation or recovery of costs, and faced substantial risk from the outset.

164. These Class Actions are atypical with respect to the nature of the defendant, the subject matter, and the application of the statutory claims, and are in many respects hybrids between consumer, securities, and ERISA actions.

165. These Class Actions are also complex. State Street's alleged unfair and deceptive acts and practices, breaches of fiduciary duty, negligent misrepresentations, and violations of ERISA occurred over a 12-year Class Period in multiple locations, and concerned an opaque market and a little-understood area of the financial services industry.

166. As more fully described in Part D above, the *ARTRS* Action was the first indirect FX case. Besides State Street, there are only four major U.S. custody banks: BNYM, JPMorgan Chase, Citibank, and Northern Trust. These banks were rarely, if ever, sued in relation to their custody businesses before these indirect FX pricing issues first began to surface. When

Plaintiffs' Counsel investigated ARTRS's claims and commenced the action, they were working essentially from a clean slate.

167. Additionally, as noted in Part D above, neither the litigation nor the Settlement was helped along by preexisting government enforcement actions or investigations. Private plaintiffs led the charge against State Street. Indeed, DOL and the SEC have benefitted significantly from Plaintiffs' Counsel's efforts in achieving the $300 million Settlement, as key terms of the Plan of Allocation are central to these agencies' settlements with State Street.

168. Further, as more fully described in Part G above, Plaintiffs' Counsel brought about this Settlement in the face of an array of litigation risks. These risks did not evaporate once Plaintiffs entered into mediation. To the contrary, State Street brought these substantive issues to bear throughout the extended mediation process, pressing its contentions on, for example, the individualized nature of Class Members' written agreements and oral communications with State Street; the implicit (and sometimes explicit) awareness and acceptance of indirect FX pricing practices by Class Members and their IMs; cost accounting issues that supported the markups applied to Indirect FX Transactions; and the changing "real" interbank FX rates on a given currency pair at a given point in time. *See also* Marks Decl., Ex. 5, ¶¶ 23-25.

169. Lead Counsel further submits that the fee request is supported by the fact that Plaintiffs' Counsel devoted substantial time to this case while controlling costs and avoiding judicial intervention.

170. As more fully described in Parts C and E above, counsel for ARTRS conducted a substantial pre-filing investigation, prepared detailed complaints, and litigated a substantial

motion to dismiss culminating in a three-hour oral argument before participating in the Court-approved mediation and discovery process.

171. The mediation sessions were protracted and well-informed by, among other things, the review and close analysis of nine million pages of documents and various nonpublic data supplied by State Street. The process was intended to, and did, bring about the best possible result for the Class in light of the risks, costs and duration of continued litigation while avoiding unnecessary expenditure of party, third-party and judicial time and resources—and Plaintiffs' Counsel put a great deal of focused effort into it. *See also* Marks Decl., Ex. 5, ¶ 30.

172. Settling the Class Actions was complicated considerably by the presence of the federal agencies, particularly the SEC and DOL, conducting their own investigations of State Street. Because the financial terms of State Street's separate settlement with DOL will be satisfied by the ERISA Settlement Allocation, Plaintiffs' Counsel had to negotiate and coordinate with DOL with respect to the Settlement Agreement, the Notice, and the Plan of Allocation. Negotiating the Plan of Allocation and other aspects of the Settlement with State Street and DOL simultaneously was a challenging and often complicated task.

173. Further, the requested fee is comparable to the fee awarded in the similar *BNYM FX* class action. As noted above, following the unsealing of several *qui tam* lawsuits, BNYM's custody clients asserted claims for, *inter alia*, unfair and deceptive acts and practices, violations of ERISA, and breach of fiduciary duty premised on a broadly similar alleged practice of excessive concealed markups on indirect FX transactions.

174. In March 2015, the parties in *BNYM FX*, and various government agencies including the DOJ, SEC, DOL, and NYAG, announced settlements totaling $714 million. This omnibus relief included a $335 million payment by BNYM specifically to settle the private

"Customer Class" cases. In September 2015, the plaintiffs' counsel sought, and received, a fee of 25% of the $335 million recovery ($83.75 million) plus expenses. *See* Order Awarding Attorneys' Fees, Service Awards, and Reimbursement of Litigation Expenses, *In re The Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Sept. 24, 2015), Exhibit 14 hereto. The percentage fee requested here is slightly lower, on a comparable class settlement amount.

175. The time spent working on the investigation, litigation and settlement of the Class Actions by Plaintiffs' Counsel is set forth in the individual firm declarations annexed hereto as Exhibits 15-23.[6]

176. Included with these declarations are schedules that summarize the lodestar of each respective firm, as well as the expenses incurred by category (the "Fee and Expense Schedules"). The individual firm declarations and the Fee and Expense Schedules indicate the amount of time spent by each attorney and professional support staff on the case, and the lodestar calculations based on their current billing rates. As stated in each of these declarations, they were prepared from contemporaneous daily time records regularly prepared and maintained by the respective firms, which are available at the request of the Court. *See also* Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards, Exhibit 24 hereto.

177. In total, from the inception of the Class Actions through September 6, 2016, Plaintiffs' Counsel expended more than 86,000 hours on the investigation, prosecution, and resolution of the claims against Defendants, for an aggregate lodestar of $41,323,895.75. Plaintiffs' Counsel's hourly billing rates here range from $350 to $1,000 for Partners, $455 to

[6] In addition to Labaton Sucharow, TLF, Lieff Cabraser, Keller Rohrback, McTigue Law, and Zuckerman Spaeder, the law firms of Feinberg, Campbell & Zack, P.C.; Beins, Axelrod, P.C.; and Richardson, Patrick, Westbrook & Brickman, LLC have submitted individual firm declarations. Exs. 21-23. These three declarations report modest time spent and expenses incurred in connection with these counsel's appearances in the *Henriquez* and *Andover Companies* Actions.

$1,000 for Of Counsel, and $325 to $725 for other attorneys. *See* Exs. 15-24. Defense firms' billing rates analyzed and gathered by Lead Counsel from bankruptcy court filings in 2015, in many cases exceeded these rates. *See* Exhibit 25 hereto.

178. Overall, the requested attorneys' fee yields a lodestar multiplier of 1.8.

179. ARTRS, and all ERISA Plaintiffs, support the requested fee as reasonable in view of the work performed and results obtained for the benefit of the Class. *See* Hopkins Decl., Ex. 1, ¶ 19; Cohn Decl., Ex. 7, ¶ 10; Henriquez Decl., Ex. 8, ¶ 10; Pehoushek-Stangeland Decl., Ex. 9, ¶¶ 5-6; Sutherland Decl., Ex. 10, ¶ 10; Taylor Decl., Ex. 11, ¶ 10; Wallace Decl., Ex. 12, ¶¶ 6-7.

180. Annexed hereto as Exhibit 26 is a true and correct copy of cited excerpts of the transcript of the June 23, 2016 Status Conference before this Court.

181. Annexed hereto as Exhibit 27 is a true and correct copy of the Order and Final Judgment in *In re CVS Corp. Securities Litigation*, Civ. No. 01-11464 JLT (D. Mass. Sept. 7, 2005).

182. Annexed hereto as Exhibit 28 is a true and correct copy of the Order and Final Judgment in *In re Lernout & Hauspie Securities Litigation*, No. 01-CV-11589 PBS (D. Mass. Dec. 22, 2004).

183. Annexed hereto as Exhibit 29 is a true and correct copy of the Order and Final Judgment in *In re Raytheon Co. Securities Litigation*, Civ. No. 99-12142-PBS (D. Mass. Dec. 6, 2004).

184. Annexed hereto as Exhibit 30 is a true and correct copy of the Declaration of Alan P. Lebowitz, General Counsel to the Comptroller of the State of New York, in *In re Raytheon Co. Securities Litigation*, Civ. No. 99-12142-PBS (D. Mass. Nov. 23, 2004).

185. Annexed hereto as Exhibit 31 is a true and correct copy of Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

186. Annexed hereto as Exhibit 32 is a true and correct copy of the Final Order Approving Class Action Settlement in *In re Reebok Easytone Litigation*, No. 10-CV-11977 FDS (D. Mass. Jan. 19, 2012).

K. Request for Payment of Litigation Expenses

187. Lead Counsel respectfully seeks payment of One Million Two Hundred Fifty Seven Thousand Six Hundred Ninety-Seven and 94/100 Dollars ($1,257,697.94) out of the Class Settlement Fund for Litigation Expenses incurred by Plaintiffs' Counsel in commencing, prosecuting, and resolving the claims asserted in the Class Actions. *See generally* Individual Firm Declarations, Exs. 15-23, and Master Chart, Ex. 24.

188. From the inception of the Class Actions, Plaintiffs' Counsel understood that they might not recover any of the expenses they incurred, and, at a minimum, would not recover any expenses until the actions were successfully resolved. Plaintiffs' Counsel further understood that, even assuming that the Class Actions were ultimately successful, an award of expenses would not compensate counsel for the lost use or opportunity costs of funds advanced to prosecute the claims against Defendants. Plaintiffs' Counsel were motivated to, and did, take steps to minimize expenses where practicable without jeopardizing the zealous and effective prosecution of the Class Actions.

189. Indeed, many of the expenses incurred in the *ARTRS* Action were paid out of a central litigation fund created and maintained by Labaton Sucharow (the "Litigation Fund"). Labaton Sucharow, TLF, and Lieff Cabraser collectively contributed $319,000 to the Litigation Fund. A description of the payments from the Litigation Fund by category is included in the

individual firm declaration submitted on behalf of Labaton Sucharow. *See* Ex. 15, ¶ 10 & Ex. C thereto.

190. Plaintiffs' Counsel's expenses include charges for, among other things, (i) experts and consultants; (ii) housing approximately nine million pages of documents produced by State Street; (iii) online factual and legal research; (iv) mediation; (v) travel; and (vi) document reproduction.

191. In particular, the cost of experts and consultants, totaling approximately $200,000, represents one of the largest components of Plaintiffs' Counsel's expenses, representing approximately 16% of their total expenses. Experts were utilized principally to consult with respect to the FX market and industry and to analyze ARTRS's and other institutional investors' indirect and direct FX trades.

192. Another large component of Plaintiffs' Counsel's expenses relates to electronic discovery, totaling approximately $445,000 or 35% of total expenses.

193. Plaintiffs' Counsel's expenses also include the costs of online and electronic research in the amount of approximately $70,000. This amount represents charges for computerized research services such as LexisNexis, Westlaw, Courtlink, Thomson Financial, Bloomberg and PACER. It is now standard practice for attorneys to use online services to assist them in researching legal and factual issues, and indeed, courts recognize that these tools create efficiencies in litigation and ultimately save money for clients and the class.

194. Plaintiffs' Counsel were also required to travel in connection with the claims against State Street, particularly with regard to the 16 mediation sessions, and to work after normal business hours, and thus incurred the related costs of rail and airline tickets, late-night transportation, meals, and lodging. Any first-class airfare has been reduced to economy rates.

Included in Plaintiffs' Counsel's total expense request is approximately $360,000 for these expenses (approximately 28% of total expenses).

195. Further, Plaintiffs' Counsel paid approximately $130,000 for Plaintiffs' share of the mediator's fees and costs.

196. The other expenses for which Plaintiffs' Counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include, among others, court fees, process servers, document-reproduction costs, long-distance telephone and facsimile charges, and postage and delivery expenses.

197. All Plaintiffs support the requested Litigation Expenses. *See* Hopkins Decl., Ex. 1, ¶ 20; Cohn Decl., Ex. 7, ¶ 10; Henriquez Decl., Ex. 8, ¶ 10; Pehoushek-Stangeland Decl., Ex. 9, ¶ 6; Sutherland Decl., Ex. 10, ¶ 10; Taylor Decl., Ex. 11, ¶ 10; Wallace Decl., Ex. 12, ¶ 7.

198. Courts have generally found that these kinds of expenses are payable from a fund recovered by counsel for the benefit of a class. Lead Counsel submits that the requested Litigation Expenses were reasonably and necessarily incurred and should be approved.

L. Request for Service Awards to Plaintiffs

199. Lead Counsel respectfully requests that the Court approve Service Awards of Twenty-Five Thousand Dollars ($25,000.00) to Plaintiff ARTRS and Ten Thousand Dollars ($10,000.00) to each of Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland, in consideration of their successful service as class representatives in these Class Actions.

200. All Plaintiffs diligently discharged their core responsibilities by monitoring the litigations, conferring with Plaintiffs' counsel, and reviewing significant pleadings and documents.

201. Plaintiff ARTRS, after conducting appropriate due diligence, stepped forward and took a risk to sue its custody bank, and consistently worked thereafter to support the prosecution of this case and the mediation process. ARTRS's Executive Director, for example, attended the hearing on State Street's motion to dismiss and subsequent lobby conference as well as multiple mediation sessions in Boston and elsewhere. ARTRS also made a complete document production in response to State Street's requests. *See also* Hopkins Decl., Ex. 1, ¶¶ 11-16.

202. Service Awards to the ERISA Plaintiffs are also justified. The ERISA Plaintiffs effectively represented a key constituency of the Class and collectively produced thousands of pages of documents to State Street in response to State Street's requests. *See* Cohn Decl., Ex. 7, ¶¶ 3-6, 9-10; Henriquez Decl., Ex. 8, ¶¶ 3-6, 9-10; Pehoushek-Stangeland Decl., Ex. 9, ¶¶ 3-4, 6; Sutherland Decl., Ex. 10, ¶¶ 3-6, 9-10; Taylor Decl., Ex. 11, ¶¶ 3-6, 9-10; Wallace Decl., Ex. 12, ¶¶ 3-4, 7.

203. The $85,000.00 in requested Service Awards equal only 0.028% of the Class Settlement Fund, and were disclosed in the Notice. Lead Counsel submits that the Service Awards are reasonable and should be approved.

M. Summary of Relief Sought

204. In view of the significant recovery to the Settlement Class against the risks, costs and duration of continued litigation, as described herein and the accompanying brief in support of final approval of the Settlement, I respectfully submit that the proposed $300 million Class Settlement should be approved as fair, reasonable, and adequate.

205. Further, I respectfully submit that the proposed Plan of Allocation of the Net Class Settlement Fund is an appropriate method of apportionment of the settlement proceeds among the members of the Settlement Class as a whole, and should be approved as fair and reasonable.

206. Further, I respectfully submit that Court should reaffirm as final its findings in Paragraphs 2-4 of the Preliminary Approval Order with regard to certification of the Settlement Class for settlement purposes.

207. Finally, in view of the skilled, efficient, and focused efforts of Plaintiffs' Counsel in bringing about the Class Settlement in the face of substantial litigation risk and practical obstacles and complexities, as described herein and the accompanying brief in support of fees and expenses, I respectfully request that the Court:

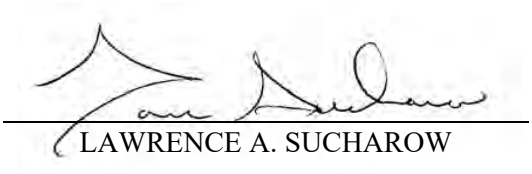
(a) award an attorneys' fee to Lead Counsel in the amount of $74,541,250.00, or approximately 24.85% of the Class Settlement Fund;

(b) approve payment of Litigation Expenses in the total amount of $1,257,697.94;

(c) approve payment of a Service Award to Plaintiff ARTRS in the amount of $25,000.00; and

(d) approve payment of Service Awards to Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland in the amount of $10,000.00 each.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 15, 2016.



LAWRENCE A. SUCHAROW

Exhibit 17

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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 DANIEL P. CHIPLOCK ON BEHALF OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP IN SUPPORT OF LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND PAYMENT OF EXPENSES

Daniel P. Chiplock, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am a partner with the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration in support of Lead Counsel's motion for an award of attorneys' fees and payment of litigation expenses on behalf of all Plaintiffs' counsel who contributed to the prosecution of the claims in the above-captioned class actions (the "Class Actions") from inception through August 31, 2016 (the "Time Period").

2. Since the outset of this action, my firm has served as additional counsel for Plaintiff Arkansas Teachers Retirement System ("ARTRS") and the proposed class in the first-filed class action (Case No. 11-cv-10230). These roles were first memorialized by order of the Court dated January 12, 2012. [Dkt. No. 28].

3. As described in the accompanying papers filed in support of both final approval of the proposed Settlement of the Class Actions and Plaintiffs' counsel's requested fee award, Lieff Cabraser has been involved since 2008 in investigating and pursuing claims of alleged deceptive practices and overcharges by custodial banks related to the foreign currency exchange ("FX") products and services offered by such banks to their custodial customers. More than two years before the Class Actions were filed, Lieff Cabraser, along with co-counsel the Thornton Law Firm LLP ("TLF"), was counsel of record in *qui tam* lawsuits originally filed under seal in California (the "California Action"), as well as other states, against State Street Bank & Trust Co. ("State Street"). The California Action ultimately was unsealed in October 2009 by the intervention of the Attorney General for the State of California. Before that point and afterwards, Lieff Cabraser investigated possible claims to be brought on a class basis for the benefit of custodial customers who would not otherwise benefit from any unsealed *qui tam* lawsuits. Based on its institutional knowledge and expertise in the area, Lieff Cabraser was

eventually associated in to the customer class lawsuit being investigated by Labaton Sucharow LLP ("Labaton") on behalf of ARTRS. Lieff Cabraser was listed as counsel on the first-filed Complaint in this Action, and has worked side-by-side with Labaton and TLF, starting in the months leading up to the filing of that Complaint and continuing through the present. Specific tasks performed by Lieff Cabraser during the more than six years of investigation, litigation, and mediation of this Action are too numerous to list *seriatim*, but broadly speaking, included but were not limited to the following:

- Factual investigation, including researching and reconstructing thousands of FX price movements for major currencies during fixed time periods prior to 2009 for several large institutional customers of State Street;
- Researching and drafting proposed class claims for inclusion in the Complaint, including (specifically) claims under M.G.L. ch. 93A;
- Briefing Defendants' motion to dismiss, with specific responsibility for defending Plaintiffs' M.G.L. ch. 93A claims and opposing Defendants' statute of limitations defense;
- Preparing for and attending Court hearings, including the hearing on Defendants' motion to dismiss;
- Preparing for and attending every mediation session held in this Action, in addition to countless phone calls between and among Plaintiffs' counsel, Defense counsel, government regulators, and/or State Street's counsel; in-person meetings between and amongst the same; and strategy sessions amongst Plaintiffs' counsel;
- Drafting discovery and information requests to State Street;
- Researching and arguing the merits of class certification in the context of mediation discussions;
- Analyzing State Street's recorded margins on indirect FX trades throughout the proposed class period, sorted by customer "bucket," including total volumes attributable to registered investment companies ("RICs"), ERISA plans, and public pension plans;
- Reviewing and closely analyzing, along with co-counsel, more than 9 million pages of documents and data produced by State Street, in preparation for deposition discovery and trial;
- Drafting, along with co-counsel, the term sheet and eventual settlement documentation (including proposed Notices) related to the $300 million class Settlement;
- Negotiating, along with co-counsel, any additional terms of the global settlement required thereafter by any government regulator (including the United States Department of Labor ("DoL")); and
- Briefing preliminary and final approval of the Settlement.

4. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request. Additionally, any personnel who billed fewer than 5 hours in the litigation have not been included in my firm's total.

5. The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

6. The total number of hours expended on this litigation by my firm during the Time Period, with the adjustment(s) referenced above, is 20,458.50 hours. The total lodestar for my firm for those hours is $9,800,487.50.

7. My firm's lodestar figures are based upon the firm's billing rates, which rates do not include charges for expenses items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

8. As detailed in Exhibit B, my firm has incurred a total of $271,944.53 in expenses in connection with the prosecution of the Class Actions. The expenses are reflected on the books and records of my firm. These books and records are prepared from expense vouchers, check records and other source materials and are an accurate record of the expenses incurred.

9. With respect to the standing of my firm, attached hereto as Exhibit C is a brief biography of my firm as well as biographies of the firm's partners and of counsels.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 14, 2016.

Daniel P. Chiplock

Exhibit A

EXHIBIT A

STATE STREET INDIRECT FX TRADING CLASS ACTION
No. 11-cv-10230, No. 11-cv-12049, No. 12-cv-11698 MLW (D. Mass.)

LODESTAR REPORT

FIRM: Lieff Cabraser Heimann & Bernstein, LLP
REPORTING PERIOD: INCEPTION THROUGH AUGUST 30, 2016

PROFESSIONAL	STATUS	HOURLY RATE	TOTAL HOURS TO DATE	TOTAL LODESTAR TO DATE
ELIZABETH CABRASER	(P)	1,000.00	29.50	$ 29,500.00
RICHARD HEIMANN	(P)	1,000.00	22.60	22,600.00
STEVEN FINEMAN	(P)	875.00	72.20	63,175.00
DAVID STELLINGS	(P)	825.00	8.10	6,682.50
DANIEL CHIPLOCK	(P)	675.00	1,357.90	916,582.50
NICHOLAS DIAMAND	(P)	625.00	32.30	20,187.50
LEXI HAZAM	(P)	650.00	53.30	34,645.00
JOY KRUSE	(P)	825.00	174.40	143,880.00
MICHAEL MIARMI	(P)	575.00	239.50	137,712.50
DANIEL SELTZ	(P)	605.00	6.50	3,932.50
JENNIFER GROSS	(A)	425.00	7.90	3,357.50
DANIEL LEATHERS	(A)	435.00	20.90	9,091.50
TANYA ASHUR	(SA)	415.00	843.50	350,052.50
JOSHUA BLOOMFIELD	(SA)	515.00	2,033.20	1,047,098.00
ELIZABETH BREHM	(SA)	415.00	1,682.90	698,403.50
JADE BUTMAN	(SA)	515.00	24.00	12,360.00
JAMES GILYARD	(SA)	415.00	882.00	366,030.00
KELLY GRALEWSKI	(SA)	415.00	1,478.90	613,743.50
CHRISTOPHER JORDAN	(SA)	415.00	899.40	373,251.00
JASON KIM	(SA)	415.00	904.00	375,160.00
JAMES LEGGETT	(SA)	415.00	893.00	370,595.00
COLEEN LIEBMANN	(SA)	415.00	24.00	9,960.00
ANDREW MCCLELLAND	(SA)	415.00	58.00	24,070.00
SCOTT MILORO	(SA)	415.00	658.80	273,402.00
LEAH NUTTING	(SA)	415.00	1,940.10	805,141.50
MARISSA OH	(SA)	515.00	800.30	412,154.50
PETER ROOS	(SA)	415.00	780.00	323,700.00
RYAN STURTEVANT	(SA)	415.00	796.00	330,340.00
ANN L. TEN EYCK	(SA)	515.00	490.70	252,710.50
VIRGINIA WEISS	(SA)	415.00	473.50	196,502.50
RACHEL WINTTERLE	(SA)	515.00	580.60	299,009.00
JONATHAN ZAUL	(SA)	415.00	822.20	341,213.00
NEHA GUPTA	(LC)	330.00	44.10	14,553.00
MELISSA MATHENY	(PL)	270.00	12.80	3,456.00

PROFESSIONAL	STATUS	HOURLY RATE	TOTAL HOURS TO DATE	TOTAL LODESTAR TO DATE
ROBERT LIEFF	(OC)	1,000.00	665.90	665,900.00
LYDIA LEE	(OC)	475.00	36.50	17,337.50
WILLOW ASHLYNN	(RA)	360.00	76.70	27,612.00
MARGIE CALANGIAN	(RA)	360.00	6.10	2,196.00
ROBERT DE MARIA	(RA)	335.00	30.00	10,050.00
KIRTI DUGAR	(RA)	450.00	290.50	130,725.00
ANTHONY GRANT	(RA)	360.00	25.00	9,000.00
ARRA KHARARJIAN	(RA)	270.00	116.90	31,563.00
MAJOR MUGRAGE	(RA)	320.00	17.40	5,568.00
RENEE MUKHERJI	(RA)	310.00	8.40	2,604.00
ANIL NAMBIAR	(RA)	360.00	38.00	13,680.00
TOTAL			**20458.50**	**$9,800,487.50**

Partner	(P)	Law Clerk	(LC)
Of Counsel	(OC)	Paralegal	(PL)
Associate	(A)	Investigator	(I)
Staff Attorney	(SA)	Research Analyst/Litigation Support	(RA)

Exhibit B

EXHIBIT B

STATE STREET INDIRECT FX TRADING CLASS ACTION
No. 11-cv-10230, No. 11-cv-12049, No. 12-cv-11698 MLW (D. Mass.)

EXPENSE REPORT

FIRM: Lieff Cabraser Heimann & Bernstein, LLP
REPORTING PERIOD: INCEPTION THROUGH AUGUST 31, 2016

EXPENSE	TOTAL AMOUNT
Duplicating / Printing	$8,514.00
Long-Distance Telephone / Fax / Conference Calls	$1,247.56
Filing / Service / Witness Fees	$0
Court Hearing & Deposition Transcripts	$84.60
Online Legal & Financial Research	$17,605.25
Overnight Delivery/Messenger Services	$93.80
Experts/Consultants/Professional Fees	$26,358.58
Litigation Support/Electronic Database	$14,054.11
Work-Related Transportation/Meals/Lodging	$95,999.30
Litigation Fund Contribution	$98,000.00
Mediation Expenses	$9,987.33
TOTAL	**$271,944.53**

Exhibit 31

JOURNAL OF EMPIRICAL LEGAL STUDIES

Journal of Empirical Legal Studies
Volume 7, Issue 4, 811–846, December 2010

An Empirical Study of Class Action Settlements and Their Fee Awards

*Brian T. Fitzpatrick**

This article is a comprehensive empirical study of class action settlements in federal court. Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total. Most judges chose to award fees by using the highly discretionary percentage-of-the-settlement method, and the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Fee percentages were strongly and inversely associated with the size of the settlement. The age of the case at settlement was positively associated with fee percentages. There was some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located, with lower percentages in securities cases and in settlements from the Second and Ninth Circuits. There was no evidence that fee percentages were associated with whether the class action was certified as a settlement class or with the political affiliation of the judge who made the award.

I. Introduction

Class actions have been the source of great controversy in the United States. Corporations fear them.[1] Policymakers have tried to corral them.[2] Commentators and scholars have

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Research for this article was supported by Vanderbilt's Cecil D. Branstetter Litigation & Dispute Resolution Program and Law & Business Program. I am grateful for comments I received from Dale Collins, Robin Effron, Ted Eisenberg, Deborah Hensler, Richard Nagareda, Randall Thomas, an anonymous referee for this journal, and participants at workshops at Vanderbilt Law School, the University of Minnesota Law School, the 2009 Meeting of the Midwestern Law and Economics Association, and the 2009 Conference on Empirical Legal Studies. I am also grateful for the research assistance of Drew Dorner, David Dunn, James Gottry, Chris Lantz, Gary Peeples, Keith Randall, Andrew Yi, and, especially, Jessica Pan.

[1]See, e.g., Robert W. Wood, Defining Employees and Independent Contractors, Bus. L. Today 45, 48 (May–June 2008).

[2]See Private Securities Litigation Reform Act (PSLRA) of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); Class Action Fairness Act of 2005, 28 U.S.C. §§ 1453, 1711–1715 (2006).

suggested countless ways to reform them.[3] Despite all the attention showered on class actions, and despite the excellent empirical work on class actions to date, the data that currently exist on how the class action system operates in the United States are limited. We do not know, for example, how much money changes hands in class action litigation every year. We do not know how much of this money goes to class action lawyers rather than class members. Indeed, we do not even know how many class action cases are resolved on an annual basis. To intelligently assess our class action system as well as whether and how it should be reformed, answers to all these questions are important. Answers to these questions are equally important to policymakers in other countries who are currently thinking about adopting U.S.-style class action devices.[4]

This article tries to answer these and other questions by reporting the results of an empirical study that attempted to gather all class action settlements approved by federal judges over a recent two-year period, 2006 and 2007. I use class action settlements as the basis of the study because, even more so than individual litigation, virtually all cases certified as class actions and not dismissed before trial end in settlement.[5] I use federal settlements as the basis of the study for practical reasons: it was easier to identify and collect settlements approved by federal judges than those approved by state judges. Systematic study of class action settlements in state courts must await further study;[6] these future studies are important because there may be more class action settlements in state courts than there are in federal court.[7]

This article attempts to make three contributions to the existing empirical literature on class action settlements. First, virtually all the prior empirical studies of federal class action settlements have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). In this article, by contrast, I attempt to collect every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first to attempt to collect a complete set of federal class action settlements for

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[3]See, e.g., Robert G. Bone, Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness, 83 B.U.L. Rev. 485, 490–94 (2003); Allan Erbsen, From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions, 58 Vand. L. Rev. 995, 1080–81 (2005).

[4]See, e.g., Samuel Issacharoff & Geoffrey Miller, Will Aggregate Litigation Come to Europe?, 62 Vand. L. Rev. 179 (2009).

[5]See, e.g., Emery Lee & Thomas E. Willing, Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions 11 (Federal Judicial Center 2008); Tom Baker & Sean J. Griffith, How the Merits Matter: D&O Insurance and Securities Settlements, 157 U. Pa. L. Rev. 755 (2009).

[6]Empirical scholars have begun to study state court class actions in certain subject areas and in certain states. See, e.g., Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Suits, 57 Vand. L. Rev. 1747 (2004); Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133 (2004); Findings of the Study of California Class Action Litigation (Administrative Office of the Courts) (First Interim Report, 2009).

[7]See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 56 (2000).

any given year.[8] As such, this article allows us to see for the first time a complete picture of the cases that are settled in federal court. This includes aggregate annual statistics, such as how many class actions are settled every year, how much money is approved every year in these settlements, and how much of that money class action lawyers reap every year. It also includes how these settlements are distributed geographically as well as by litigation area, what sort of relief was provided in the settlements, how long the class actions took to reach settlement, and an analysis of what factors were associated with the fees awarded to class counsel by district court judges.

Second, because this article analyzes settlements that were approved in both published and unpublished opinions, it allows us to assess how well the few prior studies that looked beyond securities cases but relied only on published opinions capture the complete picture of class action settlements. To the extent these prior studies adequately capture the complete picture, it may be less imperative for courts, policymakers, and empirical scholars to spend the considerable resources needed to collect unpublished opinions in order to make sound decisions about how to design our class action system.

Third, this article studies factors that may influence district court judges when they award fees to class counsel that have not been studied before. For example, in light of the discretion district court judges have been delegated over fees under Rule 23, as well as the salience the issue of class action litigation has assumed in national politics, realist theories of judicial behavior would predict that Republican judges would award smaller fee percentages than Democratic judges. I study whether the political beliefs of district court judges are associated with the fees they award and, in doing so, contribute to the literature that attempts to assess the extent to which these beliefs influence the decisions of not just appellate judges, but trial judges as well. Moreover, the article contributes to the small but growing literature examining whether the ideological influences found in published judicial decisions persist when unpublished decisions are examined as well.

In Section II of this article, I briefly survey the existing empirical studies of class action settlements. In Section III, I describe the methodology I used to collect the 2006–2007 federal class action settlements and I report my findings regarding these settlements. District court judges approved 688 class action settlements over this two-year period, involving over $33 billion. I report a number of descriptive statistics for these settlements, including the number of plaintiff versus defendant classes, the distribution of settlements by subject matter, the age of the case at settlement, the geographic distribution of settlements, the number of settlement classes, the distribution of relief across settlements, and various statistics on the amount of money involved in the settlements. It should be noted that despite the fact that the few prior studies that looked beyond securities settlements appeared to oversample larger settlements, much of the analysis set forth in this article is consistent with these prior studies. This suggests that scholars may not need to sample unpublished as well as published opinions in order to paint an adequate picture of class action settlements.

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[8]Of course, I cannot be certain that I found every one of the class actions that settled in federal court over this period. Nonetheless, I am confident that if I did not find some, the number I did not find is small and would not contribute meaningfully to the data reported in this article.

In Section IV, I perform an analysis of the fees judges awarded to class action lawyers in the 2006–2007 settlements. All told, judges awarded nearly $5 billion over this two-year period in fees and expenses to class action lawyers, or about 15 percent of the total amount of the settlements. Most federal judges chose to award fees by using the highly discretionary percentage-of-the-settlement method and, unsurprisingly, the fees awarded according to this method varied over a broad range, with a mean and median around 25 percent. Using regression analysis, I confirm prior studies and find that fee percentages are strongly and inversely associated with the size of the settlement. Further, I find that the age of the case is positively associated with fee percentages but that the percentages were not associated with whether the class action was certified as a settlement class. There also appeared to be some variation in fee percentages depending on the subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all other areas, and district courts in some circuits—the Ninth and the Second (in securities cases)—awarded lower fee percentages than courts in many other circuits. Finally, the regression analysis did not confirm the realist hypothesis: there was no association between fee percentage and the political beliefs of the judge in any regression.

II. Prior Empirical Studies of Class Action Settlements

There are many existing empirical studies of federal securities class action settlements.[9] Studies of securities settlements have been plentiful because for-profit organizations maintain lists of all federal securities class action settlements for the benefit of institutional investors that are entitled to file claims in these settlements.[10] Using these data, studies have shown that since 2005, for example, there have been roughly 100 securities class action settlements in federal court each year, and these settlements have involved between $7 billion and $17 billion per year.[11] Scholars have used these data to analyze many different aspects of these settlements, including the factors that are associated with the percentage of

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[9]See, e.g., James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587 (2006); James D. Cox, Randall S. Thomas & Lynn Bai, There are Plaintiffs and . . . there are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355 (2008); Theodore Eisenberg, Geoffrey Miller & Michael A. Perino, A New Look at Judicial Impact: Attorneys' Fees in Securities Class Actions after *Goldberger v. Integrated Resources, Inc.*, 29 Wash. U.J.L. & Pol'y 5 (2009); Michael A. Perino, Markets and Monitors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions (St. John's Legal Studies, Research Paper No. 06-0034, 2006), available at <http://ssrn.com/abstract=870577> [hereinafter Perino, Markets and Monitors]; Michael A. Perino, The Milberg Weiss Prosecution: No Harm, No Foul? (St. John's Legal Studies, Research Paper No. 08-0135, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133995> [hereinafter Perino, Milberg Weiss].

[10]See, e.g., RiskMetrics Group, available at <http://www.riskmetrics.com/scas>.

[11]See Cornerstone Research, Securities Class Action Settlements: 2007 Review and Analysis 1 (2008), available at <http://securities.stanford.edu/Settlements/REVIEW_1995-2007/Settlements_Through_12_2007.pdf>.

the settlements that courts have awarded to class action lawyers.[12] These studies have found that the mean and median fees awarded by district court judges are between 20 percent and 30 percent of the settlement amount.[13] These studies have also found that a number of factors are associated with the percentage of the settlement awarded as fees, including (inversely) the size of the settlement, the age of the case, whether a public pension fund was the lead plaintiff, and whether certain law firms were class counsel.[14] None of these studies has examined whether the political affiliation of the federal district court judge awarding the fees was associated with the size of awards.

There are no comparable organizations that maintain lists of nonsecurities class action settlements. As such, studies of class action settlements beyond the securities area are much rarer and, when they have been done, rely on samples of settlements that were not intended to be representative of the whole. The two largest studies of class action settlements not limited to securities class actions are a 2004 study by Ted Eisenberg and Geoff Miller,[15] which was recently updated to include data through 2008,[16] and a 2003 study by Class Action Reports.[17] The Eisenberg-Miller studies collected data from class action settlements in both state and federal courts found from court opinions published in the Westlaw and Lexis databases and checked against lists maintained by the CCH Federal Securities and Trade Regulation Reporters. Through 2008, their studies have now identified 689 settlements over a 16-year period, or less than 45 settlements per year.[18] Over this 16-year period, their studies found that the mean and median settlement amounts were, respectively, $116 million and $12.5 million (in 2008 dollars), and that the mean and median fees awarded by district courts were 23 percent and 24 percent of the settlement, respectively.[19] Their studies also performed an analysis of fee percentages and fee awards. For the data through 2002, they found that the percentage of the settlement awarded as fees was associated with the size of the settlement (inversely), the age of the case, and whether the

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[12]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–24, 28–36; Perino, Markets and Monitors, supra note 9, at 12–28, 39–44; Perino, Milberg Weiss, supra note 9, at 32–33, 39–60.

[13]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 17–18, 22, 28, 33; Perino, Markets and Monitors, supra note 9, at 20–21, 40; Perino, Milberg Weiss, supra note 9, at 32–33, 51–53.

[14]See, e.g., Eisenberg, Miller & Perino, supra note 9, at 14–24, 29–30, 33–34; Perino, Markets and Monitors, supra note 9, at 20–28, 41; Perino, Milberg Weiss, supra note 9, at 39–58.

[15]See Theodore Eisenberg & Geoffrey Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27 (2004).

[16]See Theodore Eisenberg & Geoffrey Miller, Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008, 7 J. Empirical Legal Stud. 248 (2010) [hereinafter Eisenberg & Miller II].

[17]See Stuart J. Logan, Jack Moshman & Beverly C. Moore, Jr., Attorney Fee Awards in Common Fund Class Actions, 24 Class Action Rep. 169 (Mar.–Apr. 2003).

[18]See Eisenberg & Miller II, supra note 16, at 251.

[19]Id. at 258–59.

district court went out of its way to comment on the level of risk that class counsel had assumed in pursuing the case.[20] For the data through 2008, they regressed only fee awards and found that the awards were inversely associated with the size of the settlement, that state courts gave lower awards than federal courts, and that the level of risk was still associated with larger awards.[21] Their studies have not examined whether the political affiliations of the federal district court judges awarding fees were associated with the size of the awards.

The Class Action Reports study collected data on 1,120 state and federal settlements over a 30-year period, or less than 40 settlements per year.[22] Over the same 10-year period analyzed by the Eisenberg-Miller study, the Class Action Reports data found mean and median settlements of $35.4 and $7.6 million (in 2002 dollars), as well as mean and median fee percentages between 25 percent and 30 percent.[23] Professors Eisenberg and Miller performed an analysis of the fee awards in the Class Action Reports study and found the percentage of the settlement awarded as fees was likewise associated with the size of the settlement (inversely) and the age of the case.[24]

III. Federal Class Action Settlements, 2006 and 2007

As far as I am aware, there has never been an empirical study of all federal class action settlements in a particular year. In this article, I attempt to make such a study for two recent years: 2006 and 2007. To compile a list of all federal class settlements in 2006 and 2007, I started with one of the aforementioned lists of securities settlements, the one maintained by RiskMetrics, and I supplemented this list with settlements that could be found through three other sources: (1) broad searches of district court opinions in the Westlaw and Lexis databases,[25] (2) four reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, *Mealey's Litigation Report*, and the *Class Action World* website[26]—and (3) a list from the Administrative Office of Courts of all district court cases

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[20]See Eisenberg & Miller, supra note 15, at 61–62.

[21]See Eisenberg & Miller II, supra note 16, at 278.

[22]See Eisenberg & Miller, supra note 15, at 34.

[23]Id. at 47, 51.

[24]Id. at 61–62.

[25]The searches consisted of the following terms: ("class action" & (settle! /s approv! /s (2006 2007))); (((counsel attorney) /s fee /s award!) & (settle! /s (2006 2007)) & "class action"); ("class action" /s settle! & da(aft 12/31/2005 & bef 1/1/2008)); ("class action" /s (fair reasonable adequate) & da(aft 12/31/2005 & bef 1/1/2008)).

[26]See <http://classactionworld.com/>.

coded as class actions that terminated by settlement between 2005 and 2008.[27] I then removed any duplicate cases and examined the docket sheets and court orders of each of the remaining cases to determine whether the cases were in fact certified as class actions under either Rule 23, Rule 23.1, or Rule 23.2.[28] For each of the cases verified as such, I gathered the district court's order approving the settlement, the district court's order awarding attorney fees, and, in many cases, the settlement agreements and class counsel's motions for fees, from electronic databases (such as Westlaw or PACER) and, when necessary, from the clerk's offices of the various federal district courts. In this section, I report the characteristics of the settlements themselves; in the next section, I report the characteristics of the attorney fees awarded to class counsel by the district courts that approved the settlements.

A. Number of Settlements

I found 688 settlements approved by federal district courts during 2006 and 2007 using the methodology described above. This is almost the exact same number the Eisenberg-Miller study found over a *16*-year period in both federal *and* state court. Indeed, the number of annual settlements identified in this study is *several times* the number of annual settlements that have been identified in any prior empirical study of class action settlements. Of the 688 settlements I found, 304 were approved in 2006 and 384 were approved in 2007.[29]

B. Defendant Versus Plaintiff Classes

Although Rule 23 permits federal judges to certify either a class of plaintiffs or a class of defendants, it is widely assumed that it is extremely rare for courts to certify defendant classes.[30] My findings confirm this widely held assumption. Of the 688 class action settlements approved in 2006 and 2007, 685 involved plaintiff classes and only three involved

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[27]I examined the AO lists in the year before and after the two-year period under investigation because the termination date recorded by the AO was not necessarily the same date the district court approved the settlement.

[28]See Fed. R. Civ. P. 23, 23.1, 23.2. I excluded from this analysis opt-in collective actions, such as those brought pursuant to the provisions of the Fair Labor Standards Act (see 29 U.S.C. § 216(b)), if such actions did not also include claims certified under the opt-out mechanism in Rule 23.

[29]A settlement was assigned to a particular year if the district court judge's order approving the settlement was dated between January 1 and December 31 of that year. Cases involving multiple defendants sometimes settled over time because defendants would settle separately with the plaintiff class. All such partial settlements approved by the district court on the same date were treated as one settlement. Partial settlements approved by the district court on different dates were treated as different settlements.

[30]See, e.g., Robert H. Klonoff, Edward K.M. Bilich & Suzette M. Malveaux, Class Actions and Other Multi-Party Litigation: Cases and Materials 1061 (2d ed. 2006).

defendant classes. All three of the defendant-class settlements were in employment benefits cases, where companies sued classes of current or former employees.[31]

C. Settlement Subject Areas

Although courts are free to certify Rule 23 classes in almost any subject area, it is widely assumed that securities settlements dominate the federal class action docket.[32] At least in terms of the number of settlements, my findings reject this conventional wisdom. As Table 1 shows, although securities settlements comprised a large percentage of the 2006 and 2007 settlements, they did not comprise a majority of those settlements. As one would have

Table 1: The Number of Class Action Settlements Approved by Federal Judges in 2006 and 2007 in Each Subject Area

	Number of Settlements	
Subject Matter	*2006*	*2007*
Securities	122 (40%)	135 (35%)
Labor and employment	41 (14%)	53 (14%)
Consumer	40 (13%)	47 (12%)
Employee benefits	23 (8%)	38 (10%)
Civil rights	24 (8%)	37 (10%)
Debt collection	19 (6%)	23 (6%)
Antitrust	13 (4%)	17 (4%)
Commercial	4 (1%)	9 (2%)
Other	18 (6%)	25 (6%)
Total	304	384

NOTE: Securities: cases brought under federal and state securities laws. Labor and employment: workplace claims brought under either federal or state law, with the exception of ERISA cases. Consumer: cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like. Employee benefits: ERISA cases. Civil rights: cases brought under 42 U.S.C. § 1983 or cases brought under the Americans with Disabilities Act seeking nonworkplace accommodations. Debt collection: cases brought under the Fair Debt Collection Practices Act. Antitrust: cases brought under federal or state antitrust laws. Commercial: cases between businesses, excluding antitrust cases. Other: includes, among other things, derivative actions against corporate managers and directors, environmental suits, insurance suits, Medicare and Medicaid suits, product liability suits, and mass tort suits.

SOURCES: Westlaw, PACER, district court clerks' offices.

[31]See Halliburton Co. v. Graves, No. 04-00280 (S.D. Tex., Sept. 28, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Aug. 29, 2007); Rexam, Inc. v. United Steel Workers of Am., No. 03-2998 (D. Minn. Sept. 17, 2007).

[32]See, e.g., John C. Coffee, Jr., Reforming the Security Class Action: An Essay on Deterrence and its Implementation, 106 Colum. L. Rev. 1534, 1539–40 (2006) (describing securities class actions as "the 800-pound gorilla that dominates and overshadows other forms of class actions").

expected in light of Supreme Court precedent over the last two decades,[33] there were almost no mass tort class actions (included in the "Other" category) settled over the two-year period.

Although the Eisenberg-Miller study through 2008 is not directly comparable on the distribution of settlements across litigation subject areas—because its state and federal court data cannot be separated (more than 10 percent of the settlements were from state court[34]) and because it excludes settlements in fee-shifting cases—their study through 2008 is the best existing point of comparison. Interestingly, despite the fact that state courts were included in their data, their study through 2008 found about the same percentage of securities cases (39 percent) as my 2006–2007 data set shows.[35] However, their study found many more consumer (18 percent) and antitrust (10 percent) cases, while finding many fewer labor and employment (8 percent), employee benefits (6 percent), and civil rights (3 percent) cases.[36] This is not unexpected given their reliance on published opinions and their exclusion of fee-shifting cases.

D. Settlement Classes

The Federal Rules of Civil Procedure permit parties to seek certification of a suit as a class action for settlement purposes only.[37] When the district court certifies a class in such circumstances, the court need not consider whether it would be manageable to try the litigation as a class.[38] So-called settlement classes have always been more controversial than classes certified for litigation because they raise the prospect that, at least where there are competing class actions filed against the same defendant, the defendant could play class counsel off one another to find the one willing to settle the case for the least amount of money.[39] Prior to the Supreme Court's 1997 opinion in *Amchem Products, Inc. v. Windsor*,[40] it was uncertain whether the Federal Rules even permitted settlement classes. It may therefore be a bit surprising to learn that 68 percent of the federal settlements in 2006 and 2007 were settlement classes. This percentage is higher than the percentage found in the Eisenberg-Miller studies, which found that only 57 percent of class action settlements in

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[33]See, e.g., Samuel Issacharoff, Private Claims, Aggregate Rights, 2008 Sup. Ct. Rev. 183, 208.

[34]See Eisenberg & Miller II, supra note 16, at 257.

[35]Id. at 262.

[36]Id.

[37]See Martin H. Redish, Settlement Class Actions, The Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process, 73 U. Chi. L. Rev. 545, 553 (2006).

[38]See Amchem Prods., Inc v Windsor, 521 U.S. 591, 620 (1997).

[39]See Redish, supra note 368, at 557–59.

[40]521 U.S. 591 (1997).

state and federal court between 2003 and 2008 were settlement classes.[41] It should be noted that the distribution of litigation subject areas among the settlement classes in my 2006–2007 federal data set did not differ much from the distribution among nonsettlement classes, with two exceptions. One exception was consumer cases, which were nearly three times as prevalent among settlement classes (15.9 percent) as among nonsettlement classes (5.9 percent); the other was civil rights cases, which were four times as prevalent among nonsettlement classes (18.0 percent) as among settlements classes (4.5 percent). In light of the skepticism with which the courts had long treated settlement classes, one might have suspected that courts would award lower fee percentages in such settlements. Nonetheless, as I report in Section III, whether a case was certified as a settlement class was not associated with the fee percentages awarded by federal district court judges.

E. The Age at Settlement

One interesting question is how long class actions were litigated before they reached settlement. Unsurprisingly, cases reached settlement over a wide range of ages.[42] As shown in Table 2, the average time to settlement was a bit more than three years (1,196 days) and the median time was a bit under three years (1,068 days). The average and median ages here are similar to those found in the Eisenberg-Miller study through 2002, which found averages of 3.35 years in fee-shifting cases and 2.86 years in non-fee-shifting cases, and

Table 2: The Number of Days, 2006–2007, Federal Class Action Cases Took to Reach Settlement in Each Subject Area

Subject Matter	*Average*	*Median*	*Minimum*	*Maximum*
Securities	1,438	1,327	392	3,802
Labor and employment	928	786	105	2,497
Consumer	963	720	127	4,961
Employee benefits	1,162	1,161	164	3,157
Civil rights	1,373	1,360	181	3,354
Debt collection	738	673	223	1,973
Antitrust	1,140	1,167	237	2,480
Commercial	1,267	760	163	5,443
Other	1,065	962	185	3,620
All	1,196	1,068	105	5,443

SOURCE: PACER.

[41]See Eisenberg & Miller II, supra note 16, at 266.

[42]The age of the case was calculated by subtracting the date the relevant complaint was filed from the date the settlement was approved by the district court judge. The dates were taken from PACER. For consolidated cases, I used the date of the earliest complaint. If the case had been transferred, consolidated, or removed, the date the complaint was filed was not always available from PACER. In such cases, I used the date the case was transferred, consolidated, or removed as the start date.

medians of 4.01 years in fee-shifting cases and 3.0 years in non-fee-shifting cases.[43] Their study through 2008 did not report case ages.

The shortest time to settlement was 105 days in a labor and employment case.[44] The longest time to settlement was nearly 15 years (5,443 days) in a commercial case.[45] The average and median time to settlement varied significantly by litigation subject matter, with securities cases generally taking the longest time and debt collection cases taking the shortest time. Labor and employment cases and consumer cases also settled relatively early.

F. The Location of Settlements

The 2006–2007 federal class action settlements were not distributed across the country in the same way federal civil litigation is in general. As Figure 1 shows, some of the geographic circuits attracted much more class action attention than we would expect based on their docket size, and others attracted much less. In particular, district courts in the First, Second, Seventh, and Ninth Circuits approved a much larger share of class action settlements than the share of all civil litigation they resolved, with the First, Second, and Seventh Circuits approving nearly double the share and the Ninth Circuit approving one-and-one-half times the share. By contrast, the shares of class action settlements approved by district courts in the Fifth and Eighth Circuits were less than one-half of their share of all civil litigation, with the Third, Fourth, and Eleventh Circuits also exhibiting significant underrepresentation.

With respect to a comparison with the Eisenberg-Miller studies, their federal court data through 2008 can be separated from their state court data on the question of the geographic distribution of settlements, and there are some significant differences between their federal data and the numbers reflected in Figure 1. Their study reported considerably higher proportions of settlements than I found from the Second (23.8 percent), Third (19.7 percent), Eighth (4.8 percent), and D.C. (3.3 percent) Circuits, and considerably lower proportions from the Fourth (1.3 percent), Seventh (6.8 percent), and Ninth (16.6 percent) Circuits.[46]

Figure 2 separates the class action settlement data in Figure 1 into securities and nonsecurities cases. Figure 2 suggests that the overrepresentation of settlements in the First and Second Circuits is largely attributable to securities cases, whereas the overrepresentation in the Seventh Circuit is attributable to nonsecurities cases, and the overrepresentation in the Ninth is attributable to both securities and nonsecurities cases.

It is interesting to ask why some circuits received more class action attention than others. One hypothesis is that class actions are filed in circuits where class action lawyers

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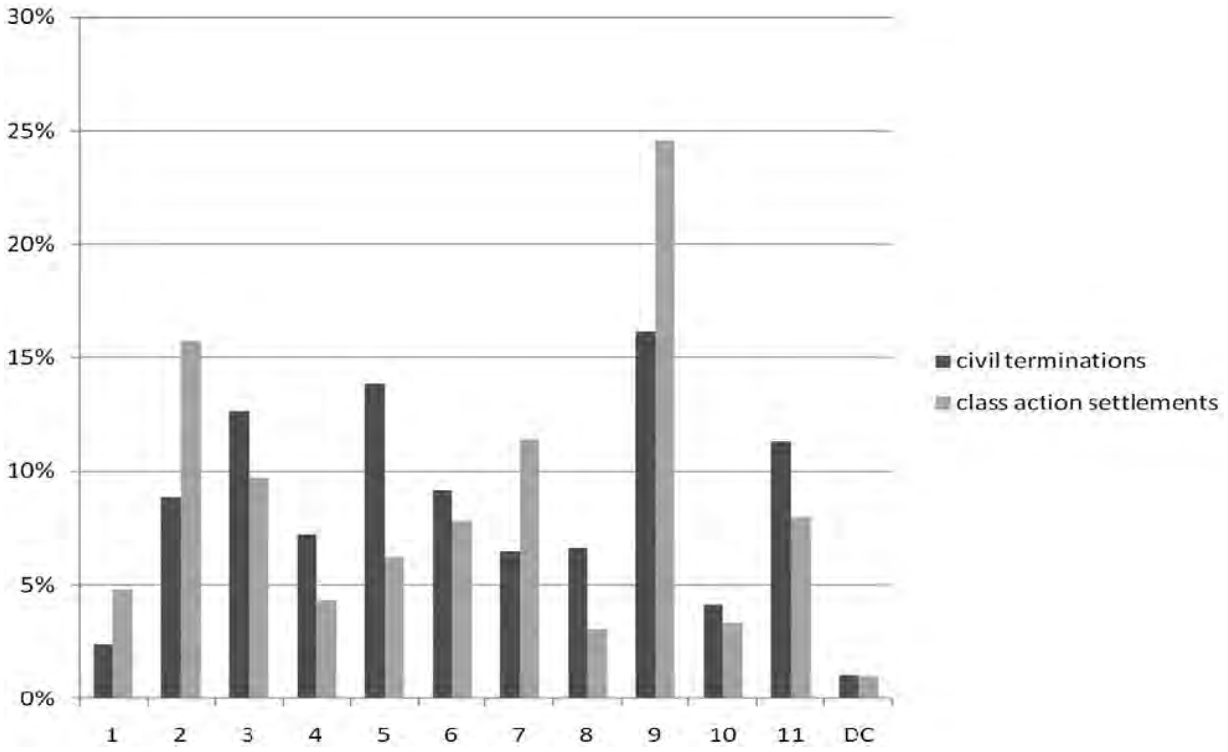
[43]See Eisenberg & Miller, supra note 15, at 59–60.

[44]See Clemmons v. Rent-a-Center W., Inc., No. 05-6307 (D. Or. Jan. 20, 2006).

[45]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006).

[46]See Eisenberg & Miller II, supra note 16, at 260.

Figure 1: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



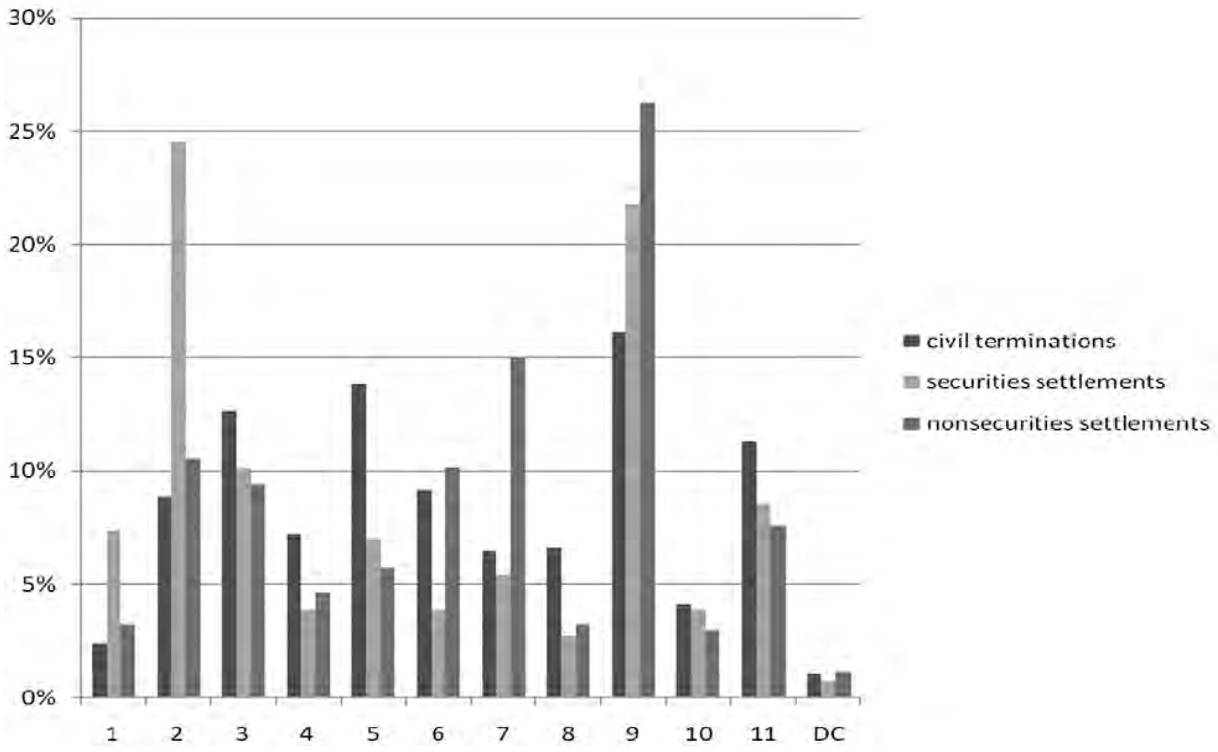
SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

believe they can find favorable law or favorable judges. Federal class actions often involve class members spread across multiple states and, as such, class action lawyers may have a great deal of discretion over the district in which file suit.[47] One way law or judges may be favorable to class action attorneys is with regard to attorney fees. In Section III, I attempt to test whether district court judges in the circuits with the most over- and undersubscribed class action dockets award attorney fees that would attract or discourage filings there; I find no evidence that they do.

Another hypothesis is that class action suits are settled in jurisdictions where defendants are located. This might be the case because although class action lawyers may have discretion over where to file, venue restrictions might ultimately restrict cases to jurisdic-

[47]See Samuel Issacharoff & Richard Nagareda, Class Settlements Under Attack, 156 U. Pa. L. Rev. 1649, 1662 (2008).

Figure 2: The percentage of 2006–2007 district court civil terminations and class action settlements in each federal circuit.



SOURCES: PACER, Statistical Tables for the Federal Judiciary 2006 & 2007 (available at <http://www.uscourts.gov/stats/index.html>).

tions in which defendants have their corporate headquarters or other operations.[48] This might explain why the Second Circuit, with the financial industry in New York, sees so many securities suits, and why other circuits with cities with a large corporate presence, such as the First (Boston), Seventh (Chicago), and Ninth (Los Angeles and San Francisco), see more settlements than one would expect based on the size of their civil dockets.

Another hypothesis might be that class action lawyers file cases wherever it is most convenient for them to litigate the cases—that is, in the cities in which their offices are located. This, too, might explain the Second Circuit's overrepresentation in securities settlements, with prominent securities firms located in New York, as well as the

[48]See 28 U.S.C. §§ 1391, 1404, 1406, 1407. See also Foster v. Nationwide Mut. Ins. Co., No. 07-04928, 2007 U.S. Dist. LEXIS 95240 at *2–17 (N.D. Cal. Dec. 14, 2007) (transferring venue to jurisdiction where defendant's corporate headquarters were located). One prior empirical study of securities class action settlements found that 85 percent of such cases are filed in the home circuit of the defendant corporation. See James D. Cox, Randall S. Thomas & Lynn Bai, Do Differences in Pleading Standards Cause Forum Shopping in Securities Class Actions?: Doctrinal and Empirical Analyses, 2009 Wis. L. Rev. 421, 429, 440, 450–51 (2009).

overrepresentation of other settlements in some of the circuits in which major metropolitan areas with prominent plaintiffs' firms are found.

G. Type of Relief

Under Rule 23, district court judges can certify class actions for injunctive or declaratory relief, for money damages, or for a combination of the two.[49] In addition, settlements can provide money damages both in the form of cash as well as in the form of in-kind relief, such as coupons to purchase the defendant's products.[50]

As shown in Table 3, the vast majority of class actions settled in 2006 and 2007 provided cash relief to the class (89 percent), but a substantial number also provided in-kind relief (6 percent) or injunctive or declaratory relief (23 percent). As would be

Table 3: The Percentage of 2006 and 2007 Class Action Settlements Providing Each Type of Relief in Each Subject Area

Subject Matter	*Cash*	*In-Kind Relief*	*Injunctive or Declaratory Relief*
Securities ($n = 257$)	100%	0%	2%
Labor and employment ($n = 94$)	95%	6%	29%
Consumer ($n = 87$)	74%	30%	37%
Employee benefits ($n = 61$)	90%	0%	34%
Civil rights ($n = 61$)	49%	2%	75%
Debt collection ($n = 42$)	98%	0%	12%
Antitrust ($n = 30$)	97%	13%	7%
Commercial ($n = 13$)	92%	0%	62%
Other ($n = 43$)	77%	7%	33%
All ($n = 688$)	89%	6%	23%

NOTE: Cash: cash, securities, refunds, charitable contributions, contributions to employee benefit plans, forgiven debt, relinquishment of liens or claims, and liquidated repairs to property. In-kind relief: vouchers, coupons, gift cards, warranty extensions, merchandise, services, and extended insurance policies. Injunctive or declaratory relief: modification of terms of employee benefit plans, modification of compensation practices, changes in business practices, capital improvements, research, and unliquidated repairs to property.

SOURCES: Westlaw, PACER, district court clerks' offices.

[49]See Fed. R. Civ. P. 23(b).

[50]These coupon settlements have become very controversial in recent years, and Congress discouraged them in the Class Action Fairness Act of 2005 by tying attorney fees to the value of coupons that were ultimately redeemed by class members as opposed to the value of coupons offered class members. See 28 U.S.C. § 1712.

expected in light of the focus on consumer cases in the debate over the anti-coupon provision in the Class Action Fairness Act of 2005,[51] consumer cases had the greatest percentage of settlements providing for in-kind relief (30 percent). Civil rights cases had the greatest percentage of settlements providing for injunctive or declaratory relief (75 percent), though almost half the civil rights cases also provided some cash relief (49 percent). The securities settlements were quite distinctive from the settlements in other areas in their singular focus on cash relief: every single securities settlement provided cash to the class and almost none provided in-kind, injunctive, or declaratory relief. This is but one example of how the focus on securities settlements in the prior empirical scholarship can lead to a distorted picture of class action litigation.

H. Settlement Money

Although securities settlements did not comprise the majority of federal class action settlements in 2006 and 2007, they did comprise the majority of the money—indeed, the *vast majority* of the money—involved in class action settlements. In Table 4, I report the total amount of ascertainable value involved in the 2006 and 2007 settlements. This amount

Table 4: The Total Amount of Money Involved in Federal Class Action Settlements in 2006 and 2007

	Total Ascertainable Monetary Value in Settlements (and Percentage of Overall Annual Total)			
Subject Matter	*2006 (n = 304)*		*2007 (n = 384)*	
Securities	$16,728	76%	$8,038	73%
Labor and employment	$266.5	1%	$547.7	5%
Consumer	$517.3	2%	$732.8	7%
Employee benefits	$443.8	2%	$280.8	3%
Civil rights	$265.4	1%	$81.7	1%
Debt collection	$8.9	<1%	$5.7	<1%
Antitrust	$1,079	5%	$660.5	6%
Commercial	$1,217	6%	$124.0	1%
Other	$1,568	7%	$592.5	5%
Total	$22,093	100%	$11,063	100%

NOTE: Dollar amounts are in millions. Includes all determinate payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.

SOURCES: Westlaw, PACER, district court clerks' offices.

[51]See, e.g., 151 Cong. Rec. H723 (2005) (statement of Rep. Sensenbrenner) (arguing that consumers are "seeing all of their gains go to attorneys and them just getting coupon settlements from the people who have allegedly done them wrong").

includes all determinate[52] payments in cash or cash equivalents (such as marketable securities), including attorney fees and expenses, as well as any in-kind relief (such as coupons) or injunctive relief that was valued by the district court.[53] I did not attempt to assign a value to any relief that was not valued by the district court (even if it may have been valued by class counsel). It should be noted that district courts did not often value in-kind or injunctive relief—they did so only 18 percent of the time—and very little of Table 4—only $1.3 billion, or 4 percent—is based on these valuations. It should also be noted that the amounts in Table 4 reflect only what defendants *agreed to pay*; they do not reflect the amounts that defendants *actually paid* after the claims administration process concluded. Prior empirical research has found that, depending on how settlements are structured (e.g., whether they awarded a fixed amount of money to each class member who eventually files a valid claim or a pro rata amount of a fixed settlement to each class member), defendants can end up paying much less than they agreed.[54]

Table 4 shows that in both years, around three-quarters of all the money involved in federal class action settlements came from securities cases. Thus, in this sense, the conventional wisdom about the dominance of securities cases in class action litigation is correct. Figure 3 is a graphical representation of the contribution each litigation area made to the total number and total amount of money involved in the 2006–2007 settlements.

Table 4 also shows that, in total, over $33 billion was approved in the 2006–2007 settlements. Over $22 billion was approved in 2006 and over $11 billion in 2007. It should be emphasized again that the totals in Table 4 understate the amount of money defendants agreed to pay in class action settlements in 2006 and 2007 because they exclude the unascertainable value of those settlements. This understatement disproportionately affects litigation areas, such as civil rights, where much of the relief is injunctive because, as I noted, very little of such relief was valued by district courts. Nonetheless, these numbers are, as far as I am aware, the first attempt to calculate how much money is involved in federal class action settlements in a given year.

The significant discrepancy between the two years is largely attributable to the 2006 securities settlement related to the collapse of Enron, which totaled $6.6 billion, as well as to the fact that seven of the eight 2006–2007 settlements for more than $1 billion were approved in 2006.[55] Indeed, it is worth noting that the eight settlements for more than $1

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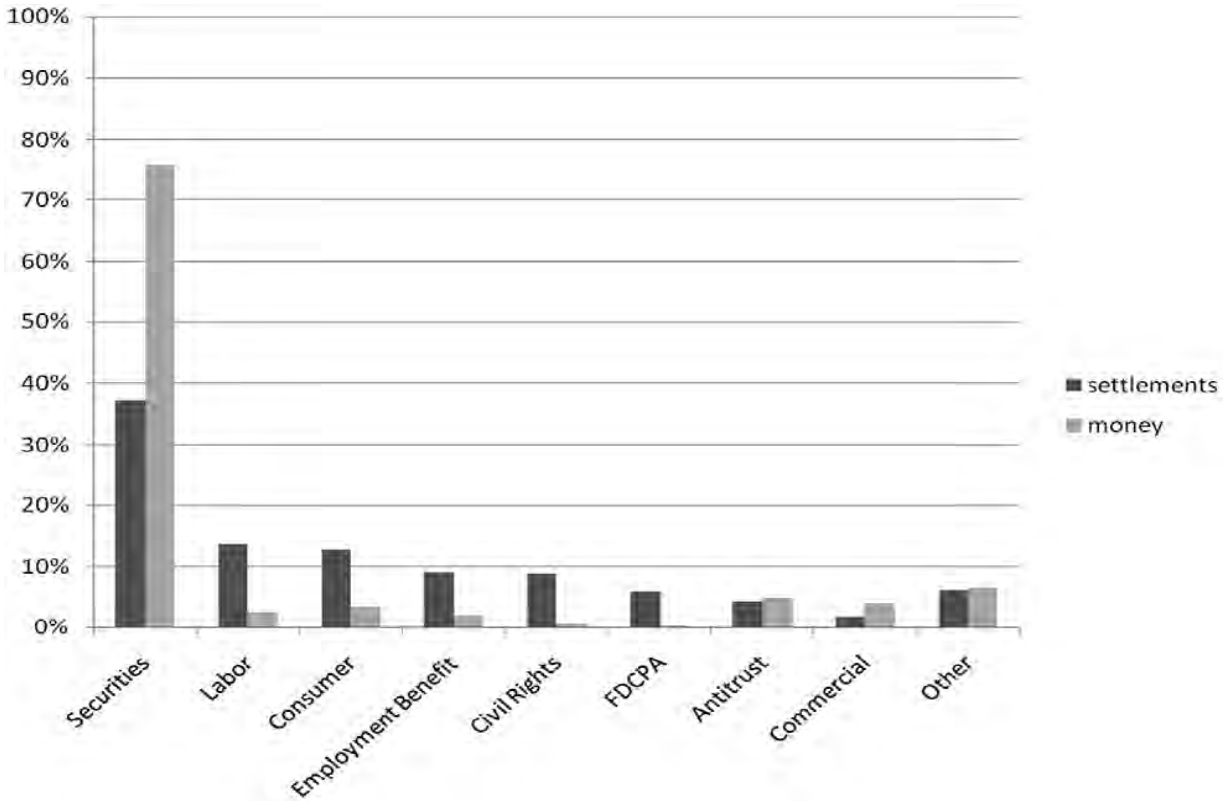
[52]For example, I excluded awards of a fixed amount of money to each class member who eventually filed a valid claim (as opposed to settlements that awarded a pro rata amount of a fixed settlement to each class member) if the total amount of money set aside to pay the claims was not set forth in the settlement documents.

[53]In some cases, the district court valued the relief in the settlement over a range. In these cases, I used the middle point in the range.

[54]See Hensler et al., supra note 7, at 427–30.

[55]See In re Enron Corp. Secs. Litig., MDL 1446 (S.D. Tex. May 24, 2006) ($6,600,000,000); In re Tyco Int'l Ltd. Multidistrict Litig., MDL 02-1335 (D.N.H. Dec. 19, 2007) ($3,200,000,000); In re AOL Time Warner, Inc. Secs. & "ERISA" Litig., MDL 1500 (S.D.N.Y. Apr. 6, 2006) ($2,500,000,000); In re: Diet Drugs Prods. Liab. Litig., MDL 1203 (E.D. Pa. May 24, 2006) ($1,275,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel I), No. 01-1855 (S.D.N.Y. Dec. 26, 2006) ($1,142,780,000); In re Royal Ahold N.V. Secs. & ERISA Litig., 03-1539 (D. Md. Jun. 16, 2006)

Figure 3: The percentage of 2006–2007 federal class action settlements and settlement money from each subject area.



SOURCES: Westlaw, PACER, district court clerks' offices.

billion accounted for almost $18 billion of the $33 billion that changed hands over the two-year period. That is, a mere 1 percent of the settlements comprised over 50 percent of the value involved in federal class action settlements in 2006 and 2007. To give some sense of the distribution of settlement size in the 2006–2007 data set, Table 5 sets forth the number of settlements with an ascertainable value beyond fee, expense, and class-representative incentive awards (605 out of the 688 settlements). Nearly two-thirds of all settlements fell below $10 million.

Given the disproportionate influence exerted by securities settlements on the total amount of money involved in class actions, it is unsurprising that the average securities settlement involved more money than the average settlement in most of the other subject areas. These numbers are provided in Table 6, which includes, again, only the settlements

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($1,100,000,000); Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) ($1,075,000,000); In re Nortel Networks Corp. Secs. Litig. (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) ($1,074,270,000).

Table 5: The Distribution by Size of 2006–2007 Federal Class Action Settlements with Ascertainable Value

Settlement Size (in Millions)	*Number of Settlements*
[$0 to $1]	131 (21.7%)
($1 to $10]	261 (43.1%)
($10 to $50]	139 (23.0%)
($50 to $100]	33 (5.45%)
($100 to $500]	31 (5.12%)
($500 to $6,600]	10 (1.65%)
Total	605

NOTE: Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

Table 6: The Average and Median Settlement Amounts in the 2006–2007 Federal Class Action Settlements with Ascertainable Value to the Class

Subject Matter	*Average*	*Median*
Securities ($n = 257$)	$96.4	$8.0
Labor and employment ($n = 88$)	$9.2	$1.8
Consumer ($n = 65$)	$18.8	$2.9
Employee benefits ($n = 52$)	$13.9	$5.3
Civil rights ($n = 34$)	$9.7	$2.5
Debt collection ($n = 40$)	$0.37	$0.088
Antitrust ($n = 29$)	$60.0	$22.0
Commercial ($n = 12$)	$111.7	$7.1
Other ($n = 28$)	$76.6	$6.2
All ($N = 605$)	$54.7	$5.1

NOTE: Dollar amounts are in millions. Includes only settlements with ascertainable value beyond merely fee, expense, and class-representative incentive awards.
SOURCES: Westlaw, PACER, district court clerks' offices.

with an ascertainable value beyond fee, expense, and class-representative incentive awards. The average settlement over the entire two-year period for all types of cases was almost $55 million, but the median was only $5.1 million. (With the $6.6 billion Enron settlement excluded, the average settlement for all ascertainable cases dropped to $43.8 million and, for securities cases, dropped to $71.0 million.) The average settlements varied widely by litigation area, with securities and commercial settlements at the high end of around $100

million, but the median settlements for nearly every area were bunched around a few million dollars. It should be noted that the high average for commercial cases is largely due to one settlement above $1 billion;[56] when that settlement is removed, the average for commercial cases was only $24.2 million.

Table 6 permits comparison with the two prior empirical studies of class action settlements that sought to include nonsecurities as well as securities cases in their purview. The Eisenberg-Miller study through 2002, which included both common-fund and fee-shifting cases, found that the mean class action settlement was $112 million and the median was $12.9 million, both in 2006 dollars,[57] more than double the average and median I found for all settlements in 2006 and 2007. The Eisenberg-Miller update through 2008 included only common-fund cases and found mean and median settlements in federal court of $115 million and $11.7 million (both again in 2006 dollars),[58] respectively; this is still more than double the average and median I found. This suggests that the methodology used by the Eisenberg-Miller studies—looking at district court opinions that were published in Westlaw or Lexis—oversampled larger class actions (because opinions approving larger class actions are, presumably, more likely to be published than opinions approving smaller ones). It is also possible that the exclusion of fee-shifting cases from their data through 2008 contributed to this skew, although, given that their data through 2002 included fee-shifting cases and found an almost identical mean and median as their data through 2008, the primary explanation for the much larger mean and median in their study through 2008 is probably their reliance on published opinions. Over the same years examined by Professors Eisenberg and Miller, the Class Action Reports study found a smaller average settlement than I did ($39.5 million in 2006 dollars), but a larger median ($8.48 million in 2006 dollars). It is possible that the Class Action Reports methodology also oversampled larger class actions, explaining its larger median, but that there are more "mega" class actions today than there were before 2003, explaining its smaller mean.[59]

It is interesting to ask how significant the $16 billion that was involved annually in these 350 or so federal class action settlements is in the grand scheme of U.S. litigation. Unfortunately, we do not know how much money is transferred every year in U.S. litigation. The only studies of which I am aware that attempt even a partial answer to this question are the estimates of how much money is transferred in the U.S. "tort" system every year by a financial services consulting firm, Tillinghast-Towers Perrin.[60] These studies are not directly

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[56]See Allapattah Servs. Inc. v. Exxon Corp., No. 91-0986 (S.D. Fla. Apr. 7, 2006) (approving $1,075,000,000 settlement).

[57]See Eisenberg & Miller, supra note 15, at 47.

[58]See Eisenberg & Miller II, supra note 16, at 262.

[59]There were eight class action settlements during 2006 and 2007 of more than $1 billion. See note 55 supra.

[60]Some commentators have been critical of Tillinghast's reports, typically on the ground that the reports overestimate the cost of the tort system. See M. Martin Boyer, Three Insights from the Canadian D&O Insurance Market: Inertia, Information and Insiders, 14 Conn. Ins. L.J. 75, 84 (2007); John Fabian Witt, Form and Substance in the Law of

comparable to the class action settlement numbers because, again, the number of tort class action settlements in 2006 and 2007 was very small. Nonetheless, as the tort system no doubt constitutes a large percentage of the money transferred in all litigation, these studies provide something of a point of reference to assess the significance of class action settlements. In 2006 and 2007, Tillinghast-Towers Perrin estimated that the U.S. tort system transferred $160 billion and $164 billion, respectively, to claimants and their lawyers.[61] The total amount of money involved in the 2006 and 2007 federal class action settlements reported in Table 4 was, therefore, roughly 10 percent of the Tillinghast-Towers Perrin estimate. This suggests that in merely 350 cases every year, federal class action settlements involve the same amount of wealth as 10 percent of the entire U.S. tort system. It would seem that this is a significant amount of money for so few cases.

IV. Attorney Fees in Federal Class Action Settlements, 2006 and 2007

A. Total Amount of Fees and Expenses

As I demonstrated in Section III, federal class action settlements involved a great deal of money in 2006 and 2007, some $16 billion a year. A perennial concern with class action litigation is whether class action lawyers are reaping an outsized portion of this money.[62] The 2006–2007 federal class action data suggest that these concerns may be exaggerated. Although class counsel were awarded some $5 billion in fees and expenses over this period, as shown in Table 7, only 13 percent of the settlement amount in 2006 and 20 percent of the amount in 2007 went to fee and expense awards.[63] The 2006 percentage is lower than the 2007 percentage in large part because the class action lawyers in the Enron securities settlement received less than 10 percent of the $6.6 billion corpus. In any event, the percentages in both 2006 and 2007 are far lower than the portions of settlements that contingency-fee lawyers receive in individual litigation, which are usually at least 33 percent.[64] Lawyers received less than 33 percent of settlements in fees and expenses in virtually every subject area in both years.

Counterinsurgency Damages, 41 Loy. L.A.L. Rev. 1455, 1475 n.135 (2008). If these criticisms are valid, then class action settlements would appear even more significant as compared to the tort system.

[61]See Tillinghast-Towers Perrin, U.S. Tort Costs: 2008 Update 5 (2008). The report calculates $252 billion in total tort "costs" in 2007 and $246.9 billion in 2006, id., but only 65 percent of those costs represent payments made to claimants and their lawyers (the remainder represents insurance administration costs and legal costs to defendants). See Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update 17 (2003).

[62]See, e.g., Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little? 158 U. Pa. L. Rev. 2043, 2043–44 (2010).

[63]In some of the partial settlements, see note 29 supra, the district court awarded expenses for all the settlements at once and it was unclear what portion of the expenses was attributable to which settlement. In these instances, I assigned each settlement a pro rata portion of expenses. To the extent possible, all the fee and expense numbers in this article exclude any interest known to be awarded by the courts.

[64]See, e.g., Herbert M. Kritzer, The Wages of Risk: The Returns of Contingency Fee Legal Practice, 47 DePaul L. Rev. 267, 284–86 (1998) (reporting results of a survey of Wisconsin lawyers).

Table 7: The Total Amount of Fees and Expenses Awarded to Class Action Lawyers in Federal Class Action Settlements in 2006 and 2007

	Total Fees and Expenses Awarded in Settlements (and as Percentage of Total Settlement Amounts) in Each Subject Area	
Subject Matter	*2006 (n = 292)*	*2007 (n = 363)*
Securities	$1,899 (11%)	$1,467 (20%)
Labor and employment	$75.1 (28%)	$144.5 (26%)
Consumer	$126.4 (24%)	$65.3 (9%)
Employee benefits	$57.1 (13%)	$71.9 (26%)
Civil rights	$31.0 (12%)	$32.2 (39%)
Debt collection	$2.5 (28%)	$1.1 (19%)
Antitrust	$274.6 (26%)	$157.3 (24%)
Commercial	$347.3 (29%)	$18.2 (15%)
Other	$119.3 (8%)	$103.3 (17%)
Total	$2,932 (13%)	$2,063 (20%)

NOTE: Dollar amounts are in millions. Excludes settlements in which fees were not (or at least not yet) sought (22 settlements), settlements in which fees have not yet been awarded (two settlements), and settlements in which fees could not be ascertained due to indefinite award amounts, missing documents, or nonpublic side agreements (nine settlements).

SOURCES: Westlaw, PACER, district court clerks' offices.

It should be noted that, in some respects, the percentages in Table 7 overstate the portion of settlements that were awarded to class action attorneys because, again, many of these settlements involved indefinite cash relief or noncash relief that could not be valued.[65] If the value of all this relief could have been included, then the percentages in Table 7 would have been even lower. On the other hand, as noted above, not all the money defendants agree to pay in class action settlements is ultimately collected by the class.[66] To the extent leftover money is returned to the defendant, the percentages in Table 7 understate the portion class action lawyers received relative to their clients.

B. Method of Awarding Fees

District court judges have a great deal of discretion in how they set fee awards in class action cases. Under Rule 23, federal judges are told only that the fees they award to class counsel

[65]Indeed, the large year-to-year variation in the percentages in labor, consumer, and employee benefits cases arose because district courts made particularly large valuations of the equitable relief in a few settlements and used the lodestar method to calculate the fees in these settlements (and thereby did not consider their large valuations in calculating the fees).

[66]See Hensler et al., supra note 7, at 427–30.

must be "reasonable."[67] Courts often exercise this discretion by choosing between two approaches: the lodestar approach or the percentage-of-the-settlement approach.[68] The lodestar approach works much the way it does in individual litigation: the court calculates the fee based on the number of hours class counsel actually worked on the case multiplied by a reasonable hourly rate and a discretionary multiplier.[69] The percentage-of-the-settlement approach bases the fee on the size of the settlement rather than on the hours class counsel actually worked: the district court picks a percentage of the settlement it thinks is reasonable based on a number of factors, one of which is often the fee lodestar (sometimes referred to as a "lodestar cross-check").[70] My 2006–2007 data set shows that the percentage-of-the-settlement approach has become much more common than the lodestar approach. In 69 percent of the settlements reported in Table 7, district court judges employed the percentage-of-the-settlement method with or without the lodestar cross-check. They employed the lodestar method in only 12 percent of settlements. In the other 20 percent of settlements, the court did not state the method it used or it used another method altogether.[71] The pure lodestar method was used most often in consumer (29 percent) and debt collection (45 percent) cases. These numbers are fairly consistent with the Eisenberg-Miller data from 2003 to 2008. They found that the lodestar method was used in only 9.6 percent of settlements.[72] Their number is no doubt lower than the 12 percent number found in my 2006–2007 data set because they excluded fee-shifting cases from their study.

C. Variation in Fees Awarded

Not only do district courts often have discretion to choose between the lodestar method and the percentage-of-the-settlement method, but each of these methods leaves district courts with a great deal of discretion in how the method is ultimately applied. The courts

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[67]Fed. R. Civ. P. 23(h).

[68]The discretion to pick between these methods is most pronounced in settlements where the underlying claim was not found in a statute that would shift attorney fees to the defendant. See, e.g., In re Thirteen Appeals Arising out of San Juan DuPont Plaza Hotel Fire Litig., 56 F.3d 295, 307 (1st Cir. 1995) (permitting either percentage or lodestar method in common-fund cases); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (same); Rawlings v. Prudential-Bache Props., Inc., 9 F.3d 513, 516 (6th Cir. 1993) (same). By contrast, courts typically used the lodestar approach in settlements arising from fee-shifting cases.

[69]See Eisenberg & Miller, supra note 15, at 31.

[70]Id. at 31–32.

[71]These numbers are based on the fee method described in the district court's order awarding fees, unless the order was silent, in which case the method, if any, described in class counsel's motion for fees (if it could be obtained) was used. If the court explicitly justified the fee award by reference to its percentage of the settlement, I counted it as the percentage method. If the court explicitly justified the award by reference to a lodestar calculation, I counted it as the lodestar method. If the court explicitly justified the award by reference to both, I counted it as the percentage method with a lodestar cross-check. If the court calculated neither a percentage nor the fee lodestar in its order, then I counted it as an "other" method.

[72]See Eisenberg & Miller II, supra note 16, at 267.

that use the percentage-of-the-settlement method usually rely on a multifactor test[73] and, like most multifactor tests, it can plausibly yield many results. It is true that in many of these cases, judges examine the fee percentages that other courts have awarded to guide their discretion.[74] In addition, the Ninth Circuit has adopted a presumption that 25 percent is the proper fee award percentage in class action cases.[75] Moreover, in securities cases, some courts presume that the proper fee award percentage is the one class counsel agreed to when it was hired by the large shareholder that is now usually selected as the lead plaintiff in such cases.[76] Nonetheless, presumptions, of course, can be overcome and, as one court has put it, "[t]here is no hard and fast rule mandating a certain percentage . . . which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case."[77] The court added: "[i]ndividualization in the exercise of a discretionary power [for fee awards] will alone retain equity as a living system and save it from sterility."[78] It is therefore not surprising that district courts awarded fees over a broad range when they used the percentage-of-the-settlement method. Figure 4 is a graph of the distribution of fee awards as a percentage of the settlement in the 444 cases where district courts used the percentage method with or without a lodestar cross-check and the fee percentages were ascertainable. These fee awards are exclusive of awards for expenses whenever the awards could be separated by examining either the district court's order or counsel's motion for fees and expenses (which was 96 percent of the time). The awards ranged from 3 percent of the settlement to 47 percent of the settlement. The average award was 25.4 percent and the median was 25 percent. Most fee awards were between 25 percent and 35 percent, with almost no awards more than 35 percent. The Eisenberg-Miller study through 2008 found a slightly lower mean (24 percent) but the same median (25 percent) among its federal court settlements.[79]

It should be noted that in 218 of these 444 settlements (49 percent), district courts said they considered the lodestar calculation as a factor in assessing the reasonableness of the fee percentages awarded. In 204 of these settlements, the lodestar multiplier resulting

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[73]The Eleventh Circuit, for example, has identified a nonexclusive list of 15 factors that district courts might consider. See Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 772 n.3, 775 (11th Cir. 1991). See also In re Tyco Int'l, Ltd. Multidistrict Litig., 535 F. Supp. 2d 249, 265 (D.N.H. 2007) (five factors); Goldberger v. Integrated Res. Inc., 209 F.3d 43, 50 (2d Cir. 2000) (six factors); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n.1 (3d Cir. 2000) (seven factors); In re Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 385 (D. Md. 2006) (13 factors); Brown v. Phillips Petroleum Co., 838 F.2d 451, 454 (10th Cir. 1988) (12 factors); In re Baan Co. Sec. Litig., 288 F. Supp. 2d 14, 17 (D.D.C. 2003) (seven factors).

[74]See Eisenberg & Miller, supra note 15, at 32.

[75]See Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003).

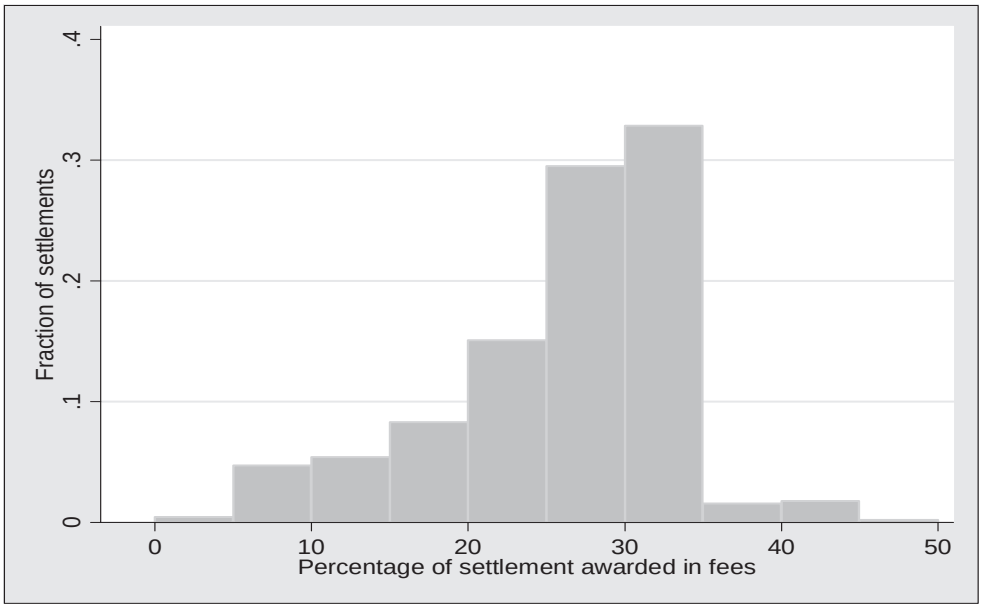
[76]See, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 282 (3d Cir. 2001).

[77]*Camden I Condo. Ass'n*, 946 F.2d at 774.

[78]*Camden I Condo. Ass'n*, 946 F.2d at 774 (alterations in original and internal quotation marks omitted).

[79]See Eisenberg & Miller II, supra note 16, at 259.

Figure 4: The distribution of 2006–2007 federal class action fee awards using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

from the fee award could be ascertained. The lodestar multiplier in these cases ranged from 0.07 to 10.3, with a mean of 1.65 and a median of 1.34. Although there is always the possibility that class counsel are optimistic with their timesheets when they submit them for lodestar consideration, these lodestar numbers—only one multiplier above 6.0, with the bulk of the range not much above 1.0—strike me as fairly parsimonious for the risk that goes into any piece of litigation and cast doubt on the notion that the percentage-of-the-settlement method results in windfalls to class counsel.[80]

Table 8 shows the mean and median fee percentages awarded in each litigation subject area. The fee percentages did not appear to vary greatly across litigation subject areas, with most mean and median awards between 25 percent and 30 percent. As I report later in this section, however, after controlling for other variables, there were statistically significant differences in the fee percentages awarded in some subject areas compared to others. The mean and median percentages for securities cases were 24.7 percent and 25.0 percent, respectively; for all nonsecurities cases, the mean and median were 26.1 percent and 26.0 percent, respectively. The Eisenberg-Miller study through 2008 found mean awards ranging from 21–27 percent and medians from 19–25 percent,[81] a bit lower than the ranges in my

[80]It should be emphasized, of course, that these 204 settlements may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check.

[81]See Eisenberg & Miller II, supra note 16, at 262.

Table 8: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Subject Matter	*Mean*	*Median*
Securities ($n = 233$)	24.7	25.0
Labor and employment ($n = 61$)	28.0	29.0
Consumer ($n = 39$)	23.5	24.6
Employee benefits ($n = 37$)	26.0	28.0
Civil rights ($n = 20$)	29.0	30.3
Debt collection ($n = 5$)	24.2	25.0
Antitrust ($n = 23$)	25.4	25.0
Commercial ($n = 7$)	23.3	25.0
Other ($n = 19$)	24.9	26.0
All ($N = 444$)	25.7	25.0

SOURCES: Westlaw, PACER, district court clerks' offices.

2006–2007 data set, which again, may be because they oversampled larger settlements (as I show below, district courts awarded smaller fee percentages in larger cases).

In light of the fact that, as I noted above, the distribution of class action settlements among the geographic circuits does not track their civil litigation dockets generally, it is interesting to ask whether one reason for the pattern in class action cases is that circuits oversubscribed with class actions award higher fee percentages. Although this question will be taken up with more sophistication in the regression analysis below, it is worth describing here the mean and median fee percentages in each of the circuits. Those data are presented in Table 9. Contrary to the hypothesis set forth in Section III, two of the circuits most oversubscribed with class actions, the Second and the Ninth, were the only circuits in which the mean fee awards were *under* 25 percent. As I explain below, these differences are statistically significant and remain so after controlling for other variables.

The lodestar method likewise permits district courts to exercise a great deal of leeway through the application of the discretionary multiplier. Figure 5 shows the distribution of lodestar multipliers in the 71 settlements in which district courts used the lodestar method and the multiplier could be ascertained. The average multiplier was 0.98 and the median was 0.92, which suggest that courts were not terribly prone to exercise their discretion to deviate from the amount of money encompassed in the lodestar calculation. These 71

Table 9: Fee Awards in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Percentage of Settlement Awarded as Fees	
Circuit	*Mean*	*Median*
First ($n = 27$)	27.0	25.0
Second ($n = 72$)	23.8	24.5
Third ($n = 50$)	25.4	29.3
Fourth ($n = 19$)	25.2	28.0
Fifth ($n = 27$)	26.4	29.0
Sixth ($n = 25$)	26.1	28.0
Seventh ($n = 39$)	27.4	29.0
Eighth ($n = 15$)	26.1	30.0
Ninth ($n = 111$)	23.9	25.0
Tenth ($n = 18$)	25.3	25.5
Eleventh ($n = 35$)	28.1	30.0
DC ($n = 6$)	26.9	26.0

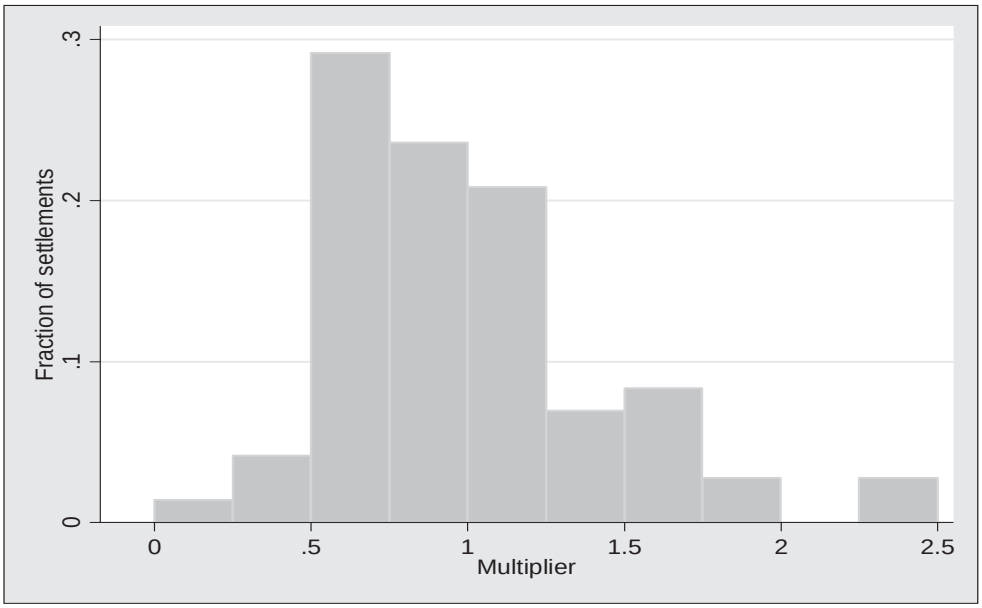
SOURCES: Westlaw, PACER, district court clerks' offices.

settlements were heavily concentrated within the consumer (median multiplier 1.13) and debt collection (0.66) subject areas. If cases in which district courts used the percentage-of-the-settlement method with a lodestar cross-check are combined with the lodestar cases, the average and median multipliers (in the 263 cases where the multipliers were ascertainable) were 1.45 and 1.19, respectively. Again—putting to one side the possibility that class counsel are optimistic with their timesheets—these multipliers appear fairly modest in light of the risk involved in any piece of litigation.

D. Factors Influencing Percentage Awards

Whether district courts are exercising their discretion over fee awards wisely is an important public policy question given the amount of money at stake in class action settlements. As shown above, district court judges awarded class action lawyers nearly $5 billion in fees and expenses in 2006–2007. Based on the comparison to the tort system set forth in Section III, it is not difficult to surmise that in the 350 or so settlements every year, district court judges

Figure 5: The distribution of lodestar multipliers in 2006–2007 federal class action fee awards using the lodestar method.



SOURCES: Westlaw, PACER, district court clerks' offices.

are awarding a significant portion of all the annual compensation received by contingency-fee lawyers in the United States. Moreover, contingency fees are arguably the engine that drives much of the noncriminal regulation in the United States; unlike many other nations, we regulate largely through the ex post, decentralized device of litigation.[82] To the extent district courts could have exercised their discretion to award billions more or billions less to class action lawyers, district courts have been delegated a great deal of leeway over a big chunk of our regulatory horsepower. It is therefore worth examining how district courts exercise their discretion over fees. This examination is particularly important in cases where district courts use the percentage-of-the-settlement method to award fees: not only do such cases comprise the vast majority of settlements, but they comprise the vast majority of the money awarded as fees. As such, the analysis that follows will be confined to the 444 settlements where the district courts used the percentage-of-the-settlement method.

As I noted, prior empirical studies have shown that fee percentages are strongly and inversely related to the size of the settlement both in securities fraud and other cases. As shown in Figure 6, the 2006–2007 data are consistent with prior studies. Regression analysis, set forth in more detail below, confirms that after controlling for other variables, fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases.

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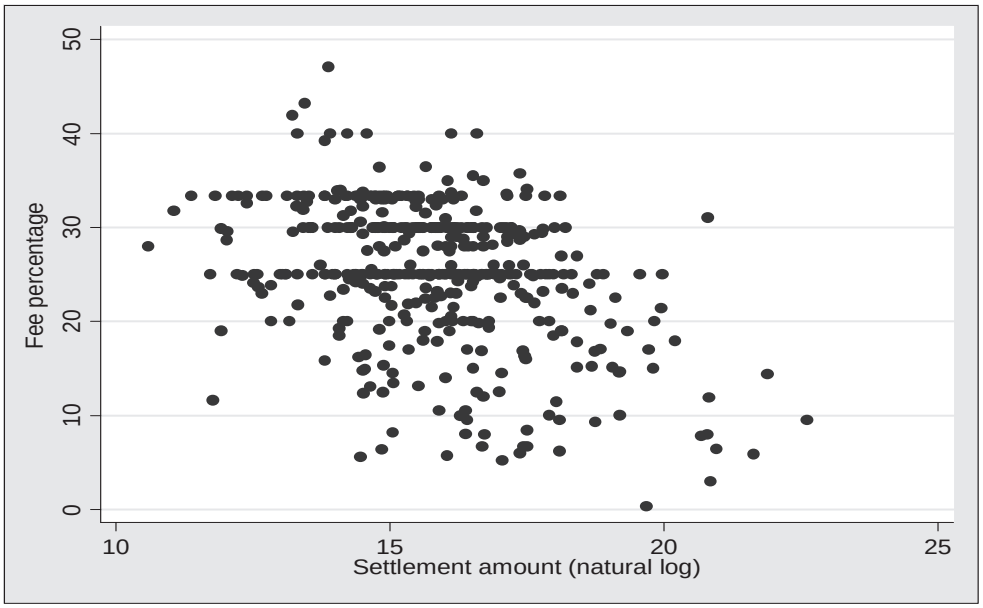
[82]See, e.g., Samuel Issacharoff, Regulating after the Fact, 56 DePaul L. Rev. 375, 377 (2007).

Figure 6: Fee awards as a function of settlement size in 2006–2007 class action cases using the percentage-of-the-settlement method with or without lodestar cross-check.



SOURCES: Westlaw, PACER, district court clerks' offices.

As noted above, courts often look to fee percentages in other cases as one factor they consider in deciding what percentage to award in a settlement at hand. In light of this practice, and in light of the fact that the size of the settlement has such a strong relationship to fee percentages, scholars have tried to help guide the practice by reporting the distribution of fee percentages across different settlement sizes.[83] In Table 10, I follow the Eisenberg-Miller studies and attempt to contribute to this guidance by setting forth the mean and median fee percentages, as well as the standard deviation, for each decile of the 2006–2007 settlements in which courts used the percentage-of-the-settlement method to award fees. The mean percentages ranged from over 28 percent in the first decile to less than 19 percent in the last decile.

It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent.

[83]See Eisenberg & Miller II, supra note 16, at 265.

Table 10: Mean, Median, and Standard Deviation of Fee Awards by Settlement Size in 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
[$0 to $0.75] ($n = 45$)	28.8%	29.6%	6.1%
($0.75 to $1.75] ($n = 44$)	28.7%	30.0%	6.2%
($1.75 to $2.85] ($n = 45$)	26.5%	29.3%	7.9%
($2.85 to $4.45] ($n = 45$)	26.0%	27.5%	6.3%
($4.45 to $7.0] ($n = 44$)	27.4%	29.7%	5.1%
($7.0 to $10.0] ($n = 43$)	26.4%	28.0%	6.6%
($10.0 to $15.2] ($n = 45$)	24.8%	25.0%	6.4%
($15.2 to $30.0] ($n = 46$)	24.4%	25.0%	7.5%
($30.0 to $72.5] ($n = 42$)	22.3%	24.9%	8.4%
($72.5 to $6,600] ($n = 45$)	18.4%	19.0%	7.9%

SOURCES: Westlaw, PACER, district court clerks' offices.

Table 11: Mean, Median, and Standard Deviation of Fee Awards of the Largest 2006–2007 Federal Class Action Settlements Using the Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

Settlement Size (in Millions)	*Mean*	*Median*	SD
($72.5 to $100] ($n = 12$)	23.7%	24.3%	5.3%
($100 to $250] ($n = 14$)	17.9%	16.9%	5.2%
($250 to $500] ($n = 8$)	17.8%	19.5%	7.9%
($500 to $1,000] ($n = 2$)	12.9%	12.9%	7.2%
($1,000 to $6,600] ($n = 9$)	13.7%	9.5%	11%

SOURCES: Westlaw, PACER, district court clerks' offices.

Prior empirical studies have not examined whether fee awards are associated with the political affiliation of the district court judges making the awards. This is surprising because realist theories of judicial behavior would predict that political affiliation would influence fee decisions.[84] It is true that as a general matter, political affiliation may influence district court judges to a lesser degree than it does appellate judges (who have been the focus of most of the prior empirical studies of realist theories): district court judges decide more routine cases and are subject to greater oversight on appeal than appellate judges. On the other hand, class action settlements are a bit different in these regards than many other decisions made by district court judges. To begin with, class action settlements are almost never appealed, and when they are, the appeals are usually settled before the appellate court hears the case.[85] Thus, district courts have much less reason to worry about the constraint of appellate review in fashioning fee awards. Moreover, one would think the potential for political affiliation to influence judicial decision making is greatest when legal sources lead to indeterminate outcomes and when judicial decisions touch on matters that are salient in national politics. (The more salient a matter is, the more likely presidents will select judges with views on the matter and the more likely those views will diverge between Republicans and Democrats.) Fee award decisions would seem to satisfy both these criteria. The law of fee awards, as explained above, is highly discretionary, and fee award decisions are wrapped up in highly salient political issues such as tort reform and the relative power of plaintiffs' lawyers and corporations. I would expect to find that judges appointed by Democratic presidents awarded higher fees in the 2006–2007 settlements than did judges appointed by Republican presidents.

The data, however, do not appear to bear this out. Of the 444 fee awards using the percentage-of-the-settlement approach, 52 percent were approved by Republican appointees, 45 percent were approved by Democratic appointees, and 4 percent were approved by non-Article III judges (usually magistrate judges). The mean fee percentage approved by Republican appointees (25.6 percent) was slightly *greater* than the mean approved by Democratic appointees (24.9 percent). The medians (25 percent) were the same.

To examine whether the realist hypothesis fared better after controlling for other variables, I performed regression analysis of the fee percentage data for the 427 settlements approved by Article III judges. I used ordinary least squares regression with the dependent variable the percentage of the settlement that was awarded in fees.[86] The independent

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[84]See generally C.K. Rowland & Robert A. Carp, Politics and Judgment in Federal District Courts (1996). See also Max M. Schanzenbach & Emerson H. Tiller, Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform, 75 U. Chi. L. Rev. 715, 724–25 (2008).

[85]See Brian T. Fitzpatrick, The End of Objector Blackmail? 62 Vand. L. Rev. 1623, 1640, 1634–38 (2009) (finding that less than 10 percent of class action settlements approved by federal courts in 2006 were appealed by class members).

[86]Professors Eisenberg and Miller used a square root transformation of the fee percentages in some of their regressions. I ran all the regressions using this transformation as well and it did not appreciably change the results. I also ran the regressions using a natural log transformation of fee percentage and with the dependent variable natural log of the fee amount (as opposed to the fee percentage). None of these models changed the results

variables were the natural log of the amount of the settlement, the natural log of the age of the case (in days), indicator variables for whether the class was certified as a settlement class, for litigation subject areas, and for circuits, as well as indicator variables for whether the judge was appointed by a Republican or Democratic president and for the judge's race and gender.[87]

The results for five regressions are in Table 12. In the first regression (Column 1), only the settlement amount, case age, and judge's political affiliation, gender, and race were included as independent variables. In the second regression (Column 2), all the independent variables were included. In the third regression (Column 3), only securities cases were analyzed, and in the fourth regression (Column 4), only nonsecurities cases were analyzed.

In none of these regressions was the political affiliation of the district court judge associated with fee percentage in a statistically significant manner.[88] One possible explanation for the lack of evidence for the realist hypothesis is that district court judges elevate other preferences above their political and ideological ones. For example, district courts of both political stripes may succumb to docket-clearing pressures and largely rubber stamp whatever fee is requested by class counsel; after all, these requests are rarely challenged by defendants. Moreover, if judges award class counsel whatever they request, class counsel will not appeal and, given that, as noted above, class members rarely appeal settlements (and when they do, often settle them before the appeal is heard),[89] judges can thereby virtually guarantee there will be no appellate review of their settlement decisions. Indeed, scholars have found that in the vast majority of cases, the fees ultimately awarded by federal judges are little different than those sought by class counsel.[90]

Another explanation for the lack of evidence for the realist hypothesis is that my data set includes both unpublished as well as published decisions. It is thought that realist theories of judicial behavior lose force in unpublished judicial decisions. This is the case because the kinds of questions for which realist theories would predict that judges have the most room to let their ideologies run are questions for which the law is ambiguous; it is

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appreciably. The regressions were also run with and without the 2006 Enron settlement because it was such an outlier ($6.6 billion); the case did not change the regression results appreciably. For every regression, the data and residuals were inspected to confirm the standard assumptions of linearity, homoscedasticity, and the normal distribution of errors.

[87]Prior studies of judicial behavior have found that the race and sex of the judge can be associated with his or her decisions. See, e.g., Adam B. Cox & Thomas J. Miles, Judging the Voting Rights Act, 108 Colum. L. Rev. 1 (2008); Donald R. Songer et al., A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals, 56 J. Pol. 425 (1994).

[88]Although these coefficients are not reported in Table 8, the gender of the district court judge was never statistically significant. The race of the judge was only occasionally significant.

[89]See Fitzpatrick, supra note 85, at 1640.

[90]See Eisenberg & Miller II, supra note 16, at 270 (finding that state and federal judges awarded the fees requested by class counsel in 72.5 percent of settlements); Eisenberg, Miller & Perino, supra note 9, at 22 ("judges take a light touch when it comes to reviewing fee requests").

Table 12: Regression of Fee Percentages in 2006–2007 Settlements Using Percentage-of-the-Settlement Method With or Without Lodestar Cross-Check

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Settlement amount (natural log)	−1.77	−1.76	−1.76	−1.41	−1.78
	(−5.43)**	(−8.52)**	(−7.16)**	(−4.00)**	(−8.67)**
Age of case (natural log days)	1.66	1.99	1.13	1.72	2.00
	(2.31)**	(2.71)**	(1.21)	(1.47)	(2.69)**
Judge's political affiliation (1 = Democrat)	−0.630	−0.345	0.657	−1.43	−0.232
	(−0.83)	(−0.49)	(0.76)	(−1.20)	(−0.34)
Settlement class		0.150	0.873	−1.62	0.124
		(0.19)	(0.84)	(−1.00)	(0.15)
1st Circuit		3.30	4.41	0.031	0.579
		(2.74)**	(3.32)**	(0.01)	(0.51)
2d Circuit		0.513	−0.813	2.93	−2.23
		(0.44)	(−0.61)	(1.14)	(−1.98)**
3d Circuit		2.25	4.00	−1.11	—
		(1.99)**	(3.85)**	(−0.50)	
4th Circuit		2.34	0.544	3.81	—
		(1.22)	(0.19)	(1.35)	
5th Circuit		2.98	1.09	6.11	0.230
		(1.90)*	(0.65)	(1.97)**	(0.15)
6th Circuit		2.91	0.838	4.41	—
		(2.28)**	(0.57)	(2.15)**	
7th Circuit		2.55	3.22	2.90	−0.227
		(2.23)**	(2.36)**	(1.46)	(−0.20)
8th Circuit		2.12	−0.759	3.73	−0.586
		(0.97)	(−0.24)	(1.19)	(−0.28)
9th Circuit		—	—	—	−2.73
					(−3.44)**
10th Circuit		1.45	−0.254	3.16	—
		(0.94)	(−0.13)	(1.29)	
11th Circuit		4.05	3.85	4.14	—
		(3.44)**	(3.07)**	(1.88)*	
DC Circuit		2.76	2.60	2.41	—
		(1.10)	(0.80)	(0.64)	
Securities case		—			—
Labor and employment case		2.93		—	2.85
		(3.00)**			(2.94)**
Consumer case		−1.65		−4.39	−1.62
		(−0.88)		(−2.20)**	(−0.88)
Employee benefits case		−0.306		−4.23	−0.325
		(−0.23)		(−2.55)**	(−0.26)
Civil rights case		1.85		−2.05	1.76
		(0.99)		(−0.97)	(0.95)
Debt collection case		−4.93		−7.93	−5.04
		(−1.71)*		(−2.49)**	(−1.75)*
Antitrust case		3.06		0.937	2.78
		(2.11)**		(0.47)	(1.98)**

Table 12 *Continued*

	Regression Coefficients (and Robust t *Statistics)*				
Independent Variable	*1*	*2*	*3*	*4*	*5*
Commercial case		−0.028		−2.65	0.178
		(−0.01)		(−0.73)	(0.05)
Other case		−0.340		−3.73	−0.221
		(−0.17)		(−1.65)	(−0.11)
Constant	42.1	37.2	43.0	38.2	40.1
	(7.29)**	(6.08)**	(6.72)**	(4.14)**	(7.62)**
N	427	427	232	195	427
R^2	.20	.26	.37	.26	.26
Root MSE	6.59	6.50	5.63	7.24	6.48

NOTE: **significant at the 5 percent level; *significant at the 10 percent level. Standard errors in Column 1 were clustered by circuit. Indicator variables for race and gender were included in each regression but not reported.
SOURCES: Westlaw, PACER, district court clerks' offices, Federal Judicial Center.

thought that these kinds of questions are more often answered in published opinions.[91] Indeed, most of the studies finding an association between ideological beliefs and case outcomes were based on data sets that included only published opinions.[92] On the other hand, there is a small but growing number of studies that examine unpublished opinions as well, and some of these studies have shown that ideological effects persisted.[93] Nonetheless, in light of the discretion that judges exercise with respect to fee award decisions, it hard to characterize *any* decision in this area as "unambiguous." Thus, even when unpublished, I would have expected the fee award decisions to exhibit an association with ideological beliefs. Thus, I am more persuaded by the explanation suggesting that judges are more concerned with clearing their dockets or insulating their decisions from appeal in these cases than with furthering their ideological beliefs.

In all the regressions, the size of the settlement was strongly and inversely associated with fee percentages. Whether the case was certified as a settlement class was not associated

[91]See, e.g., Ahmed E. Taha, Data and Selection Bias: A Case Study, 75 UMKC L. Rev. 171, 179 (2006).

[92]Id. at 178–79.

[93]See, e.g., David S. Law, Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit, 73 U. Cin. L. Rev. 817, 843 (2005); Deborah Jones Merritt & James J. Brudney, Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals, 54 Vand. L. Rev. 71, 109 (2001); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Judicature 307, 312 (1990). At the trial court level, however, the studies of civil cases have found no ideological effects. See Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 192–93 (2010); Denise M. Keele et al., An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213, 230 (2009); Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257, 276–77 (1995). With respect to criminal cases, there is at least one study at the trial court level that has found ideological effects. See Schanzenbach & Tiller, supra note 81, at 734.

with fee percentages in any of the regressions. The age of the case at settlement was associated with fee percentages in the first two regressions, and when the settlement class variable was removed in regressions 3 and 4, the age variable became positively associated with fee percentages in nonsecurities cases but remained insignificant in securities cases. Professors Eisenberg and Miller likewise found that the age of the case at settlement was positively associated with fee percentages in their 1993–2002 data set,[94] and that settlement classes were not associated with fee percentages in their 2003–2008 data set.[95]

Although the structure of these regressions did not permit extensive comparisons of fee awards across different litigation subject areas, fee percentages appeared to vary somewhat depending on the type of case that settled. Securities cases were used as the baseline litigation subject area in the second and fifth regressions, permitting a comparison of fee awards in each nonsecurities area with the awards in securities cases. These regressions show that awards in a few areas, including labor/employment and antitrust, were more lucrative than those in securities cases. In the fourth regression, which included only nonsecurities cases, labor and employment cases were used as the baseline litigation subject area, permitting comparison between fee percentages in that area and the other nonsecurities areas. This regression shows that fee percentages in several areas, including consumer and employee benefits cases, were lower than the percentages in labor and employment cases.

In the fifth regression (Column 5 of Table 12), I attempted to discern whether the circuits identified in Section III as those with the most overrepresented (the First, Second, Seventh, and Ninth) and underrepresented (the Fifth and Eighth) class action dockets awarded attorney fees differently than the other circuits. That is, perhaps district court judges in the First, Second, Seventh, and Ninth Circuits award greater percentages of class action settlements as fees than do the other circuits, whereas district court judges in the Fifth and Eighth Circuits award smaller percentages. To test this hypothesis, in the fifth regression, I included indicator variables only for the six circuits with unusual dockets to measure their fee awards against the other six circuits combined. The regression showed statistically significant association with fee percentages for only two of the six unusual circuits: the Second and Ninth Circuits. In both cases, however, the direction of the association (i.e., the Second and Ninth Circuits awarded *smaller* fees than the baseline circuits) was opposite the hypothesized direction.[96]

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[94]See Eisenberg & Miller, supra note 15, at 61.

[95]See Eisenberg & Miller II, supra note 16, at 266.

[96]This relationship persisted when the regressions were rerun among the securities and nonsecurities cases separately. I do not report these results, but, even though the First, Second, and Ninth Circuits were oversubscribed with securities class action settlements and the Fifth, Sixth, and Eighth were undersubscribed, there was no association between fee percentages and any of these unusual circuits except, again, the inverse association with the Second and Ninth Circuits. In nonsecurities cases, even though the Seventh and Ninth Circuits were oversubscribed and the Fifth and the Eighth undersubscribed, there was no association between fee percentages and any of these unusual circuits except again for the inverse association with the Ninth Circuit.

The lack of the expected association with the unusual circuits might be explained by the fact that class action lawyers forum shop along dimensions other than their potential fee awards; they might, for example, put more emphasis on favorable class-certification law because there can be no fee award if the class is not certified. As noted above, it might also be the case that class action lawyers are unable to engage in forum shopping at all because defendants are able to transfer venue to the district in which they are headquartered or another district with a significant connection to the litigation.

It is unclear why the Second and Ninth Circuits were associated with lower fee awards despite their heavy class action dockets. Indeed, it should be noted that the Ninth Circuit was the baseline circuit in the second, third, and fourth regressions and, in all these regressions, district courts in the Ninth Circuit awarded smaller fees than courts in many of the other circuits. The lower fees in the Ninth Circuit may be attributable to the fact that it has adopted a presumption that the proper fee to be awarded in a class action settlement is 25 percent of the settlement.[97] This presumption may make it more difficult for district court judges to award larger fee percentages. The lower awards in the Second Circuit are more difficult to explain, but it should be noted that the difference between the Second Circuit and the baseline circuits went away when the fifth regression was rerun with only nonsecurities cases.[98] This suggests that the awards in the Second Circuit may be lower *only* in securities cases. In any event, it should be noted that the lower fee awards from the Second and Ninth Circuits contrast with the findings in the Eisenberg-Miller studies, which found no intercircuit differences in fee awards in common-fund cases in their data through 2008.[99]

V. Conclusion

This article has attempted to fill some of the gaps in our knowledge about class action litigation by reporting the results of an empirical study that attempted to collect all class action settlements approved by federal judges in 2006 and 2007. District court judges approved 688 class action settlements over this two-year period, involving more than $33 billion. Of this $33 billion, nearly $5 billion was awarded to class action lawyers, or about 15 percent of the total. District courts typically awarded fees using the highly discretionary percentage-of-the-settlement method, and fee awards varied over a wide range under this method, with a mean and median around 25 percent. Fee awards using this method were strongly and inversely associated with the size of the settlement. Fee percentages were positively associated with the age of the case at settlement. Fee percentages were not associated with whether the class action was certified as a settlement class or with the

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[97]See note 75 supra. It should be noted that none of the results from the previous regressions were affected when the Ninth Circuit settlements were excluded from the data.

[98]The Ninth Circuit's differences persisted.

[99]See Eisenberg & Miller II, supra note 16, at 260.

political affiliation of the judge who made the award. Finally, there appeared to be some variation in fee percentages depending on subject matter of the litigation and the geographic circuit in which the district court was located. Fee percentages in securities cases were lower than the percentages in some but not all of the other litigation areas, and district courts in the Ninth Circuit and in the Second Circuit (in securities cases) awarded lower fee percentages than district courts in several other circuits. The lower awards in the Ninth Circuit may be attributable to the fact that it is the only circuit that has adopted a presumptive fee percentage of 25 percent.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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

mwb
11/2/16

[PROPOSED] ORDER AND FINAL JUDGMENT

WHEREAS, (i) plaintiffs Arkansas Teacher Retirement System, Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies

Employees Savings and Profit Sharing Plan and James Pehoushek-Stangel (collectively "Plaintiffs"), on behalf of themselves and each Settlement Class Member by and through their counsel, and (ii) State Street Bank and Trust Company (the "Settling Defendant" or "SSBT"), by and through its counsel, entered into a Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the "Settlement Agreement"), in the above-captioned cases (the "Class Actions");

WHEREAS, pursuant to the Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement (the "Preliminary Approval Order"), entered August 11, 2016, the Court scheduled a hearing for November 2, 2016 at 2:00 p.m. to, among other things, determine (i) whether the proposed Class Settlement is fair, reasonable, and adequate, and should be finally approved by the Court, and (ii) whether the Order and Final Judgment, as provided for under the Settlement Agreement, should be entered;

WHEREAS, the Court ordered that the Notice of Pendency of Class Actions, Proposed Settlement, Settlement Hearing, Plan of Allocation, and any Motion for Attorneys' Fees, Litigation Expenses, and Service Awards (the "Notice"), substantially in the form annexed to the Preliminary Approval Order as Exhibit A-1, be sent by first-class mail, postage prepaid, on or before ten (10) business days after the entry of the Preliminary Approval Order ("Notice Date") to all potential Settlement Class Members who could be identified through reasonable effort, and that a summary of the Notice (the "Publication Notice"), substantially in the form annexed to the Preliminary Approval Order as Exhibit A-2, be published in the national edition of *The Wall Street Journal* and over *PR Newswire* within fourteen (14) calendar days of the Notice Date;

WHEREAS, the Notice and Publication Notice advised Settlement Class Members of the date, time, place, and purpose of the Final Approval Hearing. The Notice further advised that

any objections to the proposed Class Settlement were required to be filed with the Court by no later than October 7, 2016, and mailed to counsel for the Parties such that they were received by no later than October 7, 2016;

WHEREAS, Plaintiffs and Lead Counsel complied with the provisions of the Preliminary Approval Order as to the distribution, mailing, and publication of the Notice and Publication Notice;

WHEREAS, on September 15, 2016, Plaintiffs moved for final approval of the proposed Class Settlement, and the Final Approval Hearing was duly held before this Court on November 2, 2016, at which time all interested Persons were afforded the opportunity to be heard; and

WHEREAS, the Court has duly considered Plaintiffs' motion, the affidavits, declarations, and memoranda of law submitted in support thereof, the Settlement Agreement, all of the submissions and arguments presented with respect to the proposed Class Settlement, and the record in the Class Actions.

NOW, THEREFORE, after due deliberation, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. **Incorporation of Settlement Documents**. This Order and Final Judgment hereby incorporates and makes a part hereof: (i) the Settlement Agreement filed with the Court on July 26, 2016; and (ii) the exhibits attached to the Settlement Agreement, including the Notice and Publication Notice, filed with the Court on September 15, 2016.

2. **Definitions**. Any term with initial capitalization that is not defined in this Order and Final Judgment shall have the meaning provided in the Settlement Agreement.

3. **Jurisdiction**. The Court has jurisdiction to enter this Order and Final Judgment. The Court has jurisdiction over the subject matter of the Class Actions and over all parties to the Class Actions, including all Settlement Class Members.

4. **Certification of the Settlement Class**. Solely for the purpose of effectuating the Class Settlement, the Court hereby affirms its determinations in the Preliminary Approval Order and finally certifies, pursuant to Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure, a Settlement Class defined as:

> All custody and trust customers of State Street Bank and Trust Company ("SSBT") (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 2, 1998 through December 31, 2009, inclusive. Excluded from the Settlement Class are: Defendants; California Public Employees' Retirement System (CalPERS), California State Teachers' Retirement System (CalSTRS), and the State of Washington Investment Board; the predecessors and affiliates of the foregoing, or any entity in which they have a controlling interest; and the officers, directors, legal representatives, heirs, successors, subsidiaries and/or assigns of any such excluded individual or entity in their capacities as such. Also excluded from the Settlement Class is any Person who submits a timely and valid request for exclusion from the Settlement Class in accordance with the requirements set forth in the Notice.

5. No requests for exclusion from the Settlement Class were received.

6. **Settlement Class Representatives and Class Counsel**. Solely for purposes of effectuating the Class Settlement, the Court hereby affirms its designations in the Preliminary Approval Order of Plaintiffs as representatives of the Settlement Class, Labaton Sucharow LLP as Lead Counsel for the Settlement Class, Thornton Law Firm LLP as Liaison Counsel for the Settlement Class, and Lieff Cabraser Heimann & Bernstein LLP as additional Counsel for the Settlement Class, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

7. **Notice**. The Court finds that the distribution, mailing, and publication of the Notice and Publication Notice to putative Settlement Class Members: (i) constituted the best notice practicable under the circumstances; (ii) was reasonably calculated, under the circumstances, to apprise Settlement Class Members of the Class Settlement, the effect of the Class Settlement (including the releases therein), and their right to exclude themselves from the Settlement Class or object to any aspect of the Class Settlement (and appear at the Final Approval Hearing), this Order and Final Judgment, the Plan of Allocation, and/or Lead Counsel's motion, on behalf of ERISA Counsel and Customer Counsel, for attorneys' fees, payment of Litigation Expenses, and any Service Awards; (iii) constituted due and sufficient notice of the Class Settlement to all Persons entitled to receive such; and (iv) satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure, the Constitution of the United States (including the Due Process Clause), the Class Action Fairness Act of 2005, 28 U.S.C. § 1715, and all other applicable laws and rules.

8. **Objections**. There have been no objections to the Settlement.

9. **Final Settlement Approval and Dismissal of Claims**. In light of the benefits to the Settlement Class, the complexity, expense, and possible duration of further litigation against the Defendants, the risks of establishing liability and damages, and the costs of continued litigation, the Court hereby fully and finally approves the Class Settlement as set forth in the Settlement Agreement in all respects, and finds that the Class Settlement is in all respects fair, reasonable, and adequate, and in the best interests of Plaintiffs and other Settlement Class Members. The Court further finds that the Class Settlement set forth in the Settlement Agreement is the result of arm's-length negotiations between experienced counsel representing

the interests of Plaintiffs, the Settlement Class, and the Defendants. The Class Settlement shall be consummated in accordance with the terms and provisions of the Settlement Agreement.

10. Upon the Effective Date, the following actions are each hereby dismissed in their entirety, with prejudice: (a) *Arkansas Teacher Retirement System v. State Street Bank and Trust Company*, No. 11-cv-10230 MLW (D. Mass.); (b) *Arnold Henriquez, et al. v. State Street Bank and Trust Company, et al.*, No. 11-cv-12049 MLW (D. Mass.); and (c) *The Andover Companies Employee Savings and Profit Sharing Plan, et al. v. State Street Bank and Trust Company*, No. 12-cv-11698 MLW (D. Mass.).

11. **Releases**. Upon the Effective Date, the Releasing Plaintiffs, and their respective past, present, and future heirs, executors, administrators, trustees, predecessors, successors, and assigns: (i) shall release and shall be deemed by operation of law and this Order and Final Judgment to have irrevocably, absolutely, and unconditionally fully, finally, and forever waived, released, discharged, and dismissed, with prejudice and on the merits, each and every one of the Released Class Claims against each and every one of the Released Defendant Parties, (ii) shall have and be deemed to have covenanted not to sue, directly or indirectly any Released Defendant Party with respect to any and all of the Released Class Claims; and (iii) shall forever be barred and enjoined from directly or indirectly filing, commencing, instituting, prosecuting, maintaining, intervening in, participating in (as a class member or otherwise) (except as a witness compelled by subpoena or court order), or receiving any benefits or other relief, from any action, suit, cause of action, arbitration, claim, demand, or other proceeding in any jurisdiction, whether in the United States or elsewhere, on their own behalf or in a representative capacity, that maintains or prosecutes any or all such Released Class Claims against each and every one of the Released Defendant Parties. All Releasing Plaintiffs, and their respective past,

present, and future heirs, executors, administrators, trustees, predecessors, successors, and assigns, shall be bound by the terms of the releases, covenants not to sue, and injunctions set forth in this Order and Final Judgment whether or not they obtain a recovery from the Class Settlement or seek, or actually receive, a distribution from the Class Settlement.

12. Upon the Effective Date, SSBT, on behalf of itself, the Released Defendant Parties, and each of their respective heirs, executors, administrators, trustees, predecessors, successors, and assigns, shall be deemed by operation of law to have fully, finally, and forever released, waived, discharged, and dismissed, with prejudice and on the merits, each and every one of the Released Prosecution Claims against each and every one of the Released Plaintiff Parties and their respective attorneys, and shall forever be barred and enjoined from commencing, instituting, prosecuting, or maintaining any or all such Released Prosecution Claims against each and-every one of the Released Plaintiff Parties and their respective attorneys.

13. Notwithstanding Paragraphs 10-11 above, nothing in this Order and Final Judgment shall bar any action by any of the Parties to enforce or effectuate the terms of the Settlement Agreement or this Order and Final Judgment, or any action by SSBT relating to insurance coverage.

14. **Rule 11 Finding**. The Court finds and concludes that the Parties and their respective counsel have complied in all respects with the requirements of Rule 11 of the Federal Rules of Civil Procedure in connection with the commencement, maintenance, prosecution, defense, and settlement of the Class Actions.

15. **Binding Effect of Order and Final Judgment**. Each Plaintiff and Settlement Class Member, and each of their respective heirs, executors, administrators, trustees,

predecessors, successors, and assigns, is bound by this Order and Final Judgment, including, without limitation, the releases contained herein, regardless of whether such Settlement Class Member (i) receives the Notice, (ii) obtains a recovery from the Class Settlement Fund, or (iii) objects to the Class Settlement, this Order and Final Judgment, the Plan of Allocation, and/or Lead Counsel's motion, on behalf of ERISA Counsel and Customer Counsel, for attorneys' fees, payment of Litigation Expenses, and any Service Awards.

16. **Use of this Order and Final Judgment**. Except as set forth in the Settlement Agreement and in Paragraph 17 below, this Order and Final Judgment and the Settlement Agreement, whether or not consummated, and any negotiations, proceedings, or agreements relating to the Settlement Agreement, the Class Settlement, and any matters arising in connection with settlement negotiations, proceedings, or agreements, shall not be offered or received against the Parties and their counsel for any purpose, and in particular:

(a) do not constitute, and shall not be offered or received against Defendants as evidence of, or construed as, or deemed to be evidence of any presumption, concession, or admission by Defendants with respect to the truth of any fact alleged by Plaintiffs or any other Settlement Class Member or the validity of any claim that has been or could have been asserted in the Class Actions or in any litigation, including but not limited to the Released Class Claims, or of any liability, damages, negligence, fault, or wrongdoing of Defendants;

(b) do not constitute, and shall not be offered or received against Defendants as evidence of a presumption, concession, or admission of any fault, misstatement, or omission with respect to any statement or written document approved or made by Defendants, or against the Plaintiffs, or any other member of the Settlement Class as evidence of any infirmity in the claims or defenses that have been or could have been asserted in the Class Actions;

(c) do not constitute, and shall not be offered or received against Defendants, Plaintiffs, or any other member of the Settlement Class, or their respective counsel, as evidence of a presumption, concession, or admission with respect to any liability, damages, negligence, fault, infirmity, or wrongdoing, or in any way referred to for any other reason against Defendants, Plaintiffs, other members of the Settlement Class, or their respective counsel, in any other civil, criminal, or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Settlement Agreement;

(d) do not constitute, and shall not be construed against Defendants, Plaintiffs, any other members of the Settlement Class, or their respective counsel as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial; and

(e) do not constitute, and shall not be construed as or received in evidence as an admission, concession, or presumption against Plaintiffs, any other Settlement Class Member, or their respective counsel, that any of their claims are without merit or infirm, that a class should not be certified, or that damages recoverable under the complaints filed in the Class Actions would not have exceeded the Class Settlement Amount.

17. The Released Parties may file or refer to the Settlement Agreement and/or this Order and Final Judgment to (i) effectuate the liability protection granted thereunder, including, without limitation, to support injunctive relief, or a defense or counterclaim based on principles of res judicata, collateral estoppel, release, good-faith settlement, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim; or (ii) effectuate the liability protections granted them under any applicable insurance policies. The Released Parties may file or refer to the Settlement Agreement and/or this Order and Final Judgment in any action that

may be brought to enforce the terms of the Settlement Agreement and/or this Order and Final Judgment. All Released Parties submit to the jurisdiction of this Court for purposes of implementing and enforcing the Class Settlement.

18. **Retention of Jurisdiction**. The Court reserves and retains jurisdiction, without affecting in any way the finality of this Order and Final Judgment, over: (i) implementation and enforcement of the Class Settlement; (ii) the allowance, disallowance, or adjustment, on equitable grounds, of any Settlement Class Member's right to recover under the Settlement Agreement, and any award or distribution from the Class Settlement Fund; (iii) disposition of the Class Settlement Fund; (iv) the hearing and determination of Lead Counsel's motion, on behalf of ERISA Counsel and Customer Counsel, for attorneys' fees, payment of Litigation Expenses, and any Service Awards; (v) the hearing and determination of any motions to approve the Plan of Allocation or the Distribution Order; (vi) enforcement and administration of this Order and Final Judgment; (vii) enforcement and administration of the Settlement Agreement, including the injunctions and releases in connection therewith; and (viii) other matters related or ancillary to the foregoing.

19. **Termination**. In the event the Class Settlement is terminated in its entirety or does not become effective in accordance with the terms of the Settlement Agreement, the Settlement Agreement, except as otherwise provided therein, including any amendment(s) thereto, and this Order and Final Judgment, including but not limited to the certification of the Settlement Class provided in Paragraph 4 above, shall be null and void and of no further force or effect, and may not be introduced as evidence or referred to in any action or proceeding by any Person, and Plaintiffs and the Defendants shall be restored to their respective positions in the Class Actions as of June 29, 2015, and, except as otherwise expressly provided, Plaintiffs and the

Defendants shall proceed in all respects as if the Settlement Agreement and any related orders had not been entered, and the balance of the Settlement Fund including interest accrued thereon, less any Notice and Administration Costs paid or incurred and less any Taxes and Tax Expenses paid, incurred, or owing, shall be refunded to SSBT.

20. **Plan of Allocation**. A separate order shall be entered regarding the proposed Plan of Allocation. Such order shall not disturb or affect any of the terms of this Order and Final Judgment.

21. **Attorneys' Fees, Litigation Expenses, and/or Service Awards**. A separate order shall be entered regarding Lead Counsel's motion, on behalf of ERISA Counsel and Customer Counsel, for attorneys' fees, payment of Litigation Expenses, and any Service Awards as allowed by the Court. Such order shall not disturb or affect any of the terms of this Order and Final Judgment.

22. **Administration of the Class Settlement**. Without further order of the Court, the Parties may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

23. **Consummation of the Class Settlement**. The Parties are hereby directed to consummate the Settlement Agreement and to perform its terms.

24. **Entry of Final Judgment**. There is no just reason for delay in the entry of this Order and Final Judgment and immediate entry by the Clerk of the Court is expressly directed.

Dated: November 2, 2016

HON. MARK L. WOLF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING

November 2, 2016
2:05 p.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

THE CLERK: All rise for the Honorable Court. This is Civil Action No. 11-10230, *Arkansas Teacher Retirement System v. State Street Corporation, et al.* You may be seated.

THE COURT: Good afternoon. Would counsel please identify themselves for the Court and for the record.

MR. GOLDSMITH: Good afternoon, Your Honor. David Goldsmith, Labaton Sucharow, for plaintiffs and the settlement class.

MS. ZEISS: Good afternoon. Nicole Zeiss for plaintiffs and the settlement class, from Labaton Sucharow.

MR. CHIPLOCK: Good afternoon, Your Honor. Daniel Chiplock from Lieff Cabraser Heimann & Bernstein also here for plaintiffs and the proposed class.

MR. PAINE: Bill Paine, Dan Halston and Tim Perla, all from Wilmer Hale for the defendant.

MR. KRAVITZ: Carl Kravitz. I'm one of the ERISA counsel.

THE COURT: Counsel for the ERISA plaintiffs?

MR. KRAVITZ: Yes, just in case something arises.

THE COURT: Following the August 8, 2016 hearing I issued an order preliminarily approving the certification of this as a class action and the proposed settlement as sufficiently fair, adequate and reasonable to be sent to the class members.

That notice was sent. I've been informed that no objections have been filed, nor have any class members opted out. The order established today, November 2, as the date for hearing on the motion for class certification and final approval of the settlement for a decision on the amount of the attorneys' fees to be awarded if the settlement is approved, a decision on the amount of expenses to be awarded and for a decision as whether service awards ought to be made.

Are there any other items that ought to be on the agenda for today?

MR. GOLDSMITH: The only other item I believe would be a very minor one, Your Honor, which would simply be to finalize class certification for settlement purposes.

THE COURT: I think --

MR. CHIPLOCK: If Your Honor didn't mention that.

THE COURT: I intended to say that.

MR. CHIPLOCK: Okay.

THE COURT: All right. So I think with regard to class certification, I went into some detail on August 8. As far as I know, nothing has changed. It appears to me that for the reasons I stated on August 8, class certification is appropriate. But do you want to be heard briefly on that?

MR. GOLDSMITH: Thank you, Your Honor.

All I would say with regard to class certification is to echo Your Honor. I mean, Your Honor did put detailed

findings on the record during the hearing we had on August 8. Nothing has happened since to cast any doubt on those findings. There were no objections, as Your Honor noted, to class certification or anything else, and so we would suggest that to finalize class certification in order to implement the settlement, should it be approved, would be proper.

THE COURT: All right. Does the defendant want to be heard on this?

MR. PAINE: No thanks, Your Honor.

THE COURT: All right. Well, I think I'll address that after I hear from you on whether the settlement is fair, reasonable and adequate, since I believe essentially the agreement, the class certification was conditioned on the settlement being approved. I've studied the excellent submissions which were and are, among other things, responsive to the questions that I raised in August. It's my tentative view that the settlement is fair, reasonable and adequate. But I would like to get orally the parties' positions on that.

MR. GOLDSMITH: Well, thank you, Your Honor.

We are very pleased this afternoon to present for Your Honor's consideration this proposed $300 million cash settlement. As Your Honor indicated, notice has gone out. We have proven that for the initial and supplemental declarations. And so now the Court has to assess whether, in its discretion, whether the settlement is real, fair, reasonable and adequate

in view of the risks, costs and duration of continued litigation.

That standard of course allows for a range of permissible settlements, and the Court knows that there is a strong judicial policy that favors the settling of complex class action litigation such as this. There's also a presumption in this circuit, which Your Honor has recognized most recently in the *Disability Law Center* case, that a settlement is reasonable when you have, one, arm's length negotiations between the parties; and two, sufficient informal or formal discovery so that the Court can be assured that the plaintiffs entered into the settlement on a reasonably informed basis.

THE COURT: And negotiation between capable experienced counsel.

MR. GOLDSMITH: As well as sophisticated counsel. That's actually not -- that's not written into the standard as we've read into the cases, but I certainly agree that should be a component. We certainly have both of them here or all three of them here.

THE COURT: Hold on just one second.

Actually I wrote that. It's in *Berenson V. Faneuil Hall Marketplace*, 671, F. Supp. 819, D. Mass. 1987, page 822. "Whereas here a proposed class settlement has been reached after meaningful discovery and after arm's length negotiation

conducted by capable counsel, it is presumptively fair."

MR GOLDSMITH: Well --

THE COURT: It was a long time ago.

MR. CHIPLOCK: It's like that scene in Annie Hall.

THE COURT: You're asking me to give you $74 million in attorneys' fees. You don't read my cases?

MR. GOLDSMITH: I have read Your Honor's case and we cite it in our brief, and I've read *Disability Law Center* as well and quoted that. I stand corrected on that, Your Honor.

THE COURT: I probably said the same thing in that case, but I don't remember. It wasn't my first one.

MR. GOLDSMITH: Right. I was actually referring to the First Circuit on that, so I was unclear on that, Your Honor.

THE COURT: Well, *Disability Law Center* I didn't echo what I had said in 1987, apparently. Go ahead.

MR. GOLDSMITH: Thank you. So regardless, I would suggest that we do have those prerequisites for the presumption here as we show in our omnibus declaration and in the separate declaration of Jonathan Marks, the mediator, which is Exhibit 5.

The parties attended 14 separate mediation sessions with Mr. Marks before finally reaching the agreement in principle in this case in mid 2015. We exchanged voluminous documents and data, which included nine million pages of State

Street documents that plaintiffs' counsel reviewed and analyzed. We had various presentations that went back and forth from time to time between the parties during the mediation sessions. This discovery and information exchange insured, Your Honor, that we were very well informed about the strengths and weaknesses or the claims and the defenses when we agreed to the settlement.

And what's very important here is that this approach we had of mediation and document discovery and information exchange was very carefully worked out among the parties, and it was presented to Your Honor for approval during a lobby conference that we had in November of 2012. And it was approved by Your Honor as a way to approach these cases in a focused and efficient way to explore settlement while insuring a flow of information but also to attempt to save costs and to avoid unnecessary disruption of party resources, third party resources, and judicial resources.

So we took a different resolution approach here. And my recollection was that it was an approach that Your Honor found to be commendable. And fortunately, the approach ultimately was successful. So with that presumption established, I think the question before the Court is are there any circumstances here that would suggest that the settlement is not fair and adequate and reasonable. I would suggest the answer is no. This settlement is the largest ever to our

research in a Chapter 93A class action. The next largest that we're aware of in Massachusetts is a $25 million settlement approved by Judge Saylor in the *Reebok* case, and there's also a $20 million settlement that was in state court.

So this case, Your Honor, is more than ten times larger. There is a case called *Warfarin*, which is cited in our brief, which was larger, about $45 million, but that's a little different because in that case they proceeded under all of the consumer protection laws of all 50 states, so it's not really a Chapter 93A case, although they cite it.

This settlement, Your Honor, is the third largest ever filed in a Federal Court within the First Circuit, if you exclude securities class actions which tend to be very large. So you have the *Tyco* securities class action which was up in New Hampshire. That was something like $3 billion.

THE COURT: That was a securities class action?

MR. GOLDSMITH: That was a securities fraud.

THE COURT: I thought you were excluding that.

MR. GOLDSMITH: I am just explaining the structure so Your Honor can the perspective. So there was the *Tyco* case, which was $3 billion. Then there was *Raytheon* securities class action which was in this district which was $460 million. Then after that there's a trio of cases, the *Neurontin* case, which is one of those drug marketing cases, which was 325, then another one of those drug marketing cases also in this court

called *First DataBank,* which was 350, so actually bigger. Then there's this case. So you have a trio of cases in the 300s, and this falls right in there. This is one of the largest class action cases filed in the First Circuit.

So that's a broad generalization of why this is a big settlement. But to get more case-specific, one of the most important factors of course is how big is the settlement as compared to the maximum potential recovery at trial. Your Honor had asked me this question in one of our prior hearings: How did we do? We peg that percentage at 20 percent. So a very pie-in-the-sky damages figure that we put together is approximately $1.5 billion.

THE COURT: Mr. Paine is going to want to order this transcript, although you're the lawyer, you're not the expert witness. You say "pie in the sky."

MR. GOLDSMITH: Right. If we were to achieve every claim, and that's an outer limit. I mean, Mr. Paine --

THE COURT: Every claim your experts are to be believed --

MR. GOLDSMITH: Correct. Mr. Paine has a very, very different view of damages, and that's a very important fact for this proceeding. But even so, $300 million gives you 20 percent. That's a very robust percentage, we would suggest. That's well within, if not above, what courts routinely find to be reasonable. And importantly, that percentage, Your Honor,

is comparable to the percentage of the recovery that was achieved in the *Bank of New York Mellon* FX case, which was very similar to this case in the Southern District of New York.

THE COURT: "FX" meaning foreign exchange?

MR. GOLDSMITH: Yes. I'm sorry. FX, foreign exchange. So as I mentioned in the prior hearing, there was a case against Bank of New York Mellon, which was one of State Street's major competitors that's very similar to this case. But that proceeded in Federal Court in New York. And Mr. Chiplock was one of the lead counsel in that case. I was not involved in that case.

THE COURT: And he hasn't retired yet?

MR. CHIPLOCK: I haven't, Your Honor.

MR. GOLDSMITH: Maybe next year.

The percentage there was about 24 percent on a comparable class recovery of about $330 million. And the judge there -- this was Judge Kaplan -- had little trouble approving that settlement as fair, reasonable and adequate. So I think the settlement falls right in line.

But referring to Your Honor's comment about State Street's view of damages, I think that's really important. So State Street, at Your Honor's directive, put a memorandum in, and they view damages at zero. And even assuming liability, Mr. Paine made an assertion that damages could maybe be $50 million, maybe.

So taking Mr. Paine at his word, if a jury -- assuming a finding of liability, which of course is not assured -- could rationally impose damages of $50 million, then I would suggest that the fairness of a $300 million settlement is almost self-evident.

So I mentioned litigation risk. So litigation risk on liability also supports the settlement, Your Honor. And we discuss this at some length in our brief and in our omnibus declaration. But again, I want to point to State Street's brief, which I think is really very helpful on this point as well. So they put together a summary of the defenses that they might mount. It's no way -- I'm not suggesting it's their full panoply of defenses or trial memorandum, but there's a cogent list of their contentions.

Now, I don't agree with their individual contentions saying that our theory doesn't make sense and things of that nature, but I think it makes very clear that the ruling that Your Honor gave us on the motions to dismiss in no way guarantees success on summary judgment and it in no way guarantees success at trial. There were thorny factual issues here, thorny legal issues. There is a somewhat arcane fuzzy area. Custodians don't get sued very often. And I think one cannot deny that State Street had, you know, legitimate defenses that they can marshal.

And there was one comment that Your Honor made during

the hearing on the motion to dismiss that I think is worth pointing out. When Your Honor raised the question of why, why would a custody client do direct FX trades if the custody client thought that the indirect trades, those are the trades that are at issue in this case, were free. And Your Honor had asked that question I believe during the hearing on the motion to dismiss. And we have answers to that question, and we would offer answers to that question if the case were to go further, you know, into litigation.

But that's an issue that we would have to grapple with. That is an issue that Your Honor would have to grapple with. If the case were to go into summary judgment, that's an issue that a jury would have to grapple with. So I think there is certainly litigation risk that supports a settlement at this magnitude. And the settlement was not handed to us, Your Honor. This was not piggyback regulation. There are multiple regulators that have some involvement in the matter as we've discussed with Your Honor before.

THE COURT: Department of Justice, Department of Labor, Securities and Exchange Commission?

MR. GOLDSMITH: Yes, sir. And the interrelationship is discussed in State Street's memorandum, and Your Honor had directed that that question be answered. But those regulators came on the scene later. This is not an instance where they plowed the road with findings and then we showed up with a

complaint that recounted those findings. We plowed the road.

And this case similarly was developed and started actually before the Bank of New York case was up and running. Even though that case was settled and that settlement was approved some months ago, the timeline which we recount in our papers shows that this case actually got started first.

Just one more note. I mean, Your Honor mentioned or noted that there are no objections, there are no opt-outs. I would suggest that that may have a particular relevance here simply because we do have a class of institutional investors. There are cases that suggest that when you don't have institutional objectors, that may carry some more weight --

THE COURT: Investors.

MR. GOLDSMITH: I'm sorry. The class here is made up of institutional investors. There are cases that say -- and we cite them in our reply brief, that say when the response of the class has no objections by institutional investors, the Court may wish to give that more weight than when most of the class is individual investors.

THE COURT: I agree with that proposition.

MR. GOLDSMITH: So the fact there are no objections and no opt-outs is of perhaps some additional significance.

That's my presentation on the settlement, Your Honor.

THE COURT: I am interested in hearing from State Street on some of the relevant factors. The written submission

was helpful, but if there are some things that you'd like to reiterate or amplify, emphasize, it would be helpful to me.

MR. PAINE: I think that our perspective on this case is that we had a thorny and difficult problem that was going to be hard for just about anybody who is not a custody banker to understand. State Street is an unusual bank. Indirect FX is an unusual business. And the world in which they conduct this business is inhabited by very sophisticated people in institutions who we believe understand very well what's going on inside that business. But external observers, whether it's a jury or a plaintiff or a Court or a regulator, has had a lot of trouble understanding the details of this very complicated business.

And as a result, we had not just litigation but threatened litigation from a whole bunch of regulators, all of whom have tremendous power to do harm to State Street and its business. So we had a big problem. And one of the big players in terms of the resolution, the problem is, Your Honor -- and you said to everybody in this room or most everybody in this room you really ought to figure out a way to resolve this that doesn't involve, you know, extensive litigation proceedings. And we did.

THE COURT: Litigation with your valued clients.

MR. PAINE: And even if it wasn't litigation with them directly, we viewed -- we watched the Bank of New York case

where they did it the old-fashioned way, and they did 100 depositions, and they subpoenaed dozens of their clients, and their clients were not happy. These are clients that -- our clients are -- some of these relationships go back decades. The bank wants those relationships to continue for decades. And it's really only every five or ten years that people are considering whether they want to change their custodian. And so it's a giant business risk to pick fights with the people that you need the evidence from.

THE COURT: I don't remember what I said to encourage you to go through a process to settle it, but I wouldn't be surprised if I pointed that out because it's something particularly important in this case.

MR. PAINE: It was a good observation you made. It's one we took to heart. It's one that everyone took to heart. The honest truth is that if the plaintiffs' lawyers and the lead plaintiff as a group were not mature enough and if we weren't patient enough and if you weren't patient enough to allow this thing to unfold in the way that it did, we would have spent $100 million on defense costs to present a very complicated issue to you for summary judgment, and then we would -- you know, we would have either won or lost that motion. But if we lost, it would have been another $50 million associated with that exercise.

So the case was too big, too complicated, too many

adversaries for us to be comfortable just doing it the old-fashioned way. So we did it the way that you suggested. I think that everyone -- there were a lot of frustrations on everyone's part. The production and review of nine million documents is not trivial. The extensive back and forth intermediated by Mr. Marks about the merits of the case was not comfortable.

But at the end of the day, the litigation timeline formed up with the regulatory timeline, and we were able to accomplish, at great expense, the objective that we had, which was to resolve this case once and for all at the same time with respect to everybody.

THE COURT: When you say, "once and for all with respect to everybody," just so I think it's clear on this record, your settlement with the Department of Labor, with regard to ERISA claims and your settlement with regard to the Securities and Exchange Commission is contingent upon the approval of this settlement by me. Is that right?

MR. PAINE: That's correct. That was a key term that we were unwavering on. We were not willing to resolve these cases except as one big bundle, and that caused a lot of difficulty because -- it caused a lot of difficulty for everyone. And I was sort of at the hub of this multi-spoked negotiation, and every change by every party involved iterating through all of the parties.

So I really do -- you know, it's not my mode to spend a lot of time complementing my adversaries, but this is a situation where State Street was unwilling to pay money like this on any other basis than what's presented to you today, and it required extreme effort and patience on behalf of everyone involved to get to the point where that pool of assets could be made available. We think it's fair. We think it's beyond fair. And we commend it to Your Honor.

THE COURT: Okay. Well, I'm going to address this only briefly because I don't think either the question of class certification or the question of whether the settlement is fair, reasonable and adequate is a close question. I think the answer to both is yes. I'm relying substantially on the excellent submissions. I'm relying on what was said today, which I won't reiterate completely, but the following:

I went through the requirements for class certification carefully in detail on August 8, 2016. Those factual findings which were then preliminary are reflected in the transcript. I don't think it's necessary or worthwhile to reiterate them. But the requirements for class certification are fully met.

In addition, I also find that the settlement of $300 million is fair, reasonable and adequate, again essentially for the reasons stated on August 8, 2016 and the additional facts that no class member has objected, no class member has opted

out. This is a situation in which each of the class members is a sophisticated -- well, is an institutional investor, I infer, a sophisticated party and the fact that there is unanimous agreement among the class members that the settlement is, from their perspective, fair, reasonable and adequate is an important and somewhat unusual fact.

It's also important and unusual in my experience that this is a settlement that regulatory agencies, expert regulatory agencies, particularly the Department of Labor and the Securities and Exchange Commission, want to see approved by making their -- settlement of their claims or potential claims against State Street contingent on the approval of this settlement. They're communicating to me that from their perspective, having responsibilities to the public and experience and expertise, this settlement is fair, reasonable and adequate.

It was negotiated by experienced, capable counsel after substantial discovery, including nine million documents. It results from arduous arm's length negotiations, as I understand it, 19 mediation sessions with a very experienced and expert mediator. So it's presumptively valid. The class members -- well, there are essentially two subclasses as I understand it, but within those classes the class members are each treated equally. And the settlement provides a substantial amount of money, $300 million, which is not as much

as the plaintiffs would advocate if they got this case to a jury, but it's considerably more than defendants believe could properly be awarded even if the plaintiffs prevailed. And whether the plaintiffs would prevail in this case is inherently uncertain.

This is a complicated area. State Street has defenses. I'm not in a position to make an informed prediction concerning how the case would come out if it were tried, but I can say it's uncertain whether it would survive a motion for summary judgment. It's uncertain how it would come out, and it's uncertain how much in damages would be awarded if the plaintiffs ultimately prevailed.

So for all of these reasons and others, essentially in the submissions, I find this is fair, reasonable and adequate.

And implicit in that is a finding that State Street had essentially valid reasons to settle. This is not a situation where the defendant agreed to pay something that will assure the plaintiff significant -- let me confirm one thing we haven't discussed. Were the attorneys' fees -- the attorneys' fees come out of a common fund, but were the attorneys' fees discussed with the defendant before the $300 million figure was reached?

MR. PAINE: No.

MR. GOLDSMITH: No, Your Honor.

MR. PAINE: No.

THE COURT: I probably asked you that before. That's my understanding. There's nothing collusive about this. This has been genuine arm's length negotiations between experienced, capable counsel who each vigorously represented their clients' interest. So I've approved the settlement.

Is there anything you feel I didn't say that I should have?

MR. GOLDSMITH: One, I suppose, question, Your Honor, did you want to hear any particular discussion of the terms of plan of allocation? Your Honor mentioned --

THE COURT: Last time --

MR. GOLDSMITH: I don't know -- just for completeness. I wasn't sure.

THE COURT: Why don't you remind me of the terms of allocation.

MR. GOLDSMITH: Sure. We've discussed it before, Your Honor. I didn't want there to be something that was left out that Your Honor wanted to hear. We discussed it briefly. There's a plan of allocation here. There's three, I suppose you could call them segments. The funds will be divided among the ERISA plans and the eligible group trusts. Group trusts are the class members where they have certain assets that are ERISA-governed and certain aspects that are not. So the ERISA portion of group trusts are part of the ERISA settlement allocation.

Then you have the registered investment companies or mutual funds. They have a portion. And then you have what we call public and other, which is basically everybody else. That includes our client, Arkansas Teacher, and they have a portion.

Essentially we used a volume-based calculation to figure out how much everybody gets. And that's largely how we will be divvying up the money from the net settlement fund after fees and expenses and the like are taken out. We'll be sending letters -- we have sent letters to the group trust class members asking them to tell us about the proportion of ERISA and non-ERISA so that we can get intelligence from them so that we can figure all that out. We have sufficient data that State Street has provided us so that we can do the calculations. I just wanted to have that explained to Your Honor.

THE COURT: Thank you. I'm persuaded that the plan of allocation is fair. And again, this is a complex area, but the class members are institutional investors, I infer sophisticated investors, and if they thought the plan of allocation was inequitable, I expect I would have heard from somebody.

So now with regard to requests for attorneys' fees. The plaintiff's counsel requests $74,541,250 in fees, $1,257,699.94 in expenses, and accrued interest on whatever sum I award. I do think it's appropriate in this case to use the

percentage of the common fund approach in determining the amount of attorneys' fees that should be awarded.

Again, I've studied the submission, but I'm interested in hearing your argument.

MR. GOLDSMITH: Thank you very much, Your Honor.

So as Your Honor said, the fee of approximately 74 and a half million dollars, that's about 24.85 of the gross settlement fund. The way we calculated that, Your Honor, is we took the $300 million gross settlement fund. We deducted the $1.75 million expense figure, which was the maximum number in the notice. So we told class members in the notice that we would seek no more than $1.75 million in expenses. And then we deducted the $85,000 in service awards that we would be seeking.

We took that number, and then we divided it by four, 25 percent of that. And that's how we came to the actual figure in fees that we're seeking here. And so the fees, expenses combined is about 25.27 percent of the gross settlement fund.

THE COURT: My calculation came to the same number.

MR. GOLDSMITH: Okay. I just wanted the Court to see how we --

THE COURT: Because usually I do combine them.

MR. GOLDSMITH: I'm aware of that, yeah. So 25.27, and then when you add on the service awards that we've

requested, if the Court were to award those, that pushes that up a little bit to 25.3 percent. So it's a little above 25 percent.

So my argument, Your Honor, first of all, is that a fee just below 25 percent we think falls right in line with the fees that the courts in this circuit generally award in class action settlements. There are a lot of cases, you know, in class action settlements, large and small, where 25 percent fees approximately have been awarded. I mean, in the *Bezdek* case, which is a 2015 case before Judge Woodlock, that's also a Chapter 93A case, Judge Woodlock went so far as to say that 25 percent is the now benchmark fee in this circuit. I don't know if it's really a benchmark like you have in the Ninth Circuit, but that's what His Honor said. And it does seem to be maybe a vibrating benchmark of sorts.

THE COURT: Well, I studied this pretty closely after I became a judge in 1985. And in the *Berenson* case I discussed it and I appointed a distinguished lawyer to help me. But basically I understood as a guideline 20 to 30 percent was an appropriate range to consider, so 25 percent is in the middle of the range. It actually seemed to me that I've been creeping up lately or at least some of my colleagues have been awarding more than 30 percent in certain cases where of course the adversary process is not working. But I've tended to stay in that 20 to 30 percent range.

MR. GOLDSMITH: So one thing we presented in our brief, Your Honor, to get a little bit more to the point, is we compared the fee that we're requesting here with the fees in every class action settlement in the First Circuit of $100 million or more. There are some cases that refer to class action settlements of $100 million or more as mega fund settlements. So we took all of those settlements in courts within the First Circuit. There are eight of them. And we put them together. There's a chart on page 7 of our brief and lays them out. I would suggest that this fee falls in the middle and looks fairly reasonable compared to the others.

And we have some explanation as to the percentages that are below, and we talk about those in our brief. I mean, the *Tyco* case, for example, that was 14.5 percent, but that was also a $3 billion recovery. So that's different. I mean, the *Raytheon* case, which was the $460 million securities case, that was 9 percent. That's also a lot different because the plaintiff in that case was the New York State Common Retirement Fund, and I know too from personal experience that the New York State Common Retirement Fund can be very demanding with attorneys' fees. And there was an affidavit that was filed in that case that required counsel not to seek more than that percentage. We actually filed that affidavit. So I think the fee there was a function of that. *First DataBank* -- I'm sorry.

THE COURT: That was part of a fee agreement or just

the position of the client after the case was settled?

MR. GOLDSMITH: I didn't hear your whole question.

THE COURT: Was that part of a fee agreement that counsel wouldn't seek more than 10 percent?

MR. GOLDSMITH: In *Raytheon*?

THE COURT: In the case you were just describing.

MR. GOLDSMITH: Yes. In *Raytheon*, what happened was, I think there was a fee agreement that was -- at the beginning of that case, I think that there was a fee grid that that client and that counsel, which was not my firm, had agreed to and it resulted based on the recovery in that fee.

THE COURT: And your fee agreement in this case provided what at the outset?

MR. GOLDSMITH: It provided -- well, it's certainly consistent with the fee that we're seeking here.

THE COURT: Well, it was a contingent fee agreement, right?

MR. GOLDSMITH: It was a contingent fee agreement, of course.

THE COURT: Did it have a cap?

MR. GOLDSMITH: I believe it was capped at 25 percent, and we are seeking a fee that's slightly below.

THE COURT: And it permitted expenses about 25 percent?

MR. GOLDSMITH: Yes -- no, no. The fee was -- it

permitted a fee of 25 percent of expenses that go below. I mean, Mr. Hopkins' affidavit --

THE COURT: Expenses that would go above?

MR. GOLDSMITH: I'm sorry. Would go above. I misspoke, Your Honor. Our affidavit from your client, Mr. Hopkins, which was Exhibit 1, does support the fees and expenses that we're seeking. So the *First DataBank* case, which had a 20 percent fee, what happened there actually was, counsel were seeking a 25 percent fee, but that would have resulted in a multiplier and lodestar multiplier of something like 10. And the judge there, I believe it was Judge Saris, found that that was a bit too rich, so she reduced the fee to 20 percent, but that still gave a lodestar multiplier of about 8.

So I think that's a little bit different. In the *Lernout and Hauspie* case, in all candor, we couldn't find a record on that. I don't know why 20 percent was awarded there instead of something higher or something lower. I don't know the answer to that.

So one important point of the fee, again mentioning the *Bank of New York* case, is that Mr. Chiplock and his colleagues sought a 25 percent fee on a $335 million class recovery and received that amount from Judge Kaplan in New York.

THE COURT: They were piggybacking on your work.

MR. GOLDSMITH: No, they were not. Hardly.

THE COURT: I thought you said you went first.

MR. GOLDSMITH: We went first but they came close behind. I would not call them piggybacking on our work. They were marching through the desert. And the fee that we're seeking here is slightly below. And we would suggest that the results achieved, what we've done here in terms of the work would support the fee as well, including the work that Your Honor had mentioned on the record in indicating Your Honor's approval of the settlement.

One thing I'd like to mention is I'd like to point to State Street's brief for a moment. State Street of course takes no position on our fee. There's no reason for them to. They don't have any interest in whatever fee the Court seeks fit to award, but I think some of the assertions are relevant actually to the fee, because if State Street's brief is to be taken at face value, we produced a $300 million settlement, and we're giving class members a windfall -- I think that's a word that they use -- after bringing a case that doesn't make any sense and that has no damages at all. So I think, you know, a fee of some substance would be in order for that, frankly.

THE COURT: Do you think 74 million is of some substance?

MR. GOLDSMITH: It is.

THE COURT: It's a number with a lot of substance to somebody who works for $200,000 a year, but go ahead.

MR. GOLDSMITH: True, sir, true.

The bank -- I think Mr. Paine alluded to this. They settled to avoid defense costs. Okay. I think they settled in part to avoid inconvenience and business interruption, all legitimate. And they settled in part to close down the regulatory actions, all the legitimate reasons to settle. $300 million is more, I think, than what the defense costs would have been here. I don't know that for a fact, but I would think so. And $300 million is a lot more than the portion of the settlement that is being used in part to satisfy certain regulatory agencies.

So as we've discussed, $60 million will be used to satisfy the Department of Labor, and there's also $92 million which is part of the financial terms between State Street and the SEC. Adding those up, that's about $152 million. That's only about half of the size of the settlement. So I think you can see very clearly that there's real value here that counsel produced alone, and we think, Your Honor, that that justifies the fee that we are respectfully seeking.

One thing I also would note is that the *Bezdek* case, which I mentioned, which was decided by Judge Woodlock, which is a Chapter 93A case, you had a similar path here in terms of the degree of work, the mediations, coupled with discovery and so on, where you had a settlement that preceded summary judgment, you know, and you had a certain amount of discovery

but you didn't have 100 depositions and the like. You had a 25 percent fee awarded by Judge Woodlock there.

Now, there was an objection filed in that action, Your Honor. There was an objection filed to the fee, and the objection stated that the plaintiffs' counsel didn't do enough work to justify a 25 percent fee. And Judge Woodlock overruled that objection. Judge Woodlock found that there was more than enough work done in terms of the work to produce the settlement, the work that was done in negotiating the settlement, the work that was done in discovery, the work that was done in investigation and motion practice and so forth.

And the First Circuit, in an opinion by Judge Lynch, affirmed that finding and I think had little trouble affirming the finding that Judge Woodlook was well within his discretion in overruling the objection to the 25 percent fee, so I would commend that authority to Your Honor as well.

THE COURT: Okay.

MR. GOLDSMITH: Finally, Your Honor, there was one other matter I did want to note on the fee, if I may, which is that many courts apply a lodestar crosscheck. It's not required.

THE COURT: And I do that.

MR. GOLDSMITH: But I'd be remiss if I didn't mention it. Here the multiplier that this fee would yield would be 1.8, which we think is pretty low under the circumstances. The

review of the nine million documents and other work that was associated with that took a lot of hours, and so that is one of the reasons why the lodestar is large here, even though we didn't take 100 depositions. So the multiplier we think compares favorably with or is frankly a lot lower than the other cases.

THE COURT: The total of the lodestar is --

MR. GOLDSMITH: Approximately $41.3 million.

THE COURT: And is it correct that your fee agreement was a contingent fee agreement so if you didn't settle this case or prevail at trial, you would have received nothing?

MR. GOLDSMITH: Correct.

THE COURT: All right.

MR. GOLDSMITH: Thank you, Your Honor.

THE COURT: Do you want to speak briefly to the expenses?

MR. GOLDSMITH: Thank you, Your Honor. Yeah, I'll speak briefly to that and the service awards, if I may.

THE COURT: Yes.

MR. GOLDSMITH: So the expenses, I believe Your Honor quoted the figure, it's approximately $1.25 million. We would submit that these expenses were reasonably and necessarily incurred in connection with the cases. We've documented those in the various firm-specific declarations, which are Exhibits 15 to 23 of our omnibus declaration. And there's a master

chart which is Exhibit 24 if Your Honor wanted to see everything on one page.

There's a number of principle categories that are predominant with the expert fees, the mediation fees were high, travel expenses, legal research expenses, document hosting fees and the like. We think that these are expenses that are generally approved by courts. It's a relatively small percentage of the gross settlement. It's less than one half of one percent. The notice, as I indicated, advised that expenses would be no more than 1.75 million. This is a lot less, and there's been no objections.

THE COURT: And I think Mr. Paine said that -- I don't think he said what the defendants' fees were to date, but he did say if this continued to summary judgment, it would be about 100 million and, you know, if it went beyond that, another 50 million. So frequently, usually courts don't have that information, but I think that's another check. Okay.

MR. GOLDSMITH: There's no question, Your Honor, that if this case had gone through full discovery and if we had settled on the courthouse steps -- let's say we settled on the courthouse steps for $300 million. More money would have come out of the gross settlement, assuming court approval, than is coming out today in terms of expenses. So the settlement is more valuable today to class members than it would be then, and also it's today and not a year from now or however long it

would have taken. So there's that.

THE COURT: All right.

MR. GOLDSMITH: And just very briefly on the requested service awards. What we are seeking is $25,000 for Arkansas and $10,000 for each of the six ERISA plaintiffs, which total $85,000. This is a case in which incentive awards can be approved by courts. And the *Bezdek* case and the *Lupron* case and *Neurontin* case all have granted incentive awards to the plaintiffs in approving the settlement in the course of approving fees.

This is different than a securities fraud case, Your Honor, where there are statutory limitations on incentive awards to plaintiff. In a 93A case the Court has discretion to do so. In fact, Chapter 93A itself reflects a policy that favors the bringing of class actions. So I would suggest that would be appropriate here.

Arkansas we think took a lot of risk in suing its own custodian to bring a case like this. Arkansas, if it's not clear, remains a client of -- custody client of State Street. And, you know, it wasn't easy for Arkansas to step forward and to do this. And Arkansas spent a lot of time and effort in acting in this case. And Mr. Hopkins was here for the motion to dismiss hearing and for the conference we had thereafter. He attended a number of the mediation sessions, not just one or two. He actually spoke with the representative of -- the State

Street executive who was there, and he had involvement in the case. And they also produced documents and so forth.

And the ERISA plaintiffs also discharged their duties as well, and we have affidavits from each of them. You'll find that as Exhibit 1 and Exhibits 7 to 12 that would support that, so we would respectfully submit that the service awards should be approved.

THE COURT: And they're content -- well, they haven't objected, but are they content with you getting $74 million and them getting, for their services, 25,000 for Arkansas Teachers and 10,000 for the rest?

MR. GOLDSMITH: Yes, because without the lawyers doing the legal work, there wouldn't be any service awards. And their declarations support all of the requests that are before you, Your Honor.

THE COURT: In my experience, service awards are a relatively recent but now common phenomenon. But the plaintiffs are supposed to be controlling the lawyers. This isn't a PLSRA case, but I think the concept applies. Service awards seem modest compared to legal fees, but that's okay because it leaves more for the class members. All right.

Well, when you cite *Bezdek* or several of Judge Saris' decisions, you almost make me wish that I could write you a long elegant decision, too, but I've got other things to write and you'd be waiting. I think you'd probably prefer to get on

with getting $300 million for the class and $74 million for yourselves.

So again, I'll decide this orally. The transcript will be the record of the decision, and I'm relying heavily on the submissions and what's been said today and speaking shorthand to some extent. I do find that requests for attorneys' fees of $74,541,250 is reasonable. I find that $1,257,697.94 in expenses is reasonable. I'm awarding accrued interest on each of those sums. I also find that a service award to each of the named plaintiffs is appropriate, $25,000 to Arkansas Teachers and $10,000 to each of the so-called ERISA plaintiffs. I have used the percentage of common fund method. I've used the reasonable lodestar to check on that. I've also considered the awards in comparable cases. The $74,500,000 plus is about -- well, is 24.48 percent of the settlement fund. Adding in the litigation expenses brings it to 25.27 percent of the settlement fund. Adding the service awards makes it a little higher. This is in the 20 to 30 percent range usually awarded by me in class action common fund cases and in many cases with settlements in the First Circuit and in many cases where the settlements are a $250 million to $500 million range.

Given the high number that roughly 25 percent award comes to, I've considered whether some reduction is -- reduction from the request, something below $25,000 is most appropriate. I find that it is not.

The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain.

The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.

The litigation expenses of $1,257,697.94 are also reasonable. Service awards have become increasingly common. They provide an incentive to name plaintiffs to participate actively in the litigation in exchange for reimbursement for their pursuit on behalf of the overall class, as Judge Woodlock wrote in *Bezdek*, 79 F. Supp. 3d at 352. And I think that's a positive thing, to have sophisticated institutional investors who are capable of being true partners with their lawyers and directing the litigation and making decisions. So I find

$25,000 to Arkansas Teachers and $10,000 to each of the six ERISA plaintiffs to be fully justified in the circumstances of this case.

So I believe I've decided everything I need to decide. Is that correct?

MR. GOLDSMITH: Yes, Your Honor. Thank you. Thank you very much indeed. If it would assist the Court, we have orders that we can hand up.

THE COURT: I have them. You filled in the blanks?

MR. GOLDSMITH: I did on the off-chance that Your Honor --

THE COURT: Okay. I didn't. You were evidently more certain about how this was going to come out than I was.

MR. GOLDSMITH: Well, a man can dream.

THE COURT: So these, I take it, are the same as the orders that I reviewed, correct?

MR. GOLDSMITH: Yes, sir, yes.

THE COURT: Except the blanks are filled in?

MR. GOLDSMITH: Yes. Those are the orders we filed with our reply brief, to be clear.

THE COURT: Right. I'm just striking out where it says "Proposed" before "Order" on the first page of each of these. How many orders should I sign?

MR. GOLDSMITH: There are three, Your Honor.

THE COURT: It says there's going to be a separate

order on attorneys' fees. Which order has your attorneys' fees?

MR. GOLDSMITH: I'm sorry. There's one.

THE COURT: Just a second.

Okay. There were three. All right. I've signed the three orders. If you wait a while, Mr. Hohler will give you copies of them even before docketing them.

MR. GOLDSMITH: Thank you.

THE COURT: Mr. Chiplock will take you all out to dinner now that he's got two of these, everybody on the plaintiffs' side.

I commend you. This was a challenging case. You worked exceptionally hard to settle it. It's taken five and a half years I think. But I think it's maybe a good model for certain other cases because I do think it was in the enlightened self-interests of the defendant to try to settle with its clients and valued clients and get a global resolution with the regulators and took a lot of hard work by the named plaintiffs and plaintiffs' counsel to get to a mutually acceptable point. So I commend you for doing that.

Court is in recess.

(Adjourned, 3:15 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 6th day of November, 2016.

/s/ Kelly Mortellite

_____

Kelly Mortellite, RMR, CRR

Official Court Reporter

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November 10, 2016

By ECF

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

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

Dear Judge Wolf:

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

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

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

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

Labaton Sucharow

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

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

We have now determined that:

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

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

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

[2] These SAs, listed alphabetically, are C. Jordan, A. McClelland, A. Ten Eyck, V. Weiss, R. Wintterle, and J. Zaul (collectively, the "Jordan SAs"). *Compare* ECF No. 104-16, at 7 (Thornton lodestar report) *with* ECF No. 104-17, at 8 (Lieff Cabraser lodestar report).

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

Labaton Sucharow

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

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

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

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

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

Respectfully submitted,

David J. Goldsmith

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

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

Labaton Sucharow

DJG/idi

cc: All Counsel of Record
(by ECF)

Certificate of Service

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

/s/ David J. Goldsmith
David J. Goldsmith

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J. February 6, 2017

I. SUMMARY

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

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

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

II. BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. THE PROPOSED SPECIAL MASTER

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. ORDER

In view of the foregoing it is hereby ORDERED that:

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

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

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

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

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

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

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

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

/s/ Mark L. Wolf
UNITED STATES DISTRICT JUDGE

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

EXHIBIT A

Labaton Sucharow

David J. Goldsmith
Partner
212 907 0879 direct
212 883 7079 fax
dgoldsmith@labaton.com

November 10, 2016

By ECF

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

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

Dear Judge Wolf:

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

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

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

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

Labaton Sucharow

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

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

We have now determined that:

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

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

---

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

[2] These SAs, listed alphabetically, are C. Jordan, A. McClelland, A. Ten Eyck, V. Weiss, R. Wintterle, and J. Zaul (collectively, the "Jordan SAs"). *Compare* ECF No. 104-16, at 7 (Thornton lodestar report) *with* ECF No. 104-17, at 8 (Lieff Cabraser lodestar report).

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

Labaton Sucharow

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

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

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

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

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

Respectfully submitted,

David J. Goldsmith

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

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

Labaton Sucharow

DJG/idi

cc: All Counsel of Record
(by ECF)

Certificate of Service

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

/s/ David J. Goldsmith
David J. Goldsmith

EXHIBIT B

SPOTLIGHT FOLLOW-UP

Critics hit law firms' bills after class-action lawsuits

By Andrea Estes | GLOBE STAFF DECEMBER 17, 2016

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

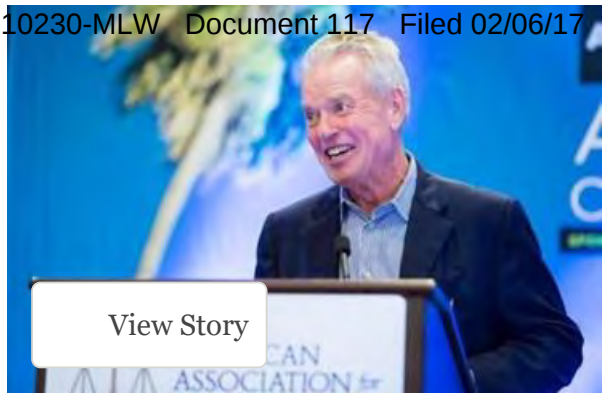
That's when the younger brother of Thornton managing partner Garrett Bradley emerged as a $500-an-hour "staff attorney" at the Boston firm.

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

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

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

Comments



Law firm 'bonuses' tied to political donations

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

Candidates returning donations from Thornton Law Firm attorneys

Hassan to return law firm's donations

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

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

BRADLEY FOR SELECTMAN

Michael Bradley, Quincy attorney.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

How low-paid lawyers can rack up big legal bills

Law firms commonly hire junior-level “staff attorneys” to review documents for $2 to $40 an hour. Thornton Law Firm took advantage of these low-paid lawyers to make millions in its lawsuit against State Street Bank.

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

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

One attorney's actual pay	$ 0
Rate listed by Thornton	$42

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

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

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

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

SOURCE: Court records

GLOBE STAFF

Related

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

EXHIBIT C

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

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

Hon. Gerald E. Rosen (Ret.)

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

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

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

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

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

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

Representative Matters

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

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

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

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

Honors, Memberships, and Professional Activities

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

Selected Articles About the Detroit Bankruptcy

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

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

Background and Education

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

Disclaimer

EXHIBIT D

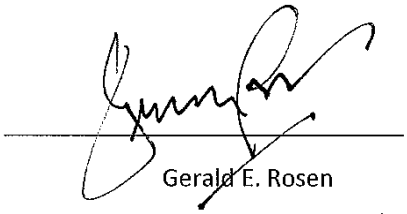
AFFIDAVIT OF GERALD E. ROSEN

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

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

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

Further affiant sayeth not.



Gerald E. Rosen
3 February 2017

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J. March 8, 2017

In a February 6, 2017 Order the court gave notice that it was considering appointing, pursuant to Federal Rule of Civil Procedure 53, Retired United States District Judge Gerald Rosen as

a Master to investigate and submit a Report and Recommendation concerning issues that have emerged concerning the court's award of more than $75,000,000 in attorneys' fees, expenses, and service awards in this class action. The parties[1] responded to that Order. A hearing concerning this matter was held on March 7, 2017.

For the reasons described in detail at the March 7, 2017 hearing, it is hereby ORDERED that pursuant to Federal Rule of Civil Procedure 53:

1. Judge Rosen is appointed as Master (the "Master").[2] The Master may retain any firm, organization, or individual he deems necessary to assist him in the performance of his duties.

2. The Master shall investigate and prepare a Report and Recommendation concerning all issues relating to the attorneys' fees, expenses, and service awards previously made in this case. The Report and Recommendation shall address, at least: (a) the

[1] In this Order, the nine law firms that served as class counsel and the named plaintiffs are collectively referred to as the "parties."

[2] After the disclosure required by Federal Rule of Civil Procedure 53(a)(2)&(b)(3) and discussion at the hearing, each of the law firms representing members of the class agreed that Judge Rosen's disqualification is not required by 28 U.S.C. §455(a) or (b). The McTigue Law firm withdrew its earlier objection under §455(a). Each firm also waived any possible objection under §455(a) as permitted by §455(e). The court also found that Judge Rosen's disqualification is not required by §455.

accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses, including but not limited to whether counsel employed the correct legal standards and had a proper factual basis for what was represented to be the lodestar for each firm; (b) the accuracy and reliability of the representations made in the November 10, 2016 letter from David Goldsmith, Esq. of Labaton Sucharow, LLP to the court (Docket No. 116); (c) the accuracy and reliability of the representations made by the parties requesting service awards; (d) the reasonableness of the amounts of attorneys' fees, expenses, and service awards previously ordered, and whether any or all of them should be reduced; (e) whether any misconduct occurred in connection with such awards; and, if so, (f) whether it should be sanctioned, see e.g. Fed. R. Civ. P. 11(b)(3)&(c); Massachusetts Supreme Judicial Court Rule of Professional Conduct 3.3(a)(1)&(3).

3. The Master shall proceed with all reasonable diligence, and either submit his Report and Recommendation by October 10, 2017 or request an extension of time to do so. See Fed. R. Civ. P. 53(b)(2).

4. The Master shall have the authority described in Federal Rule of Civil Procedure 53(c)(1) and (2). Therefore, among other things, the Master shall have the authority to compel, take, and record evidence. This includes the authority to: require the

production of documents and other records from the parties and third-parties; require responses to interrogatories, and other requests for information and admissions; conduct depositions; and conduct hearings.

5. The Master may communicate ex parte with any party. See Fed. R. Civ. P. 53(b)(2)(B).

6. The Master may communicate ex parte with the court on administrative matters. The Master may also, ex parte, request permission to communicate with the court ex parte on particular substantive matters. Requests for ex parte communications with the court on substantive matters should be minimized.[3] See Fed. R. Civ. P. 53(b)(2)(B).

[3] In the February 6, 2017 Memorandum and Order the court proposed to permit the Master to communicate ex parte with the court only concerning administrative matters. At the March 7, 2017 hearing the court stated it might allow the Master to request an opportunity for an ex parte communication on a substantive matter. The court subsequently reviewed several orders appointing masters which all authorize ex parte communications with the court on any matter. The court now finds that substantive communications should not be completely prohibited in this case because there may be some unforeseen need for them.

As the February 6, 2017 Order did not provide notice that the court may allow the Master to communicate with it ex parte regarding substantive matters, and the court did not state at the March 7, 2017 hearing that it would do so, the parties may, by March 16, 2017, object to the granting of this authority and explain the basis for their objection. If any objection is made, the court will consider this issue further.

7. The Master may also request that a submission to the court which is being served on one or more parties be made under seal.

8. Any order issued by the Master shall be filed for entry on the docket of this case and served on each party. See Fed. R. Civ. P. 53(d). However, the Master may request that an order be filed under seal and/or not be served on any party or all parties.

9. Any objection to an order issued by the Master shall be filed within 10 days of service. Any responses shall be filed within 10 days of the service of such objection. Any such objection will be decided in the manner described in Federal Rule of Civil Procedure 53(f).

10. The Master's Report and Recommendation shall be served promptly on each party. See Fed. R. Civ. P. 53(e).

11. The Master shall make and preserve a complete record of the evidence concerning his recommended findings of fact and any conclusions of law. Such record shall be filed with the Master's Report and Recommendation. The Master may move to have the record filed under seal. If any such motion is made and granted, the court may require that a redacted version be filed for the public record. See Fed. R. Civ. P. 53(b)(2)(C)&(D).

12. Action on the Master's Report and Recommendation will be taken in the manner described in Federal Rule of Civil Procedure 53(f).

13. Labaton Sucharow, LLP, shall, by March 14, 2017, pay to the Clerk of the United States District Court for the District of Massachusetts $2,000,000.[4] This payment shall be made only from the award of attorneys' fees and expenses distributed to Labaton Sucharow, LLP, the Thornton Law Firm LLP, and Lieff, Cabrasser, Heimann & Bernstein LLP. See Fed R. Civ. P. 53(g)(3). This payment is without prejudice to any right such firms may have to seek contribution from other firms which received some of the attorneys' fees awarded on November 2, 2016 if that award is reduced in the future. It is the court's intention, however, that this $2,000,000 come solely from the funds distributed to the foregoing three firms that generated the issue that prompted the appointment of the Master.

14. From the fund established pursuant to paragraph 13 hereinabove, the court will pay the reasonable fees and the expenses of the Master and any firm, organization, or individual he may retain to assist him. The court understands that the Master

[4] If the expense of the Master's work exceeds $2,000,000, the court will order additional payments.

will charge $800 per hour for his services and finds that rate to be reasonable.

The Master shall submit monthly, ex parte and under seal, a request for payment with a description of the hours worked and the services rendered, as well as supporting documentation for any expenses to be reimbursed.

The court intends to disclose the cost of the Master at the conclusion of these proceedings.

15. As the Master will be exercising judicial authority and performing judicial functions, the Master and those assisting him shall have the immunities of judicial officers of the United States. See Nystedt v. Nigro, 700 F.3d 25, 30 (1st Cir. 2012).

16. This Order may be modified upon request of the Master or a party, or by the court sua sponte, after providing notice and an opportunity to be heard. See Fed. R. Civ. P. 53(b)(4).

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all similarly situated,	)	
Plaintiffs,	)	Civil Action No. 11-10230-MLK
vs.	)	
STATE STREET BANK AND TRUST COMPANY,	)	
Defendant.	)	

HEARING

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
John J. Moakley U.S. Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
March 7, 2017
10:00 a.m.

* * * *

CATHERINE A. HANDEL, RPR-CM, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
(617) 261-0555

APPEARANCES:

For the Plaintiffs:

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
By: Richard M. Heimann, Esq.
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San Francisco, CA 94111-3339

-and-

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
By: Daniel P. Chiplock, Esq., and
Jonathan D. Selbin, Esq.
250 Hudson Street
8th Floor
New York, NY 10013-1413

-and-

LABATON SUCHAROW LLP
By: Lawrence A. Sucharow, Esq.
140 Broadway
New York, NY 10013

-and-

THORNTON LAW FIRM LLP
By: Garrett J. Bradley, Esq.,
Brian T. Kelly, Esq., and
Michael P. Thornton, Esq.
100 Summer Street
30th Floor
Boston, MA 02110

-and-

KELLER ROHRBACK LLP
By: Lynn Lincoln Sarko, Esq.
1201 Third Avenue
Suite 3200
Seattle, WA 98101-3052

(Appearances continued on the next page.)

APPEARANCES (Cont'd):

For the Plaintiffs:

ZUCKERMAN SPAEDER LLP
By: Carl S. Kravitz, Esq.
1800 M Street, NW
Suite 1000
Washington, DC 20036-5807

-and-

CHOATE HALL & STEWART LLP
By: Joan A. Lukey, Esq.
Two International Place
Boston, MA 02110

-and-

McTIGUE LAW LLP
By: J. Brian McTigue, Esq.
4530 Wisconsin Avenue, NW
Suite 300
Washington, DC 20016

-and-

BRADLEY ASSOCIATES
By: Michael G. Bradley, Esq.
80 Washington Square
Building K
Norwell, MA 02061

-and-

RICHARDSON, PATRICK, WESTBROOK & BRICKMANN, L.L.C.
By: Kimberly Keevers Palmer, Esq.
1017 Chuck Dawley Boulevard
Post Office Box 1007
Mt. Pleasant, SC 29464

-and-

FEINBERG, CAMPBELL & ZACK, P.C.
By: Catherine M. Campbell, Esq.
177 Milk Street
Boston, MA 02109

(Appearances continued on the next page.)

APPEARANCES (Cont'd):

For the Defendant:

WILMER HALE LLP
By: William H. Paine, Esq., and
Daniel Halston, Esq.
60 State Street
Boston, MA 02109

-and-

BEINS, AXELROD, P.C.
By: Jonathan G. Axelrod, Esq.
1030 15th Street, N.W.
Suite 700 East
Washington, DC 20005-1503

ALSO PRESENT:

Retired Judge Gerald Rosen.

COMPETITIVE ENTERPRISE INSTITUTE
By: Theodore H. Frank, Esq.
1310 L Street NW
7th Floor
Washington, DC 20005

George Hopkins, Executive Director for Arkansas Teacher Retirement System.

Irwin Schwartz on behalf of Colorado Public Employee's Association.

Plaintiffs Arnold Henriquez, Michael T. Cohn, William R. Taylor (appearing telephonically), Richard A. Sutherland (appearing telephonically), and James Pehoushek-Stangeland (appearing telephonically).

Janet Wallace, vice-president of Andover Company and trustee of the retirement plan.

Irwin Schwartz, counsel for the Colorado Public Employee's Retirement Association.

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Mark L. Wolf, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on March 7, 2017.)

THE DEPUTY CLERK: This is Civil Action No. 11-10230, Arkansas Teacher Retirement System versus State Street Corporation. Court is now in session. You may be seated.

THE COURT: Good morning.

ATTORNEYS: Good morning, your Honor.

THE COURT: I have an unopposed motion for admission pro hac vice on behalf of Theodore Frank, and I've allowed the motion to appear pro hac vice. I expect I'll hear from Mr. Frank today, but allowing that motion is not a ruling on the merits with regard to the request to serve as sort of a permanent amicus or guardian ad litem.

Would the remaining counsel and others present to participate with them please identify themselves for the Court and for the record.

MR. HEIMANN: Richard Heimann, your Honor, from Lieff Cabraser representing Lieff Cabraser here.

THE COURT: Okay. I had an affidavit from Mr. Chiplock.

MR. HEIMANN: Mr. Chiplock is sitting next to me,

those are the rates that our three firms generally were paying for those type of attorneys.

There was a discussion at the time as to what to use, and then our firm and, I believe, the Lieff firm used the same rates that were used within the *Mellon* case, but everybody understood that those were the rates that were going to be applied to the type of work being done by that group of people.

THE COURT: The type of rates that were going to be attributed for the purpose of making an application for attorneys' fees?

MR. G. BRADLEY: For the work that was being done by the attorneys doing the staff attorney work.

THE COURT: Let me ask Mr. Chiplock essentially the same question. Paragraph 5, Document No. 104-17, your declaration, "The hourly rates for the attorneys and professional support staff in my firm, included in Exhibit A, are the same as my firm's regular rates charged for their services which have been accepted in other complex class actions."

Did you ever charge attorneys on your Exhibit A at that rate, at the reflected rates for paying clients -- to paying clients?

MR. CHIPLOCK: The answer is yes, your Honor, we do have some paying clients. We have had some paying clients for

whom we have billed out document review work done by attorneys at this level. We call them staff attorneys or contract attorneys, depending on the year, but we have had two or three cases where we've had paying clients who have paid close to market rates or the actual market rates that are listed in my declaration.

MR. HEIMANN: If I might add, your Honor.

THE COURT: Okay. Say your name, please.

MR. HEIMANN: Richard Heimann, counsel for Lieff Cabraser.

We meant the same thing that has been described to you by the language that was in that declaration. We did not intend to represent by that declaration that we had actually paid -- paying clients those rates. It turns out we did in a handful of cases, but like Mr. Sucharow's firm and the Thornton firm, we have -- their case they have none. We have only a handful of paying clients over the years. We're almost entirely a contingent fee firm, very sensitive to what the appropriate rates are for all levels of attorneys within the firm, including the attorneys who performed the services that are in question here.

THE COURT: When you say -- there's a large body of jurisprudence on this, as I say. I just cited a couple of cases -- well, I know I just cited a couple of cases beginning with the Supreme Court. I have since read some of the

relatively recent Southern District of New York cases that have raised some of these issues, but I think the jurisprudence in those cases are like *Weatherford*, 2015 WestLaw 127847; *Citigroup*, 965 F.Supp.2nd 369; another *Citigroup*, 988 F.Supp.2d 371; *Beacon Associates*, 2013 WestLaw 2450960; *City of Pontiac*, 954 F.Supp.2d 2013.

I think the jurisprudence indicates that the rates -- the lodestar is supposed to be calculated on what lawyers are charging to paying clients in the community, however it's properly defined, not -- I think probably many other judges made the same mistake -- well, have understood the representations made the way I have for many years when we try to do that lodestar reasonableness check.

MR. HEIMANN: Well, sir, I'm not prepared, obviously, to address the specific cases that your Honor has referred to. I think the jurisprudence does support the position we're taking. This is a matter we'll take up with the special master when we have the opportunity to present fully under the full context.

THE COURT: What I'm trying to do both for the master and for you is to let you know what my present state of mind is, what my concerns are, so what emerges from this process can be as helpful to me and focused and maybe as efficient as possible.

There are representatives of each of the named

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. October 24, 2017

On March 8, 2017, the court appointed Retired United States District Judge Gerald Rosen as a Master to investigate and submit a Report and Recommendation concerning issues relating to the award

of attorneys' fees in this case. See Mar. 8, 2017 Order (Docket No. 173). The court ordered that Labaton Sucharow LLP ("Labaton") provide to the Clerk of the United States District Court for the District of Massachusetts $2,000,000 to pay the reasonable fees and expenses of the Master. Id. ¶¶ 13, 14. The court stated that "[i]f the expenses of the Master's work exceeds $2,000,000, the court will order additional payments." Id., n.4. The court also directed the Master to submit his Report and Recommendation by October 10, 2017 or request an extension of time to do so. Id. ¶3.

In a September 29, 2017 letter, the Master informed the court that recent, unforeseeable developments required further investigation. See Docket No. 207-1. He, therefore, requested an extension of time to December 15, 2017 to submit his Report and Recommendation. The court allowed that request. See Oct. 2, 2017 Order (Docket No. 207).

In an October 6, 2017 letter, which is attached hereto as Exhibit 1, the Master informed the court that, as a result of the additional required investigation, additional funding for his work will be necessary. He, therefore, requests that the court order that Labaton pay another $1,000,000 to the Clerk for that purpose.

The court has been carefully reviewing the Master's bills before approving them. His work has been performed efficiently as well as thoroughly. The remainder of the initial $2,000,000 will

not be sufficient to pay the foreseeable reasonable fees and expenses of the Master and those he has retained to assist him. Therefore, the Master's request is meritorious and is being allowed.

The March 3, 2017 Order also states that it "may be modified upon request of the master or a party, or by the court sua sponte, after providing notice and an opportunity to be heard." Mar. 8, 2017 Order (Docket No. 173) at ¶16. The Master has informed the court that he has entered a limited protective order concerning the confidentiality of certain information he has received in discovery and informed the parties that an opportunity would be provided for them to propose redactions to the Report and Recommendation which will be filed for the public record. In view of the foregoing, the court is modifying the March 8, 2017 Order to provide that: the Master shall file his Report and Recommendation with the court under seal; the court will provide the Report and Recommendation to the parties, under seal; and the court will establish schedules for proposed redactions and objections.

Accordingly, it is hereby ORDERED that:

1. The Master's request for $1,000,000 additional funds is ALLOWED. Labaton shall, pursuant to paragraphs 13 and 14 of the March 8, 2017 Order, pay to the Clerk of the United States District

Court for the District of Massachusetts $1,000,000, by November 1, 2017.

2. The Master shall file his Report and Recommendation with the court under seal and not serve it on the parties. The court will provide it to the parties under seal and give them an opportunity to propose redactions of confidential information from the version of it to be made part of the public record. The court will also establish a schedule for submission of any objections to the Report and Recommendation.

3. Any request for reconsideration of this Order shall be filed by October 31, 2017.

UNITED STATES DISTRICT JUDGE

EXHIBIT 1

October 6, 2017

Honorable Mark L. Wolf

United States District Court

One Courthouse Way

Boston, Massachusetts 02210

RE: Need for additional funds.

Dear Judge Wolf –

I write to request that additional funds be made available in order to complete my Special Master responsibilities in the State Street attorney fees matter. After ordering an initial allocation of $2,000,000 to be paid to the Clerk of the Court to fund the Special Master's work, paragraph 13, footnote 4, of the March 8, 2017 Order of Appointment, provides: "If the expense of the Master's work exceeds $2,000,000, the court will order additional payments."

I anticipated that it would not be necessary to seek additional funds to complete this assignment. However, recent events related to the later discovery phase of the investigation have required considerably more time, effort and resources than either my team or the law firms' attorneys anticipated and, although we are nearing an end to our discovery, we are still pursuing additional information and, of course, we will have to write what will be a detailed report of our findings based upon what has become a rather voluminous discovery record. Although we are attempting to be as economical and responsible as possible, I believe we will exhaust the current fund by the end of October.

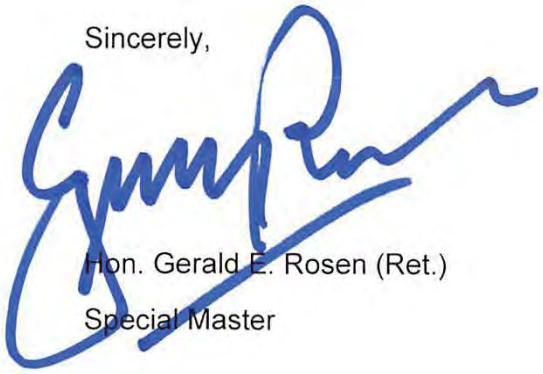
Accordingly, pursuant to the above-cited provision of your Order, I respectfully request that you order an additional $1,000,000 to be paid into the fund held for our work with the Clerk of the Court. I am happy to provide greater detail and support for this request, and to answer any questions you may have.

150 WEST JEFFERSON., SUITE 850 DETROIT, MI 48226 TEL 313.872.1100 FAX 313.872.1101

Thank you for your consideration of this request and for the confidence you have reposed in me and my team in appointing me to this very interesting case.

With best wishes, I am

Sincerely,



Hon. Gerald E. Rosen (Ret.)
Special Master

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. April 23, 2018

On March 1, 2018, the court granted the Master, Retired United States District Judge Gerald Rosen, what the Master characterized as a "final request" for an extension of time until April 23,

2018, to file his Report and Recommendation ("Report"). See Mar. 1, 2018 Order (Docket No. 216).

The court has now received the attached April 23, 2018 letter from the Master.[1] He requests an extension to May 14, 2018 to submit his Report and related exhibits. The Master states that he may need additional time to submit the complete record of all of the evidence in both documentary and electronic form as required by the March 1, 2018 Order. The Master explains that his request for a further extension is justified by the the unanticipated, recent designation of eight additional experts by the law firms whose conduct is being investigated, related required additional discovery, and the need to be responsive to the court's request that the Master submit his Report in a searchable, electronic form.

The court continues to be satisfied that the Master has been working diligently. It also finds that providing the Master additional time to finish both his Report and its Executive Summary, and to convert both into an electronic, searchable form, will contribute to the court's ability to make informed decisions

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[1] The April 23, 2018 letter concerning this administrative matter resulted from communications between the Master and the court permitted by paragraph 6 of the March 8, 2017 Order (Docket No. 173).

efficiently. Therefore, the Master's request for an extension to May 14, 2018, to file his Report is being allowed.

The Master also explains that the emergence of unforeseen, issues and related discovery require an additional approximately $300,000 to provide complete, reasonable compensation for his work through filing his Report. He also requests a reserve of at least $500,000 for his anticipated participation in proceedings after his Report is filed. Having reviewed and approved the bills of the Master and those he employs, the court finds that he has been working efficiently and that the request for $800,000 additional funding is justified.

Accordingly, it is hereby ORDERED that:

1. The Master shall file his Report and Recommendation by May 14, 2018, and may request reasonable additional time to file the complete record of the related evidence. See Mar. 8, 2017 Order (Docket No. 173), ¶¶4, 11; Mar. 1, 2018 Order (Docket No. 216).

2. The Master's request for an additional $800,000 is ALLOWED. Labaton Sucharow LLP shall, pursuant to paragraph 13 and 14 of the March 8, 2017 Order, pay $800,000 to the Clerk of the United States District Court for the District of Massachusetts by May 11, 2018.

UNITED STATES DISTRICT JUDGE

EXHIBIT 1

HON. GERALD E. ROSEN (Ret.)
150 WEST JEFFERSON, SUITE 850
DETROIT, MI 48226
(313) 872-1100

April 23, 2018

Honorable Mark L. Wolf
United States District Court
Boston, Massachusetts 02210

RE: Status of Special Master's Report and Recommendations

Dear Judge Wolf:

I write to update you on the status of my Special Master's Report and Recommendations. The current due date, granted by you in March, is today, April 23, 2018. We were prepared to file under seal with the Court by today a hard copy of the Report and Recommendations, together with all exhibits.

We are aware, however, based on the Court's March 1, 2018 Order, that the Report and Recommendations should also be submitted on a searchable disk, with hyperlinks to the exhibits, and we will effect such formatting in order to facilitate your review. However, we have determined that doing so will require the use of an outside electronic document firm and will require additional time and expense. We are confident that the additional time and cost will result in a better and more efficient product for the Court's use.

In addition, we will provide an executive summary to the report which will take additional time. The entire submission, to include the hard copy report and exhibits, a searchable electronic report with hyperlinked exhibits, and the executive summary, will be filed as one package. In light of the above factors, we respectfully request an extension until **May 14, 2018**. Barring technical or logistical issues arising, we anticipate an earlier submission, but believe it prudent to err on the side of caution.

We are also cognizant that the Court's original Order of March 8, 2017 contemplates the submission of the entire record and, once we are able to ascertain the timing and expense for converting the remainder of the full record, we will report back to the Court as to when we can expect this to be completed, and the attendant additional cost.

Beyond this, while the law firms have remained cooperative in meeting accelerated discovery schedules, our work has been made considerably more extensive and costly by a number of factors, including that the law firms collectively retained eight experts covering a wide range of relevant issues. The discovery, submissions, preparation for and conducting of depositions of these experts, as well as post-deposition and pre- and post-oral argument briefs, some of which are voluminous, concluded only last week. In this context, I must observe that the depositions, argument, and additional document discovery involving the firms' experts, as well as the Special Master's expert, have been of tremendous assistance to the Special Master in obtaining a more complete and informed view of the case and, ultimately, a more thorough and balanced Report and Recommendations. Nevertheless, as valuable as the additional work has been, this has been an all-consuming process and has resulted in a substantial commitment of additional time and resources. As a consequence of this additional commitment of time and resources, the Special Master's team has been required to expend far greater resources than anticipated, and we expect additional resources to be necessary in the near future and, certainly, in addressing any post-filing proceedings that may occur.

Based upon current estimates of time and expenditures through April 16 and projected through the filing of the Report and Recommendations, we anticipate that an additional allocation of approximately $300,000 will be necessary. Beyond this, we believe that a reserve of at least $500,000 should be set aside for any post-filing proceedings. We emphasize that these are projections and, of course, the costs of post-filing proceedings will be largely dictated by the responses of the law firms to the Special Master's Report and Recommendations.

Accordingly, we request an additional allocation totaling $800,000. Of course, if all of this allocation is not needed, we anticipate that the unspent balance will revert to the law firms. As we bring the investigative and reporting phase of our assignment to a close, we extend our deep appreciation to the Court for its thoughtful consideration of these requests.

With best wishes, I am

Sincerely,

Hon. Gerald E. Rosen (Ret.)
Special Master

United States Court of Appeals

for the

First Circuit

Case No. 21-1069

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN; ARNOLD HENRIQUEZ; MICHAEL T. COHN; WILLIAM R. TAYLOR; RICHARD A. SUTHERLAND,

Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC; DOES 1-20,

Defendants,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Interested Party-Appellant,

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER ROHRBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP

Interested Parties-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN CASE NOS. 1:11-CV-10230-MLW; 1:11-CV-12049-MLW; AND 1:12-CV-11698-MLW
HON. MARK L. WOLF, U.S. DISTRICT JUDGE

INTERESTED PARTY-APPELLANT'S APPENDIX
Volume 2 of 3 (Pages A359 to A896)

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,

Plaintiff,

No. 11-cv-10230-MLW
Hon. Mark L. Wolf

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

_____/

ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated,

Plaintiffs,

No. 11-cv-12049-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

_____/

THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on Behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated,

Plaintiffs,

No. 12-cv-11698-MLW

STATE STREET BANK AND TRUST COMPANY,

Defendant.

_____

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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I. INTRODUCTION

This investigation, conducted in the post-settlement phase of the case, has raised a number of significant issues that are important to the conduct and administration of large class actions generally and this case in particular. Among these issues are the appropriate rules and policies governing attorney fee petitions, the approach plaintiffs' counsel use in their fee petitions -- including appropriate billing rates -- and the obligations of lead counsel to act with candor and transparency toward their clients, the class, the court, and co-counsel, in general, and as to any financial obligation that will be paid from class funds in particular. After a lengthy investigation, the Special Master finds that in several significant areas, the Court was not provided accurate and reliable information in the fee petitions and at the fairness hearing and, unfortunately, these failings had profound and adverse ramifications throughout the fee approval process. The redress the Special Master recommends at the conclusion of the Report is intended, to the extent possible, to remedy these failings.

At the outset, the Special Master makes two observations. First, the Special Master recognizes the important role class actions and plaintiffs' class action attorneys play in protecting and enforcing the rights of consumers, injured parties and the public in general. To adequately fulfill this role, class action plaintiffs require sophisticated, well-resourced attorneys who should be compensated at rates comparable to those of the large, sophisticated, well-resourced defense firms who will in the vast majority of cases be opposing them. Second, an equally important part of the class action framework is ensuring the integrity of the fee petition process. Because the fee petition process is often

non-adversarial, as it was in this case, for the system to work properly, honesty, reliability and transparency are essential to enable the Court to adequately fulfill its assigned gatekeeping and fiduciary responsibilities to class members. This case and the evidence adduced during the Special Master's investigation fully exemplifies the importance of both of these policy objectives.

The underlying case here was a class action alleging unfair and deceptive practices in conducting complex foreign exchange transactions and required highly skilled and sophisticated counsel. After much work, dedication and exceptional effort in the discovery and mediation process, the parties ultimately reached a $300 million settlement. Given the risks, complexities and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by skilled and dedicated plaintiffs' counsel, was an excellent result for the class. The Court approved the settlement on November 2, 2016. Of the $300 million, plaintiffs' counsel were awarded $74,541,250.00 in attorneys' fees and $1,257,699.94 for expenses. By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved.

Unfortunately, this investigation has shown that all other things were not equal. Almost immediately after approval of the settlement, the laudable result obtained for the class became tainted when questions began to arise as a result of media inquiries concerning the fee award which, in turn, caused the Court to appoint a Special Master to

investigate and prepare a Report and Recommendations concerning all issues relating to the attorneys' fees, expenses and service awards the Court had approved in the case. The Special Master's investigation has spanned a period of some fourteen months and encompassed written discovery, the production of 200,000 pages of documents, 34 witness interviews and 63 depositions. Beyond this, the law firms that were the subject of the investigation were given extensive opportunities to contribute to the legal and factual record through briefing, providing expert opinions and oral argument, input which was helpful to the Special Master in obtaining a more complete view of the factual, legal and ethical issues raised in the investigation.

The investigation is now complete. The Special Master's Report and Recommendations detail a mixed narrative of good intentions, great talent, and undeniable accomplishment and result, undermined by serious albeit inadvertent mistakes compounded by 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.

Exacerbating matters is the fact that this payment grew out of an obligation that long pre-existed the *State Street* case and was the sole obligation of one law firm -- an obligation that this law firm shifted to the class and its co-counsel.

In short, this Report chronicles a lamentable and dismaying tale of a great result achieved by fine and highly effective lawyering that became tainted and entangled in a

web of concealment and highly questionable ethical practices by experienced attorneys who should have known better.

Having heard and considered the testimony of the witnesses, many of whom were designated as experts, and the arguments of counsel, and having reviewed and considered the parties' interrogatory responses, the documents they produced, and their supplemental submissions, the Special Master now makes the following Findings of Fact, Conclusions of Law, and Recommendations to the Court. To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that any Conclusions of Law constitute Findings of Fact, they are so adopted.

II. FINDINGS OF FACT

A. BACKGROUND

This litigation involves three separately-filed class action complaints against State Street Bank and Trust Company ("State Street") that were subsequently consolidated for pre-trial purposes. The three consolidated cases are:

Case Number	Plaintiffs	Class Representatives	Attorneys
11-cv-10230	Arkansas Teachers Retirement System ("*ATRS*")	ATRS (George Hopkins, Executive Director)	Thornton Law Firm (f/k/a Thornton & Naumes, LLP); Labaton Sucharow LLP; and Lieff Cabraser Heimann & Bernstein, LLP
11-cv-12049	Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland (collectively the "*Henriquez* Plaintiffs")	Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland	McTigue Law LLP (formerly McTigue & Veis, LLP); Beins, Axelrod, P.C.; Richardson Patrick Westbrook & Brickman LLC (succeeded by Zuckerman Spaeder, LLP)
12-cv-11698	The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland (collectively the "*Andover* Plaintiffs")	Alan Kober and James Pehoushek-Stangeland	Keller Rohrback, L.L.P.

In total, Plaintiffs alleged that State Street, which served as the custodial bank for public and private pension funds, mutual funds, and investment funds, engaged in unfair and deceptive practices in conducting "indirect" or "standing instruction" foreign currency exchange ("FX") transactions on behalf of its customers, without disclosing mark-ups to clients that ultimately inured to State Street's benefit. Specifically, that State Street executed FX transactions -- which required converting or "exchanging" foreign investments to/from foreign currencies -- either at the high end (when buying), low end (when selling), or outside the range of currency fluctuation for a particular day.

1. Background to the State Street Litigation

This litigation had its genesis in a California *qui tam* action filed under seal on April 14, 2008 by "Associates Against FX Insider Trading," on behalf of California public pension funds. [EX. 1]. The relators were represented by the Thornton Law Firm ("Thornton") and Lieff Cabraser Heimann & Bernstein, LLP ("Lieff" or "Lieff Cabraser").[1] *See* 9/15/16 Declaration of Lawrence Sucharow in Support of Motion for Final Approval of Class Settlement, MAD No. 11-cv-10230, Dkt. # 104, ¶ 24 [EX. 3]; *see also* Thornton 6/19/17 Dep., pp. 35:22 – 36:14 [EX. 2].[2] The *qui tam* lawsuit was unsealed on October 20, 2009, when the California Attorney General filed a Complaint-in-Intervention charging State Street with misappropriating more than $56 million from California's two largest public pension funds: the California Public Employees' Retirement System ("CalPERS") and the California State Teachers' Retirement System ("CalSTRS"). *See People of the State of California, ex rel. Edmund G. Brown, Jr. v. State Street Corporation, et al.,* Cal. Super. Ct. No. 34-2008-00008457-CU-MC-GDS

[1] The relators in the California *qui tam* action had been referred to the Thornton Law Firm by Harry Markopolos, an individual who "makes his living by referring whistleblowers to law firms to bring actions." Thornton 6/19/17 Dep., p 37:9-24. [EX. 2].

[2] Michael Thornton testified that he asked Lieff Cabraser to join Thornton in the California *qui tam* action because of Thornton's long-time relationship with Bob Lieff and Richard Heimann:

> [W]e've known them for a long time. I can't tell you exactly when we started. I've known Bob Lieff. I've known Richard Heimann for a long time. From, I'd say the eighties and we got to know each other better because they were heavily involved in the tobacco litigation in the nineties. Unlike us, they represented several states so they were known. And I had an opportunity to work with and become friends with Bob Lieff and Richard Heimann and Elizabeth Cabraser. And I thought they were good lawyers and they're nice people, people to work with.
>
> So, when we were filing something in California, we obviously needed California counsel. None of my firm were members of the California bar, and we asked if they would join us and they did.

Thornton 6/19/17 Dep., pp. 36:17 – 37:8. [EX. 2].

[EX. 1]; *see also* Sucharow Decl., ¶ 25 [EX. 3]; Thornton 6/19/17 Dep., p. 40:1-9 [EX. 2]. The Complaint-in-Intervention was the first public indication of State Street's allegedly unfair and deceptive practices concerning indirect FX and the first largescale action concerning FX practices. Sucharow Decl., ¶ 25 [EX. 3]; Thornton 6/19/17 Dep., p. 41:11-17 [EX. 2].

After the allegations against State Street became public, George Hopkins, the Executive Director of the Arkansas Teacher Retirement System ("ATRS"), became interested in the issue since State Street was ATRS's custodial bank. Hopkins 6/14/17 Dep., pp. 37:11 – 38:15. [EX. 4]. ATRS then retained Labaton Sucharow LLP ("Labaton"), which was serving as one of its "monitoring counsel,"[3] to investigate potential class and individual claims that could be brought against State Street on behalf of ATRS and its members. Sucharow Decl., ¶ 26. [EX. 3]. This was Labaton's first foray into FX litigation. Therefore, with ATRS's approval, Labaton teamed with Thornton and Lieff, given, among other considerations, their knowledge gained from their representation of the relators in the California *qui tam* action, and began an investigation. *Id*. *See also* George Hopkins Declaration, Dkt. # 104-1, ¶ 8 [EX. 5]; Thornton 6/19/17 Dep., pp. 43:13 – 44:4. [EX. 2].

After investigating and researching potential claims against State Street, on February 10, 2011, Labaton filed a class action complaint on behalf of ATRS (superseded

[3] "Monitoring counsel" refers to lawyers who review the performance of securities held by institutional investors to ensure their investments are handled appropriately and are not the subject of fraud or other illegal activity. *See* Eisenberg, Jonathan, *Litigating Securities Class Actions,* § 1.02(1)(d), "Portfolio Monitoring" (Lexis/Nexis 2017).

by an Amended Complaint on April 15, 2011) alleging that State Street had violated the Massachusetts Consumer Protection Act, and making several common law claims. *See Arkansas Teacher Retirement System v. State Street Corp., et al.*, MAD No. 11-cv-10230, Dkt. # 1 [EX. 6], 10.[4] [EX. 7]. The ATRS complaint was the first indirect (or "standing instruction") FX class action brought in any court. Sucharow Decl., Dkt. # 104, ¶ 35.[5] [EX. 3].

Although in investigating the claims, counsel worked essentially from a clean slate, after the ATRS complaint was filed, counsel had the benefit of a substantial amount of information they learned in the course of a subsequently-filed multi-district FX case brought against the Bank of New York Mellon, *In re The Bank of N.Y. Mellon Corp. Forex Transactions Litig.*, SDNY No. 12-MD-2335 ("*BONY Mellon*").[6] The *BONY Mellon* MDL proceeded in the Southern District of New York at the same time that the *State Street* case was being litigated (and mediated) in this Court. *BONY Mellon* was settled before this case, in September 2015, for $335 million in recovery to the class of custody clients, plus fines and penalties paid to various government agencies. *See*

[4] The complaints also originally named State Street Corporation ("SSC"), State Street's parent corporation, and the separate subsidiary State Street Global Markets LLC ("SSGM LLC") as party-defendants. On May 8, 2012, the Court entered an Order dismissing all claims asserted against SSC and SSGM LLC.

[5] In "indirect" FX trades, custody clients and investment managers do not negotiate individual transaction rates with their custodian bank, nor does the bank quote rates for a given transaction. Rather, as the name suggests, custody clients (or their investment managers) engage their custodian bank to provide ongoing custody FX services in accordance with standing instructions, and rely upon the bank to execute those FX trades on their behalf. Sucharow Decl., Dkt. # 104, ¶ 17. [EX. 3].

[6] The first of the various complaints comprising the *BONY Mellon* MDL was filed in November 2011, nine months after the *ATRS* complaint was filed.

9/24/15 Order and Final Judgment, SDNY No. 12-MD-2335, Dkt. # 638.[7] [EX. 8]. Lieff Cabraser was co-lead counsel for the nation-wide consumer class in the case. Chiplock 6/16/17 Dep., pp. 23:25 – 24:4; 25:12-22. [EX. 10]. The Thornton Law Firm, McTigue Law, and Keller Rohrback also were involved in the case. Thornton 6/19/17 Dep., 85:18-21 [EX. 2]; McTigue 7/7/17 Dep., 9:23 – 10:11; 12:22 – 13:4. [EX. 11].

Like this case, the *BONY Mellon* case was ultimately resolved by way of a mediated settlement, but unlike this case, the *BONY Mellon* case was vigorously litigated for three years prior to mediation. Chiplock 6/16/17 Dep., pp. 29:23 – 30:15. [EX. 10]. ("It was a very, very hard-fought litigation." *Id.*) That case involved intense discovery: more than 120 depositions were taken and more than twenty million documents were produced and reviewed. *Id.* As Dan Chiplock of Lieff Cabraser testified, the attorneys' experience in *BONY Mellon* allowed counsel to develop a baseline of familiarity and expertise that they brought to the *State Street* case. *Id.*, p. 27:11-17.

B. THE PARTIES, ATTORNEYS, AND COMPLAINT HISTORY

1. The Customer Class Complaint

The first of the complaints comprising the *State Street* litigation was filed by the ATRS on February 10, 2011 (the "Customer Class Complaint"). *See Arkansas Teacher Retirement System v. State Street Corp., et al.*, MAD No. 11-cv-10230, Dkt. # 1. [EX. 6].

ATRS is a cost-sharing, multi-employer defined-benefit pension plan, based in Little Rock, Arkansas, that provides retirement benefits to public school and other public

[7] Of the $335 million settlement, the attorneys in *BONY Mellon* were awarded $83,750,000 in fees and $2,901,734.19 in total expenses. SDNY No. 12-MD-2335, Dkt. # 637. [EX. 9].

education-related employees in the State of Arkansas. *ATRS* Amended Complaint, ¶ 14, MAD No. 11-cv-10230, Dkt. # 10 ("the *ATRS* Complaint"). [EX. 7]. ATRS was established in 1937 as an office of the Arkansas state government for the purpose of providing retirement benefits for employees of any Arkansas school or other educational agency participating in the system. *Id.* According to George Hopkins, the Executive Director of the ATRS Board, ATRS is a $16 billion pension plan with 75,000 active members and 45,000 retirees. Hopkins 6/14/17 Dep., pp. 10: 20-21; 13:18; 14:8-9, 14-15. [EX. 4].

Like many institutional investors, ATRS invests some of its pension assets in foreign securities, referred to by ATRS as "Global Equity" securities. *See ATRS* Amended Complaint, ¶ 15. [EX. 7]. Global Equity investments are ATRS's single largest investment asset class. *Id.* State Street has been ATRS's exclusive custodian bank since 1998. *Id.*; Hopkins 6/14/17 Dep., pp. 38:14-15; 45:7-8. [EX. 4].

ATRS is a sophisticated, institutional plaintiff that has been involved in a number of securities and securities-related actions in recent years. George Hopkins testified that since he became Executive Director of ATRS in December 2008, ATRS has been lead or co-lead plaintiff in approximately 30 class actions. *Id.*, p. 32:9-13. Hopkins explained that shortly after he took over as Executive Director, some Arkansas state legislative leaders summoned him to the Capitol and told him they thought ATRS ought to be involved in securities litigation: "[T]he other [State] Retirement System was, and they thought we ought to be, too." Hopkins 9/5/17 Dep., p. 17:12-17. [EX. 12].

Q: And did the legislators that called you over indicate why they were interested in securities litigation?

A [by Hopkins]: I got the idea that, you know, they understood the Retirement System had a lot of, you know, financial issues. I mean, obviously, we did -- when I got there, our system was in deep trouble both operationally, I think politically because they thought that the system didn't have a strong board, didn't have strong leadership, and we were, obviously, in trouble actuarially, you know, when you have those kind of losses, and I think they thought, you know, part of my duty was to bring in all the money I could. That was sort of the message I got.

Id., p. 18:4-19.

ATRS and the Customer Class are represented in this action by Labaton Sucharow, Lieff Cabraser, and Thornton. Shortly after filing the *ATRS* Complaint, Labaton moved for, and was subsequently appointed, Interim Lead Counsel for the proposed class. *See* Dkt. # 7-8 [EX. 13; EX. 14]; 28.[8] [EX. 15]. Thornton was designated as liaison counsel, and Lieff was designated as additional counsel for the proposed class. *See id.*

Labaton has represented many pension funds and other institutional investors, and has extensive securities class action experience. *See generally* Sucharow 6/14/17 Dep., pp. 10:13-14, 12:10-13 [EX. 16]; Belfi 6/14/17 Dep., pp. 9:16-20. [EX. 17]. Labaton also had a pre-existing relationship with ATRS and its Executive Director, George Hopkins, having served since 2008 as one of ATRS's monitoring counsel, and also having represented ATRS in at least two full-scale securities class actions prior to the *State Street* matter. *Id.*, p. 13:16-20.

[8] "Plaintiff's Assented to Motion for the Appointment of Interim Lead Counsel for the Proposed Class" and supporting brief were filed on April 7, 2011 [Dkt. # 7; 8] [EX. 13; EX. 14] but not ruled upon by the Court until January 12, 2012 [Dkt. # 28.] [EX. 15].

Lieff Cabraser has represented plaintiffs in many large class actions involving securities or financial fraud. *See* Fineman 6/6/17 Dep., pp. 8: 23-25, 9: 2-8. [EX. 18]. It is considered by many to be one of the preeminent plaintiffs' class action law firms in the nation. The firm also has had substantial FX experience having represented, along with Thornton, the relators in the California *qui tam* action, and served as co-lead counsel in *BONY Mellon*. *Id.*, pp. 10:24-25, 11:2-18; 12:2-24; Heimann 7/17/17 Dep., p. 32:3-6. [EX. 19]. Thornton, the smallest of the three firms representing the Customer Class,[9] was also involved in the *BONY Mellon* case and, as indicated, also represented the relator in the California *qui tam* action. Thornton 6/19/17 Dep., pp. 32:17-20; 36: 8-14; 37:9-11 [EX. 2]; Lesser 6/19/17 Dep. pp., 16:20-24, 17:1. [EX. 20].

In its initial Complaint, ATRS alleged that State Street engaged in unfair and deceptive acts and practices in connection with indirect FX transactions. Its principal theories of recovery were violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws, ch. 93A, §§ 2, 11,[10] and breach of duty of loyalty. *See Arkansas Teacher*

[9] Michael Thornton testified that the firm has only 18 lawyers. Thornton 6/19/17 Dep., p. 32:15-18. [EX. 2]. By contrast, the Labaton and Lieff firms each have 50-60 full-time lawyers. *See* www.labaton.com; www.lieffcabraser.com.

[10] The Massachusetts Consumer Protection Act, Mass. Gen. Laws, ch. 93A, § 2, provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Mass. Gen. Laws, ch. 93A, §2(a).

Section 11 of Chapter 93A extends the protections of the statute to businesses. In relevant part, Section 11 provides:

> Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two . . . may, as hereinafter provided, bring an action . . . , whether by

Retirement System v. State Street Corporation, MAD No. 11-10230, Dkt. # 1. [EX. 6]. The Amended Complaint added a new claim for relief under Section 9 of Chapter 93A. *See id.*, Dkt. # 10.[11] [EX. 7]. The Amended Complaint also alleged class claims of breach of duty of trust and negligent misrepresentation, and a separate claim for breach of contract on behalf of ATRS, individually. *Id.*

State Street is the nation's second-largest custodian bank, with $21.5 trillion in assets, including $4.7 trillion in pension assets, under custody and administration as of December 31, 2010. *ATRS* Compl., ¶ 2. [EX. 7]. As part of its array of ancillary custodial services, State Street executed "FX" transactions on behalf of its clients in order to facilitate clients' purchases or sales of foreign securities or the repatriation of foreign currency into U.S. dollars. *Id.*, ¶ 3.

Pension funds and other institutional investors have increasingly looked to overseas companies and securities markets in order to diversify their holdings and maximize investment returns. *Id.* The necessity for pension funds, in particular, to invest

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way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Mass. Gen. Laws, ch. 93A, § 11.

[11] Section 9 of Chapter 93A provides, in relevant part:

(1) Any person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two . . . may bring an action . . . whether by way of original complaint, counterclaim, cross-claim or third-party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons. . . .

Mass. Gen. Laws, ch. 93A, § 9.

in foreign securities in order to properly diversify and meet their funding requirements is well-known to and appreciated by custodians such as State Street, as pension funds' investment guidelines are publicly and readily available. *Id.*

Because foreign investments are bought and sold in the foreign currencies of the nations in which they are issued, U.S.-based investors necessarily must purchase and sell those foreign currencies in order to complete the transactions. *Id.,* ¶ 4.

In support of its theories of recovery, ATRS alleged in its Amended Complaint that it reposed a high degree of trust in State Street and authorized State Street to execute FX transactions under conditions in which State Street controlled all aspects of FX trades, including the cost. *Id.*, ¶ 5. ATRS further alleged that it depended upon State Street not only to execute FX trades honestly, but also to accurately report the FX rate and generally carry out the trades in a manner consistent with its custodial services contracts ("Custodian Contracts") and State Street's other written representations. *Id.*

ATRS's Custodian Contracts expressly provided that State Street would execute FX transactions for no additional fees above the substantial annual flat fee ATRS paid for custodial services. *Id.,* ¶ 6. In successive "Investment Manager Guides" made available to its custodial clients and their outside investment managers, State Street explained that the pricing of FX trades is "based on the market rates at the time the trade is executed." *Id.*, ¶7. Thus, State Street assured its custodial clients, including ATRS and the Class, that FX rates would reflect only the execution price, without additional fees or mark-ups. *Id.*

ATRS alleged, however, that despite these express provisions in the Investment Manager Guides and Custodian Contracts charging custodial clients annual flat fees, State Street engaged in the unfair and deceptive practice of charging its custodial clients inflated FX rates when buying foreign currency for them, and likewise reporting deflated FX rates when selling foreign currency, pocketing the difference between the actual and reported rates. *Id.*, ¶ 8. This maximized State Street's profit at the direct expense of ATRS and the Class members. In this regard, State Street allegedly charged ATRS and the Class incorrect and often fictitious FX rates, unrelated to the market-based rates State Street actually paid or received in executing the FX trades. *Id.*

Though the theory was novel, Customer Class Counsel were quite confident of the merit of their claims, particularly their Chapter 93A claims. According to Dan Chiplock of Lieff Cabraser, who developed the Chapter 93A theory and advocated the claim as being "solid" throughout the litigation, Counsel viewed Chapter 93A as "a very powerful statute for consumers . . . , a great vehicle for obtaining relief, and it also seemed to present a very promising vehicle for class certification." Chiplock 6/16/17 Dep., pp. 15:17-18, 16:4, 17:9-14. [EX. 10]. He explained:

> [T]he case law and commentary in Massachusetts describes Chapter 93A as *sui generis*, it sort of stands on its own, it's neither contract nor tort theory, it's basically an all-encompassing theory that's meant to address unfair or deceptive conduct, and it applies not only to individual consumers, but it can also apply to businesses who are victimized, for lack of a better word, by that type of conduct in their inter-business dealings. It offers double or treble damages if the conduct is found to be willful or intentional, and it also allows for prejudgment interest, which I forget the exact number, but I think it's fairly generous. So it's a powerful statute.

Id., pp. 17:17-18:8.

> As defined in the *ATRS* Complaint, the class broadly encompassed:
>
> all institutional investors in foreign securities, including but not limited to public and private pension funds, mutual funds, endowment funds and investment manager funds, for which State Street served as the custodial bank and executed FX trades on a "standing-instruction" or "non-negotiated" basis between January 2, 1998 and December 31, 2009, inclusive (the "Class Period"), and which suffered damages as a result of the deceptive acts and practices and other misconduct alleged herein.

ATRS Compl., ¶ 22. [EX. 7].

This broad definition included a number of both public and private pension and investment funds; however, no ERISA claims were alleged in either the original Complaint or the Amended Complaint.

2. <u>The ERISA Complaints</u>

As Carl Kravitz, co-counsel for the ERISA Plaintiffs, observed, "The class definition of the consumer people technically covered our clients. There was definitely a faction on the consumer side that said 'we represent these people.' . . ." Kravitz 7/6/17 Dep., p. 28:20-23. [EX. 21]. *See also* 11/15/12 Lobby Conference Tr., Dkt. #64, Remarks of Customer Class Counsel Michael Thornton, p. 16:23-25 ("[T]he ERISA claims are included in the class definition. So, we also have [an ERISA] claim.") [EX. 22]. However, as noted, no ERISA claims were alleged in the *ATRS* Complaint.[12]

[12] Carl Kravitz testified that ERISA Counsel considered intervening in the Customer Class Action. He explained:

> [T]hey didn't assert ERISA claims and, as it turned out, it was important that we did. And I think it was important to the outcome.
>
> But there was a risk that we were going to be somehow shunted to the side. And that was a big risk that we considered in terms of our taking the case. . . .
>
> And I will also tell you that we seriously considered the procedural issue of whether we needed to intervene in the consumer [case]. And we did fairly extensive research on that, and we may have even drafted a motion. We did not end up filing it because, as things started to play out, we were able to participate in the mediation. But that was a significant risk.

Therefore, on the heels of the filing of the *ATRS* Complaint, two separate class action complaints alleging ERISA violations were filed. The two sets of plaintiffs in these actions represented institutional private ERISA plans whose assets were managed by State Street (the "ERISA Class"). *See The Andover Companies Savings and Profit Sharing Plan, et al. v. State Street Bank and Trust Co.,* MAD No. 12-11698, Dkt. #1, 9 (the "*Andover* complaint") [EX. 23], and *Henriquez, et al. v. State Street Bank and Trust Co.*, MAD No. 11-12049, Dkt. Nos. 1, 24 (the "*Henriquez* complaint"). [EX. 24].

a. The *Andover* Complaint

The *Andover* Complaint, filed in the United States District Court for the District of Massachusetts on September 12, 2012, was brought on behalf of two employee-benefit plans -- The Andover Companies Employees' Savings and Profit Sharing Plan (the "Andover Plain") and The Boeing Company Voluntary Investment Plan. *See The Andover Companies Savings and Profit Sharing Plan, et al., v. State Street Bank and Trust Co., et al.*, MAD No. 12-11698, Dkt. # 1, 9. [EX. 23]. The Complaint asserted claims for breach of duties of prudence and loyalty under Section 404 of ERISA, 29 U.S.C. § 1104, and prohibited transactions under Section 406 of ERISA, 29 U.S.C. § 1106, on behalf of a class of State Street custody clients that are ERISA plans. *See id.*

The Andover Plan is an ERISA-qualified defined contribution plan established for the benefit of the employees of Merrimack Mutual Fire Insurance Company ("Merrimack") and its sister companies, Cambridge Mutual Fire Insurance Company, and

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Kravitz 7/6/17 Dep., pp. 28:24 - 29:19. [EX. 21].

Bay State Insurance Company, which, together with Merrimack, comprise the "Andover Companies." [MAD No. 12-cv-11698, Amended Class Action Complaint, ¶¶ 16-17, Dkt. # 9.] [EX. 23]. Alan Kober served as vice-president of the Andover Companies and an individual trustee of the Andover Plan from 2000 until June 1, 2014. Kober 7/6/17 Dep., pp. 7:4-5, 8:15-21 [EX. 25]; *Andover* Amended Compl., ¶ 16. [EX. 23]. Upon his retirement from the Andover Companies on June 1, 2014, Mr. Kober was succeeded by Janet Wallace. Kober 7/6/17 Dep., p. 10:11-15. [EX. 25].

During the Class Period, the Andover Plan offered its participants investments in several State Street-sponsored commingled funds, including international equity funds such as State Street's International Growth Opportunities Securities Lending Class A Fund, and the SSgA Daily International Alpha Select fund. *Andover* Amended Compl., ¶ 18. [EX. 23]. State Street served as both a Trustee for the Andover Plan and as an Investment Manager for the Andover Plan investments from 2001 through approximately 2009. *Id.* at ¶ 19.

As Trustee for the Andover Plan, State Street was required to exercise power and authority over the investment accounts for which it had express investment management discretion, or upon the direction of the Investment Manager. *Id.* at ¶ 20. Pursuant to the Master Trust Agreement, the investment power of the Trustee included the power to "purchase and sell foreign exchange and contracts for foreign exchange, including transactions entered into with State Street Bank and Trust Company, its agents or its subcustodians." *Id*.

By separate contract, State Street also served as investment manager for the Andover Plan's assets, invested in State Street's proprietary commingled funds. *Id.* Pursuant to the Investment Manager Agreement, State Street acted as both a discretionary investment manager and a designated ERISA fiduciary pursuant to Section 3(38) of ERISA with respect to all cash, securities, or other property designated by the Andover Plan. *Id.*

The other named plaintiff in the *Andover* action is James Pehoushek-Stangeland. Stangeland, a resident of Seattle, Washington, is an employee of the Boeing Company and a participant in The Boeing Company's 401(k) Voluntary Investment Plan ("the Boeing Plan"). *Id.* at ¶ 22; Stangeland 7/6/17 Dep., pp. 9:21-23. [EX. 26]. Like the Andover Plan, the Boeing Plan is an ERISA-qualified defined contribution plan established for the benefit of the employees of the Boeing Company, a multinational aerospace and defense corporation headquartered in Chicago, Illinois. *Andover* Amended Compl., ¶ 23. [EX. 23]. As a participant in The Boeing Plan, "Plaintiff Pehoushek-Stangeland has standing to bring suit on behalf of The Boeing Plan for losses to the Plan due to breaches of fiduciary duty pursuant to ERISA sections 409 [29 U.S.C. § 1109] and 502(a)(2) [29 U.S.C. § 1132(a)(2)]." *Id.* ¶ 22. State Street served as Trustee for The Boeing Company Employee Savings Plans Master Trust ("Boeing Master Trust"). *Id.* at ¶ 24.

During the Class Period, the Boeing Plan offered its participants investment options in several State Street-sponsored commingled funds. *Id.* at ¶ 25. Among the international equity funds offered were the Global All Cap Equity ex-US Index Non-

Lending Series Fund Class A ("Global Non-Lending Fund"), which Boeing designated as the "International Index Fund." *Id.* During the relevant time period, the Boeing Plan held approximately $1.9 billion in Plan assets in the International Index Fund. *Id.* at ¶ 26. These investments constituted approximately 6% of the Boeing Plan investments. *Id.* The International Index Fund invests in an index comprised of globally developed and emerging-country stocks from outside the U.S. *Id.*, p. 27. Its international investments require exchange of participants' U.S. dollars into various foreign currencies. *Id.*; Stangeland 7/6/17 Dep., p. 10: 3-7. [EX. 26].

The *Andover* Plaintiffs were represented by Keller Rohrback LLP ("Keller Rohrback").[13] Keller Rohrback is a sophisticated law firm with significant experience in complex commercial and ERISA class action litigation. Sarko 7/6/17 Dep., pp. 10: 20-25, 11:1-14. [EX. 28]. Keller Rohrback also represented ERISA plan members in the parallel *BONY Mellon* case. *Id.* at p. 13:1-2. In fact, the firm, in its own estimation, had been involved in almost every major ERISA class action brought in the United States in the last fifteen years. *Id.*, p.11:8-11.

Keller Rohrback, and in particular, Lynn Sarko, who served as Lead Counsel for his firm in the *State Street* litigation, maintained a strong professional relationship with the Department of Labor ("DOL"), which had oversight responsibilities for ERISA plans

[13] Keller Rohrback was assisted by local counsel Theodore Hess-Mahan of Hutchings Barsamian Mandelcorn LLP. As local counsel Mr. Hess-Mahan filed the initial *Andover* complaint and a number of other pleadings, handled service of process issues, and was the local point of contact for the Court, State Street Bank's defense counsel Wilmer Hale, the Boston Department of Labor office, and the press for matters pertaining to the *Andover* ERISA case. Keller Rohrback's Responses to Second Supplemental Interrogatories, Response No. 2. [EX. 27].

and was actively monitoring the *State Street* litigation. *Id*., p. 16:12-15. Sarko testified that the DOL was concerned about the *State Street* litigation and was encouraged by the fact that Keller Rohrback had become involved in the action. *See id.,* pp. 14-17.[14]

b. The *Henriquez* Complaint

A second ERISA action against State Street, initially filed on October 12, 2011 in the United States District Court for the District of Maryland, also joined the consolidated action. *See Henriquez v. State Street Bank and Trust Co., et. al.,* MDD No. 11-cv-02920, Dkt. # 1. [EX. 29]. In that case, the plaintiff, Arnold Henriquez, brought suit on behalf of the Waste Management Retirement Savings Plan and its participants and beneficiaries. *Id.* The *Henriquez* Complaint, on behalf of ERISA plans for whom State Street was a custodian, asserted a variety of claims under ERISA, including that State Street engaged in self-interested prohibited transactions under Section 406, 29 U.S.C. § 1106; breached its duties of prudence and loyalty under Section 404, 29 U.S.C. § 1104; and breached its co-fiduciary duties under Section 405, 29 U.S.C. § 1105. *See id.*

The *Henriquez* complaint in Maryland, however, was voluntarily dismissed shortly after it was filed, *see id.,* Dkt. # 7-8 [EX. 30; EX. 31]; it was later re-filed in this

[14] Sarko explained:

> The Department of Labor had good professional relationships with us, with me and some of the other lawyers. They thought we did a good job and knew the law. And this was a case that some people at the Department of Labor, lawyers, were concerned about. . . .
> . . . However, the Department of Labor has a limited budget, and they're very careful about what cases they come into, and they pretty much have the attitude that if the cases are being handled by, you know, competent, professional ERISA counsel, they will [be able to] use their resources other places.

Sarko 7/6/17 Dep., pp. 24:12-17, 24-25; 25:1-5. [EX. 28].

Court on November 18, 2011 as a "related case" to the *ATRS* case. *See Henriquez v. State Street Bank and Trust Co., et al.,* MAD No. 11-12049, Dkt. # 1. [EX. 24]. It was thereafter amended on February 24, 2012 to add three additional plaintiffs: Michael T. Cohn, a participant in the Citigroup 401(k) Plan, and William R. Taylor and Richard A. Sutherland, participants in the Retirement Plan of Johnson & Johnson. *See id.* Dkt. # 24 ("*Henriquez* Complaint"). [EX. 24].

Plaintiff Arnold Henriquez, a resident of Frederick, Maryland, is employed by Waste Management Company and a participant in the Waste Management 401(k) Retirement Savings Plan ("WM Plan"), an ERISA-covered plan. Amended Class Action Complaint, MAD No. 11-cv-12049, ¶¶ 1, 10, Dkt. # 24 [EX. 24]; Henriquez 7/7/17 Dep., pp. 6:11-12, 15; 7:14-15. [EX. 32]. Henriquez invested in the "International Equity Fund" sponsored by State Street and offered by the WM Plan. *Henriquez* Amended Compl., ¶ 10. [EX. 24]. He also invested in other funds sponsored by State Street and offered by the Plan during the Class Period, including the Large Cap Equity Fund, the Small Cap Equity Fund, the Conservative Asset Allocation Fund, the Moderate Asset Allocation Fund, the Aggressive Allocation Fund, the Bond Market, and the SSgA Target Retirement 2030 Fund. *Id.*

Plaintiff Michael Cohn, a disability retiree, is a resident of Highland Park, Illinois and a participant in the Citigroup 401(k) Plan ("Citi Plan"), which is also an ERISA-covered plan. *Henriquez* Amended Compl., ¶ 1, 11 [EX. 24]; Cohn 7/7/17 Dep., pp. 6:5, 14-17; 8:15-23. [EX. 33]. From January 2005 through August 2007, Cohn was invested in the "Aggressive Focus Fund" offered by the Citi Plan. *Henriquez* Amended Compl., ¶

11. [EX. 24]. The Aggressive Focus Fund was a "fund of funds" managed by State Street. *Id.* In September 2007, the Citi Plan changed its investment options, and Cohn invested in a newly offered "Emerging Market Equity" collective investment fund. *Id.* State Street managed this Emerging Market Equity fund since it was first offered to the Citi Plan in 2007. *Id.*

Plaintiffs William Taylor and Richard Sutherland are Johnson & Johnson retirees, and are participants in the Johnson & Johnson Pension Plan ("J&J Plan"), an ERISA-covered plan. *Id.* at ¶¶ 12-13; Taylor 7/7/17 Dep., pp. 8:7-9, 23-25; 9: 1, 7-11. [EX. 34]. Mr. Sutherland is also a participant in the J&J 401(k) Plan. McTigue 7/7/17 Dep., p. 19:18-20. [EX. 11]. Taylor resides in Aston, Pennsylvania. *Id.*, p. 7:17-20; *Henriquez* Amended Compl., ¶ 12. [EX. 24]. Sutherland resides in Albuquerque, New Mexico. *Id.,* ¶ 13. At all times relevant to this action, State Street served as the trustee and custodian of both the J&J Plan and the Johnson and Johnson Pension and Savings Plan Master Trust in which the J&J Plan was wholly invested. *Id.*, ¶¶ 12-13. The J&J Plan holds foreign investments in international securities that cannot be purchased on a domestic exchange and without foreign currency. *Id.* These holdings require FX transactions.

The *Henriquez* Plaintiffs were represented by McTigue Law LLP ("McTigue") and Zuckerman Spaeder LLP ("Zuckerman Spaeder").

McTigue has extensive experience litigating ERISA class actions. McTigue 7/7/17 Dep., p. 9:1-7. [EX. 11]. McTigue, led by named attorney Brian McTigue, also had some experience in FX cases prior to *State Street*, having represented ERISA plan participants in the *BONY Mellon* case. *Id.*, p. 10:6-13. Zuckerman Spaeder is a boutique

litigation firm with extensive trial experience. Kravitz 7/6/17 Dep. p. 10:10-13, 21-22. [EX. 21]. Carl Kravitz of Zuckerman Spaeder, like Sarko, was very involved with the negotiations with the DOL: Sarko dealt principally with the DOL headquarters in Washington and Kravitz dealt with the Boston DOL office. Sarko 7/6/17 Dep., pp. 50:14 – 51:5.[15] [EX. 28].

None of the firms representing the ERISA Class was ever appointed "lead counsel" or to any other official capacity by the Court. (Later, however, Brian McTigue of McTigue Law, attempted, albeit unsuccessfully, to secure appointment as lead counsel for the ERISA class members. *See* TLF-SST-052975 – 2980 [EX. 35]; TLF-SST-054020 – 4022 [EX. 36]; Sarko 9/8/17 Dep. p. 97:12-21 [EX. 37]; Sucharow 9/1/17 Dep., p. 93:17-23.)[16] [EX. 38].

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[15] Two other firms -- Beins, Axelrod, P.C. ("Beins Axelrod") and Richardson Patrick Westbrook & Brickman LLC ("Richardson Patrick") -- partnered with McTigue as co-counsel for the *Henriquez* Plaintiffs during the course of this litigation. These firms also had significant relevant experience. Beins Axelrod has represented a number of unions and pension and health and welfare funds. Axelrod 7/7/17 Dep., pp. 8-9:1-18. [EX. 39]. Richardson Patrick has a breadth of trial experience, including in litigating large class actions throughout the country. Brickman 7/7/17 Dep., pp. 8:22-25, 9:1-15. [EX. 40].

Beins Axelrod came into the case as McTigue's local counsel for the filing of the *Henriquez* complaint in Maryland, and stayed on as co-counsel for the Plaintiffs after the Maryland complaint was dismissed and refiled in Massachusetts, until September 30, 2013. Axelrod 7/7/17 Dep., pp. 10:25; 11:1-4; 14:15-17. [EX. 39].

Anticipating the amount of work that would be required in litigating a complex ERISA case that involved the pension plans of four major national/international companies, in early 2012, McTigue also asked Richardson Patrick to join the case. Brickman 7/7/17 Dep., pp. 10:13-15; 11:3-5. [EX. 40]. Richardson Patrick joined the case in March 2012 but only stayed on for six months, until September 2012. *Id*., pp. 19: 21-25 – 20:1-9. Michael Brickman testified that Richardson Patrick's participation in the *Henriquez* case ended because he had a large trial scheduled in another case, to which he and his firm needed to devote a substantial amount of time in August and September 2012 and, therefore, could not give McTigue the time he thought was needed on *Henriquez*. *Id*., pp. 24:10-25, 11:1-2. Zuckerman Spaeder replaced Richardson Patrick as of September 2012. Axelrod 7/7/17 Dep., p. 23:13-16 [EX. 39]; Kravitz 7/6/17 Dep., p. 11:10-12. [EX. 21].

[16] Labaton, Lieff, and Thornton, however, viewed the ERISA plaintiffs as their clients and Labaton as lead counsel for all class members, including ERISA class members. *See* Chiplock 9/8/17 Dep. pp. 93:24 – 94:2 ("We had a responsibility as class counsel to the class. And that included ERISA plans."); 97:3- 10 ("I felt that customer class counsel had a responsibility to the entire customer class with no distinctions. We didn't discriminate in our class definition. We didn't see the need to when we filed our case.") [EX. 41]. Goldsmith 9/20/17 Dep., pp. 42:11-14 ("[W]e did not assert an ERISA claim in our complaint, but we did allege a class which was broad enough to encompass ERISA governed assets."); 61:11-14 (How much of the settlement would go to ERISA clients "was

C. CHALLENGES, RISKS, AND INTERNAL TENSIONS

Bringing these actions presented numerous risks and challenges to the various plaintiffs and their counsel.

First, there was the novelty of bringing an action against one's custodian bank. As Dan Chiplock of Lieff explained,

> [T]his is not something that was done generally. Custody customers generally like their custodian, they have longstanding relationships with them. It is also not easy to change custodians, you have to go through a process, and it's not something that pension funds in particular, who have limited resources, relish doing.
>
> So it was not easy to bring people along to that theory, even if they felt that they may have been overcharged on some of their services. So that was [a] challenge to the case overall.

Chiplock 6/16/17 Dep., p. 105:3-24. [EX. 10]. *See also* Sarko 7/6/17 Dep., pp. 28:25 – 29:10. [EX. 28].

Customer Class Counsel had further concerns about the ability to certify a nationwide class under Chapter 93A: "There aren't a whole lot of cases out there where a nationwide class has been certified under one state's consumer protection laws in federal court." Chiplock 6/16/17 Dep., p. 57:17-25. [EX. 10].

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something that [DOL] were focused on. Of course, we were focused on it as well because they were our clients.") [EX. 42]. *See also* colloquy at 11/15/12 Lobby Conference:

> MICHAEL THORNTON: I just want to clarify one thing of Mr. Rudman's [State Street's attorney's] excellent summary that we might differ on. There are two clear ERISA cases, Henriquez and Andover, and in the third case, Arkansas, um, the ERISA claims are included in the class definition. So we also have a claim.
>
> ***
>
> ROBERT LIEFF: . . . There is an overlap, that's all we're trying to say. We represent the same people.
>
> THE COURT: You do represent the same people?
>
> MR. LIEFF: Yes.

[11/15/12 Lobby Conference Tr., Dkt. # 64, pp. 16-17]. [EX. 22].

Class certification on the facts of the case presented a further significant challenge for the Customer Class: State Street's various clients had separate custody contracts with the bank and no two contracts were exactly alike. *Id.*, p. 64:17-25. "[T]he fact that individual contracts varied potentially presented problems on class certification." *Id.*, p. 65:11-15; G. Bradley 6/19/17 Dep., p. 28:17-21 ("We looked at a significant amount of contracts. They could argue that one contract was different.") [EX. 43]; Sarko 7/6/17 Dep., pp. 32:19 – 33:4 ("[93A] is based as misrepresentation, sort of fraud-like claims, which … based on issues where you have different contracts can be a challenge…. So, … class certification for the customer class was huge." *Id.*) [EX. 28].

On the ERISA side, counsel had their own concerns about class certification. As Lynn Sarko explained:

> This case, I thought, was a no-brainer on class certification for ERISA, bringing it as a single case. The risk came whether you could bring what's called a class of plans case. Was it -- could you bring a case where State Street was the fiduciary for a plan on behalf of all plans that State Street was the fiduciary for. . . .
>
> So that was to me the class certification risk here.

Id., p. 28:10-23.

Class certification was but one of the legal hurdles facing counsel. The various contracts each included different choice of law provisions, which presented yet another challenge. Chiplock 6/16/17 Dep., p. 64:20-21. [EX. 10]. Further, the issue of ERISA preemption loomed large over the claims alleged by the Customer Class. *Id.*, pp. 65:19 – 66:12; Kravitz 7/6/17 Dep., p. 26:16-21 [EX. 21]; Sarko 7/6/17 Dep., p. 56:4-18 ("Their

whole argument was built on they were covered by 93A. And I think there's a very high chance it would be preempted." *Id.*) [EX. 28].

The various legal theories under which the Plaintiffs were proceeding also presented significant risks. A particular challenge was whether Class Counsel could establish that a custodian bank had any fiduciary responsibility for the transactions at issue. Dan Chiplock explained:

> So the relationship between a custodian and its customer was normally considered one of a fiduciary and the beneficiary of the fiduciary relationship. However, when it came to ancillary services like foreign exchange, custody foreign exchange, standing instructions foreign exchange, that relationship could become more attenuated under the law and under the various contracts in play.

Chiplock 6/16/17 Dep., p. 106:7-17. [EX. 10]. This was an equally risky issue for the ERISA plaintiffs:

> [T]here was an issue of whether or not the bank was actually an ERISA fiduciary. The issue of whether an entity like the bank is a fiduciary. It would turn on a number of things, but in particular whether it exercised discretion in what it did. That was a major factor.
>
> So that was one issue. And, obviously, if we didn't establish that the bank was an ERISA fiduciary, that would have been significant, both as to breach of fiduciary duty claim but also the prohibited transaction claim.

Kravitz 7/6/17 Dep., pp. 25:22 – 26:8. [EX. 21].

Counsel's concerns about the fiduciary duty issue and Plaintiffs' other substantive claims were borne out by a very unfavorable decision handed down by Judge Coté in the Southern District of New York in a factually similar case that

was brought against another custody bank, J.P. Morgan.[17] In a lengthy opinion, Judge Coté ruled against the plaintiffs in that case on just about every legal issue concerning the *State Street* Plaintiffs. Chiplock 6/16/17 Dep., p. 58:18 – 59:5. [EX. 10].

> . . . [E]ssentially what she held was, as these banks always argued, that banks have a right to take a markup on services, just like any other vendor, that it was not difficult, in her view, for a customer to look and find a pattern, if they cared to look, that showed, you know, where their prices were falling on average over the course of time in foreign exchange trades.
>
> . . . [S]he also knocked down the breach of fiduciary duty theory, holding that although a custody bank in general is to be considered a fiduciary when providing custody to a client's securities and resources, they are not acting as a fiduciary when they provide ancillary services, like standing instructions foreign exchange trading or indirect foreign exchange trading. So -- in other words, the fiduciary relationship ends when they start providing ancillary services like that.
>
> She also held, to top it off, that sophisticated customers of a custody bank, when receiving a service like this, were not consumers as that term was understood under consumer protection law.

Id., pp. 59:5 – 60:5.

Although the *J.P. Morgan* case was decided under New York law, the decision challenged equally the ERISA and Customer Class Counsel because it provided State Street with a road map for how to challenge the claims in this case. *Id.*, p. 60:13-15.

Beyond the legal hurdles and challenges, this case presented substantial financial risks for both the Customer Class Counsel and the ERISA Counsel. Litigating this case was going to take many years and be very expensive. *Id.*, p. 128:2-5; G. Bradley 6/19/17

[17] *See Louisiana Mun. Police Employees' Retirement Sys. v. J.P. Morgan Chase & Co.*, 2013 WL 3357173 (S.D.N.Y. July 3, 2013) ("*J.P. Morgan* case").

Dep., p. 29:18-21 [EX. 43]; Sarko 7/6/17 Dep., p. 36:3-12. [EX. 28]. With the regulatory agencies hovering over the case, another layer of financial risk was added. In particular, the DOL monitoring, oversight, and potential intervention presented a financial risk to the Plaintiffs and Class Counsel alike. Chiplock 6/16/17 Dep., p. 80:2-18. [EX. 10]. If the DOL were to intervene, Plaintiffs risked facing an automatic reduction of any settlement amount: DOL would take 10% of any settlement off the top, and that money would go to the general Treasury, not the clients. Sarko 7/6/17 Dep., pp. 35:17 – 36:2. [EX. 28].

And, of course, as all the firms took the case on a contingent-fee basis, they risked not being paid anything in the end. Chiplock 6/16/17 Dep., p 137:6-7 [EX. 10]; G. Bradley 6/19/17 Dep., p. 43:6-8 [EX. 43]; Kravitz 7/6/17 Dep., p. 33:5-7 ("When we're looking at the risk of the case. . . we could get in the case, expend fairly significant amount of time, and not end up with anything at the end." *Id.*) [EX. 21].

It was not just expending a great amount of time and financial resources that presented a challenge for the Plaintiffs and their attorneys; it was also that Plaintiffs were up against a "powerful institution" and very good, "Class A" defense firm, Wilmer Cutler Pickering Hale and Dorr, LLP. G. Bradley 6/19/17 Dep., p. 29:17-18 [EX. 43]; Kravitz 7/6/17 Dep., p. 27:17-18. [EX. 21]. In addition to concerns about an inevitable motion to dismiss, counsel were concerned that defense counsel would follow the "strong-arm" tactics of the defendants in *BONY Mellon* and file contractual counterclaims against their clients based on indemnification clauses in their custody contracts. *See* Chiplock 6/16/17 Dep., pp. 63:3 – 64:12. [EX. 10]. Counsel for State Street, in fact, threatened to do so

during the course of mediation, creating a tension that constantly loomed over the proceedings. *Id.*, p. 64:7-9.

Beyond the threats of opposing counsel that created tension in the case, there was also a fair degree of internal tension between and among Customer Class Counsel and ERISA Counsel -- tensions inherent in conflicting theories and potentially conflicting results. Kravitz 7/6/17 Dep., p. 46:5-12. [EX. 21]. As Kravitz testified, "There was definitely a faction on the consumer side that said 'we represent these people, what are you doing in the case?'" *Id*., pp. 28:21-24. Although Kravitz believed it was important that the ERISA parties entered the case and that the ERISA claims were raised, "There was a risk that we were going to be somehow shunted aside." *Id.,* pp, 28:24 – 29:3. Kravitz explained, "Consumer people did not want us coming in and taking a chunk of their case." *See id.*, pp. 32:16-17; 45:6-17. "Every extra dollar that went to ERISA came out of the Consumer side." *Id.*, p. 51:18-20.

The tension between the Customer Class and the ERISA Class was manifested during the hybrid mediation and discovery process: ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class. Sarko 7/6/17 Dep., p. 44:2-25. [EX. 28]. Nor were ERISA Counsel allowed access to the Customer Class's database. *Id.,* p. 45:1-23. Compounding the tension was the fact that there was never an order appointing leadership in the ERISA cases. *Id.,* pp. 42:24 – 43:3. As a consequence, the ERISA lawyers organized themselves. *Id.* at p. 42:1-2.

D. EARLY LITIGATION

During most of 2011-2012, litigation in these three cases principally involved motion practice and, in particular, briefing and argument of Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss filed by State Street in the *ATRS* and the *Henriquez* cases.[18]

In moving to dismiss the *ATRS* Complaint, State Street argued that ATRS's breach of fiduciary duty claim and its individual breach of contract claim lacked legal merit because the applicable contracts defined and limited the scope of the parties' relationship, which State Street contended was not fiduciary in nature. *See* 6/3/11 Memorandum in Support of Defendants' Motion to Dismiss, Dkt. # 19. [EX. 44]. State Street further argued that the contracts did not require it to execute FX transactions, to do so at a particular rate, or to disclose its margin on FX transactions. *Id.* Rather, State Street argued, the contracts required it only to hold assets and provide administrative services to ATRS. *Id.*

State Street also argued that ATRS's claims under Chapter 93A and for negligent misrepresentation lacked merit because there is nothing unfair or deceptive when the buyer or seller of a commodity does not disclose its margin on a purchase or sale. *Id.* It also claimed that, as a sophisticated investor, ATRS could not plausibly contend that its investment managers were unaware that the rates charged for ATRS's FX transactions were marked up from market rates. *Id.* Additionally, State Street asserted a statute of

[18] At the time of motion practice, the *Andover* case had not yet been filed.

limitations argument seeking to bar all of Plaintiffs's claims seeking relief for events dating back to 1998. *Id.*

Finally, State Street argued that all claims asserted against State Street Corporation ("SSC"), the parent corporation and its separate subsidiary, State Street Global Market LLC ("SSGM LLC"), should be dismissed because these entities had no interaction with ATRS, did not enter into any contracts with ATRS, and did not conduct FX transactions. *Id.*

The motion was fully briefed by both parties and the Court heard argument on the motion on May 8, 2012. During the hearing, the parties agreed to the dismissal of SSGM LLC as a party-defendant. *See* 5/8/12 Hearing Tr., Dkt. # 36, p. 80:8-10. [EX. 45]. Then, at the conclusion of the hearing, the Court entered an Order granting the motion to dismiss with respect to ATRS's claims against SSC, the parent corporation, but denied Defendant's motion in all other respects. *See* 5/8/12 Order, Dkt. # 33. [EX. 46]. The Court further directed counsel to meet to discuss the possibility of settlement and, if settlement could not be reached, to report back whether they wished to pursue mediation, either privately or before a magistrate judge. *Id.*

In the meantime, on August 8, 2012, State Street also moved to dismiss the *Henriquez* Complaint arguing that the Complaint should be dismissed for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).[19] State Street argued that the conduct challenged in the Complaint did not amount to an injury-in-fact to the *Henriquez*

[19] Again, the *Andover* complaint had not yet been filed.

Plaintiffs and the Plaintiffs, therefore, lacked standing to bring claims on behalf of pension plans other than their own, or on behalf of collective funds in which their own plans did not invest. *See* 8/10/12 Memorandum in Support of Defendants' Motion to Dismiss, Case No. 11-12049, Dkt. # 59. [EX. 47]. State Street also argued that the *Henriquez* Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim because the Plaintiffs did not plead an adequate factual basis to show that State Street acted as a fiduciary or that it engaged in a foreign exchange scheme. *Id.* State Street further argued failure to plead fraud with particularity. *Id.*

The *Henriquez* Plaintiffs did not file a written response. Instead, they filed their own motion arguing that they were unable to adequately respond to State Street's Motion to Dismiss without first obtaining some discovery. *See* Motion for Order for Discovery, Dkt. # 43, 57. [EX. 48; EX. 49]. State Street, of course, opposed Plaintiffs' request for discovery. *See* Memorandum in Opposition, Dkt. # 61. [EX. 50].

No substantive decision was ever rendered on either of these motions. Instead, on November 15, 2012, at the request of counsel, the Court conducted an on-the-record conference with all counsel in the lobby of its chambers (the "Lobby Conference") to discuss further proceedings. *See* 11/15/12 Lobby Conference Tr., Dkt. # 64 [EX. 22]. By this time the *Andover* Complaint had also been filed, and counsel for the *Andover* Plaintiffs also participated in the Lobby Conference.

1. Consolidation of the Cases

During the November 15, 2012 Lobby Conference, counsel informed the Court of their unsuccessful attempt to settle the *ATRS* case separately, and proposed that the three

cases -- *ATRS, Henriquez*, and *Andover* -- proceed in tandem in a "hybrid" mediation during which the parties and counsel could continue to pursue a mediated global settlement while at the same time engaging in "informal" document discovery. 11/15/12 Lobby Conference Tr., Dkt. # 64, pp. 10:15-18; 15:19-25. [EX. 22]. Counsel also proposed that they withdraw the then-pending motions in *Henriquez*, *id.,* pp. 24:22-25; 25:1-2, and that all further motion practice be "back-burnered." *Id.* at 15:6-7.

The Court agreed with counsel's proposals and, accordingly, ordered that the three actions be consolidated for all pre-trial purposes. *Id*., pp. 10, 22, 24; Order to Stay, Dkt. # 62 [EX. 51]; Electronic Order Consolidating Cases, Dkt. # 63. [EX. 52]. The Court further granted the parties' request to engage in informal discovery while mediating the matter. *See* 11/15/12 Lobby Conference Tr., p. 22:2-10. [EX. 22]. The proceedings were stayed in all other respects during the "hybrid" mediation process. *See* Order to Stay, Dkt. # 62. [EX. 51].

E. THE HYBRID MEDIATION

After the Court substantially denied State Street's Motion to Dismiss the *ATRS* Amended Complaint in May 2012, ATRS and State Street agreed to participate in private mediation. Sucharow Declaration, ¶ 87. [EX. 3]. The parties retained Jonathan B. Marks as mediator. *Id.*, ¶ 89. Between August and October 2012, in preparation for mediation, Marks held preparatory conference calls with the parties, separate half-day, in-person meetings with representatives of each side, and a full-day in-person session with both sides. *Id.*, ¶ 90. These initial efforts culminated in a two-day in-person mediation in Boston on October 23-24, 2012, attended by counsel and party representatives, including

George Hopkins of ATRS and the Chief Legal Officer of State Street. Sucharow Decl., ¶ 91 [EX. 3]; Jonathan Marks Declaration, Dkt. # 104-5, ¶ 14. [EX. 53].

No settlement was reached at the October mediation, but the parties developed a framework for exchanging discovery and managing the cases, which the Court endorsed at the November 15, 2012 Lobby Conference. Sucharow Decl., ¶ 92 [EX. 3]; 11/15/12 Lobby Conference Tr., Dkt. #64, p. 22. [EX. 22].

Thereafter, between January 2013 and June 2015, Marks conducted fourteen additional mediation sessions with the parties and their attorneys in Boston, New York City, and Washington, D.C. The mediation sessions included extensive exchanges of views on the merits, including PowerPoint presentations by both sides on legal issues, such as class certification, liability, and damages, as well as a detailed presentation by a cost accounting expert engaged by State Street. Sucharow Decl., ¶ 94 [EX. 3]; *see also* Marks Decl., ¶¶ 23-24. [EX. 53].

1. Discovery and Document Review

The mediation sessions were conducted in tandem with, and informed by, substantial discovery. In response to ATRS's requests, State Street produced more than nine million pages of documents. Sucharow Decl., ¶ 96. [EX. 3]. Further, in response to State Street's requests, ATRS produced more than 3,500 documents, exceeding 73,000 pages, concerning the full scope of ATRS's custodial relationship with State Street as well as its relationship with relevant investment managers ("IMs") and a consultant responsible for overseeing the IMs. *Id.*, ¶ 97. The ERISA Plaintiffs also collectively

produced more than 3,600 pages of documents relevant to their relationship with State Street. *Id.*

Review of these documents was performed throughout the course of the hybrid mediation. To assist in the document review, the Customer Class law firms enlisted the help of their staff attorneys ("SAs").[20]

While the *BONY Mellon* case was being actively litigated in 2013 and 2014, Lieff assigned at most five staff attorneys to review documents produced by State Street. Chiplock 6/16/17 Dep., pp. 107:15 – 108:12. [EX. 10]. During this early time, Labaton also allocated no more than five staff attorneys to review and analyze documents for the *State Street* case. Rogers 6/16/17 Dep., p. 57:7-10.[21] [EX. 54]. As the hybrid mediation progressed, State Street produced discovery related to the *Hill* case,[22] a significant production consisting of approximately 10 million pages. Rogers 6/16/17 Dep., pp. 68:25 – 69:11 [EX. 54]; Chiplock 6/16/17 Dep., p. 88:2-21. [EX. 10]. The *Hill* production added considerably to the total volume of documents that had yet to be reviewed by Customer Class Counsel.

By January 2015, Customer Class Counsel began to view discovery with greater urgency, informed in part by the favorable resolution in the *BONY Mellon* case and also

[20] "Staff attorneys" here were licensed attorneys with relevant experience hired specifically to perform large-scale document review.

[21] Michael Rogers recalls that, in 2013, Labaton assigned Todd Kussin, the staff attorney "team leader" in the *State Street* case, and four staff attorneys to perform document review during 2013 and 2014. Rogers 6/16/17 Dep., p. 57:7-10. [EX. 54].

[22] *Hill v. State Street Corp., et. al.*, MAD No.1:09-cv-12146-GAO.

by the fact that the parties had been in mediation for over two years without reaching an agreement to resolve the case. Chiplock 6/16/17 Dep., p. 111:8-13 [EX. 10]; Dugar 6/16/17 Dep., p. 85:9-16. [EX. 55]. As a result, Labaton and Lieff (which had then recently freed up thirteen staff attorneys previously assigned to the *BONY Mellon* case, as discovery in that case was coming to a close) expanded their respective document review teams by adding additional staff attorneys to review and analyze the unreviewed material accumulated in the *State Street* case. *See* Chiplock 6/16/17 Dep., pp. 109:16 – 110:2 [EX. 10]; Rogers 6/16/17 Dep., pp. 69:8-14; 74:11-13. [EX. 54]. Between January and March 2015, Labaton bolstered its document review team, maintaining fifteen to twenty different staff attorneys on the *State Street* case at any given time; Lieff acted similarly, assigning fifteen staff attorneys -- thirteen staff attorneys who transitioned directly from the *BONY Mellon* document review and two agency "contract" attorneys[23] -- to complete the review. Kussin 6/5/17 Dep., p. 17:6-13, 70:8-9 [EX. 56]; Dugar 6/16/17 Dep., p. 87:16 – 88:11, 23-24 [EX. 55]; Lieff Cabraser Response to June 1 Interrogatories, No.19. [EX. 57].

All staff attorneys reviewing documents in the *State Street* case received a binder of documents providing an overview of the case; the binder contained the *ATRS* Complaint and related pleadings, an outline of the case theory, and a list of key terms, search criteria, topics and categories to guide the staff attorney review. Goldsmith

[23] These "contract" attorneys were employed by an outside staffing agency rather than by the Lieff firm itself. *See* Lieff Cabraser's Response to Special Master's First Set of Interrogatories, No. 19. [EX. 57]. Lieff later retained two additional "contract" attorneys to work on the *State Street* case. *Id.* *See also* Chiplock 6/16/17 Dep., p. 112:12-22. [EX. 10].

7/17/17 Dep., pp.77:23 – 78:8 [EX. 58]; Rogers 6/16/17 Dep., p. 63:3-7 [EX. 54]; Lesser 6/19/17 Dep., p. 40:12-13. [EX. 20]. Michael Lesser of Thornton also drafted emails outlining important information for the staff attorneys to consider during their review. Lesser 6/19/17 Dep., pp. 40:10 – 41:4. [EX. 20].

The Labaton and Lieff staff attorneys were well-qualified and well-equipped to analyze the documents, which related to complex FX trading patterns and other financial issues raised in the case. *See* Rogers 6/16/17 Dep, pp. 58:12 – 59:7 (Staff attorneys hired by Labaton had experience in "complex litigation, [the] financial industry, . . . banking, mutual funds, certainly currency trading, or experience legally on what I would call a financial industry case.") [EX. 54]. One Labaton staff attorney, David Alper, had extensive experience in FX trading itself, having worked in the industry for twenty years. *See infra.* Several of the Lieff staff attorneys had, in the words of Chiplock, "been through war in *Bank of New York Mellon*, and [] [we]re extremely well-versed in the issues." Chiplock 6/16/17 Dep., pp. 109:20-25; 117:16-25. [EX. 10]. These staff attorneys not only performed sophisticated document review; they also prepared substantive memoranda on subject matters and potential witnesses critical to development of the legal theories. Chiplock 6/16/17 Dep. p. 32:12-20 [EX. 10]; Zaul 6/6/17 Dep., pp. 24:4 – 25:5 [EX. 59]; Alper 6/5/17 Dep., p. 17:14-16 [EX. 60]; Oh 6/6/17 Dep., p. 21:20-25 [EX. 61]; *see also* TLF-SST-005245 – 5270 (Memorandum by Maritza Bolano). [EX. 62].

2. Staff Attorney Cost-Sharing Agreement

Because Thornton did not have staff attorneys of its own, or the facilities to hire and house new attorneys solely to work on the *State Street* document review, Labaton, Lieff, and Thornton entered into an agreement to "allocate" the costs of certain staff attorneys employed by and working at Labaton and Lieff's offices to Thornton. At times, this was referred to as the "10/10/10 agreement[24] -- designating an equal number of SAs to each firm. The purpose of the cost-sharing agreement was to share the cost and risk burdens of the litigation among the three Customer Class firms. Chiplock 6/16/17 Dep., pp. 127:23 – 128:5; 131:23 – 133:15 [EX. 10]; Belfi 6/14/17 Dep, pp. 51:8 – 53:12.[25] [EX. 17]. While the exact number of staff attorneys fluctuated over the course of the agreement, Thornton, in essence, agreed to pay Labaton and Lieff for five staff attorneys each. G. Bradley 6/19/17 Dep., p. 43:10-13. [EX. 43]. Thornton did not meet, interview, select, house, or supervise the staff attorneys allocated by Labaton or Lieff. *See* Hoffman 6/5/17 Dep., pp. 62:21, 63:7-17, 64:6-9, 65:3-6 [EX. 63]; *see also* Chiplock 6/16/17 Dep., pp. 134:17 – 135:19. [EX. 10]. Nor did it matter to Thornton which staff attorneys it paid for. *See* G. Bradley 6/19/17 Dep., p. 43:10-13. [EX. 43]. Pursuant to

[24] The concept of the "10/10/10 agreement" was introduced at the beginning of the Special Master's discovery, and while not all Customer Class Counsel were familiar with that exact terminology, they affirmed that the purpose of the cost-sharing agreements between Labaton and Thornton and between Lieff and Thornton, was to allocate costs and risks equally among all firms. This was accomplished by Labaton and Lieff each assigning approximately five staff attorneys to Thornton, so that each firm would bear the cost of ten staff attorneys. *See* G. Bradley 6/19/17 Dep., p. 42:5-13 [EX. 43]; Chiplock 6/16/17 Dep., p. 133:12-15. [EX. 10].

[25] Allocating the staff attorneys was not only a means for Thornton to equalize the costs and burdens, but was also, as Garrett Bradley of Thornton admitted, "the best way to jack up the load star [sic]…the best way for us [Thornton] to increase our load star [sic] and make it comparable to the other two firms… I was absolutely concerned about Thornton's load star [sic] vis-à-vis the other two firms." G. Bradley 6/19/17 Dep. p. 67:4-13 [EX. 43]; TLF-011124 - 11126. [EX. 64].

this cost-sharing arrangement, Labaton and Lieff internally designated certain staff attorneys to Thornton, and then billed Thornton periodically for the out-of-pocket cost of the staff attorneys and, in Lieff's case, for the contract attorneys "allocated" to Thornton, as well. *Id.*; *see also* Hoffman 6/5/17 Dep., p. 63:2-7. [EX. 63].

Thornton's collection of staff attorney hours was conducted piecemeal, coordinated largely by Evan Hoffman, then an associate and the most junior member of the Thornton team, with the assistance of firm administrative staff, rather than directly between the attorneys privy to the details of the staff attorney cost-sharing agreement: Garrett Bradley for Thornton, Belfi and Rogers at Labaton, and Chiplock at Lieff Cabraser. On the Lieff side, Lieff's accounting department prepared and forwarded invoices for staff attorneys employed by Lieff to Hoffman and Thornton's business administrator on a regular basis; Hoffman collected the names and hours for the case. Lieff Response to Interrogatory No. 38 [EX. 57]; Hoffman 6/5/17 Dep., pp. 57: 11–18; 61: 21-62:5. [EX. 63]. He also kept track of the contract attorneys housed at Lieff but employed by a staffing agency. For those individuals, the staffing agency invoiced Thornton directly for the work performed. Hoffman 6/5/17 Dep., p. 62: 6-9. [EX. 63].

Hoffman was also charged with tracking staff attorneys working at Labaton. At Labaton, the firm's accounting office prepared and forwarded monthly invoices reporting the hours performed by the firm's staff attorneys designated to Thornton to Garrett Bradley's attention, also copying Thornton administrators. Labaton Response to Special Master's First Set of Interrogatories, No. 37 [EX. 249]; *see* LBS003775 - 3776 (4/9/15 Ng Email to G. Bradley attaching April 2015 Invoice). [EX. 65].

Thornton further tracked the hours performed by Michael Bradley, the brother of Thornton managing partner Garrett Bradley, who worked for neither a firm nor a staffing agency but was hired by Thornton to perform document review in the case. Michael Bradley reported his hours to Hoffman by email on a weekly or biweekly basis. Hoffman 6/5/17 Dep., pp. 107: 24-108:7. [EX. 63].

At the time Labaton and Lieff agreed to this arrangement, both firms were concerned primarily with spreading the costs -- and risks -- of the litigation; neither firm focused on what information would be reported in a potential fee petition. Belfi 6/14/17 Dep., p. 53:10-12. [EX. 17]. Nevertheless, Thornton later listed all of the staff attorneys allocated to it under the cost-sharing agreement in its lodestar fee petition, accounting for 71.5% of all Thornton hours reported. *See* Dkt. # 104-16.[26] [EX. 66]. No explicit agreement to allow Thornton to claim the Labaton and Lieff staff attorneys on Thornton's lodestar has been disclosed during the Special Master's investigation.[27]

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[26] Thornton also claimed 406.4 hours of staff attorney time for Michael Bradley, who was not affiliated with the firm but performed document review on a contingent basis during the *State Street* case. M. Bradley 6/19/17 Dep., pp. 28:20-23; 70:13-15. [EX. 67]. Bradley worked from his own office and performed document review in his free time; he was not supervised by Labaton or Lieff lawyers. M. Bradley 6/19/17 Dep., pp. 49:7-16; 52:3-18, 54:15 – 55:3. [EX. 67]. Unlike the Labaton and Lieff staff attorneys, Bradley did not prepare any memoranda. *Id*, at p. 46:21-23. The record reveals no written work product created by Michael Bradley.

Bradley worked on a contingent basis; he would only be paid if the class recovered a settlement entitling counsel to fees. M. Bradley 6/19/17 Dep., p. 70:13-15. [EX. 67]. After the Court approved the request for attorneys' fees, Bradley received a payment of $203,200, equal to the numbers reported at $500 per hour. *Id.*, p. 70:18-23.

[27] Some of the attorneys from Labaton, Lieff, and Thornton, however, independently made assumptions based on the circumstances that Thornton would claim those staff attorneys' time on its lodestar. *See e.g.*, G. Bradley 6/19/17 Dep., p. 48:1-5 ("We just assumed -- I just assumed where the local counsel were on the papers, we're litigating the case, we're putting the fee up, why wouldn't we put the people up that we were paying for?") [EX. 43]; Chiplock 6/16/17 Dep., p. 136:10-19 ("I would say it was completely understood by me when I talked with Garrett that that would be how it worked, because it was obvious to me that if you pay for the work that is being done, then, just as with any other employee when you're paying them, that you include their hours in your lodestar when you report it at the end of the day.") [EX. 10]; Rogers 6/16/17 Dep., pp. 91:18 – 92:16 ("I certainly assumed [Thornton] would [claim the SA time on their fee petition] . . . They were paying for it up-front, I assume they wanted to get paid on the back end.") [EX. 54]; Hoffman 6/5/17 Dep., p. 58:12-16 ("My understanding was that for attorneys who

F. ERISA FEE ALLOCATION

While the hybrid mediation-discovery process was ongoing in mid-2013, Customer Class Counsel and ERISA Counsel negotiated among themselves an agreement for the allocation of attorneys' fees between the two groups. Sarko 7/6/17 Dep. p. 57:18-23. [EX. 28]. That agreement -- to allocate 9% of the total fee awarded (if successful) to ERISA Counsel -- was based largely on the premise that the total ERISA case volume comprised five to nine percent of the total FX trading volume. Sarko 7/6/17 Dep., pp. 26:15-16 [EX. 28]; 59:14-22; Kravitz 7/6/17 Dep., p. 50:10-16. [EX. 21].

At the time of negotiations -- and more so at the end of the case -- ERISA Counsel did not view 9% as commensurate with the ERISA trading volume (which it was later learned was actually about 12-15% of the total trading volume) or the value they added to the *State Street* case. Sarko 7/6/17 Dep., p. 64:3-11 [EX. 28]; Kravitz 7/6/17 Dep., p. 54:7-11.[28] [EX. 21]. Nonetheless, rather than create friction with Customer Class Counsel over fees,[29] Lynn Sarko, often a liaison between ERISA and Customer Class Counsel, advocated for, and all other ERISA Counsel ultimately agreed to make, a "practical decision" to accept 9% of the fee total. *See* Sarko 7/6/17 Dep., p. 59:18-25.

Thornton was financially responsible for, they would be included on whatever the ultimate fee petition that Thornton would submit.") [EX. 63]; *see also* TLF-SST-011206 (6/29/15 email from Mike Lesser of Thornton to Dan Chiplock of Lieff) [EX. 68]; LCHB-0048939-48940 (3/9/15 Chiplock email regarding Lieff staffing to K. Dugar and N. Diamond: "[R]emember that whoever we choose Thornton is paying for them via the same arrangement we have for Jon Zaul and Chris Jordan.") [EX. 69].

[28] During oral argument, counsel for Labaton indicated that the trading volume for the ERISA funds was in a range of 9% to 10%. However, the record evidence on this point is incomplete.

[29] As noted above, from the beginning of the mediation, there was already fair degree of tension between and among Customer Class Counsel and ERISA Counsel.

[EX. 28]. The decision was intended to serve the dual goals of "mak[ing] the pie bigger" for the class members and promoting cooperation and teamwork across all counsel. Sarko 7/6/17 Dep., p. 59:18-25 [EX. 28]; *see also* Kravitz 7/6/17 Dep., p. 61:18-24. [EX. 21].

From August to December 2013, Customer Class Counsel and ERISA Counsel exchanged drafts in an attempt to memorialize their agreement to respectively share the fee award 91/9. *See* KR00000006 – 09 (8/30/13 Sarko email to Lieff (proposing draft agreement to capture the 91/9% split)) [EX. 70]; KR00000010 – 18 (9/11/13 Chiplock email to Sarko and Gerber (circulating redlined edits to proposed agreement)).[30] [EX. 71]. Early drafts of the fee allocation agreement included a provision nullifying the 91/9 allocation if the *ATRS* case, the *Andover* case, or the *Henriquez* case resulted in no recovery; that provision was later struck. *See* KR00000024 – 28 (8/30/13 Draft, Fee Allocation Agreement). [EX. 73]. Also removed was a provision stating that counsel's division of fees was "consistent with the relative volume of FX trading by ERISA and non-ERISA plans as reflected in the data produced by State Street and the prospects of recovery on the various claims alleged, and is therefore reasonable and appropriate." *Id*.

Four months later, on December 11, 2013, Counsel finally memorialized their 91/9 understanding in writing. Sarko 7/6/17 Dep., p. 60:4-14 [EX. 28]; s*ee also* KR00000045

[30] While there were several iterations of the agreement, each draft alluded to the fact that the *ATRS* Complaint filed by Customer Class Counsel was brought on behalf of "all institutional investors in foreign securities, including public and private pension funds, *ERISA-qualified plans*, mutual funds, endowment funds and investment manager funds, for which State Street served as the custodial bank" (emphasis added). *See* KR00000003 – 05 (8/29/13 Draft, "Agreement Between Counsel for Consumer and ERISA Plaintiffs Regarding Division of Attorneys' Fees" (the "Fee Allocation Agreement"). [EX. 72].

– 50 (Final Fee Allocation Agreement) [EX. 74]; Settlement Agreement, Dkt. # 89, ¶ 21 [EX. 75]; McTigue, 7/7/17 Dep., pp. 44:23 – 46:18 [EX. 11]; Thornton 6/19/17 Dep., p. 57:12-16. [EX. 2]. As part of that written agreement, ERISA Counsel and Customer Class Counsel represented that they had "disclosed and explained this Agreement to their respective clients and that their clients have consented to the Division of Fees and other terms herein." *See* Fee Allocation Agreement at ¶ 5. [EX. 72].

Although the terms of that agreement allocated just 9% to ERISA Counsel, that percentage was increased to 10%, at the suggestion of Customer Class Counsel, as counsel finalized the jointly filed Fee Petition. Thornton 6/19/17 Dep., pp. 57:17 – 58:1 [EX. 2]; Sarko 7/6/17 Dep., p. 60:15-17, 60:24-61:12 [EX. 28]; Kravitz 7/6/17 Dep., p. 59:17-19. [EX. 21]. While the Fee Allocation Agreement itself was not amended to reflect the change, the 10% increase was memorialized in an email circulated by Nicole Zeiss, Settlement Counsel for Labaton, confirming the itemization of fees and expenses for both ERISA and Customer Class attorneys. *See* ZS000027 – 28 (11/23/16 Sarko email to Kravitz ("I spoke with Labaton folks yesterday. They didn't want to put it in the formal letter but agreed to send us an email putting the numbers in and confirming the 10 percent."). [EX. 76]. ERISA Counsel welcomed the increase in percentage. *See* ZS000029 – 30 (11/23/16 Kravitz email to McTigue). [EX. 77]

G. SETTLEMENT AND NOTICE TO THE CLASS

1. Involvement of Government Agencies

The hybrid mediation spanned a period of two-and-a-half years. During that time, discovery proceeded but settlement discussions were ongoing. In addition to State Street

and Plaintiffs' counsel, three government agencies -- the DOL, the Securities and Exchange Commission ("SEC"), and the Department of Justice ("DOJ") -- were involved in, and integral to, the negotiations. Each agency independently investigated State Street's alleged misconduct, and each agency reached its own settlement with State Street in furtherance of its respective enforcement goals. *See* Dkt. # 104, ¶¶ 8, 38 [EX. 3]; *see also* Sarko 7/6/17 Dep., p. 41:9-14 [EX. 28]; Kravitz 7/6/17 Dep., pp. 56:25 – 57:4. [EX. 21]. In particular, the DOL -- charged with overseeing administration of the ERISA statute -- paid particular attention to the settlement of the claims of the ERISA plan participants, ensuring that the settlement recovery amount was adequate and commensurate with the agency's own evaluation of the case. Sarko 7/6/17 Dep., p. 79:6-15. [EX. 28]. Sarko was the lawyer principally responsible for negotiating with the DOL. State Street, in turn, made it very clear that a global settlement with all private class members and all government agencies was a necessary condition to its willingness to reach a settlement. Sarko 7/6/17 Dep., pp. 36:24 – 37:11; *see also* 11/2/16 Hearing Tr., p. 17:8-23. [EX. 78].

2. Preparation and Filing of Settlement Documents

After a multi-year discovery, mediation and negotiation, on June 30, 2015, the parties reached an agreement-in-principle to settle the consolidated class actions for $300 million. Sucharow Decl., ¶ 101. [EX. 3]. The terms of a final Term Sheet were negotiated and signed on September 11, 2015. Sucharow Decl., ¶ 104. [EX. 3]. *See also*, Zeiss 6/14/17 Dep., p. 13:10-22. [EX. 79].

Over the ensuing months, Labaton, as Lead Settlement Counsel, assumed responsibility for preparing the formal settlement documentation. Zeiss had primary responsibility for drafting the settlement documents, including the Settlement Agreement and exhibits thereto, the Preliminary Approval (motion, brief, and proposed order), the Plan of Allocation, the judgment, and the long-form Notice of Pendency of Class Action and Summary Notice ("Notice").[31] Zeiss 6/14/17 Dep., pp. 13:10-22, 15:5-6.[32] [EX. 79]. Draft versions of the Notice were circulated among, and reviewed by, Customer Class Counsel and ERISA Counsel.[33] Zeiss also prepared the Omnibus Declaration and Brief in support of Lead Counsel's Motion for Attorneys' Fees and Expenses, and for payment of service awards. *Id*., p. 16:2-6.

The Settlement and Fee Petition documents made clear that Labaton was representing both the Customer Class members and the ERISA Class members with respect to the settlement of the case. These documents, and in particular the Notice, all of which Labaton authored in whole or in part, were triple-captioned; bear the case names and numbers of all three class actions, including the ERISA actions; and provide notice to

[31] These documents and related filings submitted as part of the final approval process are referred to herein as "settlement" and "fee petition" documents, respectively.

[32] Rather than have a litigation team member handle settlement, Labaton has delegated that part of its practice to a specialized attorney (Zeiss), and in that compartmentalization, it created a separate "settlement counsel" position with responsibility for negotiating and documenting all issues related to memorializing and finalizing settlements. Zeiss 6/14/17 Dep., p. 10:24 – 11:12 [EX. 79]; Keller 10/13/17 Dep., p. 79:18-20. [EX. 80]. With respect to the *State Street* case, this compartmentalization contributed to some of the problems giving rise to the Special Master's investigation, in particular the failure to discover the "double-counting" of staff attorneys allocated to Thornton and the failure to disclose to the Court Labaton's fee arrangement with Texas attorney, Damon Chargois. These matters are discussed *infra.*

[33] In March 2017, at the request of the Special Master, the Customer Class and ERISA firms each produced a complete record of time entries performed in the *State Street* matter. These time records indicate that Customer Class Counsel reviewed the Notice and other settlement documents circulated by Zeiss.

members of the "Settlement Class" that a Class Settlement of $300 million has been entered into "by and among (i) plaintiffs Arkansas Teacher Retirement System ("ARTRS"), Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employees Savings and Profit Sharing Plan and James Pehoushek-Stangeland (collectively "Plaintiffs"), on behalf of themselves and each Settlement Class Member, by and through their counsel, and (ii) State Street Bank and Trust Company (the "Settling Defendant" or "SSBT")." *See* Notice, MAD No. 11-cv-10230, Dkt. # 95-3, filed on August 10, 2016. [EX. 81]. The Notice further defines the "Settlement Class" as

> All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 21, 1998 through December 31, 2009, inclusive.

Id.

H. FEE PETITION REQUESTING ATTORNEYS' FEES AND EXPENSES

1. Fee Negotiations Among Customer Class Counsel

At the inception of the case, Customer Class Counsel had agreed to a fee-sharing arrangement pursuant to which Labaton, Lieff, and Thornton would each be entitled to 20% of any fee award, with the remaining 40% to be distributed at the end of the litigation, commensurate with each firm's contributions to the case. *See* TLF-SST-033911 – 33913 (5/4/11 letter agreement, p. 2) [EX. 82]; Keller 10/25/17 Dep., pp. 414:14 – 420:10. [EX. 83]. *See also*, TLF-SST-040631 (8/28/15 email exchange

among Larry Sucharow, Dan Chiplock, Garrett Bradley, M. Thornton, and Bob Lieff regarding the 20-20-20/40 agreement). [EX. 84].

Around the time the parties reached an agreement-in-principle, Customer Class Counsel engaged in discussions about how to allocate the anticipated fee award among themselves. It is apparent from these discussions that with regard to balancing fees, Lieff and Thornton considered their respective roles in the *BONY Mellon* litigation, a fact wholly unrelated to the value added in this case. Dan Chiplock conceded at deposition, as did Garrett Bradley, that the *State Street* and *BONY Mellon* fee discussions became intertwined. Chiplock 9/8/17 Dep., pp. 22:7 – 23:13 [EX. 41]; Garrett Bradley 9/14/17 Dep., pp. 114:23 – 125:16. [EX. 85]. Contemporaneous emails, discussed *infra*, also reflect the intertwining of the fee negotiations in the two cases.

In August 2015, Dan Chiplock expressed an interest in determining the appropriate allocation of the remaining 40% of the anticipated fee award. *Id.* Garrett Bradley of Thornton resisted, opining that the final distribution should wait until the Court made a total fee award. *Id.*[34] What became apparent to Chiplock was that Thornton viewed any allocation of *State Street* fees as tied to the as yet undecided *BONY Mellon* fee award. *Id.*[35] ("Not to be difficult but [this is a] very different situation, in other words, from BNYM, (which I know doesn't involve you Larry, but seems to be coloring this discussion.") *See also* TLF-SST-053087 (8/28/15 email from Sucharow to

[34] By this time, Bradley was also serving as "of counsel" for Labaton. The potential significance of this is discussed *infra*.

[35] The settlement in *BONY Mellon* would be finalized the following month, September 2015.

Chiplock ("I believe there are other cases and other agreements which are influencing people's desire to either reach agreement now or later.")). [EX. 86].

Garrett Bradley pressed for an agreement that Lieff share some portion of its allotment in *BONY Mellon* with Thornton in recognition of the fact that Thornton had developed the initial FX concept, and refused to settle on an allocation in *State Street* until he saw that Thornton was treated "fairly" in *BONY Mellon.* Chiplock 9/8/17 Dep. pp. 22:8 – 23:13 [EX. 41]; TLF-SST-031166 - 31173 (G. Bradley 8/28/15 email to Bob Lieff ("…I have not agreed that it would be equitable to split the balance of the forty percent the way you described below. What I have said is that may be a fair approach depending on the outcome of our fee in the Mellon matter. If we are treated fairly there, then we will do all we can to treat you fairly in the state street matter…) [EX. 87]; *see also* 8/28/15 email from Bradley to Chiplock of the same date, *id.* ("What I am pointing out is the inequities of our different positions. In Mellon… when we had created that case by developing the fx case *all that we got was some work that resulted in $1.5 million in time*… Now contrast that to state street where you had no client and no concept… Once we have an idea of what our Mellon number looks like then we can discuss how to approach the balance of the 40% with Labaton.") (emphasis added).

Dan Chiplock, the lead attorney in *BONY Mellon*, took exception to the implication that Lieff was not treating Thornton fairly in that case. He pushed back, reminding Bradley in an email two days later that Lieff's role in creating the result in *BONY Mellon* "doubled the value of State Street." *Id.* (8/30/15 email from Chiplock to Bradley). He further reminded Bradley, "I also gave your firm more assignments than

others at the outset in BNYM until it became clear that the work simply wasn't getting done." *Id.* Bradley asked what Chiplock meant when he said Thornton did not "get the work done." *Id.* "That has never been specified and really should [not] be to be deemed credible." *Id.* Chiplock agreed to provide Bradley with emails showing the assignments given to Thornton. *Id.*

The discussion turned to lodestar reporting in *State Street*, with Chiplock warning Bradley not to include unwarranted hours in Thornton's fee petition:

> In the meantime, while we're on the subject of credibility, I want to point out that we need to be consistent and credible with our lodestar reporting in State Street. We are gathering final lodestar reports now, but I heard third-hand that Mike [Thornton] recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million. That number does not comport with the hours Mike Lesser told me for Thornton as of June 29 (around 12,750), which makes more sense given what we know about the work that was done. I am hopeful that Mike T simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf … Also recognize that your [document] reviewers were all housed outside your firm and their respective overhead and facilities expenses were paid for by others, which we were happy to do as a courtesy. Thanks.

Id.

2. **Submission of the Fee Petition**

Customer Class Counsel's discussions about fee-sharing were put on hold as *State Street* settlement negotiations wrapped up, and in advance of the hearing on final approval of the settlement, Labaton, as Lead Settlement Counsel, prepared a motion for attorneys' fees and expenses and for payment of service awards (the "Fee Petition"). Nicole Zeiss, Labaton's Settlement Counsel, was tasked with that responsibility. Zeiss 6/14/17 Dep., pp. 15:18-25 – 16:1-18. [EX. 79]. The Fee Petition consisted of the

Omnibus Declaration[36] and Brief and nine individual declarations submitted by each law firm that had filed an appearance in the case.[37] Labaton posted the Omnibus Declaration, complete with exhibits, to the settlement website making relevant case information available to the class members.[38] The individual declarations described the work performed by each firm and the basis for its fee request. Attached to each declaration was a chart ("Exhibit A") summarizing each firm's respective lodestar through August 30, 2016. *See* Exhibit A to Dkt. # 104-15 [EX. 88], 104-16 [EX. 66], 104-17 [EX. 89], 104-18 [EX. 90], 104-19 [EX. 91], 104-20 [EX. 92], 104-21 [EX. 93], 104-22 [EX. 94], 104-23. [EX. 95]. In most instances, the narrative descriptions and chart outlines were taken verbatim from a template provided by Labaton. *See* Zeiss 6/14/17 Dep., pp. 16:10-16; 21-24. [EX. 79]. Zeiss drafted the template for the small fee declarations, circulated it to the other firms, and worked with them on completing their declarations and exhibits. *Id*., pp. 16:14-16, 20:18-19. Zeiss explained her role:

> . . . I sent out the template to all the firms, and asked them to complete the templates and send me drafts.
>
> Eventually everybody sent me a draft back, and I -- in general I reviewed each of them. There was kind of a -- each one had an individual,

[36] "Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs." Dkt. # 104. [EX. 3].

[37] The Omnibus Fee Petition listed ten firms, each of which submitted a lodestar calculation identifying the names and rates of individual attorneys and staff at their respective firms. *See* Labaton Sucharow (Dkt. # 104-15) [EX. 88]; the Thornton Law Firm (Dkt. # 104-16) [EX. 66]; Lieff Cabraser Heimann and Bernstein (Dkt. # 104-17) [EX. 89]; Keller Rohrback, LLC (Dkt. # 104-18) [EX. 90]; Hutchings, Barsamiam Mandelcorn, LLP (Dkt. # 104-18) [EX. 90]; the McTigue Law Firm (Dkt. # 104-19) [EX. 91]; Zuckerman Spaeder, LLP (Dkt. # 104-20) [EX. 92]; Feinberg, Campbell & Zack, P.C. (Dkt. # 104-21) [EX. 93]; Beins, Axelrod, P.C. (Dkt. #104-22) [EX. 94]; and Richardson, Patrick, Westbrook, and Brickman, LLC (Dkt. # 104-23) [EX. 95].

[38] Available at http://www.labaton.com/en/cases/State-Street-Corp.cfm (Last visited on April 17, 2018).

> more detail than usual, narrative of what each firm's role was, which we wanted here because there were so many different firms in different roles.
>
> So I reviewed that, and asked David, I believe -- Goldsmith -- to make sure that comported with his recollection of what everybody did.
>
> I reviewed the lodestar exhibits for form, to make sure everybody was reporting . . . all the information we needed.
>
> So sometimes firms forget to put in hourly rates, sometimes the formatting is, you know, off, and hard for somebody to follow.
>
> So reviewing for form to make sure all the information was actually there, that's really all I can do because I don't have people's time records.
>
> It's not the practice to exchange time records, but, you know, sometimes if there's a timekeeper that says, you know, .2 hours, we just have sort of a practice where we like to cut that, so I might ask, you know, "Can you just report timekeepers with five hours?"
>
> So that's pretty much what I do on the lodestar tables. . . .
>
> ***
>
> **[However, i]t wasn't my practice to put them next to each other and compare them**. . . .[39]

Id., pp. 21:4 – 23:9 (emphasis added).

Nicole Zeiss was not aware of the staff attorney allocation agreement between Labaton, Lieff, and Thornton. Zeiss 6/14/17 Dep. p. 80:21-24. [EX. 79]. Her involvement in the *State Street* case was "strictly as settlement counsel." *Id*., p. 79:5-9. As Zeiss testified, Labaton has taken the negotiating of settlements out of the hands of the litigators, *id.,* p. 10:24 – 11:17, resulting in one group of attorneys working on a case not knowing what other attorneys working on the same case were doing. This is an example of the compartmentalization of work Labaton practices, which that contributed greatly to the problems experienced in this case.

[39] The failure to perform a side-by-side comparison of the lodestar reports of the three Customer Class firms contributed to the failure to catch and correct the double-counting errors as to the staff attorneys, discussed *infra*.

The Labaton template included several paragraphs describing the source of the lodestar calculations and billing rates. In particular, it included a generic description of the basis for the hourly rates listed in the lodestar calculation. With the exception of three ERISA firms -- McTigue Law,[40] Zuckerman Spaeder,[41] and Beins Axelrod[42] -- the Customer Class Counsel and the other ERISA Class Counsel adopted the template language in its entirety. Specifically, Labaton provided counsel with the following language:

- "The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request." (Dkt. # 104-15, ¶ 6 [EX. 88]; 104-16, ¶ 3 [EX. 66]; 104-17, ¶ 4 [EX. 89]; 104-18, ¶ 3 [EX. 90]; 104-21, ¶ 3 [EX. 93]; 104-23, ¶ 3) [EX. 95].)

[40] The McTigue Law Firm's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." Dkt. #104-18, ¶ 20. [EX. 90].

[41] Zuckerman Spaeder's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions and are charged to clients paying us currently by the hour." Dkt. #104-20, ¶ 4. [EX. 92].

[42] Beins Axelrod's individual fee declaration states that "[t]he hourly rates charged by the Timekeepers are the Firm's regular rates for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters. Based on my knowledge and experience, these rates are also within the range of rates normally and customarily charged in Washington, D.C. by attorneys of similar qualifications and experience in cases similar to this litigation, and have been approved in connection with other class action settlements. The Firm has charged, and received, an hourly rate of $525.00 in litigation involving fiduciary breach by a former trustee and service providers. The Firm does charge a lower rate to longstanding Fund clients in non-contingency matters and to its Union clients. To serve the public interest, the Firm has also charged reduced rates to individual employees with employment discrimination claims. Dkt. # 104-22, ¶ 8. [EX. 94].

- The hourly rates for the attorneys and professional support staff in my firm [] are the same as my firm's regular rates charged for their service, which have been accepted in other complex class actions." (Dkt. # 104-15, ¶ 7 [EX. 88]; 104-16, ¶ 4 [EX. 66]; 104-17, ¶ 5 [EX. 89]; 104-18, ¶ 4 [EX. 90]; 104-21, ¶ 4 [EX. 93]; 104-23, ¶ 4) [EX. 95].)

While, as noted, several of the firms changed the template language in their declarations in support of their own small fee petitions,[43] Garrett Bradley did not do so in his sworn Declaration in support of Thornton's fee petition. Rather, Bradley's Declaration included the following statements:

- Exhibit A is a summary of time spent by attorneys and professional support staff members "of my firm."
- The billing rates for the SAs are "based on my firm's current billing rates."
- For personnel "who are no longer employed," the lodestar is based on their rates for the "final year of employment."
- The hourly rates "are the same as my firm's regular rates charged for their services."[44]
- These rates "have been accepted in other complex class actions."

See Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP, Dkt. # 104-16. [EX. 66].

All of these statements are factually untrue and have no support in the record.[45]

[43] *See* discussion, *supra*.

[44] As to both Thornton and Labaton, the use of the word "charged" in stating that the hourly rates shown for the firm's employees "are the same as *my firm's regular rates charged* for their services" is something of a misnomer and could readily cause confusion as neither Thornton nor Labaton has hourly clients. For these firms, it would be more accurate to simply say that these are "rates previously used in fee petitions that have been approved by the courts."

[45] *See* discussion *infra* in Part III.

In addition to the above statements, the statement in Bradley's Declaration that the schedule was prepared from "contemporaneous daily time records regularly prepared and maintained by my firm," as to Garrett Bradley and Michael Thornton, raises troublesome issues. Materials produced to the Special Master raise questions about contemporaneous record keeping.[46] Additionally, daily time records of many of the staff attorneys on Thornton's lodestar schedule were not kept by Thornton. Rather, they were kept by Labaton and Lieff.

Bradley testified in his deposition that he did not read his declaration closely before signing it; rather, using Labaton's model fee-declaration template, Mike Lesser of his firm, with the assistance of Evan Hoffman, drafted his Declaration and brought him the final version, which he signed. *See* G. Bradley 6/19/17 Dep., pp. 83:17 – 84:24. [EX. 43]. However, testimony shows that Bradley had ample opportunity to give the declaration the "close read" that was required. Evan Hoffman testified that using the template supplied by Labaton, the firm "put in all the hours that we had kept track of, I along with our accounting department and [Thornton Office Manager] Anasthasia put in the expenses and then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15. [EX. 63].

At the March 7, 2017 hearing, Garrett Bradley acknowledged the inaccuracy of the information in his Declaration, characterizing the information as "unclear" and admitting

[46] The Special Master, however, is unable to conclude that this statement is untrue.

that it "should have been clarified me at the time" it was prepared, but "it was not." 3/7/17 Hearing Tr., p. 88:14-19 [EX. 96]; *see* also p. 91:4-6. At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway. *See e.g.*, 3/7/17 Hearing Tr., p. 87:13-14; 88:2-9; 14-18; 91:5-7; 92:3-8.[47] [EX. 96].

The factual misrepresentations of Garrett Bradley in his sworn Declaration contributed to the double-counting in the fee petitions. Had Bradley accurately and fully described the true status of the Labaton and Lieff staff attorneys, it is probable that a diligent attorney such as Nicole Zeiss would have been alerted to the discrepancy and would likely have caught the double-counting in the three Customer Class declarations. Beyond this, truthful and accurate statements may also have alerted the Court in its review that something was amiss, because the practice of a law firm putting a different law firm's attorneys on its lodestar petition would have been highly unusual, and the Court may well have made detailed inquiries that would have led to the discovery of the double-counting. Because Bradley's Declaration statements were wholly misleading, no one was alerted to the possibility of irregularities.

[47] Although Bradley acknowledged that he "should have clarified" the information in his Declaration, he failed to do so at any time in the four months after the Declaration was filed on September 15, 2016 -- until called to task by the Court on March 7, 2017. In those intervening four months, Bradley could have taken the opportunity to "clarify" his Declaration at the Final Approval hearing which he attended on November 2, 2016. He could have done so immediately after the *Boston Globe*'s inquiry (discussed *infra*); he could have done so in the November 10, 2016 letter to the Court, which he was involved in drafting; he could have done so after the *Globe* article was published on December 17, 2016 or after receiving the Court's February 6, 2017 Order directing counsel to show cause why a Special Master should not be appointed to investigate the accuracy of their lodestar petitions. Bradley took no advantage of any of these opportunities to "clarify" his Declaration and never did so until called upon to do so by the Court on March 7, 2017.

The Omnibus Declaration and Fee Petition, along with all of the small fee declarations and lodestar report exhibits, were filed with the Court together with the parties' Assented to Motion for Final Settlement Approval on September 15, 2016. *See* Dkt. # 104. [EX. 3].

As represented in the Omnibus Declaration and the small fee declarations, Class Counsel sought an award of fees to compensate them for the work they did during the more than six years of investigation, litigation and mediation of this action, which, collectively, included:

- Factual investigation, including researching and reconstructing FX price movements for major currencies for institutional customers of State Street;
- Researching and drafting proposed class claims for inclusion in the Complaints;
- Researching and briefing responses to Defendants' motion to dismiss;
- Preparing for and attending Court hearings, including the hearing on Defendants' motion to dismiss;
- Preparing for and attending mediation sessions held in this Action;
- Participating in numerous phone calls between and among Plaintiffs' counsel, Defense counsel, government regulators, and State Street's counsel; in-person meetings between and among the same; and strategy sessions among Plaintiffs' counsel;
- Drafting discovery and information requests to State Street;
- Researching and arguing the merits of class certification in the context of mediation discussions;
- Analyzing State Street's recorded margins on indirect FX trades throughout the proposed class period, including total volumes attributable to registered investment companies ("RICs"), ERISA plans, and public pension plans;
- Reviewing and analyzing more than nine million pages of documents and data produced by State Street, in preparation for deposition discovery and trial;
- Negotiating terms of the global settlement;
- Drafting the term sheet and eventual settlement; and
- Briefing preliminary and final approval of the Settlement.

See generally Sucharow Decl., Dkt. # 104, ¶¶ 27 - 31, 89 - 100, 104 – 106 [EX. 3]; Chiplock Decl., Dkt. # 104-17, ¶ 3. [EX. 89].

3. The Lodestar Reports of Class Counsel

For their time, the eight law firms[48] representing the plaintiffs in this matter collectively sought an award of fees in the total amount of $74,541,250.00. In support of this sum, the firms submitted lodestar reports reflecting the hours and lodestar of partners, associates and staff attorneys[49] in the following amounts:

FIRM[50]	PARTNERS	ASSOCIATES	STAFF ATTORNEYS
LABATON	5,130.2 hrs.	653.4 hrs.	31,526.4 hrs.
	$4,417,753.50	$367,162.50	$11,684,111.00
LIEFF	1,996.3 hrs.	28.8 hrs.	17,066.1 hrs.
	$1,378,897.50	$12,449.00	$7,474,896.50
Thornton	3,864.8 hrs.	328.3 hrs.	10,537.9 hrs.
	$2,683,552.00	$147,735.00	$4,508,837.00
KELLER ROHRBACK	2,039.4 hrs.	416.6 hrs.	
	$1,858,087.20	$19,460.00	

[48] Excluding local counsel firms Hutchings Barsamian Mendelcorn LLP, and Feinberg, and Campbell & Zack, P.C, which each had total lodestar figures below $10,000.00.

[49] The hours for the staff attorneys include both attorneys employed directly by Labaton and Lieff and attorneys retained by the firms from staffing agencies (separately referred to herein as "contract attorneys").

[50] *See* Lodestar Reports at Dkt. # 104-15 – 104-23. [EX. 88; EX. 95].

McTIGUE	3,624.18 hrs. $2,210,831.00		
ZUCKERMAN	1,313.65 hrs. $1,155,383.50		
RICHARDSON	245.2 hrs. $135,575.00		
BEINS AXELROD	387.8 hrs. $187,712.00		

The various lodestar reports of Plaintiffs' Counsel listed partners billing at hourly rates ranging from $535 to $1,000, and associates billing at hourly rates of $325 to $725: Labaton's report showed nine partners working on the case with billing rates of $800 - $925 an hour, and six associates with billing rates of $340 - $725 an hour. *See* Declaration of Lawrence Sucharow on Behalf of Labaton Sucharow LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. # 104-15, Ex. A. [EX. 88]. Lieff had ten partners with billing rates of $575 - $1,000 on the case, and two associates with billing rates of $425 and $435 an hour. *See* Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. # 104-17, Ex. A. [EX. 89]. Thornton's Lodestar report listed four partners at $535 - $850 an hour, and one associate at $450 an hour. *See* Declaration of Garrett J. Bradley, Esq. on Behalf of

Thornton Law Firm LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. # 104-16, Ex. A. [EX. 66].

ERISA Counsel's range of hourly rates for partners and associates was similar: Keller Rohrback's lodestar report listed fourteen partners with hourly billing rates ranging from $550 to $925 and five associates with billing rates of $400 to $525 an hour. *See* Declaration of Lynn Sarko, Dkt # 104-18, Ex. A.[51] [EX. 90]. Zuckerman Spaeder listed five partners billing at $650 to $990 an hour. *See* Declaration of Carl Kravitz, Dkt. #104-20, Ex. A. [EX. 92]. McTigue's lodestar report listed seven attorneys (none specifically designated as "partner" or "associate") with hourly billing rates of $325 to $725. *See* Declaration of J. Brian McTigue, Dkt. # 104-19. [EX. 91]. Richardson Patrick showed three partners working on the case whose billing rates ranged from $500 to $800 an hour, *see* Declaration of Kimberly Keevers Palmer, Dkt. # 104-23, Ex. A [EX. 95], and Beins Axelrod listed two attorneys billing at $455 and $525 an hour. *See* Declaration of Jonathan G. Axelrod, Dkt. # 104-22, Ex. A. [EX. 94].

Customer Class Counsel's lodestar reports also included requests for fees for "staff attorneys." Labaton listed twenty-five staff attorneys: three were billed at $410 per hour; four were billed at $390 per hour; one was billed at $375 per hour; seven were billed at $360 per hour; and 10 were billed at $335 per hour. Sucharow Decl., Dkt. #

[51] As noted, Keller Rohrback also retained a firm, Hutchings Barsamian Mendelcorn LLP, as local counsel, which appeared on Keller Rohrback's pleadings. Keller Rohrback was advised by Nicole Zeiss not to have Hutchings Barsamian file a lodestar petition because the firm's lodestar was under $10,000. *See* KR00001192-98 (Zeiss 8/31/16 email to Keller Rohrback and other ERISA counsel.) [EX. 97]. However, Keller Rohrback identifies the firm as its local counsel in its own fee petition. *See* Dkt. # 104-18, p. 4. [EX. 90].

104-15, Ex. A. [EX. 88]. Lieff's Report listed twenty staff attorneys, five of whom were billed at $515 per hour, while fifteen were billed at $415 per hour. Chiplock Decl., Dkt. # 104-17, Ex. A. [EX. 89]. Thornton listed twenty-four staff attorneys, twenty-three of whom were billed at $425 per hour, while one -- Michael Bradley -- was billed at $500. G. Bradley Decl., Dkt. # 104-16, Ex. A.[52] [EX. 66].

a. Counsel's Billing Rate-Setting Practices

Labaton does not generally take on "billable" work; however, it does set uniform attorney billing rates for use in all class action fee petitions. Sucharow 6/14/17 Dep., 47:17-18; 50:3-8. [EX. 16]. As to how the rates for partners, associates, and staff attorneys are determined, Ray Politano, Labaton's Chief Operating Officer, testified that Labaton has a billing rates subcommittee comprised of three or four persons -- Politano and two or three partners -- who meet annually and make billing rate recommendations for the firm for the upcoming year. *See* Politano 6/14/17 Dep., pp. 35:25 – 36:3. [EX. 98]. Politano testified that before the subcommittee meets, he has a paralegal gather billing rate information from a number of sources – Westlaw, Lexis, Law 360, fee petitions that were filed in other cases, and bankruptcy filings – all publicly available sources. *Id.*, pp. 38:13 – 39:4. Both plaintiff and defense firm rates are included. *Id.*, p. 40:13-19. In this process, Politano flags particular firms as competitors or

[52] Included among the staff attorneys in the lodestar reports of Lieff and Thornton were four "contract" attorneys hired by Lieff through one or more outside staffing agencies. Two of the contract attorneys, Ann Ten Eyck and Rachel Wintterle, were contracted by Lieff but "allocated" to Thornton, and Thornton paid the agency directly for the time of these two contract attorneys. Two other Lieff contract attorneys, Virginia Weiss and Andrew McClellan, were allocated only part of the time to Thornton, but Lieff paid the agency for the entire time these two attorneys worked on the *State Street* case. The billing rates for contract attorneys are discussed in greater detail, *infra*.

contemporaries that are most analogous to Labaton's practice. *Id.*, p. 39:6-19. On the plaintiffs' side, Politano said primarily firms that do class action work are identified. *Id.*, 41:22-23. Although occasionally he will look at an attorney's rates in another venue, the information provided to the subcommittee is principally information about New York firms' rates. *Id*., p. 41:3-7.

Politano also provides the subcommittee members with the current billing rates of Labaton attorneys. *Id.,* 37:14-16. The subcommittee reviews and analyzes the Labaton attorney rates in light of the other information Politano has provided the members and then makes billing rate recommendations to the firm's Executive Committee. *Id.*

The Executive Committee reviews all the information again. *Id*., 37:20-23. Based upon the review and comments from the Executive Committee, changes are made or the billing rates as recommended by the subcommittee are approved. *Id.,* 37:23-25. Politano then informs accounting, the records department, and everyone else who would need to be informed of those new rates. *Id.,*38:4-7.

Lieff has a similar process for setting attorney rates annually. *See* Fineman 6/6/17 Dep., pp., 56:23 – 57:1. [EX. 18]. Steve Fineman, Lieff's managing partner, explained the rate-setting procedure at his firm:

> [A]t the beginning of the year I get in touch with the director of our operations, Joe Dragicevic, and the communication with Joe will be what do you know about what's going on in the market, the billable rate market, and we'll talk about if there is [sic] any new surveys out, sometimes you get the surveys from American Lawyer, who does the survey that publishes all the big law firms, and we'll look at those.
>
> We'll look at whatever other publicly available surveys might be available on rates, we'll discuss it.

> I will ask him if he heard anything in his world, which is sort of law firm management world.
>
> We'll see if there is anything we can find publicly about our competitors' rates. Now, firms in my business, typically because we're not billable rate law firms, you don't usually see our firms in the surveys and we don't respond to the survey questions generally.
>
> So you have to find publicly available fee applications in order to see what people are doing, you can't, you know, as the judge knows, you can't go asking other leaders of other law firms how much they're charging for rates because then we get ourselves in all kinds of trouble.
>
> So we don't do that; we look at what's publicly available and then I make a proposal based on that conversation. . . .
>
> I'll send that proposal early in the year to the executive committee and then the executive committee generally -- what happens is at the following executive committee meeting it will be on the agenda, we will discuss it, it will be approved, and that will become the rates for the year.

Id., pp. 58:5 – 60:12. *See also* Heimann 7/17/17 Dep., pp. 60:13 – 66:13. [EX. 19].

Lieff does not only have class action/contingent fee clients; the firm also has clients it bills on an hourly basis. Fineman 6/6/17 Dep., pp. 68:3 – 70:25. [EX. 18]. These hourly clients are billed largely at the same rates claimed by Lieff in this case. *Id.*

ERISA Counsel also testified that their firms also have a formalized annual rate-setting process. Lynn Sarko, the managing partner of Keller Rohrback, testified that his firm uses a three-part process: First the executive committee gathers twenty to twenty-five fee applications filed during the year by other plaintiffs' firms, including some competitor firms, which are publicly available through PACER. Sarko 7/6/17 Dep., pp. 94:16 – 95:7. [EX. 28]. They then gather the rates of defense firms they litigate against, which are also publicly available from bankruptcy filings. *Id*., pp. 95:9-15. The third part of the process involves analyzing Keller Rohrback's expense and income statements

to determine how much the firm's expenses for the year have gone up. *Id.*, p. 95:16-20. From all this information, the executive committee sets rates for the firm's attorneys for the coming year. *Id.,* p. 95:18-20.

Carl Kravitz testified that Zuckerman Spaeder's rate-setting system is similar. Kravitz testified that at his firm, rates are also set annually, Kravitz 7/6/17 Dep., p. 115:24 [EX. 21], and, as at Keller Rohrback, the rate-setting process is directed by the managing partner and the three-or-four-member executive committee. *Id.*, p. 115:16-21. Kravitz, who has served on the firm's executive committee, said that, in setting rates for the firm's attorneys, they look at what their competitors charge and also review market data from studies performed by Citigroup or Wells Fargo. *Id.* at p. 116:4-25. Rates are decided upon and are distributed to partners to see whether anybody disagrees or has comments. *Id.*, p. 115:24 – 116:1. Then they are returned for approval by the executive committee and the partnership board. *Id.*, p. 116:1-3.

Keller Rohrback and Zuckerman Spaeder have both hourly clients and class action/contingent fee clients. Sarko 7/6/17 Dep. pp. 95:23 – 96:7 [EX. 28]; Kravitz 7/6/17 Dep., p. 88:19-25. [EX. 21]. The same rates annually set by their firms' executive committees are used for billing both sets of clients. Sarko 7/6/17 Dep., pp. 96:22 – 92:5 [EX. 28]; Kravitz 7/6/17 Dep., 117:1-5. [EX. 21].

Richardson Patrick, a 100% contingent fee firm, also sets its attorney rates annually. Brickman 7/7/17 Dep., pp. 41:21 – 43:3. [EX. 40]. Michael Brickman of Richardson Patrick testified:

> In our firm, we have an attorney who is referred to as the business manager of the firm. And on approximately an annual basis, he looks at our rates, he talks to a number of attorneys and gets information as to what other firms are charging, best he can tell. We also collect data -- and I can't tell you where it comes from -- as to -- you know, there are a number of sources where you can find out rates firms are charging and we use that. He then compiles a list, sends it around to all the partners. . . . And they then review it and tweak it. And that's how we come up with our list pretty much on an annual basis.

Id., pp. 42:14 – 43:3.[53]

Unlike the other firms, Thornton does not have any established mechanism for determining its attorneys' billing rates. *See* M. Thornton 6/19/17 Dep., p. 82:21-22 ("Because we are a contingent fee firm, we never, virtually never charge anybody by the hour.") [EX. 2]; Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master's First Set of Interrogatories, Response No. 49 ("TLF performs the majority of its work on a contingency basis, and very rarely uses annual or hourly billing rates. When it does use such rates, whether for attorneys or non-attorney staff, those rates are based on the experience of the individual, in accordance with what is common to the industry and/or has been accepted by courts in other actions.") [EX. 99]; *see also* Garrett Bradley 6/19/17 Dep., p. 64:12-15 (explaining that the $500 per hour rate reported for his brother, Michael Bradley, was tethered only to "the fact of how many years he was an attorney, what he had recently billed to an hourly client, and the fact that he took it on contingent.") [EX. 43].

[53] Because their firms are very small, both Brian McTigue and Jonathan Axelrod testified that they do not annually determine their billing rates. *See* McTigue 7/7/17 Dep., pp. 84-85 [EX. 11]; Axelrod 7/7/17 Dep., p. 48. [EX. 39].

The unempirical nature of Thornton's billing rates was particularly evident with regard to the "staff attorneys." For each of the staff attorneys listed on Thornton's lodestar report (except Michael Bradley), Thornton simply used the $425 per hour billing rate previously used for staff attorneys in the *BONY Mellon* case. *Id*., pp. 48:20 – 49:4; Hoffman 6/5/17 Dep., p. 59:5-12. [EX. 63].

4. Staff Attorneys

As indicated, the staff attorney fees accounted for nearly 70% of the Customer Class attorneys' total lodestar. *See* Chart in Section 3, *supra*; *see also* Labaton's, Lieff's, and Thornton's Lodestar Reports, Dkt. # 104-15 [EX. 88], 104-16 [EX. 66], and 104-17 [EX. 89]; *see also* Master Chart of Lodestars & Expenses, Dkt. # 104-24. [EX. 100]. As explained, these attorneys were tasked with doing document-by-document review, looking for documents that would help build the plaintiffs' case as well as those that might support State Street's defense. *See* Chiplock 6/16/17 Dep., p. 31:6-11. [EX. 10].

The fact that they were designated as "staff attorneys" or that they were tasked with "document review" should not indicate that the work they did was routine or "paralegal" in nature. Both the work they performed and their professional qualifications and experience establish them as more akin to lower-level and mid-level associates. They were all attorneys with years of relevant legal experience, *e.g.,* Christopher Jordan (11 years' experience), Jordan 6/6/17 Dep., pp. 6-7 [EX. 101]; Jonathan Zaul (6 years' experience), Zaul 6/6/17 Dep., pp. 6-7 [EX. 59]; David Alper (28 years' experience), Alper 6/5/17 Dep., pp. 9-14 [EX. 60]; Comfort Orji (11 years' experience), Orji 6/5/17 Dep., pp. 7-10 [EX. 102]; Maritza Bolano (25 years' experience), Bolano 6/5/17 Dep.,

pp. 7-14 [EX. 103], and graduates of some of the top law schools in the nation, *e.g.,* Stanford (Christopher Jordan; Marissa Oh); Harvard (Leah Nutting); UCLA (Joshua Bloomfield); University of California Hastings College of Law (Ryan Sturtevant). A number of them were former judicial law clerks. *See e.g.*, Zaul 6/6/17 Dep., p. 6:22-23 (law clerk for a California Superior Court judge) [EX. 59]; Bolano 6/5/17 Dep., p. 7:18-21 (law clerk for two different Federal judges in the Southern District of New York and the Eastern District of New York). [EX. 103]. Several of them were former associates at major law firms, *see e.g.*, Jordan 6/6/17 Dep., p. 6:24-25 [EX. 101]; Bolano 6/5/17 Dep., p. 7:22-25 [EX. 103]; Kussin 6/5/17 Dep., p. 8:9-13 [EX. 56]; Oh 6/6/17 Dep., p. 8:3-17 [EX. 61].

Beyond this, the majority of the staff attorneys had specialized knowledge or skills in FX, securities, or financial areas. For example, David Alper, a Labaton staff attorney for eight years prior to working on the *State Street* case, had 20 years' experience in the financial services industry working as an interdealer trader where he handled FX transactions.[54] Alper 6/5/17 Dep., pp. 9:15 – 12:15. [EX. 60]. Maritza Bolano had a background in commercial litigation and contract law. Bolano 6/5/17 Dep., pp. 7:22-25; 12:9-20. [EX. 103]. Bolano also had been a procurement officer for the City of New York where she oversaw the city's major health care plans, prepared RFPs when they came in, and then prepared the contracts. *Id.* She also had prior FX experience working with a large banking institution. *Id.*, p. 14:10-14. Kelly Gralewski had a background in

[54] It might well be said that Alper's experience in FX transactions made him more valuable to the Labaton team than attorneys billed at much higher rates.

international business. Gralewski 6/6/17 Dep., p. 6:21-24. [EX. 104]. Tryphena Greene had her own practice, a significant part of which involved consumer fraud cases and financial litigation involving FX transactions. Greene 6/5/17 Dep., p. 8:14-19. [EX. 105]. Marissa Oh spent several years as an associate at a major San Francisco law firm where she worked on securities litigation. Oh 6/6/17 Dep., p. 8:3-17. [EX. 61]. As noted, a large number of the staff attorneys had also worked on *BONY Mellon* before working on *State Street*. *See* Jonathan Zaul 6/6/17 Dep., p. 11:21 [EX. 59]; Christopher Jordan 6/6/17 Dep., p. 11:10-18 [EX. 101]; Kelly Gralewski 6/6/17 Dep., p. 8:16-19 [EX. 104]; Marissa Oh 6/6/17 Dep., p. 8:4-6 [EX. 61]; Tanya Ashur 6/6/17 Dep., p. 12:15-20. [EX. 106]. This experience made their work on the *State Street* case considerably more valuable.

With the exception of Michael Bradley, whose work is discussed separately, *infra*, the staff attorneys at the Labaton and Lieff firms did much more than "low-level" document review. The staff attorneys not only did first-level document review; they also digested complex information and prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore in depositions once witnesses were identified and also on areas that would require follow-up discovery and document discovery if the mediation were to end without a resolution. Chiplock 6/16/17 Dep. p. 32:12-20 [EX. 10]; Zaul 6/6/17 Dep., pp. 24:4 – 25:5 [EX. 59]; Alper 6/5/17 Dep., p. 17:14-16 [EX. 60]; Oh 6/6/17 Dep., p. 21:20-25 [EX. 61]; *see also* TLF-SST-005245-5270 (Memorandum prepared by Maritza Bolano). [EX. 62]. Most of these staff attorneys were paid in the range of $40 - $60 an hour, plus benefits. *See* Oh 6/6/17 Dep.,

p. 11:16 [EX. 61]; Ashur 6/6/17 Dep., p. 18:19 [EX. 106]; Gralewski 6/6/17 Dep. p. 26:14-17 [EX. 104]; Alper 6/5/17 Dep., p. 30:2 [EX. 60]; Jordan 6/6/17 Dep., p. 15:2 [EX. 101]; Zaul 6/6/17 Dep., p. 39:17:20. [EX. 59].

In all, the staff attorneys of Labaton and Lieff were highly qualified professionals who performed sophisticated and important work that contributed greatly to the successful settlement. In this sense, labeling them "staff attorneys," and differentiating from the perhaps more prestigious title of "associate," is something of a misnomer. It would be more accurate to characterize them as "non-partnership-track" associates who performed lower- and mid- level associate work. This is particularly so since many of them had chosen this track for personal reasons.

a. Michael Bradley

Thornton also sought reimbursement of fees for another outside "staff attorney" document reviewer, Michael Bradley. In contrast to the other staff attorneys who worked on the *State Street* case, Michael Bradley worked entirely on a contingent basis. The terms of the agreement were clear: Michael Bradley would be compensated for his work only if, and when, Plaintiffs successfully settled or prevailed in the case. M. Bradley 6/19/17 Dep., pp. 28:20-23; 70:13-15. [EX. 67]. According to Michael Bradley's deposition testimony, he requested that he receive $500 per hour for this work. *Id*. at 28:23-24, 29:1-5.[55] As part of the Fee Petition, Thornton submitted a lodestar assigning

[55] Garrett Bradley testified that he and his brother had a conversation about his fee when Michael began the document review and recalls his brother telling him that he previously billed $450 in one case. Later, nearer to the time when they were preparing the Fee Petition in 2016, Garrett determined that $500 would be an appropriate hourly rate for his brother. *See* G. Bradley 6/19/17 Dep., p. 56:7-15. [EX. 43]. Emails between Bradley and Thornton attorneys Mike Lesser and Evan Hoffman indicate that it was initially contemplated that Michal Bradley

to Michael Bradley a rate of $500 per hour for 406.4 hours, for a total of $203,200.00 in fees. *See* Thornton's Lodestar Report, Ex. A to Garrett Bradley's Declaration, Docket #104-16. [EX. 66]. Thornton has already paid Michael Bradley the entirety of this amount. M. Bradley 6/19/17 Dep., p. 70: 18-19. [EX. 67].

Michael Bradley is a solo practitioner licensed to practice in Massachusetts. *See* Michael Bradley CV. From March 2013 until June 2015, Bradley performed approximately ten hours per week of document review, on average, in the *State Street* case. *Id.*, pp. 26:16-17, 30:8, 48:12, 51:16-20. Michael Bradley does not currently work as an associate, staff attorney, or contract attorney for Lieff, Labaton, or Thornton, nor had he previously. Michael Bradley's only connection with any of those firms -- outside of the *State Street* case -- is his brother, Garrett Bradley, of Thornton. *Id*. at pp. 26:16 – 27-5, 29:11-14.[56]

During his involvement in the *State Street* case, Michael Bradley owned and operated his own law firm based in Quincy, Massachusetts. Prior to that time, Bradley worked briefly, from 2005 to 2007, as an Assistant District Attorney in the Norfolk County District Attorney's Office. *Id*., pp. 11:9-11; 12:6-7. After leaving the DA's Office, Bradley opened his solo practice. Within a few months, he took a position as executive director of the Underground Economy Task Force -- a newly created task force

be billed at an hourly rate less than $500 (i.e., $400 an hour) but at Bradley's instruction, this was increased to $500. *See* TLF-SST-007843-7844 (7/28/15 emails to and from Garrett Bradley, Michael Lesser and Evan Hoffman). [EX. 107].

[56] In fact, the Customer Class attorneys outside Thornton had never heard of Michael Bradley. *See e.g.*, Zeiss 6/14/17 Dep., pp. 68:15 – 70:5, 71:5-10 [EX. 79]; Goldsmith 7/17/17 Dep., pp. 87:17 – 88:17 [EX. 58]; Sucharow 6/14/17 Dep., pp. 62:24 – 63:7 [EX. 16]; Rogers 6/16/17 Dep., p. 97:7-22. [EX. 54].

charged with scrutinizing Massachusetts employment practices to identify routine violators of state and federal employment and wage laws. *Id*. at pp. 22:8-20; 23:6-8. In this position, Bradley oversaw interagency efforts but did not personally conduct any investigations. *Id*. at pp. 23: 6-8, 11-24. He served in this role from 2008 through 2011. *Id.*, pp. 11:16 – 12:8.[57]

After leaving the Underground Economy Task Force, Michael Bradley returned to private practice as a solo practitioner. *Id*., p. 12:7-9. While Bradley has represented clients in personal injury, probate, and employment/labor matters, the vast majority of his practice is public and private criminal defense. *Id*., p. 12:16-19. On the private side, Bradley represents clients in OUI cases, domestic violence cases, and other matters in district court. *Id.* at 15:8-9; *see also* SSSM_MB_000257-000258. [EX. 108]. Bradley is also a member of the Norfolk County Bar Advocate Program. M. Bradley 6/19/17 Dep., pp. 12:18-20, 22-24, 13:1-2. [EX. 67]. As a bar advocate, Bradley represents clients in a range of cases from minor driving infractions to serious felonies such as assault and battery with a dangerous weapon. *Id*., p. 21:6-11.

Michael Bradley did not have any background relevant to securities cases or the FX market. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 3. [EX. 109]. Nor did he possess any technical

[57] Garrett Bradley testified that Michael Bradley's work in this position provided experience that was relevant to the document review work in this case. In fact, this experience appears to have little, if any, relevance to the work required in the *State Street* case. This finding is not intended to diminish Michael Bradley's work experience, but merely to state that it was not relevant to the work required in the *State Street* case -- and certainly not as relevant as that of the Lieff and Labaton staff attorneys.

expertise with the Catalyst document review system to facilitate review. M. Bradley 6/19/17 Dep., p. 25:6-9. [EX. 67].

For over two years, Michael Bradley's contribution to the *State Street* case consisted exclusively of reviewing and coding documents in the Catalyst system. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6 [EX. 109]; M. Bradley 6/19/17 Dep., pp. 47:8-10; 50:6-8. [EX. 67]. While there is no clear evidence of this, Bradley testified that he recorded comments on a "handful" of documents. *See id.,* pp. 39:7-13; 47:20-24; 50:19-24, 51:1-5. This is consistent with his recollection that, in over two years, he found only a "handful" of highly relevant documents. *Id*., p. 48:21-24. He did not produce any substantive memoranda or other work product. *Id*., 46: 21-24; Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6. [EX. 109].

As agreed to upfront, Michael Bradley operated off-site, independently of the other staff attorneys. M. Bradley 6/19/17 Dep., p. 49: 6-9. [EX. 67]. He worked from his own office and performed the *State Street* document review in his free time; he was not supervised by Labaton or Lieff lawyers. *Id.*, 49:7-16; 52:3-18; 54:15 – 55:3. After receiving a basic onboarding from Thornton, Bradley's contact with the firm was limited to submitting weekly or bi-weekly emails tallying his hours or raising technical concerns about the software. *Id*., p. 10:24; Hoffman 6/5/17 Dep., pp.107:9 – 108:7. [EX. 63]. His review, moreover, was beyond the purview of Todd Kussin and Kirti Dugar, the on-site staff attorney supervisors at Labaton and Lieff. Kussin 6/5/17 Dep., pp. 63:20-23; 79:22-25, 80:1-2 [EX. 56]; Dugar 6/16/17 Dep., pp. 103:8-16; 104:9-14. [EX. 55].

5. Service Awards

In their fee petition, Plaintiffs' counsel also requested payment of service awards for the named plaintiff class representatives: $25,000 for ATRS and $10,000 for each of the six named ERISA Plaintiffs -- Arnold Henriquez, Michael Cohn, William Taylor, Richard Sutherland, James Pehoushek-Stangeland, and the Andover Companies Employee Savings and Profit Sharing Plan. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, MAD No. 11-cv-10230, Dkt. # 102. [EX. 110]. These institutional and individual class representatives were very involved in the litigation.

George Hopkins, Executive Director of ATRS, spent extensive time and effort in acting on behalf of ATRS in this case. Prior to assuming the ATRS Executive Director position, Hopkins served as an Arkansas state senator for 14 years, during which time he served as the co-chair of the Senate Retirement Committee. Hopkins 6/14/17 Dep., pp. 10:8-11; 11:5-18. [EX. 4]. It was Hopkins who initially spotted the potential for bringing the case and spoke with Labaton about it. *Id.*, pp. 37:25 – 40:8. He was present at all of the hearings and at the lobby conference, *id*., pp. 62:22 – 63:7, and he attended a number of the mediation sessions, *id.,* p. 65:18-20. He personally spoke directly with the State Street executives who attended the mediation sessions, *id.*, pp. 66:22 – 68:3, and directed and facilitated ATRS's production of documents. *Id.*, p. 104:7-15. Hopkins estimates that with all the lengthy evening calls with counsel, meetings with State Street,

meetings with experts and attorneys, the mediation sessions, and "think time," he spent several "hundreds of hours" on this case. *Id.*, pp. 102:3 – 102:5.[58]

Arnold Henriquez, one of the named ERISA plaintiffs, testified that he spent 25 to 30 hours on this case. Henriquez 7/7/17 Dep. p. 17:11. [EX. 32]. Although he did not attend any hearings or any mediation sessions, he testified that he reviewed pleadings, produced documents pertaining to his 401(k) and the statements and letters he received from the companies he was investing in, and was in continuous communication with his attorney about the case via phone calls, emails and texts. *Id*. at pp. 10:25 – 11:7; 14:1 – 15:14. Henriquez testified that he was never promised a service award, but that money was not what motivated him in being involved in the case; it was about righting what he believed was a wrong committed by the managers of his pension money. *Id.*, pp. 19:5 – 20:15.

Michael Cohn, another ERISA plaintiff, is disabled, but he estimates that he spent more than 50 hours searching through the "dozens and dozens" of boxes of records he stored in his basement for documents pertaining to his 401(k) needed by his lawyer. Cohn 7/7/17 Dep., pp. 23:8-17, 25:2-8. [EX. 33]. He explained:

> . . . I had dozens and dozens of boxes of records in my basement that required me go through all of those. And it's not like I sat down in one sitting. But it certainly was numerous hours. You know, more so for me being disabled than it probably would be for someone who doesn't have my

[58] The service award ultimately granted to Mr. Hopkins did not go to him personally; the entire award went to the Arkansas Teacher Retirement System fund. Mr. Hopkins merits special mention and commendation for his myriad contributions to the case. However, other aspects of his work as the Executive Director of ATRS -- the class representative in *State Street* -- discovered during this investigation present some complicated and potentially troublesome context for his role as the leader of the class representative. This is discussed *infra*, in the context of what Labaton told ATRS and Hopkins about an arrangement with Texas attorney Damon Chargois, and what Hopkins instructed Labaton attorneys not to share with him.

> physical issues. But it was hours and hours of going through those documents.

Id., p. 23:8-17.

Cohn also spent a significant amount of time reading the "hundreds of pages" of documents his lawyer sent him to review. *Id.*, p. 23:18 – 24:1. Like Mr. Henriquez, Cohn testified that a monetary service award was not a motivating factor in his decision to be a class representative, but, in retrospect, he did not think $10,000 was adequate for the amount of work he had to do on the case. *Id.*, pp. 24:23 – 25:5 ("[I]f money were the motivating factor, the answer would be no. If looking back on this case and if I were doing it for the money with the expectation of $10,000, in my personal case, no, I wouldn't do it. It's not worth it to me. To somebody who has a different background and different financial resources, the answer is probably yes.")

William Taylor is also a disability retiree, and though he did not attend any mediation sessions or hearings, like Cohn, Taylor estimates that he spent some 20 to 50 hours on the case gathering documents, reading pleadings, and discussing the case with his lawyers. Taylor 7/7/17 Dep., pp. 17:16 – 18:5; 12:18 – 13:7. [EX. 34]. He testified that his lawyers frequently sent him letters and emails and called him to keep him apprised of the proceedings. *Id.*, pp. 16:20 – 17:7. ("A lot of phone calls. I can tell you that." *Id.*, pp. 17:25 – 18:1). In his opinion, the $10,000 service award he received was fair compensation for the work he put into the case. *Id.*, p. 19:13-16.

James Pehoushek-Stangeland estimates that he spent more than 50 hours working with his lawyers on this case. Stangeland 7/6/17 Dep., p. 19:16-18. [EX. 26]. He also

provided his lawyers with documents, and during the life of the litigation he read and approved pleadings and was kept up-to-date with the proceedings by his lawyers primarily via email and telephone. *Id.*, pp. 12:12-14; 13:14 – 14:2; 17:8-17; 24:4 – 25:10.

Alan Kober, former vice-president of The Andover Companies, the only institutional ERISA plaintiff in this action, was unable to estimate the total amount of time he and his assistants spent on this case. ("I wished I had kept a logbook or a journal. Not only [of] my hours. Janet [Wallace]'s hours. Joline Pomerleau, who gathered all the documents and stuff. You know, there's a lot of hours involved and a lot of different pay rates, too." Kober 7/6/17 Dep., pp. 34:22 – 35:4). [EX. 25]. He testified that for this case, he compiled and supplied to the lawyers documents they requested and was kept abreast of what was going on in the case through various phone conversations and emails with the lawyers. *Id.*, p. 10:4-9.[59]

Taken individually and together, the class representatives provided substantial value to this case and the result ultimately achieved.

I. COURT APPROVAL OF THE SETTLEMENT AND AWARD OF FEES

1. Provisional Class Certification and Preliminary Approval of the Settlement

On August 8, 2016, the Court conducted a Preliminary Class Settlement Hearing after which it granted preliminary approval of the class settlement,[60] provisionally

[59] As with George Hopkins, the service award to Kober/Wallace did not go to them personally; it went into The Andover Companies' pension fund.

[60] As explained by Goldsmith during the August 8 hearing, "the reason why [class certification is] preliminary and not final is because class members do have a constitutional right to object to class certification if they see fit to do so." 8/8/16 Tr., Dkt. # 93, p. 6:11-15. [EX. 111].

certified the Settlement Class (as defined in the Notice of Pendency of Class Actions), approved the long-form Notice and Summary Notice, and appointed Labaton Sucharow LLP as Lead Counsel for the Settlement Class. *See* MAD No. 11-cv-10230, Dkt. #97. [EX. 112].

As indicated, the Notice defined the Settlement Class as

> All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 21, 1998 through December 31, 2009, inclusive.

See Notice, MAD No. 11-cv-10230, Dkt. # 95-3. [EX. 81].

David Goldsmith of Labaton appeared on behalf of the Settlement Class at the Preliminary Class Settlement hearing. 8/8/16 Tr., Dkt. # 93, pp. 4-6. [EX. 111]. Michael Thornton and Garrett Bradley of Thornton, Dan Chiplock of Lieff Cabraser, as well as attorneys from the three ERISA firms, also attended the hearing. *Id.*, pp. 2-4; *see also* Garrett Bradley time records for 8/8/16 (noting "attend preliminary approval hearing in front of Judge Wolf; meetings with co-counsel before and after to discuss strategy, crafting language responsive to Judge Wolf's suggestions") (corroborated by David Goldsmith who in his time records names Garrett Bradley as part of the discussions on that day).

On behalf of all counsel, Goldsmith addressed plaintiffs' request for preliminary class certification for settlement purposes, which involved meeting a two-prong test to show that class representatives and class counsel adequately represented the class

members. *Id.,* pp. 7:24 – 8:7. In response to the Court's inquiry whether Labaton could adequately represent both the ERISA and Customer classes, Goldsmith responded that Labaton was "adequate"; he argued that the Court had "no reason to depart" from its initial adequacy findings in the January 11, 2012 Memorandum and Order appointing Labaton as interim class counsel. *Id*., p. 8:18-22. The Court acknowledged, and Goldsmith agreed, that a class member may opt out of the settlement if he or she "feels that its [sic] interests justify a different path." *Id*., p. 11:6-13.

The Court further asked Goldsmith to explain why the $300 million private settlement was reasonable, and specifically addressed the role of the DOJ, SEC, and DOL in the settlement process. *Id.*, p. 13:2-7. The Court showed a clear interest in ensuring that the global settlement was fair to all participants: "if what I'm being asked to approve is going to affect something you've negotiated at arm's length with the [DOJ] and something you've negotiated with the SEC and something you've negotiated with the [DOL], I think that goes into both the reasonableness of the settlement and the fairness of the settlement." *Id*., p. 18:13-22. Goldsmith affirmed that the reasonableness of the settlement was evidenced, in part, by the fact that DOL signed off on it. *Id*., p. 18:2-6.

2. <u>Final Approval</u>

A hearing on the Motion for Final Approval of Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and for Payment of Service Awards was held on November 2, 2016. David Goldsmith of Labaton, accompanied by Nicole Zeiss, Labaton's Settlement Counsel, again represented the "plaintiffs and settlement class." 11/2/16 Hrg. Tr., Dkt. # 114, pp. 3:7-9, 10-11. [EX. 78]. Dan Chiplock of Lieff Cabraser

and Carl Kravitz of Zuckerman Spaeder also attended the hearing. *See id*., pp. 2-3. Garrett Bradley and Mike Thornton of Thornton also were in attendance. *See* G. Bradley 9/14/17 Dep., pp. 152:19 – 153:11.[61] [EX. 85]. During the hearing, the Court approved the settlement, explaining that its approval was based, in part, on its finding that counsel on both sides "vigorously represented their clients' interest." *Id.*, p. 21:1-5. The Court also found the proposed Plan of Allocation, dividing the settlement among the ERISA and Customer Class plaintiffs, to be fair. *See id.,* p. 22:16-21. The Court further noted the importance of the parties having reached a global settlement, including settlement with the federal regulators, in particular the DOL and SEC. *Id.* at pp. 17:8-23, 38:12-20.

Leading up to the hearing, counsel strategized how best to present the fee award to the Court, nothing that, "Courts have expressed concern about the adversary system breaking down in the fee context and Judge Wolf specifically noted that [issue] at the last hearing." TLF-SST-032617-2620 [EX. 203]. In considering the reasonableness of the attorneys' fees requested, the Court inquired whether the plaintiffs' fee agreement was disclosed to the class members "at the outset" of the case, to which Goldsmith responded only that the fee agreement was "consistent with the fee [plaintiffs were] seeking here." *Id.* p. 26:12-13. In a colloquy with the Court, Goldsmith argued, "[W]e produced a $300 million settlement…. So I think … a fee of some substance would be in order, frankly." *Id.*, p. 28:16-20. The Court acknowledged that the $74 million in fees requested by

[61] There is nothing in the record evidence indicating that any other attorneys from Labaton, Lieff, Thornton, or any of the ERISA firms were in attendance at the final approval hearing.

counsel "is of some substance," *id*, p. 28:21-25, but noted that none of the class representatives had objected to that fee request. *Id.*, p. 34-8-9.

At the conclusion of the hearing, Judge Wolf stated that he was "relying heavily on the submissions and what's been said today," and approved the $300 million gross settlement, as well as approving a roughly 25% award of attorneys' fees in the amount of $74,541,250.00, plus expenses in the amount of $1,257,699.94.[62] *Id.*, p. 35:7-8. In making this fee award, the Court considered the lodestar as a check on the percentage-of-common-fund method. *Id.*, p. 35:12-13. The lodestar here was approximately $41.3 million, and the award was 1.8 times the lodestar, which the Court found reasonable. *Id.* at pp. 31:7-8, 36:1-2. The Court also approved service awards totaling $85,000 -- $25,000 for ATRS and $10,000 for each of the six ERISA plaintiffs. *Id.* at pp. 33:4-6, 35:9-12. Judgment was entered accordingly. *See* Order and Final Judgment, Dkt. # 110. [EX. 113]. The Judgment became final on December 2, 2016.

J. DISTRIBUTION OF SETTLEMENT AND ATTORNEYS' FEES

As provided in the Plan of Allocation approved by the Court at the Final Settlement Hearing, $60 million of the $300 million gross settlement was allocated to the ERISA class plaintiffs, providing ERISA plan participants with a recovery ratio of roughly $2 to every $1 of loss to the class. *See* Sucharow Decl., Dkt. # 104, ¶ 134. [EX. 3]. The Plan of Allocation further provided that a maximum of $10.9 million of the

[62] The Court calculated that the fee award amounted to 24.48% of the Settlement, and when including the amount for expenses the percentage awarded to the attorneys amounted to 25.27% of the Settlement. *See* 11/2/16 Hearing Tr., Dkt. # 114, pp. 35:15-16. [EX. 78].

approximately $75 million in total attorneys' fees could be paid out of the ERISA Class' recovery for attorneys' fees.[63] This allocation was negotiated and agreed to by Customer Class Counsel and ERISA Counsel after the parties reached the agreement-in-principle on the $300 million settlement, *See* Sucharow Decl., Dkt. # 104, ¶ 139 [EX. 3]; *see also* Kravitz 7/6/17 Dep., pp. 54:25 – 55:1; 59:11-12 [EX. 21]; Sarko 7/6/17 Dep., p. 48:19 [EX. 28]; McTigue 7/7/17 Dep., p. 43:10-11. [EX. 11]. In accordance with the Plan of Allocation and the ERISA fee allocation previously agreed upon among the Customer Class Counsel and ERISA Counsel, ERISA Counsel collectively received approximately 10% of the total fee award -- a sum of $7.5 million -- with the remaining $3.4 million under the agreed-upon $10.9 million ERISA fee cap being paid to Customer Class Counsel instead of to ERISA Counsel. *See* Sucharow Decl., ¶¶ 134-139. [EX. 3].

1. Payment of Fees and Expenses

On September 2, 2016, State Street paid the gross settlement sum of $300 million into a Class Settlement Fund Escrow Account -- an escrow account maintained by Labaton, as Lead Settlement Counsel, with Citibank -- where the funds remained pending entry of Judgment. *See* Stipulation and Agreement of Settlement, Dkt. # 89 [EX. 114]; Zeiss 9/14/17 Dep., pp. 122:15, 124:9-11, 130:21-23 [EX. 115]; *see also* LBS041692 (Citibank Escrow Account Statement). [EX. 116]. Under the terms of the Stipulation, Labaton agreed that, once Judgment became final, it would "in good faith promptly

[63] The $10.9 million cap on attorneys' fees from the ERISA class recovery was negotiated by DOL. Sarko 9/8/17 Dep., p. 66:1-8 [EX. 37]; Kravitz 9/11/17 Dep., p. 66:8-23 [EX. 117]; *see also* TLF-SST-052694 – 52696 (8/21/15 email correspondence between Customer Class Counsel and ERISA Counsel related to negotiations with DOL regarding fees) [EX. 118]; TLF-SST-052697 – 52698 (8/26/15 email from Lynn Sarko to Customer Class Counsel and ERISA Counsel regarding negotiated deal with DOL) [EX. 119].

distribute any award of attorneys' fees and/or payments of litigation expenses among *plaintiffs' counsel*." Dkt. # 89 ¶ 21 (emphasis added). [EX. 114].

After the Court issued its Order awarding fees, the total sum of the fee award was transferred by Labaton into a Lead Counsel Escrow Fund, also held by Citibank. Zeiss 9/14/17 Dep., pp. 124:16-23; 125: 3-4. [EX. 115]. On December 8, 2016, after Judgment became final, Labaton instructed the bank to disburse the fees, expenses, and service awards approved by the Court. *Id*., p. 125:13-21. The fees and expenses were disbursed by the bank directly to Lieff, Thornton, McTigue, Keller Rohrback, and Zuckerman Spaeder. Zeiss 9/14/17 Dep., p. 125:13-21. [EX. 115]. Labaton also instructed the bank to transfer approximately $34 million to its firm's IOLA account, out of which Labaton that same day paid the service awards, obligations to "of counsel" attorneys,[64] and approximately $4.1 million -- 5.5% of the total Fee Award -- to Damon Chargois of Chargois & Herron, LLP ("Chargois"), who practices in Houston, Texas. *Id.*, pp. 140:21 – 141; 143:4-8.[65]

[64] "Of counsel" here refers to Goldman Scarlato & Penny. Goldman Scarlato & Penny performed work on the case and is reflected in the lodestar report Labaton submitted to the Court. Zeiss 9/14/17 Dep., pp., 143:17-20; 144:6-7. [EX. 115].

[65] Chargois initially instructed Labaton to direct the $4.1 million payment to an account held by "K&D Consulting & Investments." *See* LBS030625 (12/5/16 Chargois email to Belfi and Keller). [EX. 120]. Belfi and Keller expressed concerns that while the "fees will be received by lawyers," transferring money to K&D Consulting would make it "look[] like [Labaton] [was] sending part of [its] fee to an account that is not clearly a law firm." *Id*.; LBS028053 (Belfi and Keller12/5/16 emails). [EX. 121].

2. Previously Undisclosed Fees Paid to Chargois & Herron LLP

The $4.1 million payment to Chargois was discovered during the course of the Special Master's investigation.[66] (Chargois and his relationship with Customer Class Counsel is discussed in detail in Section K, *infra.*) Chargois never filed an appearance in the *State Street* case, nor did he or his firm, Chargois & Herron, submit any declaration or lodestar report as part of the *State Street* Fee Petition. *See* Dkt. # 104 [EX. 3], 104-15 [EX. 88], 104-16 [EX. 66], 104-17 [EX. 89], 104-19. [EX. 91]. All parties concede Chargois performed no work on the case.

The names Chargois and/or Chargois & Herron appear nowhere in the Omnibus Fee Petition, Labaton's or any other firm's small fee petition, nor in any lodestar or any exhibits. *See id.*[67] All parties concede that the Court was never informed about Chargois or the payment of $4.1 million to his firm. *See* Belfi 9/5/17 Dep., pp. 87:24-88:11; 89:1-17; 90:7-12; 122:23-123:5 [EX. 122]; Goldsmith 9/20/17 Dep., p. 112:10-14 [EX. 42]; G. Bradley 9/14/17 Dep., pp. 152:19-153:16. [EX. 85].

[66] This payment of fees to Chargois first came to light in a batch of emails on August 8, 2017, through emails produced by Thornton in June 2017, and gave rise to several additional months of depositions and written discovery. Neither Labaton nor Lieff produced any emails related to Chargois in response to the Special Master's initial requests for production of documents. After the Chargois relationship was disclosed by the Thornton-produced emails in response to the Special Master's initial document requests, both Labaton and Lieff produced a significant number of emails and documents pertaining to the Chargois relationship and payment in response to subsequent document requests by the Special Master specifically related to Chargois.

[67] It is significant to note that while the $4.1 million payment to Chargois for doing no work on the case appears nowhere in any fee petition or lodestar, Labaton saw fit to include in its lodestar a significantly smaller payment of $331,000 to another non-Labaton "of counsel" attorney, Paul Scarlato, who, in contrast to Chargois, *did* perform work on the *State Street* case. *See* Zeiss 9/14/17 Dep., pp. 137:4-11, 143:9 – 144:7 [EX. 115]; *see also* Labaton Citibank Bank statements, LBS041983 [EX. 254]; LBS041839 [EX. 255]. Scarlato was paid out of Labaton's fee award. *Id.* The only lawyer to receive class funds who did not appear in Labaton's Declaration or any of the small fee declarations is Damon Chargois.

The Special Master finds that the failure to include the payment to Chargois in the Fee Petition, or anywhere else in the settlement documents, was a material omission.

The fees to Chargois, Customer Class Counsel and ERISA Counsel, plus interest, were paid by Lead Counsel Labaton on December 8, 2016 as follows:

FIRM	FEES	INTEREST ON FEES	EXPENSES	TOTAL
Labaton	$29,604,057.44	$20,079.07	$258,666.85	$29,882,803.36
Thornton	$18,266,333.31	$12,389.21	$295,315.50	$18,575,038.02
Lieff	$15,116,965.50	$10,253.14	$271,944.53	$15,399,163.17
Keller Rohrback	$2,484,708.33	$1,685.26	$342,766.63	$2,829,160.22
McTigue	$2,484,708.34	$1,685.26	$50,176.39	$2,536,569.99
Zuckerman	$2,484,708.34	$1,685.26	$38,670.29	$2,525,063.88
Chargois	$4,099,768.75	$2,780.68	-0-	$4,102,549.43
TOTAL	**$74,541,250.00**	**$50,557.88**	**$1,257,540.19**	**$75,849,348.07**[68]

The $4.1 million payment to Chargois was the fourth largest payment made from the total fee award, and significantly more money than was paid to any ERISA firm. *See* Labaton's 8/11/17 Response to Special Master's Supp. Interrog. No. 2 [EX. 123]; *see also* Master Chart of Lodestars, Litigation Expenses and Plaintiffs' Service awards, Dkt. # 104-24. [EX. 100]. In coordinating the payment to Chargois, Zeiss instructed Labaton's accounting department to remit payment from the firm's IOLA if "it will be a rush" to pay Chargois. LBS032881 – 32883 (2/7/16 Zeiss Email to Ng). [EX. 124]. Unlike payments from settlement escrow funds -- governed by escrow agreements -- payments made from Labaton's IOLA account did not require two additional signatures for disbursement. *See* Zeiss 9/14/17 Dep., p. 120:9-23. [EX. 115]. Chargois testified

[68] *See* Labaton's 8/11/17 Response to Special Master's Supp. Interrog. No. 2. [EX. 123].

that it did not matter to him when, or from which account, the payment was made. Chargois 10/2/17 Dep., pp. 304:9-10; 305:3-10. [EX. 125].

K. DAMON CHARGOIS' INVOLVEMENT WITH LABATON AND ATRS

1. Labaton's Introduction to ATRS

The $4.1 million payment to Chargois merits separate and extensive factual discussion and findings.

Labaton represented ATRS throughout the *State Street* case, serving as Lead Counsel throughout the litigation. ATRS was headed by Executive Director George Hopkins. Hopkins had succeeded Paul Doane, the previous Executive Director, on December 29, 2008. Hopkins 9/5/17 Dep. p. 14:10-22.[69] [EX. 12].

Labaton's relationship with ATRS began in or about 2007. Around that time, Labaton -- which frequently acts as monitoring counsel[70] for its clients -- was looking to expand its securities monitoring practice and form new relationships with potential pension fund clients in the Southwest. Keller 10/13/17 Dep., p. 21:1-22 [EX. 80]; Sucharow 9/1/17 Dep. pp. 15:3-16:19 [EX. 38]; Chargois 10/2/17 Dep., p. 32:3-22. [EX.

[69] After Paul Doane resigned, for a brief period of time ("three or four months") ATRS was headed by an interim director, Gail Bolden, Doane's deputy director. Hopkins 9/5/17 Dep., p. 14:14-22. [EX. 12]. Hopkins succeeded Gail Bolden. *Id.*, p. 14:18-20.

[70] *See infra*. As monitoring counsel, Labaton uses sophisticated in-house investigators and analysts to oversee a client's portfolio of securities investments for signs of possible securities law violations. If Labaton believes a client's portfolio may have been involved in a securities violation that could lead to a viable case, Labaton may ask the client whether it would be interested in serving as lead plaintiff in a potential class action litigation based on those violations. *See* http://www.labaton.com/en/practiceareas/Institutional-Investor-Protection-Services.cfm (last visited April 2018). Because Labaton's representation is contingent on the occurrence and detection of securities violations, it "takes a while for people … to understand [Labaton's work] to the point where it can be useful to them." Keller 10/13/17 Dep., p. 24: 20-23. [EX. 80].

125]. In an effort to "mak[e] inroads" in the Arkansas community, Labaton sought the assistance of Damon Chargois, a lawyer admitted to practice in Arkansas and Texas (and who at the time maintained law firms under the name Chargois & Herron in each state.)[71] Labaton had previously retained Chargois to serve as its local counsel in *HCC Holdings,*[72] a securities fraud class action case filed in federal court in Houston.

Chargois recalls meeting Eric Belfi of Labaton in late 2006 or early 2007 when Labaton was looking for local counsel for the *HCC* case:

> A lawyer in our [Houston] office, Kamran Mashayekh, put us together -- not sure -- basically he had spoken to them before me.
>
> Then Eric Belfi I believe called me directly and asked if I'd be interested in working on a case called *HCC Holdings* that was on file in Houston.
>
> I asked [him to] tell me a bit about it and what you would expect of me, and he said essentially filing documents, and you may have to sign off on a *pro hac vice* for any lawyers that are not authorized to appear in the case.

Id., p. 17:7-18.

Chargois understood he was acting as local counsel in the *HCC* matter, and did, in fact, appear at several hearings, sponsored several attorneys' *pro hac vice* applications, and attended a mediation. *Id*., p. 18:8-17.[73] Chargois also met Chris Keller of Labaton while working on the *HCC* matter. *Id*., p. 19:8-14.

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[71] Chargois & Herron's Arkansas office was closed in late 2009 or early 2010. Chargois 10/2/17 Dep., p. 31:15-17. [EX. 125].

[72] *In re HCC Insurance Holdings, Inc. Securities Litig.*, SDTX No. 07-00801.

[73] In contrast to this case, in *HCC Holdings,* Chargois filed an Affidavit in support of the Application for an Award of Attorneys' Fees and Reimbursement of Expenses, which included a lodestar report of his firm, Chargois & Herron LLP. *See In re HCC Insurance Holdings, Inc.*, SDTX No. 07-00801, Dkt. # 71-3.

Chargois recalled Belfi asking him in 2007 to introduce him and his partner Chris Keller to institutional investors in Arkansas, as Labaton was interested in creating client relationships with institutional investors in that region. *Id*., p. 20:4-17. Chargois readily admitted that, at that time, he had no knowledge of any "institutional investors." *Id.* at p. 20:20.[74] Chargois' then partner, Tim Herron, did not have any relationships with institutional investors either. *Id.*, p. 27:16-19. However, Herron was friends with an Arkansas state senator, Steve Farris, who at the time served on the Arkansas legislature's Joint Committee on Public Retirement and Social Security which had an oversight role with respect to ATRS. Hopkins 9/5/17 Dep., p. 35:6 – 36:8. [EX. 12]. Farris suggested to Herron that they might want to try to contact Paul Doane who had then just recently taken over as Executive Director of the Arkansas Teacher Retirement System. Chargois 10/2/17 Dep., p. 33:16-21. [EX. 125]. Herron told Chargois, and Chargois called Doane. *Id.*, p. 33:24-34:1.

Chargois explained to Doane who he was and why he was calling, saying that he was working with a New York law firm that specialized in institutional investors and asked if Doane would meet with him, Belfi, and Keller, and Doane agreed. *Id.*, p. 34:1-

[74] Belfi's testimony that he had known Chargois longer, having gotten to know him working on an American Express case in 2004, and that it was Chargois who raised the idea of him introducing Labaton to institutional investors, is not credible given the credible testimony of Chargois that he did not even know what an institutional investor was when Belfi broached the subject. Belfi testified:

> He [Chargois] had a firm . . . . They do some litigation, but mostly what they do is find clients and refer it [sic] to other law firms such as ourselves.
>
> So he approached me and said he had some opportunities to introduce us to pension plans in the Texas, Arkansas, and Oklahoma region because him and his partner had contacts down there.
>
> So I asked him to proceed.

Belfi 9/5/17 Dep., p. 13:5-13. [EX. 122].

35:3. Within a week or so, a meeting took place in Little Rock. Chargois 10/2/17 Dep., p. 35:8-16. [EX. 125]. At that initial meeting, "Eric Belfi presented all the services that Labaton has available and what their -- what they could do and presented as a courtesy that they could do this monitoring of the portfolio." Chargois 10/2/17 Dep., p. 36:13-16. [EX. 125]. Doane later came to New York for another meeting with Belfi and Keller at Labaton's offices; Chargois was not present. Belfi 9/5/17 Dep., p. 38:2-6. [EX. 122]. At this meeting, Labaton conducted a presentation for Doane as to what services the firm could provide. According to Belfi, "[O]nce we did the presentation, we were kind of put on their radar. So, at some point later when they did the RFQ [Request for Qualifications of prospective monitoring counsel], they sent an RFQ for us to respond to." Belfi 9/5/17 Dep., p. 37:17-22. [EX. 122].

2. The Chargois "Arrangement"

As consideration for Chargois' efforts, Belfi and Keller agreed to pay Chargois' firm, Chargois & Herron, a maximum 20% of any attorneys' fees received by Labaton in any litigation involving an institutional investor for whom Chargois had facilitated the introduction, including ATRS (hereinafter "the Chargois Arrangement").[75] Chargois 10/2/17 Dep., pp. 50:18-25; 53:10-17 [EX. 125]; Keller 10/25/17 Dep., pp. 315:21-24,

[75] On the ERISA side, Keller Rohrback used Hutchings Barsamian, a Massachusetts firm familiar with the practices and procedures of the District Court, as local counsel in filing the *Andover* Complaint. Unlike Chargois, Hutchings Barsamian was counsel of record in the case. Keller Rohrback, apparently with the consent of all class counsel, compensated Hutchings Barsamian out of Keller Rohrback's portion of the joint fee award ($2,484,708.33, with interest). At Labaton's request, Keller Rohrback did not submit a separate lodestar petition for its local counsel, who incurred a lodestar of less than 0.017. *See* Keller Rohrback's Response to Special Master's 2d Supplemental Interrogatories, Nos. 1-4. [EX. 27].

316:11-14.[76] [EX. 83]. Both Chargois and Belfi understood that it was the mere introduction by Chargois to potential institutional investors or potential antitrust clients that was the basis of the agreement to pay Chargois 20% of any legal fee Labaton earned on any cases in which Labaton was lead counsel or co-lead counsel and the client was lead or co-lead plaintiff.[77] Chargois 10/2/17 Dep., p. 50:18-24 [EX. 125]; Belfi 9/5/17 Dep., pp. 19:6-21:21. [EX. 122]. Chargois explained:

> Q. Okay. As a result of your having made this introduction of Labaton to Arkansas Teachers, did you come to an agreement or contract or something formal or informal with respect to your ongoing relationship with Labaton?
> A. Yes, sir.
> Q. Could you tell us about that?
> A. Sure. If the -- the agreement as they presented it to me was if ultimately they are selected to represent any institutional investor that I facilitated an introduction to, if they are successful in obtaining a recovery, they would split their attorneys' fees with my firm 80 percent/20 percent.

[76] Labaton had previously entered into an agreement to pay Thornton approximately 20% of its total fee in cases where Thornton (and, in particular, Thornton partner Garrett Bradley) interacted with local pension fund clients. As Christopher Keller of Labaton explained:

> [W]e had a very, sort of, good, productive relationship with the Thornton Law Firm and -- where, you know, we would -- we would jointly get retained by, you know, funds in the Northeast area, which was their sort of area of -- they had lots of relationships within the area. And we, you know, had an understanding they would get, sort of, let's say, up to 20 percent. And the understanding was that, it was going to be somewhat of a, I call it, a turnkey, but I'm using a -- what I mean is we didn't have to do any heavy lifting up in the -- up in the area, because there's a lot -- I mean, we're a national firm. Think about this, so we have over 200 pension fund clients, we may have one within driving distance of our office, okay. So we maintain a national practice and -- but without offices all over the nation. So it's very important, any time that we can leverage others who -- who are ready and willing and able to do the heavy lifting locally, we're happy to sort of let that happen, and, of course, pension funds feel much more comfortable with people they know or people who are close by or were introduced through someone they know, so we made that a -- a -- this is how Labaton was going to build more business.

Keller 10/13/17 Dep., pp. 43:3-44:19. [EX. 80].

[77] While Chargois understood that he would receive 20%, as Keller testified, Labaton believed that it was only obligated to pay Chargois a percentage of fees proportional to ATRS's share of the contributory losses incurred by all lead plaintiffs. By way of example, if ATRS was named co-lead counsel with another plaintiff in a successful litigation, Chargois' payment would not be 20% of Labaton's fee, but would reflect ATRS's pro rata portion of the total loss amount, offsetting the full 20% figure.

Q. So you would receive 20 percent of the attorneys' fees?
A. Yes, sir.
Q. And they would receive 80 percent?
A. Yes, sir.
THE SPECIAL MASTER: Was that in all cases in which they would be counsel to a party that you helped to facilitate a relationship with?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Not limited to Arkansas?
THE WITNESS: Correct.

Chargois 10/2/17 Dep., pp. 50:11 – 51:12. [EX. 125].

This agreement was negotiated at the very outset of the Labaton request that Chargois make introductions for Labaton, not after any introduction such as that to Paul Doane was made. *Id.*, p. 52:1-7.

Under this arrangement, Chargois was not expected to file an appearance, perform any work, assume any role in any of the resulting litigation, or even interface with the client. Chargois 10/2/17 Dep., pp. 56:19-24; 57:1-6 [EX. 125]; Keller 10/25/17 Dep., p. 323:2-4. [EX. 83].

While Chargois and Keller attempted on numerous occasions over the years to reduce this agreement to writing, and exchanged several drafts to which they both agreed in large measure, no formal agreement was ever put together; it was wholly "an email relationship." Chargois 10/2/17 Dep., p. 59:8-10 ("Only e-mails. There's no four-corner document that -- in ceremony and signed or anything. It's just an e-mail relationship.") [EX. 125]. Chargois was very clear that his understanding was that this was not a "referral fee" arrangement, nor was he "local counsel"; it was just an "agreement":

THE SPECIAL MASTER: What is your understanding of the relationship? And if it evolved from something to something else --
THE WITNESS [Mr. Chargois]: Right.

THE SPECIAL MASTER: -- we'd be very interested in that.
THE WITNESS: At the very beginning I thought I would be local counsel. I was not.
. . . .
When Eric informed me that [the Joint RFQ Response] had been kicked back, I needed to withdraw, ever since then I've only referred to this as an agreement. I don't have a client so ...
THE SPECIAL MASTER: Just an agreement?
THE WITNESS: Just an agreement.
THE SPECIAL MASTER: Not a referral fee arrangement?
THE WITNESS: No, sir.
THE SPECIAL MASTER: Not a local counsel arrangement?
THE WITNESS: No, sir.
THE SPECIAL MASTER: Not a forwarding fee arrangement?
THE WITNESS: I'm not sure what forwarding fee means.
MR. SINNOTT: Neither are we.
THE SPECIAL MASTER: We weren't either. I was going to follow up on that and ask you if you've ever heard the term.
THE WITNESS: I have not.
THE SPECIAL MASTER: So just a fee arrangement or just an arrangement?
THE WITNESS: I've always referred to it as our agreement.

Chargois 10/2/17 Dep. pp. 62:10-64:5. [EX. 125].

While Labaton's relationship with Chargois began with Chargois & Herron serving as "local counsel" in the *HCC Holdings* Texas class action, it is clear that the relationship evolved over time. *See* Chargois 10/2/17 Dep., pp. 17:19-21; 38:23-24, 39:1 [EX. 125]; Sucharow 9/1/17 Dep., p. 81:16-20. [EX. 38]. As a result, the terminology used to describe the Chargois Arrangement varies greatly between individuals. Some attorneys have labeled Chargois as "local counsel," or "the local," while on other occasions describing the Chargois Arrangement as based in "referral" or a "referral obligation." *See, e.g.,* LBS027776 (4/24/13 Bradley email to others) [EX. 126]; M. Thornton 9/1/17 Dep., p. 38:13-15 [EX. 127]; Chiplock 9/8/17 Dep., pp. 68:4-7, 102:3-8 [EX. 41]; Keller 10/13/17 Dep., pp. 45:11-16; 71:24-72: 4; 96:16-18; 212:5-12. [EX.

80]. In yet other instances, the Chargois Arrangement is characterized as a "forwarding obligation." Sucharow 9/1/17 Dep., pp. 59:13-19; 86:8-12. [EX. 38]. Finally, Sucharow testified that he considered Chargois a "joint venturer" working with Labaton to find pension clients. Sucharow. 9/1/17 Dep., p. 16:1-3. [EX. 38]. Regardless of the title used, it is undisputed that Chargois' sole contribution to -- and only role in -- the *State Street* case was facilitating an introduction between Labaton and ATRS -- years before the *State Street* case was even contemplated. Sucharow 9/1/17 Dep., p. 82:7-10. [EX. 38].

a. Labaton's Compartmentalization of Knowledge of the Chargois Arrangement

While the initial discussions about partnering with Chargois included only Keller and Belfi of the Labaton firm, Larry Sucharow -- Co-Chairman and, in effect, managing partner of Labaton[78] -- learned of the firm's obligation to pay Chargois (a "referring attorney") a portion of the total attorneys' fees by 2015.[79] Sucharow 9/1/17 Dep., p.18:2-11; 20-13. [EX. 38]. Sucharow, who acted as the "lead negotiator and lead strategist" in the *State Street* case, knew of Chargois' entitlement for which he did not perform any substantive work or bill any time on the case. Sucharow 9/1/17 Dep., p.86:18- 87:1.

[78] In 1982, Sucharow was named partner of the firm. Sometime thereafter, he became managing partner. He served in that role for "many years" until his appointment as Chairman of the firm. As Chairman, Sucharow assumed duties of both the Chairman and managing partner. Sucharow 6/14/17 Dep., p. 10:18-11:4. [EX. 16]. Sucharow currently is Co-Chairman of the firm. *See* http://www.labaton.com/en/ourpeople/Lawrence-Sucharow.cfm (last visited April 16, 2018).

[79] Sucharow testified that "[it] may be that I *should have known* [prior to 2015] because I know we had some ongoing relationship with him, but it was nothing that was in the forefront of my mind." Sucharow 9/1/17 Dep., p.18:3-6. [EX. 38]. While the full nature of the Chargois Arrangement -- payment for performing no work on the case -- was not initially disclosed to Sucharow, he learned firsthand that Chargois did not work on the case after becoming involved in the settlement process. Sucharow 9/1/17 Dep., 18:24-19:1. [EX. 38].

[EX. 38]. At least as of 2015, Sucharow knew that Chargois had no role in the *State Street* case beyond the initial introduction to ATRS. *See id*.

But beyond Belfi, Keller, and Sucharow, other Labaton lawyers, including those who worked on the *State Street* case, knew little or nothing about Damon Chargois and his fee arrangement with the firm, in large part due the substantial compartmentalization of Labaton's practice. Although according to Christopher Keller, this compartmentalization was an effort to modernize and improve efficiency, *see* Keller 10/13/17 Dep., p. 79:18-20 [EX. 80], the end result was that attorneys in one department were generally unaware of decisions made or work done by attorneys in another department, even where the same client or lawsuit was involved. *See supra*. For example, Nicole Zeiss, who worked exclusively in Settlements, was not privy to decisions made by attorneys in the Litigation department or by the Relationship attorneys. Zeiss 6/14/17 Dep., p. 79:5 - 80: 24. [EX. 79]. Her involvement in the *State Street* case was "strictly as settlement counsel." *Id*., p. 79:5-9. Similarly, litigators such as David Goldsmith were not privy to client agreements entered into by the firm's Relationship counsel. *See* Goldsmith 9/20/17 Dep., pp. 112:10 – 113:9 [EX. 42]; *see also* Keller 10/13/17 Dep., p. 77:13-17 ("The client -- the client, you know, development, is a very kind of a siloed thing within the firm. They -- they -- they operate, you know, a lot on the road, amongst themselves.") [EX. 80]. As a consequence, the arrangement Eric Belfi, Labaton's "Relationship" counsel, and Christopher Keller agreed to with Damon Chargois to pay him a percentage of fees in *State Street* was not shared with the Labaton attorneys who were involved with the litigation and settlement of the case.

David Goldsmith, who was Labaton's principal litigator in *State Street*, never knew about Damon Chargois or his fee arrangement until November 21, 2016 -- several weeks after the *State Street* settlement had been approved by the Court. Goldsmith 9/20/17 Dep., pp. 111:13 – 113:9. [EX. 42] Nicole Zeiss, who appeared with Goldsmith at the Final Approval Hearing before Judge Wolf, testified that in her role as settlement counsel, she had a "general understanding" that Chargois and his firm had worked with Labaton "to develop relationships with clients in different cases," but she did not have any knowledge of the details of the firm's relationship with him. Zeiss 9/14/17 Dep., p. 19:17-21. [EX. 115].

3. The ATRS Request For Qualifications (RFQ)

Chargois' efforts got Labaton the "foot in the door" it wanted and needed with ATRS. In mid-2008, ATRS issued a Request for Qualifications ("RFQ") to Labaton, among other firms. Chargois 10/2/17 Dep., p. 37:19-22. [EX. 125]. On July 30, 2008, Labaton responded by submitting a "joint proposal" on behalf of Labaton and Chargois & Herron. LBS017738 – 17755 (7/30/08 Joint Response by Labaton Sucharow LLP & Chargois & Herron, LLP) [EX. 128]; *see also* Belfi 9/5/17 Dep., p. 37:20-23. [EX. 122]. Labaton, through Belfi, received ATRS's response to Labaton's response to the RFQ on October 13, 2008 by email from ATRS Chief Counsel Christa Clark. *See* LBS017455 - 17456 (10/13/08 email from C. Clark). [EX. 129].

Clark advised Belfi that Labaton had been selected as an additional monitoring counsel for ATRS, but that Chargois & Herron was *not* approved as part of the proposal. *Id.* Clark indicated that while there was no requirement to use Chargois & Herron,

Labaton could use Chargois & Herron on a "case by case basis" if they were "a necessary and appropriate expense." *Id.* Specifically, Clark's email to Belfi stated in relevant part:

> I am pleased to inform you that subject to final approval of the Attorney General's ATRS has selected Labaton Sucharow as an additional monitoring counsel for our system.
>
> I would like to speak to you regarding the additional firm on your submission Chargois & Herron. This is a little awkward, but since your firms are not legally affiliated, we are unable to process the state contract form with both firms listed.
>
> If your firm is doing the monitoring and providing the financial backing for the cases, I think it is most appropriate that we add your firm independently to the list of approved firms. Your firm *may affiliate that firm or use them as independent contractors, if you deem is* [sic] *appropriate on a case by case basis. There would be no requirement that you use them if it was not a necessary and appropriate expense of a case.* I don't know how to best handle this point but the state procurement process is not conducive to a joint proposal.

See LBS017456 (10/13/08 email from C. Clark) (italics added). [EX. 129].

Chargois understood that his firm was not accepted as part of the RFQ process. Chargois 10/2/17 Dep., pp. 48:15-49:1. [EX. 125].

At no point either before or after receiving Clark's email did Labaton inform Ms. Clark or Mr. Doane (or his successor, Mr. Hopkins) of the pre-existing Chargois Arrangement generally, or that it was obligated to pay Chargois a portion of any fees that might be awarded in its representation of ATRS in the *State Street* matter.[80] Belfi, 9/5/17

[80] In response to a specific question in the RFQ, inquiring about fee agreements with other law firms, Labaton did not mention the Chargois obligations, even though the Chargois Arrangement had already been agreed upon by Labaton. [EX. 128].

Dep. pp., 23:5-16; 115:17-21; 118:16-19 [EX. 122]; Keller 10/25/17 Dep., p. 297:14-16.[81] [EX. 83].

4. ATRS's Lack of Knowledge of the Chargois Arrangement

Beginning in 2008, Labaton served as monitoring counsel for ATRS.[82] Belfi 9/5/17 Dep., p. 18:6-7. [EX. 122]. Shortly thereafter, George Hopkins replaced Paul Doane as Executive Director of ATRS. *Id*., p. 27:16-18. Belfi explained that Hopkins was a much more direct person, who only wanted to deal with Belfi. Belfi 9/5/17 Dep., pp. 27:18-28:7, 56:22-57:10. [EX. 122].

Hence, the relationship between Chargois and ATRS shifted with Hopkins' appointment. Belfi 9/5/17 Dep., p. 57:11-24. [EX. 122]. Labaton no longer needed Chargois to facilitate communications with ATRS. Nevertheless, Labaton continued to remit payments to Chargois under their previous agreement to avoid litigation by

[81] Belfi testified that after receiving ATRS's October 13, 2008 email response to the RFQ, he had a telephone conversation with Christa Clark in which he discussed with Ms. Clark Labaton working with Chargois & Herron:

> A. I had a follow-up call with Christa after I got this e-mail, and we had a conversation concerning that, you know, we would be working with Chargois & Herron, but we would be the ones that would go on the contract.
> Q. And did you tell her that Chargois & Herron would be a necessary and appropriate expense?
> A. The issue at this point is this is like eight years ago, and I -- I can't spell out the conversation. I just know I had a follow-up conversation with Christa concerning the fact that they were going to be involved in the relationship. As far as being able to decipher anything else that happened in that conversation, I couldn't tell you.

Belfi 9/5/17 Dep., pp. 117:20 – 118:10. [EX. 122]. Nothing in Belfi's testimony, however, indicates that Clark was informed that because of the pre-existing Chargois Arrangement, Labaton was obligated to pay Chargois & Herron a portion of any fees it might be awarded in any class action lawsuit brought on behalf of ATRS.

[82] Labaton continues to serve as one of five firms "on retainer" to ATRS, responsible for monitoring ATRS's investment portfolio and alerting ATRS to potential misappropriation or unexpected monetary loss. Hopkins 6/14/17 Dep., pp. 29:9-22; 30:3-5. [EX. 4].

Chargois that would likely be filed in Chargois' home state, Texas. Belfi 9/5/17 Dep., 58:1-7, 10-15. [EX. 122].

George Hopkins worked closely with Labaton in deciding to file the *State Street* lawsuit, and he remained very involved in the case, including in the mediation process, spending "hundreds of hours" working on the case during its five-year history. Hopkins 6/14/17, p. 102:35. [EX. 4].

Labaton sought Hopkins' approval before partnering with Lieff and Thornton in the class action litigation. However, Labaton did not seek Hopkins' approval to share information with or remit payments to Chargois. Hopkins, in fact, was never informed of the existence of Damon Chargois nor of any agreement between Labaton and Chargois, much less one that entitled Chargois to 20% of any attorney fee recovered by Labaton on behalf of ATRS. *See* Hopkins 9/5/17 Dep., pp. 21:5-10, 64:4-67:11 [EX. 12]; Belfi 9/5/17 Dep., pp. 18:9-20:17; 24:6-20.[83] [EX. 122].

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[83] Hopkins testified that he "had no idea" that Chargois had introduced Belfi and Keller to ATRS before his tenure. In fact, Hopkins had never even heard of Damon Chargois or Chargois & Herron prior to their disclosure during the Special Master's investigation in August 2017. Hopkins 9/5/17 Dep, pp. 20:22-21:10; 64:4-65:24. [EX. 12]. Hopkins testified regarding his knowledge of Chargois as follows:

> Q. Were you aware that members of a law firm with a Little Rock office had introduced individuals that you would later come to know as Eric Belfi and Chris Keller to influential Arkansas officials in an effort to secure legal work with the state?
> A. I had no idea.
> Q. Are you familiar with the firm name Chargois & Herron?
> A. As of about two weeks, ten days ago.
> Q. But you never encountered them to the best of your recollection years ago?
> A. I had never heard of that firm before.

Hopkins 9/5/17 Dep, pp. 20:22-21:10. [EX. 12].

In a Declaration sent to the Special Master on March 17, 2018 -- eight weeks before the filing of this R&R -- George Hopkins confirmed that he had no knowledge of the Chargois agreement, but states that he "did not want to know the specifics of fee allocations between Labaton and other attorneys," and purports to "ratify that [the Chargois] agreement." Hopkins 3/15/18 Declaration, ¶¶ 7, 10, 16. [EX. 130]. *See* further discussion of Hopkins' Declaration, *infra*.

It is apparent from Labaton's email correspondence with George Hopkins that Labaton took pains at every turn not to reveal Damon Chargois, Chargois & Herron, or their 20% interest in ATRS cases to Hopkins. For example, rather than include Chargois as a co-addressee or cc him on email correspondence concerning ATRS cases in which Chargois & Herron had an interest, Eric Belfi of Labaton either blind-copied Chargois or Herron or separately forwarded the emails to them, the effect of both being the same -- to not reveal Chargois & Herron to Hopkins. *See, e.g.,*

- LBS018439 (Chargois and Herron bcc'd on 5/10/10 email from Belfi to Hopkins re: "Blue Ribbon" report for *Goldman Sachs* litigation) [EX. 131];
- LBS017505 (Tim Herron bcc'd on 5/6/10 email from Belfi to Hopkins updating status of *The Hartford* securities litigation) [EX. 132];
- LBS018437 – 18438 (5/15-16/10 email chain from Hopkins to Belfi re: potential joint filing of a case with Nix Patterson, forwarded by Belfi to Chargois) [EX. 133];
- LBS020417 – 20418 (5/14/10 letter from Belfi to Hopkins re: *Colonial BancGroup* case, forwarded to Chargois on 5/17/10) [EX. 134];
- LBS017822 (Chargois bcc'd on 5/2/13 email from Belfi to Hopkins re: motion to dismiss filed in the *Facebook* case) [EX. 135];
- LBS017824 (10/23/13 email from Belfi to Hopkins re: *Facebook* securities litigation, w/attachments, forwarded to Chargois) [EX. 136];
- LBS017825 – 17826 (Chargois bcc'd on 7/24/13 email from Belfi to Hopkins re: *Goldman Sachs* trial). [EX. 137].

See also Belfi 9/5/17 Dep., pp. 110:5 – 113:5 [EX. 122]; Keller 10/25/17 Dep., pp. 353:14-354:17; 358:1-24; 463:2-464:2. [EX. 83].

Nor did the Retention Agreement in *State Street* signed by Hopkins disclose the Chargois Arrangement. The Retention Agreement provided, in relevant part, only that ATRS agreed that Labaton "may divide fees with other attorneys for serving as local or liaison counsel, as referral fees, or for other services performed in connection with the Litigation." LBS011060-11062 (2/8/11 Retention Agreement email from Eric Belfi to George Hopkins).[84] [EX. 138]. It further provided that "[t]he division of attorneys' fees with other counsel may be determined upon a percentage basis or upon time spent in assisting with the prosecution of the Litigation." *Id*. The Retention Agreement did not name any individual attorney nor specify which, if any, of these "services" it would seek as part of the litigation. *See id.* It contains only a vague reference to "referral fees," and it does not name Chargois or Chargois & Herron, and makes no reference to the obligation to Chargois the ATRS lawsuit would trigger or how the payment would be made. Chargois acknowledged he played no role whatsoever in ATRS's *State Street* lawsuit, and only met George Hopkins once, when he happened to be in San Francisco visiting his sister and attended an unrelated court hearing. Chargois 10/2/17 Dep., pp. 54:18-23, 74:21-75:3. [EX. 125].

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[84] Specifically, the Retention Agreement provides, in relevant part:

> Arkansas Teacher agrees that Labaton Sucharow *may allocate fees to other attorneys who serve as local or liaison counsel, as referral fees, or for other services performed in connection with the Litigation.* The division of attorneys' fees with other counsel may be determined upon a percentage basis or upon time spent assisting with the prosecution of the Litigation. Any division of fees among counsel will be Labaton Sucharow's sole responsibility and will not increase the fees payable by Arkansas Teacher or the class upon a successful resolution of the Litigation.

LBS011060 – 11062 (emphasis added). [EX. 138].

Labaton's purported reason for not informing Hopkins of the Chargois Arrangement is because Hopkins "did not want to know." *See* Hopkins 3/15/18 Declaration [EX. 130]; Belfi 9/5/17 Dep., pp. 23:17 – 24:5. [EX. 122]. This was a unilateral decision by Belfi, however, who concluded after meeting Hopkins that he would appreciate a more direct relationship. Belfi 9/5/17 Dep., pp. 27-28; 56-57. [EX. 122]. According to Belfi, the subject of Chargois "did not come up," and, admittedly, Belfi did not want to bring another attorney not from Labaton into the case, Belfi 9/5/17 Dep., pp. 110, 122. [EX. 122].

a. Agreement Among Labaton, Lieff, and Thornton to Share in the Payment of Labaton's Obligation to Chargois

Labaton's obligation to pay Chargois 20% of any fee it might be awarded in *State Street* was disclosed to Lieff and Thornton in or about April 2013. The subject was first raised at a meeting during a Global Justice Network conference in Dublin, Ireland, an event organized by Bob Lieff and attended by Michael Thornton, Garrett Bradley, and Lynn Sarko.[85] Lieff 9/11/17 Dep., p. 63:10-22. [EX. 139]. In an April 26, 2013, email from Garrett Bradley to Robert Lieff, Michael Thornton, Eric Belfi, Christopher Keller, and Dan Chiplock, and copied to Chargois (referred to by the parties as the "Dublin email"), Chargois was referred to as "the local counsel who assists Labaton in matters involving Arkansas Teachers Retirement System." LBS025771. [EX. 140]. In that

[85] Bob Lieff testified that he does not have a specific recollection of a conversation with Bradley and Michael Thornton regarding Chargois. Lieff 9/11/17 Dep., p. 66:2-5. [EX. 139]. Although Lynn Sarko attended the Global Justice Network meeting, there is no evidence that he was a party to any discussion with Bob Lieff, Michael Thornton or Garrett Bradley concerning Chargois, and Sarko testified that he did not learn about the Chargois agreement until it was disclosed in the Special Master's investigation in August 2017.

email, Garrett Bradley memorialized an agreement reached earlier among the three Customer Class law firms to share in the payment of Labaton's 20% obligation to Chargois.[86] In relevant part, Bradley's email stated as follows:

> Bob, as you, Mike and I discussed in Dublin last week, I am sending this e-mail regarding the obligation to the local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System. Labaton has an obligation to this counsel, Damon Chargois, copied on this e-mail, of 20 percent of the net fee to Labaton in the State Street FX cases before Judge Wolf. Currently this amount will be 4 percent because of the agreement between Labaton, Thornton and Lieff of a division of 20 percent guaranteed, each with the balance to be decided on at a later date. Obviously, this may go up should Labaton receive an amount higher than 20 percent. We have agreed that the amount due to the local, whatever it turns out to be, 4 or 5, will be paid off the top with the balance fee split between Lieff, Labaton, Thornton pursuant to our agreement. The local asks that I copy him on this e-mail so he will have confirmation of this agreement. When we spoke to him, he was agreeable to this as well. Garrett.

LBS025771 (4/25/13 G. Bradley email to R. Lieff, M. Thornton, E. Belfi, C. Keller and D. Chiplock, copied to Chargois). [EX. 140].

Discussions concerning the specific percentage to be paid Chargois were ongoing while the parties continued with their hybrid mediation in 2013 and 2014. Later, in late 2015, after the settlement had initially been agreed to by the parties, Customer Class Counsel all agreed to allocate 5.5% of their collective fee award to Chargois. Chiplock 9/8/17 Dep., pp. 106:18-107:1. [EX. 41]. Labaton, Lieff, and Thornton contributed

[86] During the *State Street* litigation, Garrett Bradley had substantial contact with Belfi and Keller of Labaton, and Chargois. Bradley attended annual marketing conferences hosted by Labaton and attended by Keller, Belfi, and Chargois. Then, effective January 1, 2015 through late 2016, Garrett Bradley held a dual role as partner at Thornton and "of counsel" to Labaton. *See* LBS007086 – 7090 (Bradley's Of Counsel Agreement). [EX. 141]. In this role, Bradley agreed to "assist Labaton partners in identifying and seeking retention by clients for securities." *Id*.

equally to satisfy this obligation. Labaton Sucharow's 8/11/16 Responses to Special Master's Supplemental Interrogatories, Response No. 1(b). [EX. 123].

5. Lieff's and Thornton's[87] Limited Knowledge of the Chargois Arrangement

Lieff and Thornton were not privy to the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which ATRS was a co-lead counsel. Lieff 9/11/17 Dep., p. 92:2-12 [EX. 139]; Thornton 9/1/17 Dep., pp. 19-21, 35:12-24. [EX. 127]. An original cost-sharing agreement circulated among Customer Class Counsel in 2011 was drafted, but never executed, shortly after the *ATRS* Complaint was filed. This draft referenced only that the firms acknowledged that "[t]here is an 'off the top' obligation to 'referring counsel' of 6% of the fees awarded," without any specifics. *See* TLF-SST-033911 – 33913 (5/4/11 letter agreement).[88] [EX. 82]. This draft agreement, with its reference to "referring counsel," was shared between Labaton and Garrett Bradley. However, a copy apparently was never circulated to Lieff. *See* Lieff 9/11/17 Dep., p. 98 [EX. 139]; Keller 10/25/17 Dep., p. 415 [EX. 83]; Oral Argument Trans, pp. 94-95 (Ms. Lukey), pp. 221-222 (Mr. Heimann) [EX. 162].This is significant both as to Garrett Bradley's knowledge of the true nature of the Chargois Arrangement, as well as Lieff's knowledge, as it reflects that Bradley and Labaton referred to Chargois

[87] As discussed *infra*, Garrett Bradley stood in a unique position vis-à-vis Labaton (*see* note 86, *supra*), and specifically, the Chargois Arrangement. Thus, Bradley's knowledge must be considered separately from that of the other Thornton attorneys.

[88] Christopher Keller, who drafted the letter agreement, testified that the "off the top" percentage to referring counsel -- 6% -- reflected 20% of Labaton's 1/3 share of the fees: "20 percent of a third is 6 point something so we probably just went with 6 percent." Keller 10/25/17 Dep., p. 419:8-9. [EX. 83].

as "referring counsel" but that all emails and other communications to Lieff refer to Chargois as "local counsel" or "the local."

This arrangement was next addressed among the three Customer Class firms in the April 24, 2013, "Dublin" email in which Garrett Bradley described a financial obligation owed to Chargois. In that email, Bradley characterized Chargois as "local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System." LBS 025771. [EX. 140]. The Labaton attorneys addressed on the email, Chris Keller and Eric Belfi, did not offer any additional explanation. Nor did either attorney inform their co-counsel that Chargois was not performing any work in the matter. Understanding that Chargois was operating as "local counsel," Bob Lieff responded to the email on April 23, 2013, stating "I am in full agreement [with splitting payment to Chargois]." LBS030997 – 30998, (4/24/13 Lieff Email to G. Bradley, et al.). [EX. 142]. Eric Belfi responded to the email on May 6, 2013, stating "[w]e are in full agreement." *Id*.

While members of the Lieff and Thornton firms were generally aware of Labaton's obligation -- to be shared by Customer Class Counsel -- to pay Chargois a percentage of Labaton's total fee in the *State Street* case, the exact percentage or details of that arrangement were not discussed until settlement discussions were well underway years into the litigation. Thornton 9/1/17 Dep., pp. 36:16-17, 22-24; 37:1-7. [EX. 127].

a. Thornton's Knowledge of the Chargois Arrangement

Garrett Bradley of Thornton received an initial draft of the proposed cost-sharing agreement on May 23, 2011. *See* TLF-SST-033910 – 33913 (email from Christopher

Keller to Garrett Bradley with draft cost-sharing agreement attached). [EX. 143]. Bradley knew at least three months before that Labaton had an ongoing relationship with Chargois, and that Chargois was entitled to 20% of fees awarded in this case. TLF-SST-075440-5441 (2/4/11 Keller email to Bradley). [EX. 204] Although the "referring counsel" was not identified in the proposed cost-sharing agreement, Bradley testified that he had never heard anyone other than Damon Chargois referred to as "referring counsel" by Labaton in connection with the *State Street* litigation, G. Bradley 9/14/17 Dep., p. 43:1-20 [EX. 85], and his deposition testimony indicates that he was aware that Labaton had an obligation to pay Chargois a percentage of the fees at least as early as "around the time the complaint was filed or shortly" before. *Id.*, p. 44:7-12.[89] Bradley testified, however, that he did not know that Chargois would not have to do any work for a share of the fees, nor did he know the details of the arrangement. ("I thought his role was similar to ours; that he did substantive work, corresponded with the client, dealt with the client, got authority. That's what I thought his role was." *Id.*, p. 45:10-13; *see also* p. 47:7-8).[90]

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[89] Bradley testified:

> I believe as early as -- just prior to or right around the time of filing in 2011, I raised with Chris [Keller] how are we going to deal with your obligation to Damon 'cause I was very concerned that he would try to apply for 20 percent of this entire case.
>
> And I asked them to deal with it.

G. Bradley 9/14/17 Dep. p. 44:7-13. [EX. 85].

[90] It is difficult to credit Bradley's testimony on this point because Bradley, Chargois, Belfi, and Keller spent a considerable amount of time together during Labaton's "marketing" conferences during this period and, in addition, Bradley held a dual role from January 1, 2015 through late 2016 as Thornton's managing partner and as "Of Counsel" to Labaton with the sole responsibility of client development. Further, Labaton's General Counsel, Mike Stocker, asked Bradley -- and not Labaton's own "relationship" lawyers, Belfi and Keller -- to intervene with Chargois in handling negotiations with Chargois when negotiations over Chargois' fee in the case became more pointed. *See* 6/21/16 email, TLF-SST-012527 – 012528. [EX. 144]. Beyond this, Thornton had arrangements with

Michael Thornton was included as an addressee of the May 4, 2011 draft letter, but testified that he never received or reviewed that letter at the time. Thornton 9/1/17 Dep., p. 148:6. [EX. 127]. Thornton testified that he was unaware of Chargois until Garrett Bradley told him of an obligation to pay "local/referring counsel" in or about 2013, and even then, did not know Chargois by name. *Id*., p. 148:7-13; p. 20: 14-17; p. 35: 14-24. While it is clear that Thornton understood that Chargois was entitled to receive a portion of the fees awarded in the *State Street* case due to his role in securing Labaton a position on the monitoring panel, *id*. at pp. 44: 8-22; 36: 16-19, Thornton did not know that Chargois was entitled to receive a 20% payment in every case in which ATRS served as lead or co-lead counsel. *Id*., p. 44: 16-24. And while Chargois did not serve as forum local counsel in the case, Thornton understood that Chargois was a referring attorney, *i.e.,* an attorney who referred the matter because he was either not competent or it was not his role to bring action on behalf of ATRS against State Street. *Id*. at p. 38: 4-11; p. 42:2-16.

b. Lieff's Knowledge of the Chargois Arrangement

Bob Lieff and Dan Chiplock, both recipients of the "Dublin" email, testified that they understood Damon Chargois to be performing some substantive role as local counsel for Labaton in the *State Street* litigation, serving the class by assisting the ATRS client

Labaton similar to its arrangement with Chargois. And importantly, as noted, the draft of the original letter agreement as to sharing the Chargois fee – which refers to Chargois as "referring counsel," as opposed to "local counsel," was not shared with Lieff, indicating that Bradley was knowledgeable about the true nature of the Chargois Arrangement, and that Chargois was not acting as "local counsel," which is how he was referred in other correspondence in which Lieff is a party. Finally, as a more general matter, the Special Master finds Garrett Bradley to be a less than credible witness on a range of issues.

locally in Arkansas, *see* Lieff 9/11/17 Dep., pp. 58-80 [EX. 139]; Chiplock 9/8/17 Dep., pp. 101-116. [EX. 41].

In arriving at their understanding of the Chargois role, both Chiplock and Lieff relied both upon their understanding of Labaton's role as Lead Counsel and the representations made by Garrett Bradley in relation to Chargois. *See* 4/5/18 Declaration of Daniel Chiplock, ¶¶5-6 [EX. 145]; LBS 025771 [EX. 140], LCHB-0053483 (4/24/13 "Dublin email," in which Garrett Bradley referred to Chargois as "the local counsel who assists Labaton in matters involving Arkansas Teachers Retirement System" and to which Bob Lieff replied that he was in full agreement as to the proposed allocation). [EX. 146].

Bob Lieff testified that he thought Chargois was local counsel for Labaton dealing with the client in Arkansas. *See* Lieff 9/11/17 Dep., p. 67:9-13 ("I thought he was local counsel for Labaton in this particular case I assumed dealing with the Arkansas fund because that's what local counsel will do. That was my understanding.") [EX. 139]. He further testified that had he known that Chargois had done no work on the case, he would not have agreed to the allocation of part of his firm's fee award to Chargois. Lieff 9/11/17 Dep., p. 97:13-16.[91] [EX. 139]. Lieff also testified that had he known the full story of the Chargois-Labaton relationship, he would have encouraged the Labaton lawyers to make the Court aware of it. *See id*.

[91] While Bob Lieff's testimony on this point may reflect that he was incurious in not inquiring further as to Chargois' actual role in the case, the Special Master credits his testimony as it is supported by numerous contemporaneous documents and emails which refer to Chargois as "local counsel" or "the local" and the 2011 draft letter which referenced Chargois as "referring counsel" that was shared between Labaton and Garrett Bradley, but not Lieff.

Informing both Lieff and Chiplock's belief that Chargois played a local role was their recent experience in *BONY Mellon*, in which Lieff's local counsel interfaced with their Ohio pension fund client but otherwise had little contact with co-lead counsel and non-lead counsel participating in the New York litigation. *See* Lieff 9/11/17 Dep., pp. 58-80 [EX. 139]; Chiplock 9/8/17 Dep., pp. 101-116 [EX. 41]; 4/5/18 Declaration of Daniel Chiplock, ¶6. [EX. 145]. Subsequent email communications between Labaton, Thornton and Lieff in 2015 describing a financial obligation to a local Arkansas attorney reinforced Lieff's belief that Chargois fulfilled some local role in the case. *See*, *e.g.*, TLF-SST-040617 – 40618 [EX. 147], LCHB-0053491 – 53492 (8/6/2015 Bradley email to Lieff and Thornton regarding "Fee discussions" related to *BONY Mellon* and *State Street*, with reference to "Arkansas local") [EX. 148]; LCHB-0053493 [EX. 149], TLF-SST-038574 – 38579 (8/28/15 Lieff email to Bradley and Thornton regarding *State Street* and referring to Arkansas local counsel; Bradley response to same) [EX. 150]; TLF-SST-053117 – 53126 (8/28/15 Chiplock email to Sucharow, Bradley and Thornton regarding memorialization of the fee allocation agreement among the firms, and referencing payments to ERISA counsel and "local Arkansas counsel" in relation to the distribution of Customer Class Counsel fees) [EX. 151]; LCHB-0053513 - 53521 (continuation of correspondence among counsel regarding same) [EX. 152]; LCHB-0053507 – 53512 (8/28/15 separate correspondence between Chiplock and Lieff regarding same) [EX. 153]; TLF-SST-053117 – 53126 [EX. 151], LCHB-0053531 – 53532 (8/30/15 further response from Bradley to Chiplock, Lieff, and Sucharow referring to the "Arkansas firm" and the prior April 2013 correspondence, noting that there was already a "written

agreement between all the parties that the Arkansas component would come off the top") [EX. 154]. Neither Labaton or Bradley corrected these characterizations of the Chargois role as local counsel. Related communications from Chiplock to Lieff in mid-2016 demonstrate that Chiplock still believed that Chargois occupied this role during the finalization of the Fee Petition. LCHB-0053538 – 53540 (forwarding 2013 and 2015 email correspondence) [EX. 155]; LCHB-0053541 (forwarding 2013 correspondence and referencing calculation of "local counsel's" fee) [EX. 156].

Attorneys from the firms exchanged emails related to the Arrangement again in 2015. On August 28, 2015, Dan Chiplock corresponded with Larry Sucharow, Garrett Bradley, and Michael Thornton regarding memorialization of the fee allocation agreement among the firms; Chiplock referred to payments to ERISA Counsel and "local Arkansas counsel" in relation to the distribution of Customer Class Counsel fees. TLF-SST-053117 – 53126 (8/28/15 Chiplock Email to Sucharow, G. Bradley, Thornton, and Lieff). [EX. 151]. Garrett Bradley, referencing the prior emails in 2013, replied that there was already "a written agreement between all the parties that the Arkansas component would come off the top" and stated that the "ERISA piece" should be handled the same way. *Id*. As Chris Keller and Eric Belfi were not included on this email exchange, and Larry Sucharow was at that point unaware that Chargois was not performing any work as the local Arkansas counsel, the 2013 characterization of the Chargois role remained uncorrected.

The Chargois Arrangement was again raised in email correspondence between the three firms on July 8, 2016. Garrett Bradley wrote to Mike Thornton, Larry Sucharow, Dan Chiplock, Chris Keller, Eric Belfi, and Damon Chargois:

> Gentlemen,
>
> As we discuss how to distribute the fee between ourselves and, of course the ERISA attorneys, I have had discussion with Damon Chargois, the local attorney in this matter who has played an important role. Damon and his firm are willing to accept 5.5% of the total fee awarded by the Court in the State Street class case now pending before Judge Wolf. As you know, we had a prior deal with him that his fee would be "off the top". He understands that ERISA counsel is now in the same pool of money. He has agreed to come down to this number with a guarantee that it will be off the court awarded fee number. Please reply all if you agree. Given that it is off the total number their [sic] is no need to add the ERISA counsel to this email chain.

LBS039936 – 39937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois). [EX. 157].

At no time in this multi-year correspondence was the nature of Chargois' role -- *i.e.*, as a "referring attorney" -- made clear. None of the Labaton attorneys followed up on the July 2016 email in writing. Nor does the record contain any evidence that any of the Labaton attorneys informed their co-counsel, either before or after this email, that Chargois had played no role in the *State Street* case, nor did the Labaton attorneys attempt to explain what "important role" Chargois played. Bob Lieff and Mike Thornton replied to Bradley's July 8 email expressing their firms' respective agreement to these terms. *Id.*; LBS031152 – 31153 (7/8/16 Thornton Email to G. Bradley & 7/8/16 Lieff Email to G. Bradley, et al.). [EX. 158]. Separately, Chris Keller wrote to Garrett Bradley, "great work getting this done." LBS039936. [EX. 157].

c. Inconsistency of Information Regarding the Chargois Arrangement

As noted above, even among Labaton attorneys, full knowledge of the Chargois Arrangement appears to have been limited to Belfi and Keller and, later, Sucharow. *See* Sucharow 9/1/17 Dep., p. 17:10-13 ("I'm not sure I ever knew in the sense that I didn't hear 'til later on that there was an obligation to [Chargois]."). [EX. 38]. For example, Larry Sucharow, who described himself as the "lead negotiator and lead strategist" for plaintiffs in the *State Street* case, testified that, although he knew who Chargois was, he only learned of Labaton's financial obligation to Chargois in 2015. *Id.,* pp. 18:20-23; 87:1.[92] Similarly, David Goldsmith, the lead Labaton litigator who appeared and argued on behalf of the purported Settlement Class in the Preliminary and Final Settlement Approval Hearings before Judge Wolf, did not know anything about the Chargois Arrangement until November 21, 2016, several weeks after the Final Approval Hearing. Goldsmith 9/20/17 Dep., pp. 108:20-109:2.[93] [EX. 42]. Even those who were aware of the Arrangement were unfamiliar with Chargois' full name. Sucharow 9/1/17 Dep., pp. 7-9; 35:17-24. [EX. 38].

[92] Though he testified that he learned of his firm's obligation to Chargois in 2015, Sucharow signed the Omnibus Declaration, which was filed with the Court in September 2016; the Declaration did not disclose the Chargois Agreement or reference the intended payment to Chargois.

[93] David Goldsmith testified that he first learned of Chargois and his fee arrangement with Labaton on November 21, 2016. Goldsmith 9/20/17 Dep., pp.111:13 -112:9. [EX. 42]. He further testified that he had no idea that a payment was going to be made to Chargois out of the class funds or that the Chargois payment was going to be 5.5 percent of the total $75 million fee award. *Id.,* pp. 112:10 – 113:9. Goldsmith admitted that this was important information and that he would have liked to have known about it before he went before Judge Wolf at the Final Approval Hearing. *Id.* Goldsmith further admitted he knew of no work done by Chargois on the *State Street* case, nor had any other Labaton lawyer told him that Chargois did any work on the matter. *Id.* at pp. 114:11 – 115:13.

Outside of Labaton attorneys, the terms "forwarding fee" and "referral fee" have no significance in a class action context. 9/11/17 Lieff Dep., p. 79:20-22. [EX. 139]. Robert Lieff testified that the term "local counsel" is also not descriptive of Chargois' role, as it is a term of art used to describe an attorney who works for a client on a case-by-case basis and submits a fee petition for services performed in a particular case, an understanding shared by Chargois himself. Lieff 9/11/17 Dep., p. 80:9-17. [EX. 139]. Although they now seek to cast Chargois in the role of "referring" counsel, Labaton attorneys never used the phrase "referring counsel" in discussions with Chargois, other than in the 2011 draft letter agreement which was not circulated to Lieff and ultimately was not executed. Chargois 10/2/17 Dep., p. 64:15-19. [EX. 125]. When asked, Chargois did not view his role as a "referring counsel," "liaison counsel," or "local counsel" in the *State Street* case or any case involving ATRS. Chargois 10/2/17 Dep., pp. 55: 8-13, 20-24; 63:11 – 64:6 [EX. 125]**;** this was just "an agreement." *Id.*, p. 63:5-21.

6. ERISA Counsel's Lack of Knowledge of the Chargois Arrangement

Neither Labaton nor any other Customer Class Counsel ever informed ERISA Counsel of Labaton's obligation to Chargois, or Chargois' role in connection with this case. Sarko 9/8/17 Dep., pp. 56:18 – 57:9, 71:14-23 [EX. 37]; Kravitz 9/11/17 Dep. p. 70:8-10 [EX. 117]; McTigue, 9/8/17 Dep., p. 17:14-21 [EX. 159]. Like Hopkins, ERISA Counsel learned of the Chargois Arrangement only during the course of the Special Master's investigation in or about August 2017. Sarko 9/8/17 Dep., 71:14-23 [EX. 37]; Kravitz 9/11/17 Dep. 70:8-10 [EX. 117]; McTigue 9/8/17 Dep., p. 17:14-21 [EX. 159].

One effect of the Customer Class Counsel's failure to disclose the Chargois Arrangement to ERISA Counsel was the non-disclosure to the ERISA class representatives and members themselves.

As with Hopkins, Labaton was at pains to keep ERISA Counsel from learning about Chargois or the Chargois Arrangement. *See e.g.,* Sucharow response to G. Bradley email regarding proposed Claw Back letter (discussed *infra*) addressed only to Customer Class Counsel advising "no reason for ERISA to see Damon's split." TLF-SST-012272 – 12274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller, and Belfi) [EX. 160]; LBS039936 – 39937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois) ("Given that it is off the total number their [sic] is no need to add the ERISA counsel to this email chain.") [EX. 157]; TLF-SST-053117-53126 [EX. 151].

ERISA Counsel testified that had they known of the Chargois Arrangement during the *State Street* case, they would have proceeded differently in several material respects. Lynn Sarko of Keller Rohrback testified that had he known of the Chargois Arrangement, he "absolutely" would have felt an obligation to disclose the Arrangement to the ERISA class representatives and obtain their informed consent. Sarko 9/8/17 Dep., p. 91:4-15. [EX. 37]. Moreover, had he become aware that an attorney who did no work on the case would receive in excess of $4 million prior to signing the ERISA Fee Allocation in 2013, Sarko would not have agreed to the ERISA lawyers receiving only 10% of the total fee award, *id.* pp.75:2-22, 78:19-79:4. The other ERISA counsel, Brian McTigue of McTigue Law and Carl Kravitz of Zuckerman Spaeder, testified that they would not have

agreed to it, either. *See* McTigue 9/8/17 Dep. p. 21:15-24 [EX. 159]; Kravitz 9/11/17 Dep., pp. 83:3-84:22 [EX. 117]. (It bears noting here that Chargois received more than any of the ERISA firms received. *See* Table in Section G, *supra*; *see also* Labaton's 8/11/17 Response to Special Master's Supp. Interrog. No. 2.) [EX. 123].

Sarko further testified that had he known about the payment to Chargois, he would not have agreed to the filing of a joint fee petition with Customer Class Counsel because "in order to do that, I would have had to get approval from the named [ERISA] plaintiffs who would not have agreed…. They're straight shooters. They would say this doesn't sound right." Sarko 9/8/17 Dep., p. 75:18-22. [EX. 37]. Nor would he have signed the Claw Back Agreement (*see* Section L-3, *infra*) agreeing to reimburse Labaton for any reduction in the fee award imposed by the Court as a result of the November 10, 2016 letter to the Court admitting the overstatement of the *State Street* lodestar (discussed *infra*). Sarko 9/8/17 Dep., pp. 75:2-22, 78:19 – 79:4. [EX. 37].

In addition, the failure to tell ERISA counsel about the Chargois Arrangement and payment had yet another serious consequence: The Department of Labor, which had oversight and regulatory responsibility for the ERISA funds and was participating in the settlement negotiations, was also kept entirely in the dark about the Chargois payment. Lynn Sarko was the lawyer principally responsible for liaising with the DOL and keeping its lawyers advised of the progress of settlement negotiations, including attorney fees, and discovery documents and depositions clearly reflect that the DOL was acutely interested in the payment of attorneys' fees. *See* Sarko 7/6/17 Dep., pp. 51:2-3, 79:16-22, 8-:3-12 [EX. 28]; Sarko 9/8/17 Dep., p. 88:2-89:5 [EX. 37]. It was at the DOL's insistence that a

cap on the ERISA class's attorneys' fees was included in the Agreement of Settlement. *See* Stipulation and Agreement of Settlement, Dkt. #89, ¶ 24 and footnote 1 [EX. 114];[94] Sarko 9/8/17 Dep., p 35:1-8 ("That was a negotiated point with the Department of Labor… they [we]re very focused on the ERISA portion.") [EX. 37]. Because it was not informed by ERISA Counsel, and particularly Sarko, the DOL was kept ignorant of the Chargois payment.[95] This is significant because State Street was insisting upon a global settlement that included *all* interested parties -- especially the DOL. Sarko 9/8/17 Dep., pp. 23:19 – 24:4. [EX. 37]. In Sarko's opinion, "if you would have dropped this piece of information [about the Chargois payment] into the mix, it would have blown that up." *Id.*, p. 84:3.[96]

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[94] Paragraph 24 of the Stipulation and Agreement of Settlement provided:

> 24. Except with respect to the amount of Plaintiffs' counsel's attorneys' fees chargeable to the ERISA Plans, as provided for below, the amount of the Class Settlement Fund allocated to the ERISA Plans and Registered Investment Companies and other Settlement Class Members shall be increased or decreased, as the case may be, by their proportional share (using the allocations set forth in the Plan of Allocation compared to the Class Settlement Amount) of any interest, costs (including Notice and Administration Expenses), Litigation Expenses, Service Awards, Taxes and Tax Expenses, and attorneys' fees of Plaintiffs' counsel, obtained or paid pursuant to permission of the Court. However: (i) the cost of any ERISA Independent Fiduciary shall be borne solely by SSBT and shall not be paid out of the Class Settlement Amount; and (ii) ***no more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in attorneys' fees shall be paid out of the ERISA Settlement Allocation***.

Dkt. # 89, ¶ 24 (footnote omitted; emphasis added). [EX. 114].

A footnote appended to Paragraph 24 further made clear that "[i]f the Settlement Class seeks and/or the Court awards attorneys' fees at a rate which would, if applied to the $60,000,000 ERISA Settlement Allocation, result in a fee of less than $10,900,000, then such lower rate and resulting fee at that rate shall apply to the ERISA Settlement Allocation." *Id.,* note 1.

[95] The SEC and DOJ were similarly kept in the dark about the Chargois payment.

[96] The Special Master finds the testimony of Sarko, Kravitz, and McTigue to be credible on each of the points above.

7. Failure to Disclose the Chargois Arrangement to the Special Master

As noted *supra*, the Special Master first learned of Chargois' role the *State Street* case after Thornton disclosed a handful of documents referencing payment to Chargois during discovery.[97] Chargois' name, however, did not appear in the thousands of documents produced by Labaton or Lieff in response to substantially similar requests. At the Special Master's request, Thornton, Lieff, and Labaton collectively provided thousands of additional documents concerning what is now known as the Chargois Arrangement.[98]

Labaton now argues that neither it nor Lieff had an obligation to produce information related to that financial obligation in response to the Special Master's initial discovery requests.[99] *See* 4/12/18 Rebuttal Response by Labaton Sucharow LLP, at p. 11 [EX. 161]; 8/11/17 Labaton Sucharow LLP's Response to Supplemental Interrogatory

[97] *See* note 66, *supra*.

[98] While the lack of disclosure is somewhat disconcerting in light of the fact that Chargois received the fourth largest payout from the class fund, the Special Master does not conclude that the nondisclosure constitutes discovery misconduct. However, given the scope of the Special Master's mandate, certainly a more prudent practice would have been to inform the Special Master about the Chargois Arrangement, and produce all relevant documents, at the beginning of the investigation.

[99] *See* 4/12/18 Rebuttal Response by Labaton Sucharow LLP, at p. 11 ("The implication of discovery wrongdoing is clear, but incorrect. [EX. 161]. In fact, Request for Production No. 22 … which sought documents 'regarding the allocation of a certain percentage of the Fee Award among counsel,' and which is the only discovery request that arguably elicited information about the Chargois Agreement -- was withdrawn after a conference with the Special Master's counsel…. It is unclear why TLF produced the materials, but Labaton Sucharow and Lieff Cabraser were justified in not doing so."); *see also* 8/11/17 Labaton Sucharow LLP's Response to Supplemental Interrogatory 1(g) (stating that the firm did not read the Special Master's prior interrogatories or requests for production as requesting information related to the private referral arrangement or other information regarding the fee allocation). [EX. 123].

It is significant to note that Labaton did not disclose Chargois to its own counsel. Oral Argument Trans., 29: 11-14; 29:17 – 30:1. [EX. 162]. This is significant because, while Labaton had knowledge of the Chargois Arrangement, counsel whom it directed to negotiate with Special Master's counsel to limit the scope of the initial discovery requests did not. *Id*. at 29:17 – 30:1 ([Lukey:] "I didn't have a clue about Mr. Chargois at that point.")

1(g) [EX. 123]. Labaton's argument is based in large part, if not entirely, on the fact that Request for Production No. 22 -- seeking information about the allocation *among* counsel -- was withdrawn by agreement of counsel.[100] Several other discovery requests propounded by the Special Master, however, did reasonably call for disclosure of information and communications relating to Chargois and the Chargois Arrangement. And, apart from any discovery obligation, disclosure of the Chargois Arrangement is a critical piece of the Special Master's evaluation of the "accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses." March 8, 2017 Memorandum and Order, Dkt. # 173 at p. 2.[101] [EX. 163].

On March 23, 2017, Labaton, Lieff, and Thornton received identically worded Requests for Production[102] calling for "[a]ll documents referring to, relating to,

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[100] On March 22, 2017, counsel for Labaton (Lukey and Wolosz) met with Special Master's Counsel (Sinnott and McEvoy) to discuss how best to streamline and prioritize the information sought in the Special Master's First Set of Interrogatories and Requests served on Customer Class Counsel on May 18, 2017. Labaton's counsel also relayed concern shared by counsel for Lieff, who was unable to participate but had conferred with counsel for Labaton previously. Of great concern to all counsel was the looming deadline for responding to the detailed discovery requests then set just fourteen days from the service date to accommodate an expedited deposition schedule in June and July 2017. Counsel for the firms contended that several of the requests would be overly burdensome and/or otherwise unfeasible and potentially duplicative. After discussing the individual objections, the Special Master's Counsel agreed to narrow the scope of many of the requests prompting this concern and amended the upcoming deadline to a three-tiered deadline of June 1, June 9, and July 10, 2017, respectively. Because Lieff's counsel was neither present nor able to participate telephonically, the Special Master's Counsel sent Lieff a revised version of the May 18, 2017 discovery requests by email. *See* Revised Requests for Production to Lieff dated May 23, 2017 [EX. 165].; *See also* 5/23/2017 email from Special Master's Counsel to Richard Heimann. [EX. 258].

Thornton's counsel (Mr. Kelly) communicated Thornton's objections in an email dated March 22 to the Special Master's Counsel. The Special Master's Counsel responded to those objections by email the next day and served revised versions of both requests. *See* 5/23/17 Sinnott to Kelly [EX. 259].

[101] The March 8, 2017 order appointing the Special Master states that the Special Master "shall investigate and prepare a Report and Recommendation concerning *all issues* relating to the attorneys' fees, expenses, and service awards previously made in this case." (emphasis added) (March 8, 2017 Order, Dkt. # 173). [EX. 163].

[102] After meeting with Labaton's counsel, and after receiving written objections from Thornton's counsel, Special Master's Counsel propounded revised discovery requests amending the original requests. *See* note 100, *supra*.

evidencing or constituting discussions between the Law Firm and the Plaintiffs' Law Firms relating to sharing costs and/or expenses of the SST Document Review/SST Litigation, including but not limited to sharing the cost of Staff Attorneys, hosting costs for Catalyst database, and other expenses associated with conducting voluminous document review." *See* Revised Requests for Production to Labaton (No. 18),[103] Lieff (No. 16), and Thornton (No. 18) dated May 23, 2017.[104] [EX. 164; EX. 165; EX. 166]. In response to Request No. 18, Thornton produced June 2016 email communications between Bradley and Labaton's Belfi, Keller, and Stocker, which related to the Chargois obligation. *See* TLF-SST-012526. [EX. 144]. Thornton also produced TLF-SST-012759, a June 2016 exchange between Bradley and Chargois related to the fee negotiation.[105] [EX. 167]. Also included in Thornton's production was TLF-SST-012671 - 12672, the "Dublin email" exchange between Thornton, Lieff, Labaton, and Chargois in 2013. [EX. 168]. While these email communications were sent to or from Labaton attorneys, and in some cases Lieff attorneys, neither firm produced them.

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[103] As explained *infra*, Labaton's counsel met in person with the Special Master's Counsel on May 22, 2017, to narrow the scope of the initial requests propounded by the Special Master. During that meeting, counsel reached an understanding that several of the requests would be stricken and others significantly narrowed. Labaton thereafter memorialized their understanding of the new parameters in its written response to the Requests for Production. Because counsel for the Lieff and Thornton firms were not present at the May 22, 2017 meeting, the Special Master propounded "revised" requests on both firms shortly after that meeting.

[104] Labaton objected to the request on the basis of the volume of preliminary results, and Lieff joined in the objection. The firms were instructed by the Special Master to follow up, if necessary, to confer in relation to potentially narrowing relevant search terms; neither firm did.

[105] Bradley later referenced this exchange in email discussions with Belfi on the same date (*see* LBS037410) [EX. 169], which, after further negotiation, developed into confirmation by Bradley to Labaton and Lieff two weeks later that Chargois had agreed to a 5.5% fee (*see* LBS039936). [EX. 170].

Thornton also viewed the Dublin email as responsive to its Request No. 35, calling for "[a]ll documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records." Labaton and Lieff did not produce Chargois-related documents in response to identically worded Requests (Revised Requests Nos. 40 and 38, respectively) to their firms.[106]

The counterparts to those requests, the Revised Interrogatories, propounded by the Special Master that same date, also reasonably called for production of the Chargois Arrangement. Yet none of the three firms provided information about Chargois. For example, Revised Interrogatory No. 60 to Labaton ("Identify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor"), and identically worded Revised Interrogatory No. 62 to Lieff and No. 63 to Thornton, asked about financial expenditures not included in the Fee Petition. All three firms understood that Chargois' payment would be 5.5% of the Fee Award taken "off the top." *See* Labaton's June 9 Response to Special Master's First Set of Interrogatories [EX. 174]; Lieff's June 9

[106] Thornton's initial productions also included documents relating to Chargois that were responsive to Revised Request No. 40 ("All documents and/or communications relating to the discovery of billing errors disclosed in the November 10, 2016 Letter filed with the Court, including but not limited to communications between and among you, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms.") and Revised Request No. 43 ("All documents relating to, referring to, evidencing, or constituting the November 10, 2016 Letter, including all drafts, outlines, notes, and communications relating to the filing of that correspondence."). *See* TLF-SST-012272 [EX. 160], TLF-SST-012275 [EX. 171], TLF-SST-012279 [EX. 172], TLF-SST-012283 [EX. 173]. The reason for doing so appears to be that both requests seek communications among attorneys involved in the case about the attorneys' fees in this case, as implicated by the double-counting errors discovered in November 2016 (the subject of the November 10th letter to the Court) and the related claw back communications (discussed *infra*). Labaton and Lieff received corresponding requests (Revised Request No. 47 and Revised Request No. 50) of identical wording.

Response to Special Master's First Set of Interrogatories [EX. 175]; Thornton's June 9 Response to Special Master's First Set of Interrogatories [EX. 176]. Moreover, Labaton's obligation arose directly out of its portion of the total fee award. Neither Chargois nor the Chargois Arrangement was referenced in response to this inquiry.

Perhaps the request most directly calling for disclosure of Chargois is Interrogatory No. 72 to Labaton: "Identify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge."[107] Chargois was not listed in any of the interrogatory responses. The firms chose not to identify him in response to this catch-all question. Of course, all three firms were aware that Chargois received a fee based on the total fees awarded out of the settlement, and to that extent, had knowledge of the fees in the *State Street* case. While Labaton (and Thornton's Garrett Bradley) exclusively communicated with Chargois during the life of the case, and thus were uniquely situated to know his actual contributions to -- and by extension Chargois' own knowledge of -- the litigation, all three firms were aware of Chargois and his involvement in the fee allocation.[108]

8. Payments to Chargois Pursuant to the Chargois Arrangement

[107] This language appears verbatim in Revised Interrogatories No. 74 to Lieff and No. 76 to Thornton.

[108] In responding, Labaton construed this Interrogatory as calling for identification of "the principal Labaton Sucharow attorneys or staff who worked on, or have unique knowledge regarding, the topic being reviewed by the Special Master." *See* Labaton's June 9 Response to the Special Master's Revised Interrogatories [EX. 174].

Since the Chargois Arrangement began in 2008, Labaton has represented ATRS in at least nine cases for which it has paid Chargois a percentage of Labaton's total fee award:

- *In re A10 Networks, Inc. Shareholder Litigation,* No. 2015-1-CV-276207 (Cal. Super. Ct. Jan 29, 2015)
- *Brado v. Vocera Communications, Inc.* No. 13-CV-3567 (N.D. Cal. Aug.1, 2013)
- *Perry v. Spectrum Pharmaceuticals, Inc.*, No. 13-CV- 0433 (D. Nev. Mar.14, 2013)
- *Hoppaugh v. K12 Inc.,* No. 12-CV-0103 (E.D. Va. Jan. 30, 2012)
- *In re Hewlett-Packard Company Securities Litigation,* No. 11-CV-1404 (C.D. Cal. Sept. 13, 2011)
- *Arkansas Teacher Retirement System v. State Street Corporation,* No. 11-CV-10230 (D. Mass. Feb 10, 2011)
- *In re Beckman Coulter, Inc. Securities Litigation,* No. 10-CV-1327 (C.D. Cal. Sept. 3, 2010)
- *In re Colonial BancGroup, Inc. Securities Litigation*, No. 09-CV-0104 (M.D. Ala. Feb. 9, 2009)
- *In re Capacitors Antitrust Litigation*, No. 14-CV-3264-JD (N.D. Cal.) [109]

Labaton's 8/11/17 Response to Special Master's Supplemental Interrogatory, 1(a) [EX. 123]; Chargois 10/2/17 Dep., pp. 54:2-3; 65:1-71:13[110] [EX. 125].

[109] Chargois testified that *In re Capacitors* was not an ATRS case and hence not covered by the agreement. *See* Chargois 10/2/17 Dep., p.65:4-7. [EX. 125].

[110] While not identified in response to discovery, media reports also identify Labaton filing on behalf of ATRS and being named co-lead counsel in a multi-trillion-dollar action alleging that many of the country's leading banks harmed both the United States government and private investors by rigging the management of $13 trillion in securities sold by the U.S. Department of Treasury in *In Re: Treasury Securities Auction Antitrust Litigation,* (S.D.N.Y. 2017). Potentially, the Chargois Agreement would cover this case as well. *See*, *e.g*, Dunstan Prial, Law360, "Big Banks Face Wider Treasure Auction-Fixing Suit" (Nov. 16, 2017).

In each of these cases, Labaton paid Chargois a percentage -- more often amounting to 10-15% rather than the originally agreed-upon 20% -- of Labaton's total fee award. Chargois 10/2/17 Dep., p. 60:17-20.[111] [EX. 125]. Neither Chargois nor any Chargois & Herron attorneys entered an appearance or did any work in any of these actions.

L. MEDIA SCRUTINY OF THE STATE STREET SETTLEMENT AND THE SPECIAL MASTER'S APPOINTMENT

1. The *Boston Globe* Inquiry and Discovery of Double-Counting Errors

By all accounts, the $300 million settlement reflected an excellent result for the class members and was the product of the highly professional and skilled work of the class's law firms. Sarko 7/6/17 Dep., p. 109:22-23 [EX. 28]; Kravitz 7/6/17 Dep., pp. 105:23 – 106:7 [EX. 21]; Hopkins 6/14/17 Dep., p. 100:1-10. [EX. 4]. However, on

[111] Chargois was not happy with the frequent reductions in the amounts Labaton paid him. He expressed his frustration in an October 18, 2014 email to Labaton:

> "… I am very concerned that you guys are attempting to significantly, substantially and materially alter our agreement. Our deal with Labaton is straightforward. We got you ATRS as a client after considerable favors, political activity, money spent and time dedicated in Arkansas, and Labaton would use ATRS to seek lead counsel appointments in institutional investor fraud and misrepresentation cases. Where Labaton is successful in getting appointed lead counsel and obtains a settlement or judgment award, we split Labaton's attorney fee award 80/20 period. As I said in my text to you regarding HP and your allocation, I understand the circumstances in this case and am okay with the fee split in this instance. We are not changing our fee split agreement for all the other pension fund cases. You promised me that you would give me advanced notice of when you guys would seek a modification or accommodation on a given settlement, and I want you to keep that going forward."

LBS017593 - 17594 (10/18/14 Chargois email to Belfi) [EX. 177]; *see also* Chargois 10/2/17 Dep., pp. 253:2-255:4. [EX. 125].

The Special Master did not investigate further into the background facts alleged by Chargois in this email as to how the Chargois/Labaton/ATRS relationship was originated and developed. This subject is beyond the scope of the Special Master's assignment from the Court. It is sufficient for the purposes of the Report and Recommendations for the Special Master to find, as he does, that Chargois was significantly involved at the inception of the Labaton/ATRS relationship by making the original contact with ATRS on Labaton's behalf and facilitating an introduction to the then-Executive Director of ATRS, Paul Doane, of Labaton attorneys Eric Belfi and Chris Keller.

November 8, 2016 -- less than a week after the Court had approved the Settlement and entered Judgment -- Garrett Bradley, managing partner at the Thornton Law Firm, received a phone call from the firm's counsel, Nixon, Peabody LLP, informing him that the firm had been contacted by a *Boston Globe* reporter. Garrett Bradley 6/19/17 Dep., pp. 85:23 – 86:11. [EX. 43]. According to Bradley, the reporter informed Thornton's attorneys that the *Globe* had reviewed the fee petitions submitted in the *State Street* matter and noted that certain staff attorneys' names appeared on both the Thornton lodestar report and the Labaton lodestar report with exactly the same number of hours down to a decimal point. *Id.*; *see also*, Michael Thornton 6/19/17 Dep., pp. 92:10-23 [EX. 2]; David Goldsmith 7/17/17 Dep., p. 132:16-24.[112] [EX. 58].

Bradley testified that after hearing this, he immediately went to see Evan Hoffman, the attorney at Thornton who had been in charge of in-taking the hours of the Labaton and Lieff staff attorneys assigned to Thornton on the *State Street* matter, and asked Hoffman to print out all of the fee declarations filed by the law firms in the case. G. Bradley 6/19/17 Dep., p. 86:15-17. [EX. 43]. Bradley stated that he then compared Thornton's fee declaration to Lieff's and Labaton's, "and immediately noticed same names, different rates, and [] knew something was wrong right away." *Id.*, 86:19-21. Bradley promptly called Labaton. *Id.* at p. 87:9. According to Bradley, "[T]hey pulled up what they had, we pulled up what we had and we could tell that there was a problem."

[112] David Goldsmith of Labaton testified that Garrett Bradley had also told him that the *Globe* reporter had made a comment about Thornton's billing rates, and "gave him [Garrett] grief about his brother," Michael Bradley, who was listed on the fee petition as one of the Thornton attorneys who worked on the *State Street* case. Goldsmith 7/17/17 Dep., p. 133:11-20. [EX. 58].

Id., p. 87:9-11. Bradley also had Mike Lesser, one of his partners at Thornton, reach out to Dan Chiplock of Lieff Cabraser and have Chiplock check Lieff's fee declaration, as well. *Id.*, 87:11-12.

David Goldsmith testified that at Labaton, the attorneys tried to figure out what was going on. Goldsmith 7/17/17 Dep., p. 136:5-6. [EX. 58]. Goldsmith said that he had numerous discussions with people in the firm:

> I spoke with Mike Stocker [Labaton's General Counsel]. . . . Nicole Zeiss and I were talking a lot. I spoke with Howard Goldberg. I spoke with Danette McKenzie, I spoke with Todd Kussin. And I basically led an effort to determine internally what the double counting was and how we could correct it and disclose the problem to the court.

Id., p. 137:11-19.

The attorneys at Lieff Cabraser also reviewed their records to locate any double-counting. *See* Chiplock 6/16/17 Dep., pp. 163:1 – 164:17. [EX. 10].

After conducting their internal reviews, Labaton, Lieff, and Thornton unanimously agreed that the *State Street* Fee Petition overstated hours worked by Customer Class Counsel by 9,322.9 hours due to the double-counting of certain lawyers' hours, resulting in a lodestar overstatement of $4,058,654.50.[113] The Fee Petition attributed hours of staff (and contract) attorneys allocated by Lieff and Labaton to Thornton for purposes of cost-sharing not only to the lodestar petitions of Lieff and Labaton -- the staff attorneys' host firms -- but also to Thornton's lodestar.

[113] The ERISA Counsel's lodestar reports were unaffected by the double-counting.

Specifically, the internal reviews revealed that 17 staff attorneys had been listed on both the Thornton and Labaton lodestar reports, and for all 17, the billing rates for the staff attorneys on the Thornton report were consistently higher. Goldsmith 7/17/17 Dep., p. 142:12-19. [EX. 58]. Lieff also confirmed that six staff attorneys on Thornton's lodestar report also appeared on Lieff's report. Chiplock 6/16/17 Dep., p. 164:9-17 [EX. 10]; *see also* Goldsmith 11/10/16 Letter to the Court, Dkt. # 116. [EX. 178]. This dramatically inflated the lodestar of Thornton. *See* 11/10/16 Letter from David J. Goldsmith to Hon. Mark L. Wolf, Dkt. # 116. [EX. 178].

2. The November 10, 2016 Letter to the Court

After Labaton, Thornton, and Lieff confirmed that the double-counting alleged by the *Globe* reporter had, in fact, occurred, David Goldsmith of Labaton took the lead in writing a letter to the Court to explain what had happened. G. Bradley 6/19/17 Dep., p. 87:15-17 [EX. 43]; Goldsmith 7/17/17 Dep., pp. 143:25 – 144:5. [EX. 58]. Goldsmith circulated his proposed letter to a number of people within his firm, and to the Thornton and Lieff firms. *Id.,* p. 144:5-9. He also circulated the letter to the ERISA firms. Various iterations of the letter were circulated within a compressed period of time. *Id.*

Goldsmith testified that he received a fair number of comments and proposed edits, but he recalled only two subjects on which there was some significant disagreement. One was that "when I wrote the letter, I said that we received an inquiry from the *Boston Globe*, and Garrett [Bradley] did not want to disclose that the media organization was the *Boston Globe*. He just wanted to say media organization. We ended up just saying media organization." *Id.*, p. 144:17-23. There was also some

disagreement about what exactly would be said with regard to the ERISA Counsel's part in this. *Id.*, p. 145:3-6. *See also* Sarko 7/6/17 Dep., p. 107:10-12 ("I remember the one thing I wanted to be in there was that it had nothing to do with the ERISA counsel." *Id.*) [EX. 28]; McTigue 7/7/17 Dep., p. 91:1-8 ("I suggested an edit ... which said the ERISA firms have not been involved in this staff attorney issue. In the actions that gave rise to the staff attorney issue." *Id.*) [EX. 11]. Goldsmith testified that ERISA Counsel's requested edits required some "massaging," and he ended up including a footnote in his draft that he thought pretty candidly said that the lodestar reports of the ERISA Counsel appeared unaffected. Goldsmith 7/17/17 Dep., p. 145:6-13. [EX. 58]. After all counsel finally agreed upon the language, Goldsmith finalized the letter and, on November 10, 2016, the letter was delivered to Judge Wolf.

The Goldsmith letter explained that due to "inadvertent errors," Plaintiffs' Counsel's reported combined time and lodestar were incorrect. Of the reported 86,113.7 hours, 9,322.9 hours were overstated. Of the reported lodestar of $41,323,895.75, $4,058,654.50 was overstated. 11/10/16 Goldsmith Letter, Dkt. # 116, p. 2. [EX. 178]. The letter stated that the mistakes had been brought to light as the result of a media inquiry and that the errors had been corrected by removing the duplicative time. *See id*. The letter also made clear that the lodestar reports in the individual firm declarations submitted by ERISA Counsel were unaffected by the double-counting errors found in Customer Class Counsel's lodestar reports. *See id*., footnote 3.

Notwithstanding that their original lodestar reports had been overstated, Goldsmith suggested to Judge Wolf that the $4,058,654.00 overstatement -- more than 9,300 double-

counted hours -- of the Customer Class Counsel's lodestar should not change the Court's original determination of the reasonableness of his award of 24.85% of the gross settlement as attorney fees. *See* 11/10/16 Letter, p. 2. [EX. 178].

In relevant part, the November 10, 2016 letter stated as follows:

Dear Judge Wolf:

> We are writing respectfully to advise the Court of inadvertent errors just discovered in certain written submissions from Labaton Sucharow LLP, Thornton Law Firm LLP, and Lieff Cabraser Heimann & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees, which the Court granted following the fairness hearing held on November 2, 2016. See Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Order," ECF No. 111).
>
> These mistakes came to our attention during internal reviews that were conducted in response to an inquiry from the media received after the hearing. The purpose of this letter is to disclose the error and provide a corrected lodestar and multiplier. We respectfully submit that the error should have no impact on the Court's ruling on attorneys' fees.
>
> As the Court is aware, the submissions supporting Lead Counsel's fee application included individual declarations submitted on behalf of Labaton Sucharow, Thornton, and Lieff Cabraser, reporting each firm's lodestar and number of hours billed. See ECF Nos. 104-15, at 7-9; 104-16, at 7-8; 104-17, at 8-9; see also ECF No. 104-24 (Master Chart).
>
> The professionals and paraprofessionals listed in these firms' respective lodestar reports include persons denoted as Staff Attorneys, or "SAs." SAs are bar-admitted, experienced attorneys hired on a temporary, though generally long-term, basis, and are paid by the hour. The SAs in this action were tasked principally with reviewing and analyzing the millions of pages of documents produced by State Street.
>
> Seventeen (17) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Labaton Sucharow lodestar report. Six (6) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Lieff Cabraser lodestar report. Both sets of overlap reflect the fact that as the litigation proceeded, efforts were made to share costs among counsel,

such that financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices was borne by Thornton.

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

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

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

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

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

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

Respectfully submitted,
/s/
David J. Goldsmith

11/10/16 Letter from David J. Goldsmith, Dkt. #116 (footnotes omitted). [EX. 178].

The Goldsmith letter made no attempt to explain how or why the double-counting occurred. Nor did Labaton take this opportunity to disclose the Chargois Arrangement. (Of course, Goldsmith, himself, did not know about Chargois at the time he wrote the letter to the Court.)[114]

3. The November 21, 2016 Claw Back Letter Agreement

After the November 10, 2016 letter was delivered, Plaintiffs' Counsel awaited a response from the Court. Recognizing that the Court might respond adversely and ultimately decide to reduce the fee award, on November 21, 2016, at the direction of Labaton's Chairman, Lawrence Sucharow, David Goldsmith drafted a letter that Sucharow then sent to all counsel -- including ERISA Counsel -- for their signature, asking all counsel to agree to refund to Labaton, for re-deposit into the *State Street* escrow account, their respective pro-rata share of any court-ordered reduction of fees, expenses, and/or service awards (the "Claw Back Letter"). *See* Goldsmith 7/17/17 Dep., pp. 152:17 – 155:13 [EX. 58]; *see also* TLF-SST-012264 – 12266 (11/21/16 Sucharow Draft Letter to Counsel). [EX. 179].

The issue of whether to send a similar letter to Chargois was raised in an email addressed only to Customer Class Counsel by Garrett Bradley, to which Sucharow responded:

> Need two letters with breakdown, ERISA just gets sent to ERISA counsel with 10 percent off the top and then a third each. Class co-counsel get one with ERISA 10 percent off the top, Damon's percentage also off the top, and each of class co-counsel split with the percentages agreed to. *In short, no reason for ERISA to see*

[114] This is another instance of problems created at Labaton as a result of its compartmentalization of its practice. *See* discussion, *supra.*

> *Damon's split. They only need to see their 10 percent and then split three ways.* By the way, I want to asterisk the 10 percent to ERISA with a footnote saying although our fee agreement with ERISA counsel only provides for a 9 percent allocation, co-class counsel have determined to increase that to 10 percent in light of the excellent work and contribution of ERISA counsel.

TLF-SST-012272 – 12274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller, and Belfi) (emphasis added).[115] [EX. 160].

Larry Sucharow then also directed Goldsmith to send a separate claw back letter to Damon Chargois for his signature, as well. Goldsmith 9/20/17 Dep., p. 171:14-23. [EX. 42]. Accordingly, Goldsmith drafted a letter for Eric Belfi, the "ATRS relationship partner" with Labaton, to send to Chargois. *Id*, p. 172:10-15. *See also* Belfi 9/5/17 Dep. p. 93:13-16. [EX. 122].

Goldsmith testified that all counsel ultimately complied with the request and signed the letter agreement. Goldsmith 7/17/17 Dep., p. 160:2-7. [EX. 58]. Although Goldsmith acknowledged that the ERISA firms had nothing to do with the errors in the Thornton/Labaton/Lieff fee petitions, he testified, "We thought the best way to deal with this would be to gather signatures from everybody, even if perhaps they apparently weren't involved in the double counting, that if there was a reduction that applied to them, that they would return the money." *Id.,* pp. 158:25 - 159:9. Goldsmith, however, admitted that "if there was a determination that expressly applied only to some firms, then I guess this letter would bring up some questions about how that would be handled." *Id.*, p. 159:10-15.

[115] This was another attempt to ensure that ERISA lawyers did not learn about the Chargois Agreement or payment.

4. The *Boston Globe* Article

Before the Court had an opportunity to respond to Goldsmith's November 10 letter, on December 17, 2016, the *Boston Globe* published its article. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE, December 17, 2016. In addition to reporting the double-counting and Goldsmith's explanation, the *Globe* article also criticized the rates at which the staff attorneys were billed in the *State Street* action. *See id*. The article further specifically targeted the fees billed by Michael Bradley, who, according to the article, "is a lawyer, but normally works alone, often making $53 an hour as a court-appointed defender in Quincy District Court," but was billed at "nearly 10 times that rate in the State Street case." *Id.* Citing Garrett Bradley's Fee Declaration, the *Globe* reported that Michael Bradley was billed in the *State Street* case as a "$500-an-hour 'staff attorney'" who "worked 406.4 hours on the lawsuit . . . at a cost of $203,200." *Id.*

The *Boston Globe* also criticized the billing rates of the other staff attorneys:

> Michael Bradley wasn't the only lawyer for whose work Thornton claimed stratospheric – and questionable – legal costs in the filing to US District Judge Mark L. Wolf. Garrett Bradley listed 23 other staff attorneys, each with hourly rates of $425, who collectively accounted for $4 million in costs. But one of the lawyers told the *Globe* he was actually paid just $30 an hour for his services – and not by Thornton. Like all the other staff attorneys on Garrett Bradley's list, except his brother, he worked for another firm in the case, which also counted his hours on its list of costs.
>
> . . . . .
>
> More than 60 percent of the costs that Thornton and two other law firms submitted to Judge Wolf came from the work of staff attorneys – all of them assigned hourly rates at least 10 times higher than the $25 to $40 an hour typical for these low-level positions – which involve document review.

Id.

5. The Court's Response to Goldsmith's Letter and the *Boston Globe* Article

a. Appointment of the Special Master

With questions having been raised as to the accuracy and reliability of the lodestar reports that had been submitted by Plaintiffs' counsel and relied upon by the Court in awarding fees, the Court proposed the appointment of a Special Master to investigate these issues and prepare a Report and Recommendation concerning them. *See* 2/6/17 Memorandum and Order, Dkt. # 117. [EX. 180]. The Court thereafter held a hearing on March 7, 2017 to discuss, among other issues, the appointment of Hon. Gerald E. Rosen as the Special Master. *Id.* At that hearing, all counsel consented to the appointment of Judge Rosen as Special Master. *See* 3/7/17 Hrg. Tr., Dkt. # 176, pp. 43, 55.[116] [EX. 96]. Counsel further consented to the payment of $2 million by Labaton, Lieff, and Thornton, collectively, for deposit with the Clerk of the Court to fund the Special Master's investigation. *Id.,* pp. 51-52.

The following day, March 8, 2017, the Court entered a Memorandum and Order appointing Hon. Gerald E. Rosen, ret., as Special Master to investigate and prepare a

[116] McTigue initially filed a written objection to the appointment of Judge Rosen, *see* McTigue Law's Response to 2/6/17 Order, Dkt. # 138 [EX. 181], but on the record at the hearing, Brian McTigue withdrew that objection. *See* 3/7/17 Hrg. Tr., Dkt. # 176, p. 55:3-4. [EX. 96].

Report and Recommendation. *See* 3/8/17 Memorandum and Order, Dkt. # 173. [EX. 163]. The Order, in pertinent part, provides as follows:

> [I]t is hereby ORDERED that pursuant to Federal Rule of Civil Procedure 53:
>
> 1. Judge Rosen is appointed as Master (the "Master"). The Master may retain any firm, organization, or individual he deems necessary to assist him in the performance of his duties.
>
> 2. The Master shall investigate and prepare a Report and Recommendation concerning all issues relating to the attorneys' fees, expenses and service awards previously made in this case. The Report and Recommendation shall address at least: (a) the accuracy and reliability of the representations made by class counsel in their request for awards of attorneys' fees and expenses, including but not limited to whether counsel employed the correct legal standards and had a proper factual basis for what was represented to be the lodestar for each firm; (b) the accuracy and reliability of the representations made in the November 10, 2016 letter from David Goldsmith, Esq. of Labaton Sucharow, LLP (Docket No. 116); (c) the accuracy and reliability of the representations made by class counsel and each of the named plaintiffs in requesting service awards; (d) the reasonableness of the amounts of attorneys' fees, expenses and service awards previously ordered, and whether any or all of them should be reduced; (e) whether any misconduct occurred in connection with such awards; and if so, whether it should be sanctioned, *see e.g.,* Fed. R. Civ. P. 11(b)(3) & (c); Massachusetts Supreme Judicial Court Rule of Professional Conduct 3.3(a)(1) & (3).
>
> ***
>
> 4. The Master shall have the authority described in Federal Rule of Civil Procedure 53(c)(1) and (2). Therefore, among other things, the Master shall have the authority to compel, take and record evidence. This includes the authority to require the production of documents and other records from the parties and third-parties; require responses to interrogatories, and other requests for information and admissions; conduct depositions; and conduct hearings.
>
> ***
>
> 11. The Master shall make and preserve a complete record of the evidence concerning his recommended findings of fact and any conclusions of law. Such record shall be filed with the Master's Report and Recommendation.

3/8/17 Memorandum and Order, Dkt. # 173 (footnotes omitted). [EX. 163].

b. The Special Master's Investigative Team

The Appointing Order in this case specifically authorized the Special Master to "retain any firm, organization, or individual he deems necessary to assist him in the performance of his duties." *See* 3/8/17 Memorandum and Order, Dkt. # 173, ¶ 1. [EX. 163]. Pursuant to that authority, the Special Master assembled a team led by William Sinnott, a partner in the Boston law firm of Donoghue, Barrett & Singal P.C. (now "Barrett & Singal, P.C.") ("Counsel to the Special Master") to assist him in the investigation. Other attorneys comprising the Special Master's investigative team were: Elizabeth McEvoy and Brian Mulcahy, also attorneys with Barrett & Singal; Linda Hylenski, former career law clerk for Judge Rosen in the United States District Court for the Eastern District of Michigan, currently a research attorney with JAMS; and the Hon. Mary Beth Kelly, a former Justice of the Michigan Supreme Court, currently a JAMS mediator and arbitrator. The Special Master also retained John Toothman, Esq., an authority on legal fees and legal fee management, to serve as the team's Technical Expert,[117] and Professor Stephen Gillers as an expert on the ethical and professional conduct issues raised in this case.

c. The Investigation

[117] Several of Plaintiffs' Counsel objected to the appointment of Mr. Toothman. The Special Master overruled the objection. *See* Special Master's 3/31/17 Order Regarding the Law Firms' Objection to Retention of John Toothman, Dkt. # 193. [EX. 182]. This decision was appealed to the District Court which affirmed the Special Master. *See* Dkt. # 199 [EX. 183], 204 [EX. 184].

Over the course of a fourteen-month investigation, the Special Master and his investigative team conducted written discovery, reviewed over 200,000 pages of documents, interviewed 34 witnesses, and conducted 63 depositions in Boston, New York, Washington, D.C., and Detroit. As directed in the Appointing Order, the principal areas of inquiry at the core of the investigation were:

a. The accuracy and reliability of the fee petitions;

b. The accuracy and reliability of the representations made in Goldsmith's November 10, 2016 letter to the Court;

c. The accuracy and reliability of representations made by the parties requesting service awards;

d. The reasonableness of the amounts of attorneys' fees, expenses, and service awards previously ordered and whether any or all should be reduced; and

e. Whether any misconduct occurred in connection with the awards, and if so, whether it should be sanctioned.

The Findings of Fact set forth above inform the Special Master's Conclusions of Law that follow. To the extent that any Findings of Fact constitute Conclusions of Law, they are so adopted.

III. CONCLUSIONS OF LAW

A. APPLICABLE STANDARDS

1. The Special Master's Authority to Decide Issues Regarding the Fee Award

In a certified class action, the court may refer issues related to the amount of an award of attorneys' fees and nontaxable costs to a special master pursuant to Fed. R. Civ. P. 54(d)(2)(D). *See* Fed. R. Civ. P. 23(h). Rule 54(d)(2)(D) provides, "[T]he court may refer issues concerning the value of services to a special master under Rule 53 without

regard to the limitations of Rule 53(a)(1)." As the 1993 Advisory Committee Note to Rule 54 explains, "the rule [] explicitly permits . . . the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. . . . This authorization eliminates any controversy as to whether such references are permitted . . ." Fed. R. Civ. P. 54 Advisory Committee's Note to 1993 Amendment. Pursuant to Rule 53, the appointing order delineates the special master's duties and authority. Fed. R. Civ. P. 53(b)(2)(A). *See* 3/8/17 Memorandum and Order, Dkt. # 173. [EX. 163].

2. Duties of the Court and Counsel in Class Action Fee Petition Proceedings

Fed. R. Civ. P. 23(e) squarely places the court in the role of protector of the rights of the class when a settlement is reached and attorneys' fees are awarded. *See In re Agent Orange Product Liability Litigation,* 818 F. 2d 216, 222 (2d Cir. 1987).[118] "In fulfilling this role, courts should look to the various codes of ethics as guidelines for judging the conduct of counsel." *Id.* (citations omitted).

Attorneys seeking fees from a common fund have a duty to present all relevant facts to the court reviewing the petition. *Id.* at 224-226. This duty arises under Rule 23(e) as the court must, pursuant to that provision, ensure that a settlement, and the distribution of that settlement, in a class action are fair and reasonable. *See Bezdek v. Vibram USA, Inc.,* 809 F.3d 78, 82 (1st Cir. 2015); Fed. R. Civ. P. 23(e)(2) ("[T]he court may approve [a proposed settlement] only after a hearing and on finding that it is fair, reasonable, and adequate.") As noted in the Advisory Committee Notes to Rule 23,

[118] *Agent Orange* is the leading case in the area of judicial scrutiny of fee-sharing agreements among class action plaintiffs' attorneys.

"Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. . . . In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility." Fed. R. Civ. P. 23(h), Advisory Committee Notes, 2003 Amendment.

This gatekeeper duty on the part of the court clearly reflects the court's equitable authority to safeguard settlement funds as a fiduciary of the class. *Bezdek v. Vibram, USA, Inc.,* 809 F. 3d at 80; *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 736 (1st Cir.1999) ("[T]he district court, called upon to make awards of fees and/or expenses… functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class."); *see also In re Eastman Kodak ERISA Litig.*, 213 F. Supp. 3d 503, 508 (W.D.N.Y. 2016) (quoting *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 765 (S.D.N.Y.1977) ("[S]ince the fee award in some respects operates to reduce the amount of benefit which might otherwise have accrued to class members, the courts bear a special responsibility to safeguard the interests of these absent plaintiffs").

The fee petition process clearly places an enhanced duty of full disclosure and transparency upon counsel filing their petition for attorney fees so that the court can perform its gatekeeping function fully and completely advised of all factors and agreements that impact the allocation of attorneys' fees vis-à-vis the actual recovery of the class. The First Circuit has held that where courts must determine an award of attorneys' fees -- such as in approving an award requested in a common fund class action

case -- a court has a responsibility to "render a principled decision" by closely scrutinizing fees, even fees agreed upon by counsel and the client. *See Codex Corp. v. Milgo Electronic Corp.,* 717 F.2d 622, 632 (1st Cir. 1983), *cert. denied*, 466 U.S. 931 (1984). Absent full disclosure, the court cannot, with full knowledge, discharge its gatekeeping function and ensure fairness to the class. *Weinberger v. Great Northern Nekoosa Corp.,* 925 F. 2d 518, 528 (1st Cir. 1991).

The Special Master is guided by the foregoing general standards in deciding the issues presented in this case.

B. ACCURACY, RELIABILITY, AND REASONABLENESS OF THE LODESTARS

The Court has called upon the Special Master to determine the accuracy and reliability of representations made to the Court in connection with the fee petition and the reasonableness of the fees previously ordered.

1. The Firms' Lodestar Petitions

To exercise its fiduciary duty to protect the class when responding to class counsel's fee request, a court needs accurate and complete information about the contributions of the firms seeking counsel fees. Here, the *State Street* fee petition requesting attorneys' fees in the amount of $74,541,250.00, plus $1,257,699.94 in expenses and accrued interest, was supported by the Omnibus Declaration of Lawrence A. Sucharow and nine individual declarations submitted by each law firm that had filed an appearance in the case.

The individual declarations incorporated a narrative provided to them in a "template" prepared by Labaton in setting forth the respective firms' attorneys' work on the case. Specifically, in these individual declarations, each of the law firms represented to the Court:

- The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request. (Dkt. Nos. 104-15, ¶ 6 [EX. 88]; 104-16, ¶ 3 [EX. 66]; 104-17, ¶ 4 [EX. 89]; 104-18, ¶ 3 [EX. 90], ¶ 3 [EX. 93]; 104-23, ¶ 3 [EX. 95]).

- The hourly rates for the attorneys and professional support staff in my firm [] are the same as my firm's regular rates charged for their service, which have been accepted in other complex class actions." (Dkt. Nos. 104-15, ¶ 7 [EX. 88]; 104-16, ¶ 4 [EX. 66]; 104-17, ¶ 5 [EX. 89]; 104-18, ¶ 4 [EX. 90]; 104-21, ¶ 4 [EX. 93]; 104-23, ¶ 4 [EX. 95].)[119]

[119] With respect to hourly rates, three of the ERISA firms -- McTigue Law, Zuckerman Spaeder, and Beins Axelrod -- used different language: McTigue Law's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." Dkt. No. 104-18, ¶ 20. [EX. 91].

Zuckerman Spaeder's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions and are charged to clients paying us currently by the hour." Dkt. No. 104-20, ¶ 4. [EX. 92].

Beins Axelrod's individual fee declaration states that "[t]he hourly rates charged by the Timekeepers are the Firm's regular rates for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters. Based on my knowledge and experience, these rates are also within the range of rates normally and customarily charged in Washington, D.C. by attorneys of similar qualifications and experience in cases similar to this litigation, and have been approved in connection with other class action settlements. The Firm has charged, and received, an hourly rate of $525.00 in litigation involving fiduciary breach by a former trustee and service providers. The Firm does charge a lower rate to longstanding Fund clients in non-contingency matters and to its Union clients. To serve the public interest, the Firm has also charged reduced rates to individual employees with employment discrimination claims. Dkt. No. 104-22, ¶ 8. [EX. 94].

A chart ("Exhibit A") summarizing each firm's respective lodestar through August 30, 2016 was attached to each individual firm's declaration, which listed the hours of work done by partners, associates, staff attorneys, contract attorneys, "of counsel" attorneys, local counsel, research analysts, paralegals, and investigators, and the rates at which their work was billed.

2. Governing Law

In examining the Fee Petition in this case, the Special Master starts with the basic principle that an award of attorneys' fees from a common fund must be reasonable. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."). Because the Court derives its authority to order reimbursement from a common fund from its historical equitable powers, each fee request must be assessed on its own terms; "individualization is the name of the game." *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (authority to order reimbursement from a common fund has its origins in equity); *see also United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st. Cir. 1999) (recognizing, in a land dispute case involving a common fund award, that the common fund is an equitable award and the district court has broad discretion in determining the appropriateness of such an award).

Courts analyze fee awards using two different methods: the percentage-of-fund ("POF") method and the lodestar calculation. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir.1995) (describing two methods); *see Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) (identifying

percentage-of-fund and lodestar as the two options for determining fee awards); *see also Duhaime v. John Hancock Mut. Life Ins. Co*., 989 F. Supp. 375, 377 (D. Mass. 1997).

Under the lodestar approach, the court calculates the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"). Alternatively, courts can award fees based on what the court determines is a reasonable percentage of the fund recovered. *See In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 77-79 (D. Mass. 2005) (discussing the applicability, use, and common percentage size when using the POF method); *Roberts v. TJX Companies, Inc*., No. 13-13142, 2016 WL 8677312, at *10 (D. Mass. 2016) (identifying factors the 1st Circuit has identified as relevant to the determination of the reasonableness of a POF award).

The First Circuit has taken a flexible approach and has determined that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a POF basis or by fashioning a lodestar. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig*., 56 F.3d at 308. ("Given the peculiarities of common fund cases and the fact that each method, in its own way, offers particular advantages, we believe the approach of choice is to accord the district court discretion to use whichever method, POF or lodestar, best fits the individual case. We so hold, recognizing that the discretion we have described may, at times, involve using a combination of both methods when appropriate."

Although the First Circuit has declared that the district court has a choice as to whether to use the POF or lodestar approach, a majority of courts in this circuit rely heavily on the POF calculation in determining the reasonableness of fee awards. *See In re Lupron Mktg. & Sales Practices Litig*., 2005 WL 2006833, at *3-5 (D. Mass. Aug. 17, 2005); *Duhaime v. John Hancock Mut. Life Ins. Co*., 989 F. Supp. 375, 377 (D. Mass. 1997) (POF method more aligns with interests of the class); *In re Relafen*, 231 F.R.D. at 79 (identifying POF as appropriate under the circumstances of the case). However, where the court begins with a POF analysis, it will nevertheless calculate the lodestar as a cross-check to confirm the reasonableness of the POF award. *See In re Thirteen Appeals*, 56 F.3d at 307; *Walsh v. Popular, Inc*., 839 F. Supp. 2d 476, 485 (D.P.R. 2012) (using lodestar to confirm the reasonableness of the POF award for attorneys' fees in an ERISA class-action settlement); *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, No. 05–11148, 2009 WL 3418628, at *1 (D. Mass. 2009) (determining that lodestar is enough of a cross-check on the POF method; a full audit of all attorneys' fees and costs was too cumbersome and time-consuming). The lodestar cross-check is the approach used by the Court in this case. *See* 11/2/16 Hearing. Tr., pp. 30:18-22, 35:13. [EX. 78].

The transcript of the November 2, 2016 Hearing bears out that the Court accepted Class Counsel's calculation of fees and expenses, including service awards to the Plaintiff representatives, as 25.27% of the gross settlement fund. *See* 11/2/16 Hearing Tr., pp. 23:6-19; 35:3 – 37:3. The Court also applied the lodestar cross-check to the fees and found the fees reasonable. "The amount awarded is about 1.8 times the lodestar.

The lodestar is about $41 million. This is reasonable." *Id*., pp. 36:1-2. The Court left no doubt as to the importance of the lodestar in approval of the award: "I have used the percentage of common fund method. I've used the reasonable lodestar to check on that." *Id*., p. 35: 12-13.

In concluding that the amount of fees requested was reasonable, the Court reviewed in detail the relevant factors to determine reasonableness outlined in *Johnson v. Georgia Hwy. Express*, 488 F.2d 714 (5th Cir. 1974) and *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984), highlighting the submission of the number of hours spent, the result achieved for the class, the novel theory pursued, the potential difficulty of achieving class certification, the global settlement reached with the ERISA class, the arduous discovery and mediation process that proceeded in tandem, and the involvement and agreement of the regulatory bodies involved, namely the DOL, the SEC, and the DOJ.

But beyond these factors -- and inherent in the application of the POF and lodestar cross-check -- any determination of the reasonableness of attorneys' fees depends entirely in the first instance on the accuracy and reliability of rates and hours submitted to the Court in the lodestar petitions of the parties.

3. Rates and Hours

a. Reasonableness of Hourly Rates

A reasonable hourly rate takes into account such factors as the type of work performed, who performed it, the expertise that it required, and when it was undertaken. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950-51 (1st Cir. 1984) (internal citations omitted). There is, of course, no universal rate for legal services. *Hutchinson ex rel.*

Julien v. Patrick, 636 F.3d 1, 16 (1st Cir. 2011). Hourly rates vary based on "the nature of the work, the locality in which it is performed, the qualification of the lawyers, among other criteria." *United States v. One Star Class Sloop Sailboat*, 546 F.3d 26, 38 (1st Cir.2008) (when determining hourly rates for a lodestar calculation, a court may apply standard local rates for a specific type or work, even if the out-of-state attorney traditionally charges a higher rate for the same type of work), *citing Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 295 (1st Cir. 2001) (analyzing the factors to be considered when determining the reasonable hourly rate for a lodestar calculation under a fee-shifting statute). Given the great variance in hourly rates charged across different jurisdictions, and among attorneys of varying background and experience, the court must first determine the appropriate point of reference -- or venue -- against which the reported fees will be compared.

b. Prevailing Rates in the Community

i. First Circuit Rule -- Local Forum

In the First Circuit, courts apply the prevailing rates in the community taking into account the qualifications, experience, and specialized competence of the attorneys involved. *Gay Officers Action League v. Puerto Rico*, 247 F.3d at 295. The presumption for cases pending in federal court in Boston is that Boston rates apply. *See Stokes v. Saga Int'l Holidays, Ltd.*, 376 F.Supp.2d 86, 92 (D. Mass. 2005). This forum venue presumption clearly should apply in cases involving the interpretation of local statutes or a straightforward application of state common law claims. *See Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) ("Where it is unreasonable to select a higher priced outside

attorney -- as, for example, in an ordinary case requiring no specialized abilities not amply reflected among local lawyers -- the local rate is the appropriate yardstick"). This is because local counsel are often better equipped than out-of-town counsel to litigate the nuances presented by local statutes and navigate local rules and procedures. *Id.* For these reasons, the First Circuit has determined that the "community" is the venue where the case is pending. *Id.* (discussing that a reasonable and well-informed client would be more willing to pay a local attorney at local rates if he or she could appropriately handle the legal issue); *see also Fryer v. A.S.A.P. Fire and Safety Corp., Inc*., 750 F.Supp.2d 331, 339 (D. Mass. 2010) (finding the community rate to be the rate in the community where the court sits); *Stokes*, 376 F.Supp.2d at 92.

As with any rule, however, there are circumstances in which a rate other than the local rate is more appropriate. In *Maceira*, the First Circuit held that out-of-town specialists may be able to command a higher rate for their services if the case requires specialized abilities not amply reflected among local lawyers, or "when a specialist was required for the handling of the case and a smaller community does not have one available." *Guckenberger v. Boston University*, 8 F. Supp.2d 91, 103-104 (D. Mass. 1998) (small communities may not have a specialist required to handle a case, and therefore an out-of-town specialist may be required).[120]

Courts have also found that where a case is national in scope and requires the expertise of counsel from outside the forum, "national rates" rather than local rates may

[120] Absent evidence that out-of-town rates should apply, courts adhere to the presumption that the local rates of the forum community will apply. *See e.g., Vieques Conservation and Historical Trust Inc. v. Martinez*, 313 F. Supp. 2d 40, 46 (D. P.R. 2004).

be appropriate. *See In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1308-09 (E.D.N.Y. 1985) (finding that using a "nationally prevailing rate" was an appropriate solution for determining attorneys' fees in complex, wide-scope cases); *see also Feinberg v. Hibernia Corp*., 966 F. Supp. 422, 447 (E.D. La. 1997) (declining to apply the local New Orleans rates; considering multiple factors, including the relevant New York rates and expenses of the firms involved, court found New York rates should apply).

ii. The "Community"

The First Circuit rule and these exceptions underscore the importance of identifying the underlying community in determining the appropriate billing venue for legal services. The threshold question then becomes: What is the relevant "community" for purposes of national class action litigations? As counsel suggested throughout discovery, "community" refers not just to a geographic legal community, but more broadly to a community of practitioners. *See e.g.,* Heimann 7/17/17 Dep., pp. 70:5 – 71:4. [EX. 19]. Indeed, several courts have applied a similar analysis. *See, e.g., Boxell v. Plan for Group Ins. of Verizon Comm., Inc.*, No. 1:13–CV–089 JD, 2015 WL 4464147 at *9 (N.D. Ind. July 21, 2015) ("when the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that area is a national market, the relevant community is not the local market area, but the community of practitioners in that subject matter") (some internal punctuation omitted); *Lucas v. Kmart Corp.*, No. 99–cv–01923–JLK–CBS, 2006 WL 2729260 *4 (D. Colo. July 27, 2006) (relevant community for purposes of determining a reasonable billing rate

for class counsel consists of attorneys who litigate nationwide, complex class actions); *see also Donnell v. United States,* 682 F2d 240, 252 (D.C. Cir. 1982); *Flash II, supra*, 546 F.3d at 40-41. The Special Master agrees with counsel that what constitutes a community for purposes of determining a prevailing billing rate in this case is a far more nuanced inquiry than simply determining the situs of the Court.

iii. The State Street Case

Counsel contend that the venue of the litigation is not determinative of the community for purposes of selecting a billing venue in this case. Heimann 7/17/17 Dep., pp. 69:13 – 71:9 [EX. 19]; Fineman 6/6/17 Dep., pp. 74:24 – 75:9 [EX. 18]; Zeiss 6/14/17 Dep., pp. 65:5 – 23 [EX. 79]. Instead, counsel have argued the relevant community should be the community of practitioners equipped to handle the subject matter. Zeiss 6/14/17 Dep., pp. 65:24 – 66:13 [EX. 79]; *see also* Labaton Sucharow Responses to Interrogatories Nos, 44, 51 [EX. 174]. Counsel thus take the position that the relevant community in the *State Street* litigation is the community of practitioners with similar experience and skills to assert a national class action on behalf of a national class of plaintiffs. *Id.* Accordingly, counsel suggest "national" rates, rather than local rates, should apply.

It is certainly true that the forum venue of the *State Street* litigation is Boston, but it is equally relevant that counsel were members of the plaintiffs' class action bar and had extensive experience litigating complex class action matters across the country. *See* Lieff Cabraser Response to Special Master's First Set of Interrogatories, No. 1 [EX. 175]; Goldsmith 7/17/17 Dep., p. 11:4-9 [EX. 58]; Sucharow 6/17/17 Dep., 9:19-25; 13:11-13

[EX. 16]. Therefore, for purposes of determining billing venue, the community is one of seasoned class action litigators with experience bringing large securities, consumer, and ERISA claims.

Beyond this, the Plaintiff class members were situated throughout the United States.

For these reasons, it is appropriate that, as suggested by counsel, national rates should apply to the work performed in the *State Street* case. A thorough investigation has identified several factors that require expertise not readily available in the Boston market. In this analysis, consideration of the totality of the circumstances surrounding the case is required, including at least (1) the subject matter of the claims alleged; (2) availability of capable local counsel; (3) whether litigation called for out-of-town expertise not otherwise available in Boston; and (4) the national character of the litigation. A close examination of each factor strongly militates in favor of applying a national rate to the work performed in the *State Street* litigation.

1. Complexity of FX Trading Claims and the Need for Experienced Counsel

It is well accepted that a case requiring specialized abilities may, and often does, warrant higher attorney rates. *See Maceira, supra*; *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983). Cases involving complicated or novel legal concepts require clients to obtain counsel with specialized knowledge of the subject area. *See e.g., Interfaith Community Organization v. Honeywell Intern., Inc.* 426 F.3d 694, 707 (3d Cir. 2005). Specialized knowledge, however, may reside in out-of-town counsel. National class actions like the one brought against State Street are an area of specialty. *LV v. New York*

City Dept. of Education, 700 F. Supp. 2d 510, 515-16 (S.D.N.Y. 2010). Counsel with experience litigating complex class action cases do not reside in every legal market. That is because prosecution of a complex national class action requires unique legal skills and abilities as well as substantial resources. *Id; see also McClain v. Lufkin Indus., Inc.,* 649 F.3d 374, 382-83 (5th Cir. 2011); *Edmonds v. United States,* 658 F. Supp. 1126, 1146 (D. S.C. 1987). This is especially true in securities class action cases, which often require class members to meet heightened pleading requirements. *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1047 (N.D. Cal. 2008).[121]

Encompassed in all this is the requirement that in order to stand on equal footing with well-resourced defendants in complex, sophisticated cases – defendants who will invariably have highly skilled, highly experienced, and well-resourced counsel – the class must have counsel of equal training, skill, experience, and resources. Such counsel on the plaintiffs' side of the case may well not exist in the forum of the case. The Special Master finds that this is an important factor in ensuring that class members are well represented in complex, sophisticated class actions.

This was particularly true in this case. Given the complexity of the wrongs alleged against State Street, finding counsel with highly specialized experience in handling complex national class actions was essential. In this case, experience was required in two different areas: First, there was a need for counsel who could

[121] While the *State Street* litigation does not fall squarely under the umbrella of a securities class action, the substantive and procedural legal challenges involved in the *State Street* litigation were as complicated, if not more, than a securities class action case brought under the PSLRA. Therefore, the analysis of the applicable billing venue in securities cases is instructive.

successfully navigate Fed. R. Civ. P. 23 and the other procedural hurdles in certifying a national class in a novel subject area. Second, the success of the litigation depended on finding counsel who were versed in the intricacies of the global FX market and could factually support a monetary claim for relief from State Street. The same was true for the ERISA claims.

Turning to the mechanics of class litigation, counsel faced several unique legal challenges that required a sophisticated legal strategy just to keep the case afloat. The legal claims asserted against State Street were novel. Goldsmith 7/17/17 Dep., pp. 25:8-10; 27:11-22 [EX. 58]; Chiplock 6/16/17 Dep., pp. 58:10 – 60:24 [EX. 10]. Prior to the *State Street* litigation, no court had the opportunity to opine on all the precise legal theories raised by counsel, most notably the ability to certify a national class under Mass. Gen. Laws. ch. 93A. Heimann 7/17/17 Dep., pp. 36:5 – 37:2; 40:14 – 41:7 [EX. 19]; Chiplock 6/16/17 Dep., 57:20-25 [EX. 10]. Counsel, in turn, did not have the benefit of relying on past judicial jurisprudence informing the likely outcomes of class certification under consumer protection law, fiduciary status, and other issues affecting certification of a national class. Goldsmith 7/17/17 Dep., pp. 28:7 – 29:5 [EX. 58]; Heimann 7/17/17 Dep., pp. 36:5 – 37:2; 41:23-25 [EX. 19]. Quite the opposite. The few courts that had weighed in on these threshold legal issues had reached outcomes that weighed against at least two of Plaintiffs' legal theories -- breach of fiduciary duty and violation of Massachusetts consumer protection laws. Heimann 7/17/17 Dep., p. 37:3-17 [EX. 19]; Chiplock 6/16/17 Dep., pp. 58:18 – 60:20 [EX. 10]. Counsel further faced the likely possibility that State Street, like BONY Mellon, would file meritorious counterclaims

against the individual customer funds to recover lost funds. Chiplock 6/16/17 Dep., pp. 63:3 – 64:9. [EX. 10]. *See also Southeast Pennsylvania Trans. Auth. v. The Bank of New York Mellon Corp.*, SDNY No. 12-cv-3066, Dkt. # 111; *Int'l Union of Operating Engineers, Stationery Engineers Local 39 Pension Fund v. The Bank of New York Mellon Corp.*, SDNY No. 12-cv-3067, Dkt. # 155; *Ohio Police and Fire Pension Fund v. The Bank of New York Mellon Corp.*, SDNY No. 12-cv-3470, Dkt. # 46. Filing counterclaims would markedly shift the parties' respective bargaining positions.

The non-legal hurdles required an equal, if not greater, level of sophistication. Counsel in this case faced a formidable opponent in State Street and WilmerHale, a top Boston-based national defense firm. WilmerHale advocated doggedly on behalf of State Street throughout the litigation and mediation. Chiplock 6/16/17 Dep., p. 68:12 ("[D]efense counsel made us work hard…") [EX. 10]; Michael Thornton 6/19/17 Dep., p. 15:7-14. [EX. 2]. As experienced counsel, the WilmerHale attorneys skillfully exploited the weaknesses and risks of plaintiffs' case at every stage. Combating sophisticated defense tactics required equally sophisticated and experienced plaintiffs' counsel. Plaintiffs' counsel skillfully matched defense counsel's arguments advanced throughout a hard-fought mediation. Chiplock 6/16/17 Dep., p. 69:10-12. [EX. 10].

For the sake of brevity, it is unnecessary to summarize each attorney's substantive contributions to the favorable settlement; rather only a few notable examples will be highlighted. Lawrence Sucharow, who led the mediation efforts, first raised the issue of a hybrid mediation and sold the idea to his counterparts at WilmerHale, with whom he had a long professional relationship. Sucharow 6/14/17 Dep., p. 17:3-25. [EX. 16].

Several other attorneys also brought significant experience and meaningful working relationships to the table. Lynn Sarko, who had a longstanding relationship and extensive experience litigating national cases alongside the DOL, served as the liaison to the DOL and was ultimately responsible for securing the DOL's approval of the settlement-in-principle, a necessary precondition for the global settlement insisted upon by Defendant. Sarko 7/6/17 Dep., p. 51:2-5 [EX. 28]; Chiplock 6/16/17 Dep., p. 85:7-19 [EX. 10]. Bob Lieff, who had participated in several multi-firm class action litigations, brought a different kind of expertise -- that of handling internal dynamics. Thornton 6/19/17 Dep., p. 57:3-4. [EX. 2]. Finally, Michael Lesser of the Thornton Law Firm, who had developed a comprehensive understanding of FX pricing during litigation of the California action, assumed a lead role in calculating the potential damages owed to the class and crafting a theory of damages to use as leverage in the mediation with State Street. Kravitz 7/6/17 Dep., p. 78:4-23 [EX. 21]; Lesser 6/19/17 Dep., pp. 22:22 – 23:1. [EX. 20].

But litigating and understanding complex legal issues was only half the battle. Simply understanding the intricacies of the FX market required a great deal of sophistication and familiarity with FX trading practices not commonly known by legal professionals -- even those with experience in securities and financial fraud matters. Goldsmith 7/17/17 Dep., pp. 24:15 – 25:12. [EX. 58]. There was a steep learning curve involved in understanding the mechanics of FX trading. Attorneys at Lieff and Thornton had already mastered the basics of the FX trading through their participation in the California *qui tam* action and the *BONY Mellon* MDL, making them akin to subject-

matter experts. *See* §§ II(A)(1) and (B)(1), *supra*. An advanced understanding of the mechanics of the FX market were not just helpful, but essential to proving the case. Just to assert a damage figure during the pleading and mediation stages, counsel had to analyze the differences in markups applied by State Street to its indirect customer trades as opposed to the market differentials for those same days and times. Hoffman 6/5/17 Dep., pp. 22:20 – 23:25 [EX. 63]; Lesser 6/19/17 Dep., pp. 21:14 – 22:13 [EX. 20]. This was no easy task and required a high level of comprehension.

2. Unavailability of Local Counsel

As described above, the sophistication of the subject matter necessitated counsel with significant experience. After a thorough review, it is apparent that, in the local plaintiffs' bar, there was no firm that possessed all of the requisite skills, experience, or resources necessary to carry the litigation forward on its own. While Thornton is based in Boston, Thornton's main contribution to the case was in its experience litigating national class actions. Moreover, Thornton lacked the human and financial resources to bring this action on its own. Hoffman 6/5/17Dep., pp. 31:25 – 32:23. [EX. 63].

3. National Scope of Class Action Litigation

The *State Street* case was national in scope in several other respects. The Settlement Class, comprised of all custody and trust customers of State Street (including ERISA Plans, Group Trusts, and State Street's direct trustees), included class members from all over the country suing State Street, a large custodial bank with offices around the country and in thirty countries around the world. Moreover, the class representatives who participated in the litigation resided in six different states: Arkansas, Pennsylvania,

Washington, New Mexico, Illinois, and Maryland. Counsel themselves hailed from six different cities in six different states.[122] That most of the counsel involved in the case were not "local" to Boston, combined with the presence of a diverse class of plaintiffs from across the country, further supports the adoption of a national rate approach.

4. ERISA Claims

The case for national rates is even stronger when considering the work of ERISA counsel in bringing the *Henriquez* and *Andover* complaints. Courts reviewing fee petitions in ERISA cases have routinely considered the comparable rates of ERISA attorneys in other jurisdictions and determined that ERISA cases involve a "national standard." *See, e.g., Mogck v. UNUM Life Ins. Co. of America,* 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2007). In *Mogck,* the court noted that counsel handling ERISA matters often take on complex, undesirable cases. *Id.* ERISA counsel, moreover, tend to practice in various districts. And, as is the case in the *State Street* litigation, ERISA counsel frequently have extensive experience litigating under the ERISA statute. *Id.*

Further, despite counsel's having obtained a very favorable result for the class, representing ERISA plans in the *State Street* case was not without significant challenges. As ERISA and non-ERISA counsel readily acknowledged throughout the investigation, the definition of "ERISA funds" was a constantly evolving concept. Chiplock 6/16/17

[122] Customer Class Counsel included Labaton Sucharow, based in New York City with offices in Delaware, Washington D.C., and Illinois; Lieff Cabraser, based in San Francisco with offices in Nashville, New York City, and Seattle; and Thornton Law Firm, based in Boston. ERISA Counsel included Keller Rohrback, based in Seattle with offices in Oakland, New York, Phoenix, Santa Barbara, California and Ronan, Montana; Zuckerman Spaeder, based in Washington, D.C. with offices in New York City, Tampa, and Baltimore; and, McTigue Law, based in Washington, D.C. Two other firms also participated on behalf of the ERISA participants: Beins Axelrod and Richardson Patrick. Beins Axelrod is based in Washington, DC; Richardson Patrick is based in Mount Pleasant, South Carolina (but maintains a national litigation practice).

Dep., p. 86:3-25. [EX. 10]. The total trading volume attributable to the ERISA plans (providing a basis for calculating damages) was subject to change throughout the period of negotiating the final term sheet. *Id.* And, similar to the *ATRS* complaint, the *Henriquez* and *Andover* complaints were subject to several legal arguments that could be raised in an inevitable motion to dismiss, most notably whether a group plan had standing to bring a breach of fiduciary claim against State Street. Sarko 7/6/17 Dep., p. 28:12-18 [EX. 28]; Kravitz 7/6/17 Dep., pp. 35:22 – 36:15 [EX. 21].

ERISA counsel representing the *Henriquez* and *Andover* plaintiffs in the *State Street* litigation overcame these challenges by drawing on several decades of experience litigating complex ERISA cases across the country. Keller Rohrback and McTigue Law, in particular, had recently been involved in the *BONY Mellon* case representing ERISA participants bringing substantially similar claims to those alleged in *State Street*. Sarko 7/6/17 Dep., p. 13:1-2 [EX. 28]; McTigue 7/7/17 Dep., p. 10:1-24 [EX. 11]. McTigue, in fact, has represented ERISA participants in many investment cases throughout his entire career. *Id.*, p. 9:1-7.

iv. Determination of National Rate

Given our decision that national, rather than regional, rates apply to this case, the next question is how to determine the appropriate national rate in the *State Street* case. The national rate applying to the *State Street* case, like any rate, must be tethered to the rates typically charged by counsel practicing in the subject matter -- here complex securities/financial fraud litigation -- in those geographic markets where securities and financial fraud litigation are typically brought. Like regional rates, national rates should

be commensurate with the legal rates for attorneys of comparable skill, experience, and reputation litigating substantially similar matters. Applying these principles, we rely on rates charged in comparable cases as well as those reported by firms in our target regions for partners, associates, and staff attorneys. Because of an apparent lack of data reported on "staff attorney" rates, as to the reasonableness of those rates we are further informed by courts that have weighed in on this issue.

c. Market Rates in 2016

We return to the basic premise that there is "no universal rate." Due to the wide range of experience and reputation among firms, and significant differences in legal markets, different law firms (and different law practices within those firms) command different rates. Even focusing solely on the national market, no single hourly rate can accurately convey the value of an entire legal field. Given the inherent challenges involved in calculating a uniform rate, the Special Master examines each of the firms' rates from the perspective of a reasonable range of national rates.

i. Legal Framework

In assessing the reasonableness of the hourly rates listed on the Fee Petition, it is important to identify the appropriate framework. Not all rates bear the same weight; some rates by virtue of the collector, subject-matter, or field, are more informative in our analysis than others. We look, then, to the source of the hourly rates rather than the dollar amounts themselves.

In deconstructing the Fee Petition rates, the Special Master has identified two threshold issues that inform and direct this analysis: first, what substantive practice

area(s) best reflect the legal work performed in the *State Street* case; and second, which geographic regions best inform a national rate for that practice area. Beyond this, even where consideration of the practice area and geographic regions yields a reasonable range, the Special Master must independently decide what, if any, adjustments must be applied to correct for the biases in the reporting data.

a) Relevant Practice Area

We start, rather than end, our analysis by noting that *State Street*, while venued in Boston, was a class action case of national scope with class members located all across the country. Even among national class actions, the *State Street* case was atypical in several respects. The alleged malfeasance in the FX trading market represented a "hybrid" between consumer, securities, and ERISA-based claims. Labaton's June 1 Response to Special Master's First Set of Interrogatories, No. 8 [EX. 249]. In 2009, when the theory for the *State Street* case was originated,[123] FX trading was not a heavily litigated area of the financial services industry. Thornton 6/19/17 Dep., p. 41: 11-17 [EX. 2]. Indeed, the *State Street* case drew the attention of three separate governmental agencies regulating three separate areas of law: the SEC, which monitors securities; the DOL, which oversees the labor market and work-related benefits such as ERISA plans; and the DOJ, which enforces the criminal code.

Given the novelty of the subject matter and the formidable size and resources of State Street, we find the *State Street* case most comparable to a large securities or

[123] *See People of the State of California, ex rel. Edmund G. Brown, Jr. v. State Street Corporation, et al.*, Cal. Super. Ct. No. 34-2008-00008457-CU-MC-GDS

financial fraud case, which typically involves complex financial data and implicates large national classes, rather than a more routine consumer class action case. We distinguish between securities class actions, on the one hand, and more ordinary class actions, on the other, in light of the higher demand for specialized and sophisticated market expertise required in litigating securities-based cases.[124]

b) Relevant Geographic Markets

It is axiomatic that the national rate is not merely an "average" of the rates charged across all legal markets in the United States. While that average figure has some bearing, we do not adopt a one-size-fits-all approach here. Rather, for our purposes, a national rate represents the appropriate hourly rate for counsel litigating national and highly complex securities or financial fraud cases -- whether in a multi-district or class action litigation -- based on what firms litigating in that space reasonably earn in their home market. Because the *State Street* case is most accurately viewed as a complex securities and/or financial fraud class action, we turn now to the question of *which* legal markets provide high-quality securities litigation such that they tend to influence the national rate for these services.

[124] While the size of a law firm is one factor to consider in determining whether the rates charged by that firm are reasonable, it is not determinative in our analysis of the reasonableness of rates charged by firms involved in this case. As was the case in *State Street*, firms specializing in plaintiffs' class action cases often operate with a smaller attorney team than that of a traditional large law firm. This subset of plaintiff-side firms, however, are often just as sophisticated and capable as their large-firm adversaries, and thus are entitled to the same compensation and should not be limited by the number of attorneys they employ. For this reason, we consider, but are not constrained by, the results of the NALFA survey, for which the majority of responses received were from firms with fifty or fewer attorneys. *See* NALFA Survey Results. [EX. 185].

Beyond this, as noted, the Special Master believes that because of the important societal role plaintiffs' firms play in protecting consumers and the public in these complex areas, plaintiffs' firms are entitled to the same levels of compensation as their large defense-firm counterparts.

The Plaintiffs' firms in this case were experienced in large-scale litigation and, specifically, FX litigation, and worked out of four major legal markets: New York City, Boston, San Francisco, and Washington, D.C.[125] For purposes of calculating a national rate, we rely heavily -- but not exclusively -- on the reported average hourly rates charged in these four legal markets.[126]

c) Survey Design Flaws and Challenges

As with any data analysis, we must take into consideration the statistical challenges and flaws in the methodology through which the data is collected.

First, an immediate challenge we faced in conducting our review was the limited data upon which to ground our analyses. Due to the proprietary nature of hourly rates, hourly rate data, designated by one's location and position within a firm, are not readily available to the public in great quantity. As a result, practitioners and courts alike rely heavily on information reported on lodestar petitions and their equivalents, and rates accepted by courts in comparable actions.

Second, we recognize the great potential for biases among those firms who self-report data in hourly fee surveys. Practitioners who take contingent cases and therefore routinely rely on courts to approve their hourly rates have a strong interest in reinforcing substantial rates, and given the scarcity of reliable hourly rate information, there may be

[125] While the main Keller Rohrback attorney, Lynn Sarko, works out of the firm's Seattle office, Keller Rohrback maintains offices in major cities in five states, including an office in New York City.

[126] The National Law Journal survey, discussed *infra*, provides data based upon the state in which the firm has its largest U.S. Office.

an incentive for law firms presenting fee petitions to a court to submit artificially inflated rates to reinforce the reasonableness of their own rates.

Additionally, and as addressed elsewhere in the Report, we proceed with caution when considering rates previously approved in other class action cases. Those rates, while tethered to the market in which those attorneys practice -- which naturally varies from case to case -- are often artificially selected by firms at the fee petition stage but are otherwise insulated from the scrutiny of the legal market. That is, they have been approved by judges reviewing the lodestar, but not by a client that has the option of looking elsewhere for legal representation. Thus, such rates may be higher than those charged to a client paying on an hourly basis who has an incentive to negotiate a lower price.

Finally, even rates billed to a client that pays a firm on an hourly basis are often not collected in full and do not represent the rate actually realized in a given case. Thus, even hourly rates that are vetted through a scrutinizing client, supply and demand, and the realities of a free market for legal services may be inflated compared to somewhat lower actualization rates. These inflated rates can be a misleading guidepost for judges assigning a reasonable rate for the purposes of a lodestar cross-check in a class action fee petition.

2. Analysis

a) Partners and Associates

The lodestar reports of Plaintiffs' Counsel charge partners at hourly rates ranging from $535 to $1,000, and associates at hourly rates of $325 to $725.[127] As discussed below, we conclude that these rates are commensurate with partner and associate rates charged and approved in similarly complex class actions, and therefore are reasonable.

Comparison to other securities/financial fraud cases

Given the niche area of securities/financial fraud class actions, we find particularly instructive those rates awarded in comparable class actions cases throughout the country.[128]

[127] Labaton had nine partners working on the case with billing rates of $800 - $925 an hour, and six associates with billing rates of $340 - $725 an hour. See Declaration of Lawrence Sucharow on Behalf of Labaton Sucharow LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. No. 104-15, Ex. A. [EX. 88]. Lieff had 10 partners with billing rates of $575 - $1,000 on the case, and two associates with billing rates of $425 and $435 an hour. *See* Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. No. 104-17, Ex. A. [EX. 89]. Thornton's lodestar report listed four partners at $535 - $850 an hour, and one associate at $450 an hour. *See* Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. No. 104-16, Ex. A. [EX. 66].

On the ERISA side, Keller Rohrback had 14 partners with hourly billing rates of $550 - $925 and five associates billing at rates of $400 - $525 an hour. *See* Declaration of Lynn Sarko, Dkt. No. 104-18, Ex. A. [EX. 90]. Zuckerman Spaeder had five partners (and no associates) working on the case with billing rates of $650 - $990 an hour. See Declaration of Carl Kravitz, Dkt. No. 104-20, Ex. A. [EX. 92]. McTigue Law's lodestar report does not differentiate between partners and associates; the seven attorneys listed on McTigue's report had hourly billing rates of $325 - $725. *See* Declaration of Brian J. McTigue, Dkt. No. 104-19, Ex. A. [EX. 91]. Beins Axelrod's report lists only one partner, Jonathan G. Axelrod, who billed at $525 an hour, and one "of counsel" attorney who billed at $455 an hour. *See* Declaration of Jonathan G. Axelrod, Dkt. No. 104-22, Ex. A. [EX. 94]. Richardson Patrick lists three partners who worked on the case with billing rates of $500 - $800 an hour; no associates were listed. *See* Declaration of Kimberly Keevers Palmer, Dkt. No. 104-23, Ex. A. [EX. 95].

[128] The Special Master did not conduct an independent survey of all financial fraud class action cases. Such an effort would fall far outside his mandate to determine what rates are reasonable in the context of the *State Street* case. The Special Master, therefore, provides the following cases as representative of the range of rates accepted by Courts in other actions, but they are not intended to be an exhaustive collection of all such rates.

The *BONY Mellon* case, which overlapped with *State Street* in time and subject matter, which involved substantially similar legal claims in the FX arena, and which was litigated by five[129] of the nine firms listed on in *State Street* Fee Petition, is particularly instructive. In *BONY Mellon*, the rates billed by Lieff, Thornton, Keller Rohrback, the McTigue Firm, and Beins Axelrod were generally consistent, if not identical, to those listed in the *State Street* case. In some instances, these rates reflected a modest increase from the rates submitted by the same timekeepers.[130] Such increases over time are not unexpected and need not detain us here. *See* Exhibit B to Chiplock *BONY Mellon* Declaration, SDNY No. 2335, Dkt. No 622-1 [EX. 186]; Exhibit B to Lesser Decl. Dkt. No. 622-8 [EX. 187]; Exhibit B to Sarko Decl. Dkt. No. 622-3 [EX. 188]; Exhibit B to McTigue Decl. Dkt. No. 622-5 [EX. 189]; Exhibit B to Axelrod, Dkt. No. 622-4 [EX. 190]. In *BONY Mellon*, the hourly rates for partners ranged from $525 to $985, and for associates the range was $325 to $525. *See* fee petitions at Dkt. No. 922.

The range of rates approved in antitrust, bankruptcy, and securities/financial fraud class actions settled at or around the time of submission of the Fee Petition are also instructive. And we pay particularly close attention to those cases the firms themselves highlighted by attaching to their individual declarations submitted to the Court in 2016.[131]

[129] Lieff Cabraser served as co-lead counsel in *BONY Mellon*. The Thornton Law Firm, Keller Rohrback, the McTigue Law Firm, and Beins Axelrod also participated in that case. All five firms submitted a fee petition that included a lodestar calculation.

[130] After review and consideration of the reasonableness of these rates, Judge Kaplan approved them. As compared to *BONY Mellon*, where the *State Street* rates increased, they did so by a modest amount of $25 or $50.

[131] *See, e.g., In re HealthSouth Corp. Securities Litigation,* No. CV-03-BE-1501-S, (N.D. Ala. 2010); *In re Countrywide Financial Corp. Securities Litigation*, No. CV 07-05295 MRP (MANx), (C.D. Cal 2010); *In re*

The fees approved by Courts in almost all such matters, involving a class action case on par with the complexity and magnitude of *State Street*, are commensurate with the fees listed in the *State Street* Fee Petition. A modest increase in hourly rate over a five or six-year span is expected in this economy, given the ever-growing legal industry and its demands, not to mention ordinary inflation. Legal professionals are entitled to set their own rates, and the Court and clients can push back as they deem necessary. In that regard, a more-than-modest, or in some cases substantial, elevation in rates may not be patently unreasonable.[132]

National Data: Market-to-Market Comparisons

While recognizing the potential biases and statistical limitations inherent in any fee survey, we also consider the national data collected on rates. As one such source, we highlight our review of the *National Law Journal*'s 2016 Billing Survey.

The partner and associate rates submitted on the *State Street* Fee Petition are consistent with the range of average hourly rates reported for Boston, New York City,

American Int'l Group, No. 04 Civ. 8141 (DAB) (AJP), (S.D.N.Y. 2012); *In re Composite Company*, No. 1:13-cv-10491-FDS (D. Mass. 2016); *In re Schering-Plough/ENHANCE Securities Litigation*, 2:08-cv-00397-ES-JAD, (D.N.J. 2013); *In re Facebook, Inc. IPO Securities And Derivative Litigation,* MDL No. 12-2389 (RWS), (S.D.N.Y. 2018) *In re Volkswagen Products Liability Litigation*, MDL No. 02672-CRB (JSC), (N.D. Cal. 2017). In reviewing the fees sought and approved in these and other cases relied on by the Customer Class and ERISA firms, we find equally as instructive the rates charged by contemporaries in the plaintiffs' class action bar who also participated in the matters

[132] Keller Rohrback's rates are but one example of a more noticeable upward trajectory. Of the several cases Keller Rohrback included in Exhibit C to Sarko's Declaration, the range of associate and partner rates, including Sarko's own hourly rate, have shifted over time. Dkt. # 104-18. [EX. 90]. For example, in 2011, associate and partner hourly rates in a previous securities class action and products liability action ranged from $275 to $740 and $295 to $450, respectively, as compared to *State Street*, where associates and partners charged hourly rates of between $400 and $925.*Compare In re Washington Mutual*, No. 2:08-md-1919 MJP, (W.D. Wash. 2011) and *In re Mattel, Inc., Toy Lead Paint Products Liability Litigation*, No. 2:07-ml-01897-DSF-AJW, (C.D. Cal. 2010) to Dkt. # 104-18. [EX. 90]. The listed rate for Sarko, who, as a senior member of the firm, billed at the top of that range, increased from $740 to $925 for *State Street*.

San Francisco, and Washington, D.C. The $535 to $1,000 range for partner hourly rates is generally consistent with the partner ranges of the four target regions, which collectively range from $475 to $1,350. It is also consistent with the REDACTED range charged by opposing counsel, WilmerHale. *See* 5/4/18 Paine Letter [EX. 250]. The $325 to $725 range for associate rate is also well within the range of hourly rates for associates reported in these representative geographic regions, which collectively reported $225 to $1,000, and is also consistent with associate (including senior associate) rates reported by WilmerHale for 2016, REDACTED. *See Id.*

The partner rates reported in the *NLJ* Survey for Boston (reporting only one firm) ranged from $607 - $792, with an average hourly rate of approximately $702; New York ranged from $225 - $1,350, with an average hourly rate of approximately $683; San Francisco ranged from $475 - $800, with an average rate of approximately $646 per hour; Washington DC ranged from $540 - $1,325, with an average rate of approximately $794 per hour.

The associate rates reported for Boston (four firms reporting) ranged from $225 - $508, with an average hourly rate of approximately $405; New York ranged from $250 - $1,000, with an average rate of $544 per hour (and counsel billing rates reported between $425 - $955, with an overall average rate of approximately $687 per hour); San Francisco ranged from $350 - $620, with an average rate of approximately $468 per hour (and counsel billing rates reported at an average of $630); Washington, D.C. ranged from $295 - $690, with an average rate of approximately $512 per hour (and counsel billing rates reported at an average hourly rate of $749).

While important for determining a baseline range, we do not go on to analyze each firm's rates against the reported trends in their geographic region. Local rates play a limited role in the calculation of a national rate for securities/financial fraud class actions. While law firms must maintain a physical office somewhere in the country, the going rate for services in that city has little bearing on the complexity, risks, undesirability, contingent nature, and/or sophistication of the work -- each of which is considered in the reasonable rate analysis -- taken on by a firm routinely engaged in plaintiffs' class action litigation. This is not to say that regional rates are insignificant; they are the benchmarks that drive our analysis. Lest we leave any doubt, regional rates provide the underpinnings of a national rate for this precise type of work.

While the *State Street* rates fall squarely within the bounds of the rates charged in 2016 in each home region, and thus are not patently *un*reasonable, whether the rates reported by the firms are, in fact, reasonable when compared to the most frequently charged rates for similar services requires further analysis. We look, then, to the average rates for each group. Overall, hourly billing rates for partners trended in the range of approximately $650 to $800 per hour in our sample markets, and for associates, $400 to $550. These rates are generally consistent with 2016 rates for the "NLJ 500" -- a list of the 500 largest U.S.-centric firms, which reported an average partner hourly rate of approximately $650 and average associate hourly rate of approximately $415 among the nationwide group. While the Plaintiffs' firms[133] are not included in the NLJ 500 based

[133] We recognize that, among the ERISA firms, Keller Rohrback and Zuckerman Spaeder have comparatively larger practices with 80-100 attorneys each, and offices in multiple locations. That said, we in no way diminish the

exclusively on their relatively small size, given the complexity of their specialized practices, the firms nonetheless demand rates comparable to those of large nationwide firms.

b) Staff Attorneys

We turn now to the reasonableness of the rates charged for the staff attorneys in the *State Street* case. The Customer Class firms reported staff attorneys at hourly billing rates of $335 to $515.[134] With the exception of two Lieff staff attorneys, those rates landed mainly between $335 and $440. Given that the staff attorneys performed associate-level work (albeit that of a junior-level associate) and on a more desirable weekly work schedule, these rates properly reflect a small discount from the reported $325 to $725 associate range.

For reasons that are not entirely clear to the Special Master, firms do not report staff attorney data with the same frequency as associate, counsel, and partner data. To help fill the void, the Special Master commissioned a survey through the National Association of Legal Fee Analysis ("NALFA") specifically soliciting information about staff attorney rates among sophisticated plaintiff-side firms.[135] While NALFA's

important efforts of Brian McTigue and the McTigue Law Firm, which have initiated significant FX litigation that spurred national class actions, such as the *State Street* case, despite the firm's relatively small size.

[134] Labaton staff attorneys' rates ranged from $335 - $440 per hour, Lieff Cabraser staff attorneys were billed at $415, except for two staff attorneys (Joshua Bloomfield and Marissa Oh) who were charged at $515. Thornton billed $425 per hour for the staff attorneys.

[135] NALFA circulated the Staff Attorney Survey by email a total of 1,592 times. The emails targeted managing partners and office managers in the field of financial fraud/securities and other class actions. The "open rate" of the emails was a mere 15%; only 237 of the total emails sent were opened, as opposed to merely viewed, by recipients. And of the 237 opened emails, only 35 users clicked on the link to access the survey website, yielding a "click rate" of 15% of that subset. Overall, the results show that only 2% of recipients receiving the NALFA survey accessed

partner/associate counterpart survey received modest attention among recipients, none responded to the staff-attorney-specific questions.

Because the staff attorney survey did not generate any responses, NALFA could not reach any statistically significant conclusions or findings on the hourly rates of staff attorneys in the targeted legal community. *See* NALFA Report, p. 2. [EX. 191]. But the lack of response itself is significant to the Special Master's analysis. The difference between the click rate and the open rate may suggest either that law firms are less inclined to share data about the staff attorney position or that the firms do not employ attorneys in this capacity. This rate drops significantly -- to 2% -- when one looks at those users who successfully accessed the survey. The downward trend of responsiveness corroborates other record evidence that the use and designation of staff attorneys is not common practice and the classification itself is not, moreover, well understood among lawyers, including many of the firms involved the *State Street* case. Axelrod 7/7/17 Dep., pp. 29: 9-15 (testifying that firm did not use staff or contact attorneys), 35: 11-14, 37: 1-9 (familiar with the concept of non-tenured track attorneys and contract attorneys but not the term "staff attorney") [EX. 39]; Sarko 7/6/17 Dep., pp. 73: 9-26 (all attorneys working on *State Street* case appeared on firm website), p. 74: 6-17 (different firms use different titles for attorneys in non-associate roles) [EX. 28]; Kravitz 7/6/17 Dep., p. 84:8- 85: 22 [EX. 21].

the survey questions. Notably and regrettably, none of the recipients who visited the survey website submitted information.

As with partner and associate attorneys, we give considerable credence to the staff attorney rates approved in comparable cases. Indeed, several District Courts have evaluated the reasonableness of staff attorney rates and, in doing so, have weighed similar factors including the experience and skill of the individual attorneys, their contributions to the litigation, the prevailing market for their services, and the propriety of the rates in the context of the overall fee award.[136]

Applying these factors, courts have approved hourly rates between $300 and $395 for staff attorneys who participated in complex litigation in recent years. *See*, *e.g.*, *In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *6-13 (N.D. Cal. Dec. 19, 2016) (accepting staff and contract attorney rates between $300 - $350 where litigation was complex, presented novel issues, and required review of documents produced in foreign languages, and where the firm provided sufficient evidence of the expertise, language skills, and contributions of the attorneys to the litigation); *Gilbert v. Abercrombie & Fitch, Co.*, 2016 WL 4159682, at *1 (S.D. Ohio Aug. 5, 2016), *report and recommendation adopted*, 2016 WL 4449709 (S.D. Ohio Aug. 24, 2016) (approving requested hourly rate of $350 for staff attorney involved in shareholder litigation);

[136] Courts have evaluated the rates charged for staff attorneys employed by legal services and non-profit organizations in much the same way, focusing on the attorneys' relative experience, skill, and contribution to the litigation. *See*, *e.g.*, *King v. New York City Employees' Ret. Sys. (NYCERS)*, 2017 WL 1317851, at *5 (E.D.N.Y. Jan. 12, 2017), *report and recommendation adopted sub nom. King v. New York City Employees Ret. Sys. (NYCERS)*, 2017 WL 1317223 (E.D.N.Y. Apr. 5, 2017) (hourly rate of $350 for three senior staff attorneys at Brooklyn Legal Services with between 26 and 35 years of practice experience); *Song v. 47 Old Country, Inc.*,2015 WL 10641286, at *4 (E.D.N.Y. Oct. 1, 2015), *report and recommendation adopted*, 2016 WL 1425811 (E.D.N.Y. Mar. 31, 2016) (hourly rate of $300 for experienced staff attorney employed in Legal Aid's Employment Unit since 2006; $250 rate for staff employed with Unit since 2009; $225 rate for staff employed with Unit since 2011); *Garcia v. Los Angeles Cty. Sheriff's Dep't*, 2015 WL 13646906, at *18 (C.D. Cal. Sept. 14, 2015) (hourly rates of between $300 -$400 for experienced staff attorneys at the Disability Law Rights Center were reasonable, based on the organization's extensive experience litigating civil rights class actions).

Phillips v. Triad Guar. Inc., 2016 WL 2636289, at *7 (M.D.N.C. May 9, 2016) (accepting rate of $350 for staff attorney participating in complex securities litigation, for which the total fee represented a negative lodestar multiplier); *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *26 (C.D. Cal. July 28, 2014) (approving as reasonable hourly rate of $395 for two staff attorneys in case in which total requested fee was approximately half of total lodestar).[137] Courts have been reluctant to award those same rates, however, where the requesting firm fails to provide sufficient evidence corroborating the experience, qualifications, and contributions of staff attorneys.[138]

While many of the staff attorneys, including all the staff attorneys working for Lieff and Thornton, were billed at a rate above the $300 - $395 range, we find that the higher rates billed were justified in this instance. As discussed *infra*, Lieff and Labaton have presented sufficient evidence that the staff attorneys involved in this complex litigation performed substantive and valuable work beyond simple document review. In addition, the Special Master had the opportunity to interview and depose a number of staff attorneys during discovery and was highly impressed with their sophistication and knowledge of the FX market, especially given the two-year gap since intense fact review

[137] While it is not always clear from the available record in this case whether the attorneys involved are best described as staff attorneys, as opposed to agency attorneys, as we have defined them in this Report, to the extent we rely on these cases in determining the reasonableness of rates for *staff attorneys* (*see* discussion of the category of "contract" attorneys *infra*), we do so only to the extent they address licensed attorneys employed by the firms tasked with performing associate-level work.

[138] *See* pp. 231-231, *infra*.

in the *State Street* case ended.[139] Most, if not all, of the staff attorneys had specialized experience and/or skills that made them particularly equipped to perform comprehensive document review and spot important issues in the case. *See infra*. Beyond this, the staff attorneys here performed tasks that were more important than simple document review, such as preparing sophisticated legal memoranda and factual memoranda to prepare their respective litigation teams for depositions should the case reach that stage. This work was more in the nature of lower-level to mid-level associate work.[140]

d. Rates Used in Lodestar

i. Partners and Associates

Turing then to the lodestar reports in this case, those of Plaintiffs' Counsel list partners billing at hourly rates ranging from $535 to $1,000, and associates billing at hourly rates of $325 to $725. *See* discussion *supra.* As explained above, Labaton, Lieff, and the principal ERISA firms involved in this case all had structured annual fee-setting mechanisms in place. *Id. See also* Politano 6/14/17 Dep, pp. 35:22-37:7 [EX. 98]; Fineman 6/6/17 Dep., pp. 58:5 – 60:12 [EX. 18]; Heimann 7/17/17 Dep., pp. 60:13 – 66:13 [EX. 19]; Sarko 7/6/17 Dep., 94:16 – 95:20 [EX. 28]; Kravitz 7/6/17 Dep., pp. 115:16 – 116:25 [EX. 21]; Brickman 7/17/17 Dep., pp. 42:14 – 43:3 [EX. 40]. These

[139] The Special Master was particularly impressed with one staff attorney, David Alper. Alper, who had a lengthy background in FX trading, possessed greater substantive and industry knowledge than the other staff attorneys, and likely the other attorneys litigating the *State Street* case.

[140] This review for the most part went beyond the "first-level" document review, to determine relevance and privilege, performed by contract attorneys hired by WilmerHale in this case. *See* 5/4/18 Paine Letter to Sinnott (detailing document-review services by outside and firm document reviewers in 2016 at $36.40 and $75 per hour, respectively) [EX. 250].

formalized methods show an effort on the part of Labaton, Lieff, and the ERISA firms to set their fees based on prevailing market rates in the community, as those firms viewed the market.[141] Therefore, as discussed above, we find that the rates yielded by this process were reasonable. Given the ever-growing complexity of class action cases, the large financial risks associated with taking on multi-year contingent litigation, and the fierce competition among firms vying for those cases, we find nothing improper with the firms maintaining rates commensurate with other class action firms, as well as their defense-side adversaries. The rates charged by their adversaries in this case are instructive: REDACTED for partners; REDACTED for counsel; REDACTED for associates. *See* 5/4/18 Paine Letter [EX. 250]. This is simply a reality of legal practice.[142] Accordingly, the rates at which these firms billed on their lodestar reports are presumptively reasonable.

Although Thornton does not appear to have had any established mechanism for determining its attorneys' billing rates and instead appears to take a somewhat arbitrary approach for setting fees, *see* Thornton Law Firm, LLP's June 9, 2017 Responses to

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[141] As described above, the firms provided, and the Special Master has reviewed, the internal procedures maintained by the firms for determining annual billing rates within their respective firms. *See, e.g.*, Politano 6/14/17 Dep., pp. 35-45 [EX. 98]. With the exception of Thornton, which does not conduct an annual review, the firms each maintain executive committees to review the rates charged by the firm as compared to the rates charged by their direct competitors, accepted in other fee petitions, and as reported nationally in data collected through fee surveys.

[142] As a general proposition, the hourly rates submitted in some class action fee petitions may warrant heightened scrutiny. Unlike hourly rates charged to clients paying for legal services by the hour, the rates submitted to the Court on a fee petition rates are insulated from the pressures and client scrutiny of the legal marketplace. Absent a "paying client," firms may be tempted to artificially inflate their hourly rates on a lodestar petition. While this may well be the reality of bringing class action cases in generally, we do not find that this to be the case with the rates presented on the Fee Petition in the *State Street* case. This is borne out by the largely comparable rates charged by WilmerHale in this case. *See* 5/4/18 Paine Letter. [EX. 250].

Special Master's First Set of Interrogatories, Response No. 49 [EX. 176]; *see also* Garrett Bradley 6/19/17 Dep., p. 64:12-15 (explaining that the $500 per hour rate reported for his brother, Michael Bradley, was tethered only to "the fact of how many years he was an attorney, what he had recently billed to an hourly client, and the fact that he took it on contingent") [EX. 43], given that the rates at which Thornton partners and associates were billed were comparable to (and indeed generally less than) Labaton's and Lieff's billing rates, and given the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness. The Special Master is particularly persuaded that Thornton's billing rates here -- which range from an associate rate of $450 to partner rates of $535 - $850 an hour -- are reasonable because rates in this range were previously approved for Thornton by the Court in the *BONY Mellon* case.[143]

The *State Street* firms' billing rates are also consistent with the ranges of rates in the relevant markets. Examining the number of hours expended by partners at their respective billing rates, Labaton billed approximately $861 per partner hour, Lieff billed approximately $691 per partner hour, and Thornton billed approximately $694 per partner hour. Keller Rohrback billed approximately $755 per partner hour; Zuckerman Spaeder billed approximately $856 per partner hour; the McTigue Firm billed approximately $691 per partner hour; Richardson Patrick billed approximately $616 per partner hour; and Beins Axelrod billed $525 per partner hour. *See* discussion, *supra.*

[143] In *BONY Mellon*, the Court approved Thornton's $1,600,683 lodestar which listed associates with billing rates of $420 - $485 and partners with rates of $650 - $850. *See* SDNY No. 12-2335, Dkt. Nos. 622-8 [EX. 187]; 637 [EX. 9].

Considering the total number of associate hours included in the lodestar, Labaton billed at a rate of approximately $562 per associate hour expended, Lieff at a rate of approximately $432 per associate hour, and Thornton at a rate of $450 per associate hour. Keller Rohrback billed approximately $490 per associate hour. The other ERISA Class Counsel did not bill associate hours. *Id*. The range of rates included in the fee petition is generally consistent with the expected ranges for partners and associates practicing specialized class action litigation in the relevant markets, and the average hourly rates per partner-hour and associate-hour expended are similarly appropriate.

For all these reasons, the Special Master concludes that the hourly rates billed on the *State Street* Fee Petition for partners and associates were reasonable.

ii. Staff Attorneys' Rates

The lodestar reports list staff attorneys' billing rates ranging from $335 to $515 per hour. Labaton listed 25 staff attorneys: Three were billed at $410 per hour; four were billed at $390 per hour; one was billed at $375 per hour; seven were billed at $360 per hour; and ten were billed at $335 per hour. Lieff's report listed twenty staff attorneys, five of whom were billed at $515 per hour and fifteen of whom were billed at $415 per hour. Thornton listed twenty-four staff attorneys, twenty-three of whom were billed at $425 per hour while one -- Michael Bradley -- was billed at $500.[144]

Contrary to the picture painted in the *Boston Globe* article, with the exception of Michael Bradley, whose work is discussed separately, *infra*, these staff attorneys did

[144] The ERISA firms had no staff attorneys or "contract" attorneys.

much more than "low-level" document review. As noted, they were all attorneys with years of experience and the majority of them had specialized knowledge or skills in the FX and securities areas. A number of them had worked on *BONY Mellon*, which raised issues similar to those in the *State Street* case. They all made substantive contributions to the case: They did not simply do first-level document review; they also digested complex information and prepared topical memoranda and witness memoranda for depositions -- the same kind of work done by associates at large firms. Rather than referring to them as staff attorneys, it would be more accurate to refer to them as "non-partnership-track" attorneys.

The *Boston Globe* article also took issue with the staff attorney billing rates as compared to what the staff attorneys were actually *paid*. The article reported that these attorneys were paid only $25 to $40 an hour. In fact, the vast majority of the staff attorneys were paid in the range of $40 - $60 an hour, plus benefits. More importantly, there is nothing impermissible about marking up an attorney's billing rate above "cost" so long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed. *See City of Pontiac Gen. Employees Retirement Sys. V. Lockheed Martin Corp*., 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013); *see also Matter of Trinity Indus., Inc.*, 876 F.2d 1485, 1495 (11th Cir. 1989) ("private practitioners whose overhead expenses must be, and ultimately are, passed onto clients via a mark-up in hourly rates charged typically can recoup such expenses as part of a fee award"); *Guckenberger*, 8 F. Supp. 2d at 105 (D. Mass. 1998); *In re Enron Corp. Sec., Deriv. & ERISA Litig*., 586 F. Supp. 2d 732, 782-83 (S.D. Tex. 2008).

As indicated, district courts determine the reasonableness of a petitioning firm's staff attorney rates in the same manner in which they examine the reasonableness of partner and associate rates -- by assessing the experience and skill of the individual attorneys, their contributions to the litigation, the prevailing market for their services, and the propriety of the rates in the context of the overall fee award.[145] *See*, *e.g.*, *In re Optical Disk Drive Prod. Antitrust Litig.*, *supra,* 2016 WL 7364803, at *6-13 (accepting staff and contract attorney rates between $300 - $350 where the firm provided sufficient evidence of the expertise, language skills, and contributions of the attorneys to the litigation); *Gilbert v. Abercrombie & Fitch, Co.*, *supra,* 2016 WL 4159682, at *1, *report and recommendation adopted*, 2016 WL 4449709 (approving requested hourly rate of $350 for staff attorney involved in shareholder litigation); *Phillips v. Triad Guar. Inc.*, *supra,* 2016 WL 2636289, at *7 (accepting rate of $350 for staff attorney participating in complex securities litigation, for which the total fee represented a negative lodestar multiplier); *In re Am. Apparel, Inc. S'holder Litig.*, *supra* 2014 WL 10212865, at *26 (approving as reasonable hourly rate of $395 for two staff attorneys in case in which total requested fee was approximately half of total lodestar); *see also In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 375-78 (S.D.N.Y. 2013) (commenting that a blended rate of $300 appeared more appropriate than $385 requested rate for staff attorneys whose work constituted more than 70% of attorney time expended and total lodestar value, but

[145] *See* note 133, *supra*.

declining to decide an "exact rate at which a hypothetical paying client would compensate a firm for the services of staff attorneys").

As noted, where firms fail to provide sufficient evidence of the experience, qualifications, and contributions of staff attorneys, courts may decline to award requested staff attorney rates or decline fees for staff attorney time altogether. *See*, *e.g.*, *Makaeff v. Trump Univ., LLC*, 2015 WL 1579000, at *5 (S.D. Cal. Apr. 9, 2015) (rejecting claimed staff attorney rate of $350, and excluding staff attorney fees of $121,047.50, where plaintiff did not produce satisfactory evidence of the prevailing market rate for staff attorneys in the district or the background, skill, and litigation experience of the attorneys); *City of Plantation Police Officers' Employees' Ret. Sys. v. Jeffries*, 2014 WL 7404000, at *14 (S.D. Ohio Dec. 30, 2014) (rejecting rates of $340 - $375 and applying rate of $185 for three staff attorneys where plaintiff provided no indication as to their qualifications and experience and no evidence of work performed beyond "assisting with investigating initial claims and reviewing document productions"); *see also Spangler v. Nat'l Coll. of Tech. Instruction*, 2018 WL 846930, at *2 (S.D. Cal. Jan. 5, 2018) (finding no issue with $315 staff attorney rate, but excluding staff attorney's 371.9 document review hours (Dkt. 199-6) as unreasonable or unnecessary); *St. Louis Police Ret. Sys. v. Severson*, 2014 WL 3945655, at *5 (N.D. Cal. Aug. 11, 2014) (reducing staff attorney rate from $395 to $350 and ultimately awarding no fee for seven hours expended by staff attorney, which were duplicative).

Here, as noted, the Customer Class firms have presented sufficient evidence that the staff attorneys involved in this complex litigation possessed specialized experience

and performed substantive and valuable work well beyond simple document review. The majority of the staff attorneys had specialized experience and skills in securities litigation, and a number of staff attorneys carried specialized knowledge from their prior participation in the *BONY Mellon* matter.

The Special Master concludes that the staff attorney billing rates in the lodestar fee petition are generally reasonable given that the staff attorneys were responsible for some 70% of the work billed on the case. These rates are particularly reasonable when compared to the relatively low number of hours billed by associates for the three Customer Class law firms (less than 2% of the total time billed). This can be attributed to the fact that the staff attorneys effectively did the work of lower- to mid-level associates. Thus, for purposes of the analysis here, the Special Master views the staff attorney work as associate-level work.

The rates at which the staff attorneys were billed, however, varied among the firms. Except for Michael Bradley's $500 per hour rate, Thornton billed all of the staff attorneys on its lodestar report at $425.[146] Except in two instances,[147] Thornton billed all

[146] Evan Hoffman of Thornton testified that the $425 hourly rate was selected for all the staff attorneys on Thornton's lodestar because Dan Chiplock of Lieff Cabraser, who had been lead counsel in *BONY Mellon*, stated that this was the rate that had been approved by the Court for the staff attorneys in that case. *See* Hoffman 6/5/17 Dep., p. 59:5-12. [EX. 63]. In an email at the end of August 2015, after the agreement-in-principle to settle the *State Street* case, when counsel were gathering their time and expense information in anticipation of the finalization of the settlement, Chiplock asked his fellow Customer Class Counsel whether "we want to cap document reviewer rates at a certain level" and suggested that they "probably need to pick a consistent rate." *See* LCHB-0052627 – 52628 [EX. 192]; *see also* Chiplock 6/16/17 Dep., pp. 182;5 – 183:5 [EX. 10]. "In *Bank of New York Mellon*, the top document reviewer rate was $425 an hour." *Id.* According to Chiplock, however, the discussion about setting rates for document reviewers was never picked up again. It was more than a year later that the Fee Petition was prepared. Yet, based on Chiplock's August 2015 email, Thornton decided to use $425 as the hourly rate for all the staff attorneys in its lodestar. Chiplock 6/16/17 Dep., p. 184:20-25 [EX. 10]; Hoffman 6/5/17 Dep., p. 59:5-12 [EX. 63].

[147] Lieff billed two staff attorneys -- Ann Ten Eyck and Rachel Wintterle -- at $515 per hour. *See* Lieff lodestar report, Dkt. No. 104-17(A). [EX. 89].

the staff attorneys on its lodestar report at rates that were generally considerably *higher* than the rates at which those same attorneys were billed by Labaton and Lieff.[148] The attorneys were billed by Labaton and Lieff at hourly rates ranging from $335 - $415, most in the range of $335 - $360 an hour. *See* Labaton lodestar report, Dkt. No. 104-15(A) [EX. 88]; Lieff lodestar report, Dkt. No. 104-17(A) [EX. 89].[149]

Although the Special Master finds nothing unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms, an adjustment of the amounts billed in Thornton's lodestar for staff attorneys will be required.[150]

iii. "Contract" Attorneys

Included within the staff attorneys listed on Lieff's and Thornton's lodestar reports were four "contract" attorneys who were hired by Lieff through one or more outside staffing agencies. Chiplock 6/16/17 Dep., pp. 112:23 – 113:5. [EX. 10]. It is a different question altogether whether the markup of billing rates for staff attorneys may be applied to "contract attorney" hours.

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[148] The double-counting of the staff attorneys is addressed separately, *infra*.

[149] Labaton billed two staff attorneys -- David Alper and D. Hong -- at $425, the same rate used by Thornton. *See* Labaton lodestar report, Dkt. No. 104-15(A). [EX. 88]. These two attorneys were the highest billed Labaton staff attorneys. *See id.* The rate billed for David Alper, who had unique experience for this case because of his extensive work as a trader in the FX industry, was especially reasonable in view of the valuable contributions this experience allowed him to make in this case.

[150] Fees for these staff attorneys will be calculated at the same rate as they were billed on the Labaton and Lieff petitions.

Contract attorneys are distinguishable from non-partnership-track attorneys working on an hourly basis, as these are "attorneys who are not permanent employees of the law firm, are hired largely from outside staffing agencies, are not listed on counsel's law firm website or resume, are paid by the hour, and are hired on a temporary basis to complete specific projects related to a particular action." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394 (S.D.N.Y. 2013). Counsel nonetheless contend that because contract attorneys and non-partnership track staff attorneys performed functionally the same work, they should be treated equally for purposes of a lodestar calculation. Fineman 6/6/17 Dep, p. 47:5-12 [EX. 18]; Heimann 7/17/17 Dep., pp. 51:18 – 52:15 [EX. 19].

Viewed in isolation, as a basic proposition, it is not the least bit objectionable that law firms may charge clients legal fees that include a surcharge for overhead as well as profits. *Guckenberger*, *supra,* 8 F. Supp. 2d at 105; *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, *supra*, 586 F. Supp. 2d at 782-83. *See also* ABA Formal Opinion, 88-356. As several courts have held, there is nothing disingenuous about billing clients at market rates for work performed by attorneys, whether traditional or non-partnership-track. *See In re Tyco Intern, Ltd. Multidistrict Litigation*, 535 F. Supp. 2d at 272; *Charlebois*, 993 F. Supp. 2d at 1124 (hours of off-track attorneys and other attorneys not counsel of record properly included in lodestar). That one attorney is on a partnership track while another is not is, in this context, a distinction without a difference. Quite simply, similar work justifies similar rates.

But this logic rings hollow with respect to contract attorneys essentially "rented" by a firm on a temporary basis. Unlike the non-partnership-track staff attorneys, the contract attorneys utilized in this case did not enjoy an uninterrupted affiliation with the firm. Nor did the firm offer health insurance or provide other employment benefits made available to employees, including off-track staff attorneys. Further, the contract attorneys did not receive W-2s from the firm. Fineman 6/6/17 Dep, p.46:14-23. [EX. 18]. Beyond this, the contract attorneys, as non-employees, did not bring with them the full panoply of federal and state employment law obligations that relate to employees of a business.

For these reasons, the Special Master declines to treat the contract attorneys as the functional equivalent of associates or non-partnership-track staff attorneys employed by the firms. While courts that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates, *see In re Citigroup*, 395-396; *In re Beacon Assocs. Litig*., No. 09 Civ. 777(CM), 2013 WL 2450960, at *18 (S.D.N.Y. May 9, 2013), further differentiation among the so-called "temporary attorneys," *i.e.,* contract attorneys and non-partnership-track staff attorneys, is necessary.

Lieff's hiring of contract attorneys in this case resembled a cost more akin to an outsourced expense, such as a consultant. In making this observation, there is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary. The recommendation made herein reflects the economic realities for law firms that retain low-cost contract attorneys to perform work readily assigned to a first- or second-year associate in a traditional law firm

model. Given the considerable economic benefits realized by those firms that hire contract attorneys in a large class action case, such as *State Street*, law firms that realize such a benefit should distinguish the costs of contract attorneys from those of staff attorneys who perform the same or similar work on a matter when seeking reimbursement of fees and expenses.

To be sure, federal courts "have not spoken with one voice concerning the proper treatment of contract attorney costs in the calculation of a lodestar." *In re: Cathode Ray Tube (CRT) Antitrust Litig*., No. 1917, 2016 WL 4126533, at *8-9 (N.D. Cal. Aug. 3, 2016), *dismissed sub nom. In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 16-16368, 2017 WL 3468376 (9th Cir. Mar. 2, 2017) (declining to decide whether contract attorneys' rates should be reduced on plaintiffs' lodestar). Several courts, including two within this Circuit, have applied market rates without regard to the actual wages paid to a contract attorney. *See, e.g., In re Tyco Int'l, Ltd. Multidistrict Litig*., 535 F.Supp.2d 249, 272 (D.N.H. 2007); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 410 (D. Conn. 2009); *see also Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1124 (C.D. Cal. 2012).

In *Tyco* and *Carlson*, the District Courts of New Hampshire and Connecticut, respectively, applied market rates across the board without differentiating between contract and non-partnership-track attorneys paid on an hourly basis. For the reasons stated above, those decisions that find contract attorneys indistinguishable from off-track associates are not acceptable for purposes of this Report. It is from this faulty premise that both courts affirmed fee awards charging contract attorneys at the equivalent of associate rates. *See Tyco*, 535 F. Supp. 2d at 272 (reasoning that calculation of market

rates is not intended to reflect actual costs incurred by firm in applying associate market rates to contract attorney hours); *Carlson*, 596 F. Supp. 2d at 410 ("not objectionable per se [] to apply a multiplier to a lodestar that includes work performed by contract attorneys"). While an inherent markup on attorneys' fees may apply to non-partnership track attorneys who are employees of a firm, such a markup grossly distorts the financial burdens of hiring true "temporary" or contract attorneys. We find these courts have painted with too broad a brush.

On the other end of the spectrum, other courts have refused to reimburse non-partnership-track attorneys at associate market rates. *See, e.g., City of Pontiac Gen. Employees' Retirement Sys.*, 954 F. Supp. 2d at 280; *In re Citigroup*, 965 F. Supp. 2d at395–96. Where the law firm paid significantly less per hour for these attorneys -- between $40 and $50 per hour -- the presumption is that a reduction is required to reflect the economic discrepancy. *See City of Pontiac,* 954 F. Supp. 2d at 280 (court calculated a blended rate); *In re Citigroup,* 965 F. Supp. 2d at 398 (exercising its discretion to set a blended hourly rate between contract and staff attorneys). The Special Master joins the *City of Pontiac* and *In re Citigroup* courts in applying a healthy dose of skepticism to lodestar calculations charging equal rates for contract attorneys and non-partnership track staff attorneys.

Even more fundamental than the rate claimed on a fee petition is how contract attorney costs are passed to the clients -- here, the class members. That is, whether contract attorneys should be billed as expenses or legal service fees.

The Special Master diverges from those decisions applying a blended rate insofar as those courts accepted, without discussion, the billing of contract attorney expenditures as legal fees rather than as a cost or expense. Whether an expenditure constitutes a legal services fee or a reimbursable expense is not black-and-white. The ABA rules and judicial decisions leave attorneys a wide degree of latitude to decide: "[s]ervices of a contract lawyer may be billed to the client either as fees for legal services or as costs or expenses incurred by the retaining lawyer." ABA Formal Opinion 00-420. Moreover, the decision to bill a contract attorney as an expense or as a legal service fee is not a matter of ethics. *Id*. It is, rather, a measure of professional judgment. Attorneys must exercise that judgment considering the circumstances of each representation. At the very least, a decision must be informed by the role of the contract attorney vis-à-vis the other attorneys in the case.

Here, Lieff did not face the same long-term financial obligations in securing contract attorneys as it did with its non-partnership-track staff attorneys. The staff attorneys employed by Lieff full-time received health insurance and other employment benefits, such as participation in the firm's 401(k) plan. *See* Oh 6/6/17 Dep., p. 41:2-7 [EX. 61]; Ashur 6/6/17 Dep., p. 14:5-9 [EX. 106]; Fineman 6/6/17 Dep., p. 34:2 – 35:13 [EX. 18]. The firm paid others an annual salary (as opposed to an hourly wage), plus benefits. Zaul 6/6/17 Dep., p. 38:17-22. [EX. 59]. By contrast, Lieff does not offer contract attorneys paid through an agency any additional monetary benefits. In fact, the firm is largely not even privy to the compensation paid to contract attorneys because the agency is responsible for paying those wages. Fineman 6/6/17 Dep., p. 37:2-3. [EX. 18].

Charging contract attorneys as a fixed cost more accurately reflects the financial constraints, or lack thereof, in the contract attorney position. This is not to ignore the important role fulfilled by contract attorneys in large litigation matters. Contract attorneys have become increasingly common in complex cases requiring review of extensive electronic discovery. Johnson 7/17/17 Dep., pp. 17:10 - 18:6. [EX. 198]. In some instances, contract attorneys hired through a staffing agency can fulfill needs, particularly for document review, better than hiring new attorneys. Heimann 7/17/17 Dep., pp. 101:19 -102:19. [EX. 19].

This is no doubt true. But the fact remains that a law firm does not face the same long-term financial commitments and risks inherent in an employment relationship. Even in the most complex cases, a firm still pays only a modest hourly fee for contract attorneys, sometimes less than $50 per hour. *See* Fineman 6/6/17 Dep., pp. 36:21 – 37:11. [EX. 18]. In this respect, this cost is most akin to a disbursement of funds passed along to the client at face value. See ABA Formal Opinion, 93-379. [EX. 193]. Indeed, attorneys have an ethical obligation to pass along the benefit of a discount absent an agreement to the contrary. *Id*.

While legal and ethical rulings have not provided definitive guidance on this interesting issue, the better, more common-sensical view is that the costs of contract attorneys should be passed along as a reimbursable expense rather than as a marked-up profit center. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015) (expenses for contract attorney document review among expenses); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 437 (S.D.N.Y. 2016) (“While courts in this Circuit have

permitted attorneys to garnish their lodestars with marked-up contract attorney fees, this Court appreciates Counsel's decision to treat these contractor fees as an expense. It saves the Court from having to determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary. This Court encourages the Plaintiffs' class action bar to consider adopting this practice in future actions") (citation and internal punctuation omitted).

As a final caution against allowing a market-rate markup of contract attorneys, it bears noting that when contract attorneys are permitted to be marked up and billed at market rates on lodestar petitions in class actions, the effective rate usually does not stop there. In the vast majority of cases, a multiplier is applied to these market rates, often (as in this case) at a level of two times or even more. Thus, the actual realized rate on these contract attorneys can be twenty times as much as the firm actually paid the agency, or more. For example, if a firm pays an agency $40/hour for a contract attorney but claims $400/hour for that contract attorney on its lodestar, and then obtains a 2.0 multiplier, the actual recovery rate for this contract attorney is $800/hour -- or twenty times what the firm paid for the attorney.

In class actions, this is charged against class funds. Quite simply, this is far too steep a price for class members to pay for what amounts to rented workers.

The lodestar multiplier given to class attorneys is, as a general matter, justifiable in part by such factors as preclusion of taking other cases or work, the nature and length of the relationship with the client, time limitations, the amount invested and the results obtained, novelty and complexity, and the undesirability of taking the case. *Johnson v.*

Georgia Highway Exp., Inc. 488 F.2d 714, 717-719 (5th Cir. 1974); *see also Blum v. Stenson*, 465 U.S. 886, 898-901 (1984). These factors have little if any applicability to the hiring of contract attorneys.

To permit marked-up rates and then add a multiplier on contract attorneys is an unfair burden on class funds.

iv. Michael Bradley

Counsel further sought reimbursement of fees for yet another outside "staff attorney" document reviewer in Michael Bradley, a Massachusetts-licensed attorney who is the brother of Garrett Bradley, the managing partner of Thornton. As part of the Fee Petition, Thornton submitted a lodestar assigning to Michael Bradley a rate of $500 per hour for 406.4 hours, for a total of $203,200.00 in fees. *See* Exhibit A to Garrett Bradley's Declaration, Docket #104-16. [EX. 66]. Despite the legal limbo of this case, Thornton has already paid Michael Bradley the entirety of this amount. M. Bradley 6/19/17 Dep., p. 70: 18-19. [EX. 67].

Put plainly, Michael Bradley's work did not justify a rate of $500 per hour.

Michael Bradley is a solo practitioner who practices in Quincy, Massachusetts. Bradley performed approximately ten hours per week of document review in the *State Street* case, working unsupervised from his own office, not at Thornton's offices. M. Bradley 6/19/17 Dep., p. 52:5-13. [EX. 67]. Michael Bradley does not currently work, nor has he previously worked, as an associate, staff attorney, or contract attorney for Lieff, Labaton, or Thornton. Indeed, Michael Bradley's only connection with any of those firms -- outside the *State Street* case -- is his brother. *Id*. at pp. 26:16 – 27:5; 29:11-

14. It comes as no surprise that, apart from the Thornton attorneys who assigned document review work to Bradley during this period, none of the other attorneys or class representatives involved in the *State Street* litigation even knew of Michael Bradley prior to the publication of the *Globe* article. *See* Heimann 7/17/17 Dep., p. 107:18-24 [EX. 19]; Chiplock 6/16/17 Dep., p. 209:20 – 21:3 [EX. 10]; Sarko 7/6/17 Dep., p. 103:18-21 [EX. 28]; *see also* Goldsmith 7/17/17 Dep., pp. 87:9 – 88:14 [EX. 58]; Zeiss 6/14/17 Dep., pp. 68:15 – 70:2. [EX. 79].

This is not to say that plaintiffs' firms should avoid retaining sophisticated outside attorneys where there is a need for a qualified reviewer or expert. Outside expertise can be a useful asset to plaintiffs' firms tackling complex financial issues such as those presented in *State Street*. But a firm must still charge rates in line with those of an attorney of "reasonably comparable skill, experience, and reputation." *Grendel's Den, Inc.*, 749 F.2d at 955.

1. Relevant Legal Background and Experience

During his involvement in the *State Street* case from 2013 to 2015, Michael Bradley owned and operated his own law firm based in Quincy, Massachusetts. Prior to that time, Bradley worked for two years, from 2005 to 2007, as an Assistant District Attorney in the Norfolk County District Attorney's Office, then spent a few years prior to 2011 as the executive director of the Underground Economy Task Force -- a task force charged with scrutinizing Massachusetts employment practices to identify routine

violators of state and federal employment and wage laws, where he oversaw interagency efforts but did not personally conduct any investigations. M. Bradley 6/19/17 Dep., pp. 11:9-11; 12:6-7; 22:8-20; 23:6-8, 11-24. [EX. 67]. After leaving the Underground Economy Task Force in 2011, Michael Bradley returned to private practice as a solo practitioner. *Id.*, p. 12:7-9.

In his practice, Bradley has represented clients in personal injury, probate, and employment/labor matters, but the vast majority of his practice is public and private criminal defense, principally representing, on the private side, clients in OUI cases, domestic violence cases, and other matters in district court, and as a court-appointed public defender, clients in a range of cases from minor driving infractions to serious felonies, such as assault and battery with a dangerous weapon. *Id.*, p. 21:6-11.

While Michael Bradley's experience is no doubt an asset to a potential client in need of criminal representation, it has no relevance to the allegations in the *State Street* case. Nor did Bradley's work as a prosecutor or as executive director of the Underground Economy Task Force uniquely qualify him to scrutinize the internal FX trading records produced by State Street. *But see* G. Bradley 6/19/17 Dep., 53:14-21. [EX. 43]. Michael Bradley did not have any relevant background in securities cases or with the FX market. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 3. [EX. 109]. Nor did he possess any technical expertise with the Catalyst document review system used in this case by Labaton and Thornton to facilitate review. M. Bradley 6/19/17 Dep., 25: 6-9. [EX. 67]. He was no more qualified to review documents than any other attorney with six years of general practice experience.

2. Contributions to the State Street Case

Beyond this, Michael Bradley's contributions to this case were distinctly limited when compared to the staff attorneys of the other two firms. The superficial nature of Michael Bradley's occasional document review in this case provides yet more support for the conclusion that $500 per hour is disproportionate to the work performed. For over two years, Michael Bradley's contribution to the *State Street* case consisted exclusively of reviewing and coding documents in the Catalyst system. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6 [EX. 109]; M. Bradley 6/19/17 Dep., pp. 47:8-10; 50:6-8 [EX. 67]. While there is no clear evidence of this, Bradley testified that he recorded comments on a "handful" of documents. *See* M. 6/19/17 Bradley Dep., pp. 39:7-13; 47:20-24; 50:19-24, 51:1-5. [EX. 67]. This is consistent with his recollection that, in over two years, he found only a "handful" of highly relevant documents. M. Bradley 6/19/17 Dep., p. 48:21-24. [EX. 67].

Perhaps most telling is Michael Bradley's failure to produce any substantive memoranda or other work product. M. Bradley 6/19/17 Dep., 46: 21-24 [EX. 67]; Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6 [EX. 109]. The lack of work product distinguishes Bradley not only from the non-partnership-track staff attorneys employed by Lieff and Labaton who were conducting document review -- on a full-time basis -- but also from the contract attorneys retained by Lieff who were also called upon to draft substantive and topical memoranda

based on the documents they reviewed. *See* Chiplock 6/16/17 Dep., pp. 115:11 – 116:10. [EX. 10].

By and large, Michael Bradley was unsupervised. As agreed to upfront, he operated independently of the other attorneys. M. Bradley 6/19/17 Dep., p. 49: 6-9. [EX. 67]. After receiving a basic onboarding from Thornton, Bradley's contact with the firm was limited to submitting weekly or bi-weekly emails tallying his hours and raising technical concerns about the software. M. Bradley 6/19/17 Dep., p. 10-24 [EX. 67]; Hoffman 6/5/17 Dep., pp.107:9-23; 107:24-25, 108:1-7 [EX. 63]. His review, moreover, was outside the scope of Todd Kussin and Kirti Dugar, the on-site supervisors at Labaton and Lieff, respectively. Kussin 6/5/17 Dep., pp. 63:20-23; 79:22-25, 80:1-2 [EX. 56]; Dugar 6/16/17 Dep., pp. 103:8-16; 104:9-14 [EX. 55].

Beyond this, all of his work was performed in his free time and did not infringe upon other paying work or reduce his earning opportunities. Although he performed his work on a contingency basis, with some contingent risk, in fact, aside from a modest expenditure of time, he had little risk.

3. Appropriate Hourly Rate

Looking at the benchmarks of comparable skill, experience, and reputation, the Special Master concludes that the rate of $500 per hour is disproportionate to Michael Bradley's contribution to the *State Street* case, particularly when compared to the other staff attorneys on the case. That rate grossly overstates the very basic skills and experience Bradley brought to the *State Street* case.

But it must be noted that the $500 rate was not set at Michael Bradley's initiative or request. Rather, Thornton -- specifically Garrett Bradley -- selected this rate in an apparent effort to increase Thornton's individual lodestar value. In this context, the Special Master does not credit Garrett Bradley's explanation that, in 2013, before his brother commenced employment with Thornton, he and Michael discussed his rate and agreed at that time that Thornton would pay Michael $500 per hour for his work on a contingent basis. *See* G. Bradley 6/19/17 Dep., pp. 53:24-54:10; 56:10-15. [EX. 43]. In making this finding, the Special Master is informed by email correspondence between Garrett Bradley and the other Thornton attorneys years later that was still discussing what an appropriate rate for Michael Bradley should be. *See* TLF-SST-012768 (G. Bradley 1/8/15 email correspondence with M. Lesser: "What rate are we using for my brother's time in SST? . . . Whatever it is, I'm sure we can bill him out higher") [EX. 196]; TLF-SST-01276 [EX. 197]]. *See also* discussion, *infra*.

The Special Master is equally unpersuaded that the hourly rates received by Michael Bradley immediately prior to the *State Street* case should determine his reasonable hourly rate in the *State Street* case. For private criminal defense work, clients principally paid Bradley a flat fee without regard to actual hours expended on the representation. *See* SSSM_MB_000119-123 [EX. 194]; SSSM_MB_000124-130 [EX. 195]; M. 6/19/17 Bradley Dep., 14: 18-19; 15: 22-24, 16: 1-11 [EX. 67]. Similarly, and as is typical for personal injury work, for such cases Michael Bradley received a contingent fee equal to one-third of the total recovery. M. Bradley 6/19/17 Dep. 13:7-10, 20-23. [EX. 67].

Michael Bradley has represented some clients on an hourly basis, but the hourly rates charged fall at opposite ends of the fee spectrum and are of little value to the analysis here. For example, Michael Bradley earned $450 per hour in one case for his representation of an estate administrator who became party to the underlying will contest. M. Bradley 6/19/17 Dep., 71: 11-16. [EX. 67]. And in one other case, Bradley charged $500 per hour for approximately three hours' work on a motion to seal records of a criminal matter. M. Bradley 6/19/17 Dep., pp. 16:17-24, 17:1-7 [EX. 67]; SSSM_MB_000257-261 [EX. 108]. On the other end of the spectrum, and far more frequently, Bradley has routinely received a mere $53 per hour for work as a court-appointed attorney through the Norfolk County Bar Advocate Program. M. 6/19/17 Bradley Dep., pp.12:22-24; 13:16; 20:15-23. [EX. 67]. That rate, of course, is set by the Legislature and not subject to fluctuations of the market. M. Bradley 6/19/17 Dep., p. 20:15-23. [EX. 67].

To determine the accuracy and reasonableness of the fees paid in the *State Street* case, one must look beyond the contemporaneous rates charged by Michael Bradley. The rates charged by Michael Bradley to his private clients do, and should, reflect the market for comparable legal services. Attorneys setting rates for a private client must consider several factors, such as overhead, risk, and profit. (The Special Master expresses no opinion whether the rates charged by Michael Bradley are in line with the market rates for similar services in the Greater Boston market.) Nevertheless, these rates are untethered to the substantive work Bradley performed in the *State Street* case.

What rates Michael Bradley charged his own clients has little bearing, if any, on a reasonable rate for Bradley's document review efforts performed in this case. Unlike his solo work, Bradley did not assume great risk in the *State Street* case. He worked exclusively on a database hosted by another firm. M. Bradley 6/19/17 Dep., p. 30:11-12 [EX. 67]; G. Bradley 6/19/17 Dep., p. 53:10-11 [EX. 43]. He was not responsible for creating the document review; he merely followed an existing protocol. M. Bradley 6/19/17 Dep., p. 34:14-21. [EX. 67]. Furthermore, as noted, Bradley worked on his own schedule, giving priority to his own cases and performing document review at odd hours or when time allowed. M. Bradley 6/19/17 Dep., pp. 51:16-20; 52:5-8, 14-18. [EX. 67].

Michael Bradley's hourly work in this case most closely resembles that of a junior level associate. Thornton paid no overhead costs for Bradley's services. G. Bradley 6/19/17 Dep., p. 64:12-19. [EX. 43]. Thornton's claim that, based on the firm's alleged agreement to pay Michael Bradley $500 per hour for his time only in the event of a successful recovery, it faced a far greater risk in procuring Michael Bradley as opposed to a contract attorney hired through an agency, is without justification. In reality, the firm's financial risk was minimal. Thornton's internal email traffic indicates that the firm had not assigned Michael Bradley a rate, at least for lodestar purposes, as late as 2015. *See* TLF-SST-012768 (G. Bradley 1/8/15 email correspondence with M. Lesser: "What rate are we using for my brother's time in SST? . . .Whatever it is, I'm sure we can bill him out higher") [EX. 196]; TLF-SST-01276 [EX. 197]]. *See also* TLF-SST-007843-7844 (7/28/15 email from Bradley, Lesser, and Hoffman directing that Michael Bradley be

billed at $500 per hour instead of the $400 hourly rate Thornton had previously decided to use for him). [EX. 107].

Given the unique circumstances governing Michael Bradley's work on the *State Street* case -- the minimal time commitment, the lack of supervision, and the fairly low level of work performed -- the Special Master finds that $500 is an unreasonable rate for purposes of a lodestar calculation. This conclusion, of course, does not impact any private financial arrangement between Thornton and Michael Bradley. Thornton is free to agree to any terms it sees fit, including to pay Michael Bradley $500 per hour or more. Indeed, Thornton has already paid Michael Bradley in full for his work on the case and the findings here are not intended to invalidate any obligation Thornton has to Michael Bradley. The Special Master leaves it to Thornton to take whatever action it sees fit to claw back those funds should it believe doing so is appropriate.

A final point must be made as to Michael Bradley's $500 per hour rate, both as to Bradley himself and as to Thornton. Unlike the other staff attorneys on this case who were paid only $40 - $60 an hour despite being billed at much higher rates, Michael Bradley was paid the full $500 an hour; he received all of that himself. This totaled over $200,000. Beyond this, because of the 1.8 multiplier effect, Thornton received almost an additional $500 per hour on Michael Bradley's time, resulting in an additional almost $200,000 to the Thornton firm. This is clearly unreasonable, and Thornton's award must be reduced by the amount earned by applying this inflated hourly rate at an almost two-times multiplier.

In sum, for purposes of the lodestar report presented by Thornton to the Court as support for the request for attorneys' fees, a substantial downward adjustment of the fees sought for Michael Bradley's work is necessary.

e. Hours of All the Firms

A reasonable hourly rate, of course, is only half of the lodestar equation -- other factors must be weighed in the equation. In general, the lodestar is the product of the number of hours appropriately worked times a reasonable hourly rate or rates. *Hensley*, 461 U.S. at 433; *Hutchinson ex. rel. Julien*, 636 F.3d at 13; *Gay Officers Action League*, 247 F.3d at 295. The party seeking an award of attorney fees has the burden of producing evidence supporting both the hours worked and the rate claimed. *Hensley*, 461 U.S. at 433.

i. Records of Time for the Firms

1. Contemporaneity of the Firms' Records

Courts in the First Circuit require that attorneys intending to seek fee awards maintain reasonably detailed contemporaneous time records to support a future fee application. *Gay Officers Action League*, 247 F.3d at 297.[151] The contemporaneous record requirement is designed to "ensure that the information presented is reliable and sufficiently detailed so that the reasonableness of the fee claimed may be challenged by the adversary and evaluated by the court. . . ." *Pontarelli v. Stone*, 781 F. Supp. 114, 120 (D.R.I. 1992). The First Circuit has warned that "in cases involving fee applications for

[151] Black's Law Dictionary defines "contemporaneous" as "living, occurring, or existing at the same time." Black's Law Dictionary (10th ed. 2014). Merriam Webster defines the term as "existing, occurring, or originating during the same time." *See* https://www.merriam-webster.com/dictionary/contemporaneously (last visited April 1, 2018).

services rendered. . . the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance." *Grendel's Den*, 749 F.2d at 952.

This requirement was first announced in relation to applications for fees and costs pursuant to 42 U.S.C. § 1988. *Id*. at 950-52. Courts in this Circuit have since adopted and applied the requirement in other contexts, including the review of fee applications related to class action settlements. *See*, *e.g.*, *Hutchinson ex rel. Julien, supra*, 636 F.3d at 13 (noting that fee-seeking party in negotiated class action settlement had burden of producing contemporaneous time and billing records); *Weinberger*, 925 F.2d at 523-527 (remanding where "woefully deficient" class action fee application failed to include contemporaneous time records or other documents). Where district courts employ the percentage of fund method in assessing the reasonableness of a requested fee, utilizing a lodestar cross-check, time records may "inform the court's inquiry into the reasonableness of a particular percentage" award. *See In re Thirteen Appeals*, 56 F.3d at 307, n. 11 (noting that "because the district court in any given case may eschew the [percentage of fund] method in favor of the lodestar method, [the First Circuit urges] attorneys to keep detailed, contemporaneous time records in common fund cases").

"The party seeking [an] award has the burden of producing materials that support the request… [t]hese materials should include counsel's contemporaneous time and billing records, suitably detailed, and information anent the law firm's standard billing rates." *Hutchinson*, 636 F.3d at 13 (citations omitted). Contemporaneous records serve as the best evidence that hours claimed were actually expended and provides a basis for a

court's review of the accuracy of the records and the reasonableness of time spent. *See Castaneda-Castillo v. Holder*, 723 F.3d 48, 79 (1st Cir. 2013) ("Records that include the different tasks each attorney performed, the total number of hours billed, the billing rate for those hours, the date on which each task[ ] was performed, and the amount of time spent on each task generally fulfill this requirement."); *see also Deary v. City of Gloucester*, 789 F. Supp. 61, 64 (D. Mass. 1992), *aff'd*, 9 F.3d 191 (1st Cir. 1993) (attorney affidavits detailing specific work completed on specific dates, coupled with attorney time slips, were essentially contemporaneous and sufficiently reliable in support of most hours claimed).

As a practical matter, it is time-consuming and laborious for a district court to review every underlying contemporaneous time entry, particularly in litigation spanning several years and involving numerous counsel. Thus, when assessing class action fee applications, district courts often rely upon summaries reflecting the contemporaneous time entries of attorneys involved. *See, e.g.*, *Authors Guild, Inc. v. Bass*, 614 F. App'x 564, 566 (2d Cir. 2015) ("The district court did not abuse its discretion in relying on the summaries rather than the records on which they were based"). *Gay Officers Action League*, 247 F.3d at 297 (where attorneys attested to having maintained contemporaneous time records, compilations of records submitted with fee application were acceptable in lieu of original records).

However, while a court may reasonably rely on summary evidence, such evidence must be based upon entries that are contemporaneously maintained in the first instance. *See*, *e.g.*, *Morin v. Sec'y of Health & Human Servs.*, 835 F. Supp. 1431, 1439 (D.N.H.

1993) (absent suggestion of a reconstructed record where no contemporaneous records had been maintained, district court concluded that submission was properly contemporaneous). Because a court has discretion in determining an appropriate fee award, it may properly reduce an award where counsel has not maintained reliable contemporaneous records. *See Hensley*, 461 U.S. at 438, n. 13 (1983). ("[T]he District Court properly considered the reasonableness of the hours expended, and reduced the hours of one attorney by thirty percent to account for his inexperience and failure to keep contemporaneous time records.").

"Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). Some courts in this Circuit have found reconstructed estimates of attorney hours insufficient to satisfy the contemporaneous record requirement, resulting in substantial percentage reductions to claimed awards or, in extreme cases, denial of fees altogether.[152] However, because courts maintain discretion in determining an appropriate fee award, some have noted that the requirement

[152] *See*, *e.g.*, *Gardner v. Simpson Fin. Ltd. P'ship*, 963 F. Supp. 2d 89, 92-95 (D. Mass. 2013) (citing cases involving a "deep discount" of 20-25% of hours on basis of reconstructed records, and substantially discounting requested award where counsel submitted no contemporaneous records and request was grossly inflated); *Mary G-N v. City of Northampton*, 2015 WL 9462080, at *3–4 (D. Mass. Dec. 28, 2015) (unpublished) (awarding 30% of claim by attorney that reconstructed time records on basis of dates on which computer files were saved and research was downloaded); *Wilson v. McClure*, 135 F. Supp. 2d 66, 73–74 (D. Mass. 2001) (district court reduced attorney's claimed hours "in order to reflect the strict minimum amount of time it would take one to perform the work actually performed"); *Libertad v. Sanchez*, 134 F. Supp. 2d 218, 231-34 (D.P.R. 2001) (50% reduction to claim based on reconstruction from attorney's memory, notes, assistant's records, and calendar of filings and court appearances; 75% reduction to claim based on attorney's memory and consultation with co-counsel 5-6 years after completing work, raising accuracy concerns); *Pontarelli*, 781 F. Supp. at 122 (denying fee application in entirety where failure to maintain contemporaneous records contributed to inaccuracies and discrepancies in records that cast "serious doubt" on their reliability).

should not be applied "blindly" and have that exercised discretion in awarding fees on the basis of other sufficiently reliable evidence demonstrating the reasonableness of a requested fee.[153]

In this case, the Special Master has found no evidence of a lack of contemporaneity with respect to the records of Labaton, Lieff, and the ERISA law firms. All of these firms kept track of attorney time electronically, and deposition testimony confirms that attorney time was entered on their respective timekeeping systems on a routine and regular basis. For example, at Labaton, attorneys used the "Rainmaker" software to keep track of their time. *See* Goldberg 7/17/17 Dep. pp. 11:7 – 12:25; 30:25 – 31:7. [EX. 199]. Howard Goldberg, who was part of Settlement Counsel Nicole Zeiss's team, testified that he used the Rainmaker program to prepare the firm's fee petition in *State Street*. *Id.*, p. 11:21-24. The software enabled him to isolate records for each individual who worked on the case, create a report, and sort the time of each timekeeper for use by Zeiss in preparing Labaton's lodestar fee petition. *Id.*, p. 12:21-25. Labaton staff attorneys testified that, daily, they electronically submitted time. *See, e.g.*, Orji

[153] *See*, *e.g.*, *Awuah v. Coverall N. Am., Inc.*, 791 F. Supp. 2d 284, 289 (D. Mass. 2011) (substantial reduction not required where district court had a "unique vantage point" as to the work completed by attorney, and the benefit of contemporaneous records submitted by other counsel); *Nkihtaqmikon v. Bureau of Indian Affairs*, 723 F. Supp. 2d 272, 291 (D. Me. 2010) (district court considered fact that a small portion of requested were not contemporaneously documented, but were supported by a combination of contemporaneous and reconstructive billing); *see also Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929, 966 (C.D. Cal. 2010) (25% reduction where attorney reconstructed misplaced contemporaneous records on basis of memory and references to records of other counsel and documents filed with the court or distributed to government); *Scott v. City of New York*, 643 F.3d 56, 59 (2d Cir. 2011) (entries in official court records could serve as reliable documentation of attorney time, if a district court chooses to rely upon them in a limited fashion, as they are comparable to contemporaneous attorney time records); *Scott v. City of New York*, 626 F.3d 130, 134 (2d Cir. 2010) (noting existence of "rare circumstances" in which, in the district court's discretion, attorney fees may be warranted in complete absence of contemporaneous); *Monaghan v. SZS 33 Assocs., L.P.,* 154 F.R.D. 78, 84 (S.D.N.Y. 1994) (collecting cases and noting that courts in the Second Circuit assessing reconstructed time records have applied roughly 30% reductions in absence of contemporaneous time records).

6/5/17 Dep., p. 22: 3-10 [EX. 102]; Bolano 6/5/17 Dep., p. 28:18- 29:8 [EX. 103]. Labaton staff attorneys also manually recorded their time "in" and "out" of the office through by recording those times in a hard-copy binder designated for staff attorney hours. *See* Alpert 6/5/17 Dep., p. 62: 18-22 [EX. 60]; Greene 6/5/17 Dep., p. 28: 4-14 [EX. 105]. In March 2014, Labaton provided a summary of its then-current lodestar and expenses to the other Customer Class firms, evidence of its regular maintenance of time records. *See* LCHB-0052426-2436 (5/27/14 email from Rogers to Lieff and TLF recipients attaching billing memo). [EX. 205].

Lieff used a comparable electronic timekeeping system to maintain accurate and contemporaneous time records for its attorneys. *See* Chiplock 6/16/17 Dep., pp. 151:20-21, 153:6-9. [EX. 10]. By way of example, Dan Chiplock and Kirti Dugar testified that staff attorneys employed by Lieff Cabraser are trained to "religiously send [their] time to our internal time keeping department [and] keep careful record of [their] time." *Id.*; Dugar 6/16/17 Dep., p. 115:8-15 ("Chris Jordan and Jon Zol [sic; Zaul] were entering time in our system. . . , and then they [TLF] were getting invoiced. So the time entry would maintain there because that's the source of the generation of an invoice.")[154] [EX. 55]. *See also* Heimann 7/17/17 Dep., p. 18:11-16 ("[I]n all of the cases that we are involved in, we maintain the time devoted to the case on a contemporaneous basis. We record our time [] whether or not we are going to be compensated on an hourly basis.") [EX. 19]. *See also* Fineman 6/16/17 Dep., pp. 39: 15 -40: 16 [EX. 18]. Lieff also

[154] A training error with respect to two agency attorneys paid for by Lieff, who reported time both to Lieff's internal time keeping department and to their staffing agency, reportedly contributed to the double counting issue. See Chiplock 6/17/17 Dep., pp. 151: 15- 153:20 [EX. 10].

periodically shared its time and expense records with fellow Customer Class Counsel. *See, e.g.*, LCHB-0052576-2578 (5/21/15 lodestar summary provided from Lieff to TLF) [EX. 206].

Lynn Sarko testified that Keller Rohrback uses a similar electronic time-keeping system: "[W]e have a computerized system. Rates are put in for each department for each timekeeper. . . . Whenever you record your time, it goes into the system. . . ." Sarko 7/6/17 Dep., p. 89:1-6. [EX. 28]. Zuckerman Spaeder attorney time is kept by the firm's accounting department. Kravitz 7/6/17 Dep., pp. 111:23-24, 112:3-5. [EX. 21]. Carl Kravitz testified that, with this centralized system in place, he, as the firm's lead attorney on *State Street,* could review attorney hours on the case at any time, and did so periodically: "[W]e try to keep track of what our investment [is] I would keep an eye on how much time we were putting into the case." *Id.*, p. 112:11-18.

(a) Thornton's Records

Though Thornton also owned billing software, it was used only sporadically and by only some of the firm's attorneys. In fact, the testimony of Thornton attorneys who worked on *State Street* testified that they did not use the software to track time spent on this case. *See* Thornton 9/1/17 Dep., p. 121:13-21 [EX. 127]; G. Bradley 9/14/17 Dep., p. 151:3-9 [EX. 85]. According to Garrett Bradley of TLF,

> We don't keep our time like other firms keep their time as we're a majority plaintiffs' firm. Contingent firm. We do keep our time on matters that we obviously need to keep our time on. I understand there to be a software that's not functional. I don't believe it was used by anybody [from Thornton] in this case. It wasn't used by me.

G. Bradley 9/14/17 Dep., p. 151:3-9. [EX. 85].

Mike Thornton did not view time-keeping as particularly important in contingent fee cases, such as the *State Street* case:

> You get contingency you get very sloppy about it normally 'cause you don't have to -- it doesn't make any difference, although some contingency law firms keep track of their hours because they want to see if they're justified -- that in the cases they're justified of the time they're putting in.

Thornton 9/1/17 Dep., p. 122:18-24. [EX. 127].

With those considerations in mind, the Special Master evaluates the reliability and sufficiency of the records maintained and produced by Thornton attorneys in this investigation. Notwithstanding that Thornton attorneys did not use an electronic time-keeping system, the Special Master finds the evidence of contemporaneity sufficient as to the time records submitted for Michael Lesser and Evan Hoffman. *See* Hoffman 6/5/17 Dep., p. 125:2-13 [EX. 63]:

Q. When you gathered up your own particular time and submitted it to Labaton, had you kept your time contemporaneously or did you just make it up at the end of the process?
A. No, I kept my time contemporaneously.
Q. And the time that you kept was put down into various notes that we have delivered to the special master and his counsel?
A. That's my understanding.

See also Thornton 9/1/17 Dep., p. 123:22-23 (Lesser and Hoffman were "very methodical about [keeping] their time.") [EX. 127]. Thornton produced copies of Hoffman's contemporaneous handwritten recordings. *See* TLF-SST-000420-0443 [EX. 207]. These records include a brief description of work completed, the date of performance, and the number of hours expended. Crediting Hoffman's testimony that the records were maintained during the course of the litigation, the Special Master deems the

records sufficiently reliable to support his time included in the Thornton lodestar. Thornton also produced similar handwritten time records purportedly maintained by Lesser. *See* TLF-SST-000492-0502 [EX. 208]. They similarly contain a description of the work performed, and the number of hours expended, on a given date, and are sufficiently detailed and reliable to support the Lesser time included in the Thornton lodestar.[155]

Mike Thornton and Garrett Bradley also presented evidence showing an attempt to keep contemporaneous time records. To some degree, however, the Thornton and Bradley time included in the Thornton lodestar appears to have been based on an after-the-fact reconstruction through other available records, rather than contemporaneously maintained time records.[156]

In including his time on TLF's lodestar, Mike Thornton testified that he simply used his calendars:

> Q. How did you put your work and hours on the time that was used for the load star [sic; lodestar] here? What sources did you use?

[155] Further evidence of Lesser and Hoffman's efforts to maintain contemporaneous time records is seen in 2014 email correspondence. In April 2014, in reference to the fee petition prepared in the concurrent *BONY Mellon* case, Chiplock reminded Lesser of the need to maintain sufficient time records for any potential fee petition. *See* TLF-SST-031020-1023 ("I've been meaning to check in with you guys and make sure you are keeping adequate time records for all of the good work you are doing – class action fee requests require time reports, and you don't want to be creating those after the fact. We can chat about it and I can send you samples if you like, just let me know.") [EX. 209]. In response, Lesser noted to Chiplock that he had "rough manual records" and requested that Chiplock provide the samples. *Id*. Chiplock provided Lieff's recent lodestar detail summary, which Lesser forwarded to Hoffman the next month with instruction to "enter the hours you have into forms like this[.]" TLF-SST-033600-3702 (5/20/14 Lesser to Hoffman) [EX. 210].

[156] While the District Court retains discretion to reduce those hours based solely on reconstructed records, *see Mary G-N,* 2015 WL 9462080, at *3–4, we do not recommend such a reduction here, based largely on the fact that the Court reviewed the hours as part of a lodestar cross-check, rather than reimbursing Thornton attorneys on a one-to-one basis. It is a close call. But given our finding that Garrett Bradley's Declaration, which included Thornton's individual lodestar calculation, was false, for which we recommend proposed remedies, we do not find it necessary to also reduce the hours.

> A. My calendars. My secretary would help. I tried to say on certain things where the hours were going to be necessary I said stop me at the end of the day and make me say how long I spent on times.
> I also -- my calendar helped in that I knew if I was doing a conference call, um, with other -- or co-counsel on this case, and there are many, many, many of those -- because I would have that on my calendar, and I may have a notation about the time; I might not, but then I could look at either Lieff Cabraser or Labaton's because they tend to be much more methodical than me.

M. Thornton 9/1/17 Dep., at p. 123:7-21 [EX. 127]. Thornton testified that while he and his assistant kept calendars, Michael Lesser and Evan Hoffman largely kept track of the hours he expended in the State Street matter. *Id*., p. 121:22-122:3; 123:7-19.

Garrett Bradley testified that he sometimes wrote notes on the bottom of whatever document he was reading and put it in the file for later compilation by Evan Hoffman or an assistant; and other times he, like Thornton, simply used his calendar:

> The way I kept time on this matter would be I'd write on -- if I was reading a document, I'd write on the document and stick it in the file. I'd also jot down time long hand on pieces of paper.
> There's -- obviously, many people in the firm were on this case, and Evan [Hoffman] as the junior lawyer would track some time if we were all doing something; and, if need be, if there was something specific like a mediation, it may be tracked by calendar or e-mail.

G. Bradley 9/14/17 Dep., p. 151:10-19.[157] [EX. 85].

There is evidence of Evan Hoffman's efforts to reconstruct time Thornton attorney time through other records. TLF-SST-011246-1249 (5/21/14 Hoffman email to Lesser) ("All of the hours are taken from LCHB's chart where there were mentions of discussions

[157] While Mike Thornton's calendar entries and Bradley's handwritten notes purport to be kept contemporaneously, we found no evidence to corroborate this contention other than Bradley's recent declaration. *See* 3/23/18 Declaration of Garrett Bradley [EX. 219]. More importantly, the numeric notations and dates themselves lack sufficient detail to allow the Court to evaluate the reasonableness of these expenditures based on a description of the tasks performed.

with either 'co-counsel' 'team' or, of course, Mike Lesser and/or MPT, GJB.") [EX. 200]. However, it appears that Hoffman did not always have access to Bradley's time records. TLF-SST-006839-6840 (6/29/15 Lesser email to Thornton and Hoffman, noting that "[w]e need hours for Garrett on this case" and Bradley's response, "I will get my time in…") [EX. 211].

Even accepting the records produced for Thornton and Bradley as contemporaneous -- that is, if we accept Thornton's representations as to their nature -- are limited and lack in sufficient detail to, alone, constitute reliable records in support of the Thornton (585.9 hours) and Bradley (734.9 hours) time included in the Thornton lodestar. For example, Thornton produced documents the firm has represented to contain calendar entries for Bradley (TLF-SST-036001-6037 [EX. 212]) and Thornton (TLF-SST-042987-30021 [EX. 213]), which do not account for all of the substantial number of hours expended by those attorneys. Thornton also produced records reflecting Bradley's time expenditure, which include versions of the lodestar compilation created by Hoffman and documents Hoffman used in creating that compilation. *See*, e.g., TLF-SST-000612-0620 (Bradley time entries) [EX. 214]; TLF-SST-000620-0637 (Bradley time entries) [EX. 215]. Bradley has also attested to having reviewed a set of documents during the litigation. *See* TLF-SST-090343-0346 (1/20/11 Internal Memo) [EX. 216]; TLF-SST-090347-0348 (12/8/10 Belfi Email to Lesser) [EX. 217]; TLF-SST-090657-0664 (12/22/10 Internal Memo) [EX. 218]; *see also* 3/23/18 Declaration of Garrett Bradley [EX. 219]. While a small percentage of these documents contain brief handwritten notations by Bradley, few contain any indication of the date of review and the number of

hours actually expended on a given date.[158] These documents, alone, do not support the lodestar hours submitted for Bradley. Thus, the Thornton and Bradley hours ultimately included in the Thornton lodestar were based, at least in part, on a reconstruction from other records.

ii. Reliability and Specificity

To support an award of fees, the First Circuit requires a "full and specific accounting" for time. *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977); *Weinberger*, 925 F.2d at 527. "[B]ills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused." *King*, *supra.* As described below, based on our review of the individual as well as firm-wide time entries recorded in this case, the time records produced by the firms participating in the *State Street* case sufficiently and reliably detail the firms' substantive, legal contributions to that case.[159]

To reach this conclusion, we rely, in large part, on comprehensive time records produced at the beginning of this investigation by each of the nine firms that received a

[158] Thornton was also asked to produce any other documentation supporting its fee petition. *See* Special Master's First Set of RFP, No. 53. [EX. 166] Many documents produced are copies of documents produced by State Street in relation to the California litigation. A small portion contain brief handwritten notes or markings, ostensibly made by a Thornton attorney or a staff attorney during document review. *See, e.g.*, TLF-SST-017998 ("Look for [m]ore") [EX. 220]; TLF-SST-018165 ("Get Dox") [EX. 221]; TLF-SST-019134 (notations related to volume and revenue figures) [EX. 222]; TLF-SST-023952-3954 (notation regarding "knowledge") [EX. 223]. A few contained more detailed notes. *See, e.g.*, TLF-SST-025463-5464 (more extensive handwritten notes regarding Automatic Repatriation) [EX. 224]. These written notations, however, do not reflect the date of review, the identity of the reviewing attorney, or the amount of time expended (or included on the lodestar summary) by the attorney, and are therefore of limited value in considering the reliability of the hours included in the Thornton lodestar.

[159] This is a different question than whether the records themselves were maintained contemporaneously by the respective firms. We distinguish Thornton along these lines. While Garrett Bradley and Michael Thornton's time records evidenced reasonable expenditures of time, given the complexity of the litigation, and described the work performed in sufficient detail, as we conclude above, they lacked sufficient indicia of contemporaneity. In fact, the record shows that Michael Thornton and Garrett Bradley's time was not kept on a daily basis.

portion of the Fee Award (except Chargois about whom the Special Master did not know) produced at the request of the Special Master as well as testimony and emails produced in discovery. In the aggregate, the attorneys in the *State Street* case expended approximately 77,000 hours. This total amount of time, while substantial, was appropriate given the voluminous document productions and complex nature of the legal claims, potential defenses, and damages implicated by the FX-based claims alleged in this case.

Aside from the reasonableness of the aggregate tally, we conclude that the hours presented on the Fee Petition are reasonable for three additional reasons. First, the firms appropriately staffed the case, assigning lawyers to specific tasks commensurate with their experience and capabilities with a sensitivity to the costs ultimately passed on to the client, the class, through the common fund. Thus, the hours expended by each individual attorney accurately reflect the nature of the work assigned to him or her. Second, the narratives in the time records themselves capture the precise nature of these substantive contributions in detailed -- and in some instances highly detailed -- descriptions of the legal work performed within the individual records.[160] Finally, while some of the firms in the case also worked on other FX cases before and during the *State Street* case, as described *infra*, we found no evidence that those firms "double billed" time from the other litigations to the *State Street* case, and deem it appropriate to include time spent reviewing related FX-case, especially those concurrent with *State Street*, to the extent the

[160] Because Chargois did not perform any substantive work on the *State Street* case Chargois and Herron did not submit a lodestar calculation or any time entries to Judge Wolf or the Special Master appointed to investigate the Fee Award in the underlying case.

review informed strategy, settlement, and the course of the *State Street* litigation. We address each firm in more detail below.

(a) Lieff

Over the life of the *State Street* case, Lieff billed the second largest number of hours in the case. We begin by acknowledging that the total amount billed by Lieff as well as its status vis-à-vis the other Customer Class firms as the second-highest billing firm in the case is consistent with the fact that Lieff housed a team of more than ten document reviewers throughout the multi-year hybrid mediation and played a significant role in the legal strategy and mediation. For the litigation team, Bob Lieff (665.9 hours) participated in the mediation sessions and consulted on settlement strategy, while Dan Chiplock (1357.9 hours) had a hands-on role with the case from inception of Lieff's involvement, from the researching and filing of the complaint, coordinating document review and discovery, to contributing to the drafting of the final approval briefs. *See* Lieff Cabraser Time Records (Chiplock). [EX. 247]. While Lieff listed other attorneys at the firm, and most importantly two senior partners -- Steve Fineman and Richard Heimann -- those attorneys' participation was far more limited than Chiplock, and in the case of Fineman and Heimann, was minimal[161] and related mainly to contacting potential clients. The billing entries of Lieff attorneys, moreover, sufficiently conveyed the nature of the work -- whether emails, meetings, drafting or reviewing -- along with the salient details, such as with whom and the basic substance of each task.

[161] Steve Fineman billed less than 100 hours on the case, while Richard Heimann billed less than 25 hours. *See* Lieff Time Records (Fineman and Heimann). [EX. 247].

While we recognize the danger that Lieff, as Co-Lead Counsel in the *BONY Mellon* case, could include hours in the *State Street* lodestar expended in litigating the *BONY Mellon* case or other FX matters, we conclude that Lieff did not do so here. All the hours submitted by Lieff in its *State Street* hours bear, directly or indirectly, on the legal issues presented in the *State Street* case.[162] *See* Chiplock 6/16/17 Dep., p.41: 2-7; Lieff Time Records (Chiplock entry, 4/9/2015 ["Telephone conference Dan Halston re ERISA recovery in BNYM settlement."]). [EX. 247]. These hours, however, represent a small percentage of the total hours and should not detract from the larger review of work performed in the *State Street* case.[163]

We comment separately on the time records submitted for Lieff's Staff Attorneys. While most of time entries submitted by Lieff staff attorneys include a generic narrative, such as "document review," or "review and code documents," we conclude that these descriptions, while generic, adequately describe their narrow yet important tasks. Although there is certainly room to improve these narratives,[164] such as to include

[162] Each of the three Customer Class firms included on their individual lodestars a certain amount of time spent meeting with pension funds other than ATRS. These efforts were unsuccessful, as evidenced by the fact that Arkansas was the only institutional class representative on the customer side, However, there is no class action unless a class representative is willing to come forward and bring a case. Thus, it is essential that plaintiffs-side law firms contemplating a meritorious class action secure at least one client to represent the class, which here was the non-ERISA class, and ideally, more than one. Finding an institutional client willing to sue their custodian bank is not an easy task, and it was reasonable for the firms to contact multiple institutional clients about participating in the *State Street* litigation, even after ATRS came on board. *See* discussion, *infra*.

[163] Lieff attorneys recorded less than fifteen hours for non-*State Street* FX litigations, and in each instance, those efforts had a direct benefit to the *State Street* case. *See* Lieff Time Records (Lieff, Chiplock). It is well within a Court's jurisdiction to allocate fees from a common fund for such hours performed outside the context of the litigation. *See Hawes v. Colorado Div. of Ins*., 65 P.3d 1008, 1023–24 (Colo. 2003) (distinguishing facts of present cases from common fund situation and noting that "courts, under inherent powers may grant attorneys' fees for work completed before the court's jurisdiction was invoked") (citing *Winton v. Amos*, 255 U.S. 373, 394–95 (1921); *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1120-21 (9th Cir. 2002)).

[164] *See* Alper's time records. [EX. 264].

specific Bates ranges and topics, or to identify important documents or information uncovered during a day's review, both of which would yield a more complete record upon which to evaluate the hours spent, we nevertheless fully credit all the time entries submitted by Lieff's staff attorneys.

(b) Labaton

Labaton recorded the most hours in the *State Street* case. [EX. 264]. This expenditure of time is commensurate with its role as Lead Counsel as well as with the complexity and extremely hard-fought nature of the five-year long litigation. It is also reflective of the fact that Labaton housed numerous reviewers -- as many as twenty at one time -- working full-time throughout the duration of the mediation/discovery, which contributed significantly to the total tally.

As compared to Lieff and Thornton, Labaton assembled a much larger team to work on the *State Street* case.[165] We find that creating an expansive team was required to carry out Labaton's duties as Interim Lead Counsel and lead settlement counsel in the case. Specifically, the key players at Labaton included Larry Sucharow -- "lead negotiator and lead strategist" (801.4 hours); David Goldsmith, who argued substantive motions before the Court at the Motion to Dismiss, Preliminary Approval, and Final Approval hearings (1310.7 hours); and Michael Rogers, then an associate at the firm,

[165] The Labaton time records include several internal meetings and telephone conferences in which only Labaton attorneys participated. While this practice has drawn scrutiny in other contexts by insurance companies overseeing outside litigation, such collaboration and collective thinking is a necessary, if not critical, tool in devising strategy and meaningfully litigating a case, especially a case as complex and multifaceted as *State Street*. Accordingly, we find such meetings appropriate in these circumstances.

who performed the bulk of the legal research, initial drafting of the complaint and opposition, and oversaw document review on the Labaton side (1578.4 hours); Eric Belfi, who had an ongoing relationship with George Hopkins and ATRS and assumed primary responsibility for communicating with ATRS throughout the litigation (669.5 hours);[166] and Nicole Zeiss, the settlement partner who was the chief drafter of the Plan of Allocation, drafted the Omnibus and individual declaration templates, and coordinated settlement efforts and submission of the final approval pleadings (361.2 hours).[167] [EX. 264]. Given the attorneys' respective experience, skill sets, and positions within the firm, these totals are reasonable.

Although Labaton did not participate in the *BONY Mellon* case, as evidenced in the individual time entries of its lawyers, it was nevertheless informed by the legal theories proffered and tested in that case. The *BONY Mellon* case and settlement, which alleged substantially similar misconduct of FX trading, paralleled the *State Street* case in several respects, perhaps most importantly in that *BONY Mellon* also yielded a very positive result for its class. In fact, the *BONY Mellon* case was considered by those prosecuting the *State Street* case as a "template" to a successful settlement. Chiplock 6/16/17 Dep., p. 110: 20-25. [EX. 10]. The fact that the Labaton lawyers, mainly David Goldsmith, but to some extent also Michael Rogers and Larry Sucharow, reviewed *BONY*

[166] According to Belfi's time records, Belfi communicated with the "client," mostly George Hopkins himself, on approximately 87 separate occasions between November 2009 and July 2016. *See* Labaton Time Records (Belfi). As discussed *infra*, at no point during any of these conversations updating Hopkins on the case did Belfi inform him of the Chargois Arrangement or about Labaton's financial obligation to pay Chargois.

[167] Christopher Keller (182.5 hours), a partner at Labaton, was also involved in the case, though mainly with "client retention" and "case strategy." Given his limited role, we conclude that his total of 182 hours was reasonable.

Mellon pleadings and transcripts -- and in one instance actually attended the settlement approval hearing in the *BONY Mellon* case -- is evidence of strategic lawyering.[168] It reflects the reality that the *State Street* case was not litigated in isolation.

Like Lieff, most, if not all, of the time records for Labaton staff attorneys sufficiently detailed their document review and related discovery tasks. While the level of detail varies among time keepers, all but a few referenced the precise document set or bates ranges, or topics, reviewed.[169]

(c) Thornton

Thornton billed the third-largest amount in the *State Street* case, second only to Labaton and Lieff. The inclusion of Lieff and Labaton staff attorneys made up approximately 70% of these hours.[170] [EX. 245]. Putting aside how and when the time

[168] Labaton attorneys recorded fewer than twenty-five time entries, and no more than sixty hours, for consulting *BONY Mellon*-related pleadings and events.

[169] *See* Labaton Time Records (Alper, 2/18/15). We highlight one entry created by Labaton staff attorney, David Alper, which contains extensive details of the tasks performed and exemplifies the degree of detail that renders an entry more reliable than others to the Court:

> "Reviewed, analyzed and tagged emails spreadsheets and documents for responsiveness pertaining to the Arkansas Teacher Retirement System v. State Street case. Uncovered a Hot e email document which I promptly recorded in the Team's collective Excel spreadsheet for future reference and analysis. These numerous investment, pricing and revenue F/X documents are non-consecutive or the Bates range were missing from said documents." [EX. 264].

For one, this entry details the precise efforts made by Alper on this date – reviewing, analyzing and tagging – and, secondly, describe the fruits of that labor, namely, "[u]ncover[ing] a hot e-mail document" that was simultaneously flagged for the litigation team. While the time pressures and practice challenges of performing document review, not to mention contemporaneously documenting one's time, make it difficult to record each day's efforts with this level of precision, we nonetheless highlight this entry as a "gold standard" for entries pertaining to document review and related efforts.

[170] Thornton's inclusion of Labaton and Lieff staff attorneys on its firm lodestar contributed to, but was not the sole cause of, the double-counting issues that first raised concerns about the Fee Petition in this case.

entries themselves were created or maintained, the total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable.

Thornton's team included four key individuals: Mike Thornton (585.9 hours), who, along with lawyers at Lieff, came up with the concept of bringing the *State Street* case and oversaw the case strategy and mediations; Garrett Bradley (734.9 hours), who participated in the mediation sessions, vetted potential clients, and communicated with co-counsel during the case, including the finalization of the settlement; Michael Lesser (1433.8 hours), who was hands-on through all stages in the litigation, and most notably assigned discrete legal topics to lead the staff attorneys through complex issues presented in discovery, and additionally developed the theory on damages; and Evan Hoffman (1110.2 hours), who also participated in all stages of the litigation, contributed valuable substantive research, and had the difficult task of tracking Thornton's hours for its own attorneys as well as staff attorneys housed by Lieff and Labaton.

Thornton also made efforts, predating the filing of the *ATRS* Complaint in this case, to secure institutional clients to bring a lawsuit against State Street. Given the inherent challenges of finding any class member willing to publicly sue its custodian and serve as class representative, it was reasonable for the firms to reach out to firms other than ATRS at the initial stages of the case. Furthermore, Thornton attorneys, like its Customer Class colleagues, billed relatively few hours for consulting and/or reviewing pleadings and rulings in related FX cases, most notably in connection with the *BONY Mellon* case in which it was also involved. Such minimal expenditures of time are

reasonable given the significance of the *BONY Mellon* decision as well as the substantive and procedural overlap between the two cases. [EX. 245].

(d) Michael Bradley

While Michael Bradley's involvement raises several questions, for example, about the value he added to the case and the reasonableness of the rates charged on his behalf, we conclude that the total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable.[171] As described earlier, Michael Bradley performed his review largely during off-hours from his own private practice, typically billing between one to two or two-and-a-half hours per day, over a fifteen month period. *See* SSM_MB_000003-0052 (M. Bradley 3/29/13-7/1/15 Billing Records). [EX. 263]. Unlike the Lieff and Labaton staff attorneys, his time entries provide simply that he performed "Document Review" on each of these days. *See id*. However, because Michael Bradley only reviewed documents in the Catalyst system, "Document Review" adequately describes the tasks performed on each of those days.

(e) ERISA Firms

The six ERISA firms collectively billed just over 11,600 hours, less than any single Customer Class firm. While Richardson Patrick Westbrook & Brickman, Feinberg Campbell & Zack, and to some extent, Beins Axelrod, had a more limited role, the value contributed by the other three ERISA firms far exceeded their straight hour tally. Each of

[171] In reviewing the handwritten and email time records submitted by Michael Bradley in support of his time, the Special Master was not able to independently verify the exact total of 406.4 hours reported on the Fee Petition. However, in reviewing the daily and weekly totals Michael Bradley emailed to Evan Hoffman at Thornton on a periodic basis, the Special Master confirmed that those hours totaled at least 400 hours. We find any difference *de minimis*.

the firms played a significant role. McTigue Law (4,914.05), led by Brian McTigue, filed the *Henriquez* Complaint, initiating the ERISA suit, and represented four of the named plaintiffs; Keller Rohrback (4,690.65), led by Lynn Sarko, filed the *Andover* Complaint, represented two of the ERISA named plaintiffs, and engaged in extensive dialogue with the DOL; Zuckerman Spaeder (1,400.5), led by Carl Kravitz, also interfaced with DOL and contributed to the ERISA-specific strategy. [EX. 246]; [EX. 265]; [EX. 266]. Apart from spending a reasonable number of hours, McTigue Law, Keller Rohrback, and Zuckerman Spaeder appropriately delegated work among its senior and junior-level attorneys and made best use of their respective skill sets.[172]

Like the Customer Class firms, the ERISA firms also recorded time for periodically reviewing pleadings, docket entries, and decisions in related FX litigations. Again, such an expenditure of time and effort was warranted in light of the novelty of the FX-based legal claims and challenges, and the concurrent nature of those cases with the *State Street* case. In this instance, a thorough review of current and pending FX cases was good lawyering and we do not take issue with those entries.

[172] For McTigue Law Firm, Brian McTigue and James Moore (and Regina Markey after April, 2015) handled case strategy, conferences with co-counsel, and substantive work on the merits of the underlying case as well as approval of the settlement. *See* McTigue Law Time Records. [EX. 265]. Other attorneys at the firm participated in research and drafting efforts, and David Bond, a valuable nonlawyer at the firm, conducted important review of dockets and pleadings in other FX litigations. For Keller Rohrback, Laura Gerber, David Copley, and Lynn Sarko had the greatest involvement in filing the *Andover Complaint* and joining the other firms in litigating the *State Street* case, with Copley having greatest involvement during the negotiation of the term sheet and finalization of the settlement and Gerber expending the majority of her hours communicating with the firm's two named representatives, Mr. Stangeland and The Andover Companies, in the early stages of the litigation (2012-2013). [EX. 246]. Finally, for Zuckerman Spaeder, Adam Fotiades and Afton Hodge were heavily involved in reviewing discovery and coordinating document review among ERISA Counsel. Dwight Bostwick, the firm's Chairman, participated with Carl Kravitz in handling discussions with co-counsel and opposing counsel and determining strategy for the case. *See* Zuckerman Spaeder Time Records. [EX. 266].

f. Double-Counting of Staff Attorney Hours

The hot-button issue which triggered the Special Master's investigation was the double-counting of staff attorney (SA) hours uncovered by the *Boston Globe* in November 2016. Internal reviews of the individual fee petitions conducted by Labaton, Lieff and Thornton following the *Globe* inquiry revealed that 17 staff attorneys had been listed on both the Thornton and Labaton lodestar reports and six staff attorneys appeared on both Thornton's and Lieff's reports. The result of the double-counting was a significant overstatement of the combined attorney time reported in the Lodestar Fee Petition: Of the reported 86,113.7 hours, 9,322.9 hours (or approximately 11%) were overstated; of the reported lodestar of $41,323,895.75, $4,058,654.50 was overstated. *See* 11/10/16 Letter to the Court, Dkt. # 116, pg. 2. [EX. 178].[173] The double-counting was disclosed to the Court in David Goldsmith's November 10, 2016 letter. *Id*

i. Causes of the Double-Counting Are Not Explained in Goldsmith's Letter

As to the cause of the double-counting, the only explanation offered by Goldsmith in his letter was that the double-counting occurred due to "inadvertent errors." *See* 11/10/16 Letter to the Court, Dkt. No. 116. [EX. 178]. Though the letter explained that "efforts were made to share costs among counsel," such that Thornton bore "financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices," *id.,* no mention is made in the letter of the unusual agreement to "allocate" particular staff attorneys to Thornton or of the fact that Thornton decided that this cost-

[173] As part of its mandate, the Special Master reviewed voluminous documentation produced by the firms in support of their respective lodestar figures. The Special Master confirmed that the total hours and lodestar calculations were, in fact, accurate.

sharing arrangement entitled it to claim the time billed by the allocated staff attorneys in its own lodestar.

It is clear, however, that some attorneys at Labaton, Lieff and Thornton independently assumed that Thornton would claim the SA time on its lodestar. *See e.g.*, G. Bradley 6/19/17 Dep., p. 48:1-5 ("We just assumed -- I just assumed where the local counsel were on the papers, we're litigating the case, we're putting the fee up, why wouldn't we put the people up that we were paying for?") [EX. 43]; Rogers 6/16/17 Dep., pp. 91:18 – 92:16 ("I certainly assumed [Thornton] would [claim the SA time on their fee petition] .... They were paying for it up-front, I assume they wanted to get paid on the back end.") [EX. 54]; *see also* Hoffman 6/5/17 Dep., p. 58:12-16 [EX. 63]; Chiplock 6/16/17 Dep., p. 136:10-19 [EX. 10]; TLF-SST-011206 (6/29/15 email from Lesser to Chiplock) [EX. 68]. Nevertheless, the Special Master has found no evidence of any explicit agreement by Labaton or Lieff to allow Thornton to claim on its lodestar the time worked by Labaton or Lieff staff attorneys, and this arrangement was so unusual and outside the norm that, had there been an agreement, it certainly should have been captured or reflected in a formal contract or at least an informal writing. Neither was the case here, and it was this lack of an explicit or formalized agreement to allow the Labaton and Lieff staff attorneys to be included on Thornton's fee petition that contributed greatly to the double-counting of the staff attorney time.

Despite this, there is sufficient evidence in the record to find that at least some attorneys at both Labaton and Lieff believed that the staff attorneys paid for and allocated

to Thornton would be included on Thornton's lodestar petition,[174] and that the inclusion of these same staff attorneys by Labaton and Lieff on their own fee petitions was simply a mistake that grew out of a combination of different circumstances. However, because the occurrence was so unusual and none of this was explained in the Goldsmith letter to the Court, this subject bears extensive examination and discussion.

ii. The Allocation of Staff Attorneys to Thornton

The stated purpose of the staff attorney allocation arrangement was to share the cost and risk burdens of the litigation equally among the three Customer Class law firms. *See* Chiplock 6/16/17 Dep., pp 127:23 – 128:5; 131:23 – 133:15 [EX. 10]; Belfi 6/14/17 Dep., pp. 51:8 – 53:12. [EX. 17]. Sometimes referred to as the "10/10/10 agreement," as Labaton and Lieff each assigned five staff attorneys to Thornton so that each firm ended up bearing the cost of approximately ten staff attorneys, not only did this arrangement provide a means of equalizing the costs and burdens, but also as Garrett Bradley, managing partner of Thornton candidly admitted, it was "the best way to jack up the load star [sic]. . . the best way for us [Thornton] to increase our load star [sic] and make it comparable to the other two firms. . . . I was absolutely concerned about Thornton's load star [sic] vis-à-vis the other two firms." G. Bradley 6/19/17 Dep., p. 67:4-13 [EX. 43];

[174] After learning of the double-counting, Chiplock emailed Goldsmith explaining how the double-counting occurred. His email confirms that two Lieff staff attorneys, Rachel Wintterle and Ann Ten Eyck "*should not have been included in [Lieff] 's lodestar at all*," and then described how their time, as well as time for Chris Jordan and Jonathan Zaul, was "inadvertently" included with the time of other Lieff reviewers because Lieff "neglected to exclude time entries" for a specific time period. TLF-SST-032267 (11/9/16 Chiplock to Goldsmith). [EX. 261]. This sentiment is reflected in the November 10 Letter, drafted principally by Goldsmith, which states that certain hours of both Labaton and Lieff staff attorneys "mistakenly were [] reported" in those firms' respective lodestars. 11/10/16 Letter. [EX. 178]. During the investigation, both Mike Rogers and Kirti Dugar, the person on the ground at Lieff, testified that they assumed Thornton would claim the staff attorneys allocated to it on the Thornton lodestar. Rogers 6/16/17 Dep., pp. 91: 18-23; 92: 12-16 [EX. 54]; Dugar 6/16/17 Dep., pp. 114: 22 – 115:5 [EX. 55].

TLF-SST-011124 - 1126 (2/6/15 email from Garrett Bradley to Michael Thornton). [EX. 64].

The allocation of staff attorneys was effectuated through normal billing/invoicing procedures, which was largely handled by those who knew nothing of the details of the arrangement. *See* Politano 6/14/17 Dep., pp. 26:15 – 28:9 [EX. 98]; Chiplock 6/16/17 Dep., p. 156:16-21 ("I delegated that process [at Lieff Cabraser] to Nick [Diamond], and to Kirti [Dugar], to work out with our accounting department creating an invoice and sending it off to Thornton so that those hours are properly accounted for and paid for.") [EX. 10]. According to Labaton's chief operating officer, Ray Politano,[175] Labaton billed Thornton monthly for the hours worked by the allocated staff attorneys, without identifying the staff attorneys whose hours were being invoiced. Politano 6/14/17 Dep., pp. 26:15 – 28:9. [EX. 98]. Politano further testified that Labaton had shared costs of staff attorneys in a similar manner in approximately ten other cases but that the staff attorneys would be listed on Labaton's fee petition, *not* on the other firms' fee petitions, "ninety percent of the time." *Id.*, pp. 22:22 – 23:14. (In the other ten percent of the cases, the shared staff attorneys would enter their time directly into the other firm's database and never report it to Labaton; hence, Labaton did not list them on in its fee petition. *Id.* at pp., 23:20 – 24:7.) Michael Rogers testified that it was more common to simply invoice the other firm for the shared-cost staff attorneys, get reimbursed for the cost, and then at the end, if there was a successful resolution to the case, allocate a share of the fees

[175] Politano is not a lawyer; his background is in finance. Politano 6/14/17 Dep., p. 9:3-5. [EX. 98]. He testified that his responsibilities at Labaton "are to maintain the review of the administrative area. I'm in charge of accounting, records, marketing, word processing, all the administrative functions within the firm." *Id.,* p. 10:14-18.

to the other firm, which reflected what that firm might have gotten if it had billed themselves. Rogers 6/16/17 Dep., pp. 94:7-19; 96:13-17. [EX. 54]. Suffice it to say that had this more straight-forward method been followed here, rather than through the artifice of "allocating" the individual lawyers to Thornton, and Thornton putting those lawyers on its lodestar report as if the staff attorneys were Thornton's own lawyers, the double-counting would not have occurred.

iii. Failure to Detect the Double-Counting Error

As noted, Goldsmith's November 10 letter makes no attempt to explain why the double-counting error occurred nor why it was not caught before the Fee Petition was filed. Labaton, Lieff and Thornton had agreed in May of 2011 "to exchange on a quarterly basis our then current lodestar reports showing quarterly and aggregate billings in this matter." TLF-SST-033911-3913 (5/4/11 Keller Letter). [EX. 82]. There is no evidence, however, that the three firms ever followed that agreement. Had they done so, the "inadvertent mistake" of double-counting would almost certainly have been detected.

The Special Master finds that one major reason that the double-counting error was not detected is Labaton's compartmentalization of its litigation practice, which resulted in the preparation of the fee petition by a Labaton partner, Nicole Zeiss, who was not involved in the litigation, and knew nothing of the SA cost-sharing arrangement but was responsible for preparing the settlement and fee petition documents. Zeiss testified she was not informed of any agreement for loaning Lieff or Labaton staff attorneys to Thornton, and, therefore, did nothing to verify the accuracy of any hours submitted by the various firms. Zeiss 6/14/17 Dep., pp. 24:8-20; 25:17 – 26:18; 84:16 – 86:12. [EX. 79].

Nor did Zeiss circulate among the class firms the individual declarations or lodestar reports. Zeiss 6/14/17 Dep., pp. 21:4-7, 22:24-25 ("I sent out the template to all the firms, and asked them to complete the templates and send me drafts. . . . It's not the practice to exchange time records [among the firms.]") [EX. 79]. As a consequence, neither Lieff nor any of the ERISA firms ever saw Labaton's or Thornton's fee petitions prior to their being filed with the Court and, therefore, were not in a position to catch the double-billing. (The ERISA firms did not utilize staff attorneys in this case, and as Goldsmith noted in his November 10 letter, the ERISA firms' lodestars were unaffected by the double-counting.)

If the November 10 letter had been fully explanatory, it would have, and should have, provided the Court with the details of the cost-sharing/staff attorney allocation agreement, including the reason(s) why the double-counting mistake was not caught before the Fee Petition was filed.

iv. Thornton's Higher Billing Rates for Staff Attorneys Not Explained

The Goldsmith letter similarly does not explain how or why the hourly rates at which Thornton billed the shared-cost staff attorneys were rates *higher* than the rates at which the same staff attorneys were billed by Labaton and Lieff. As indicated above, Thornton billed all of the staff attorneys on its lodestar report at $425 per hour. *See* Thornton Lodestar Report at Dkt. No. 104-16. [EX. 66]. Labaton billed all but three of the shared-cost attorneys at rates ranging from $335 to $410 per hour, most in the $335 to

$360 range;[176] four of the six Lieff staff attorneys were billed at $415 per hour (the other two were billed at a higher rate, $515/hour.) *See* Lieff Lodestar Report at Dkt. No. 104-17. [EX. 89]. Thornton's explanation was that they simply used the same hourly rate ($425) that had been used as the rate for the staff attorneys in the *BONY Mellon* case in the Southern District of New York. Though Thornton contends that Dan Chiplock of Lieff and Mike Rogers of Labaton suggested that they use $425 as the hourly rate, *see* Hoffman 6/05/17 Dep., p. 59:5-12 [EX. 63], the evidence presented to the Special Master indicates only that Chiplock and Rogers suggested that they try to be "consistent" in the SA rates they used and that they use $425 as a "cap" on SA rates, *not* that they use $425 as the hourly rate for all staff attorneys. *See* LCHB-52627 – 52628. [EX. 192].

Rather than make any attempt to explain the discrepancy in billing rates in the November 10 letter, Goldsmith stated they merely removed the duplicative time and "[w]hen a given SA had different hourly billing rate, we removed the time billed at the higher rate." 11/10/16 letter, Dkt. No. 116. [EX. 178]. While this approach was prudent, it does not explain why the Thornton rates were higher than the Labaton and Lieff rates for the same staff attorneys.

4. Misrepresentations in Thornton Fee Petition

a. Labaton Template Issues

As indicated, the individual fee petitions of the Customer Class and ERISA law firms incorporated a narrative provided to them in a "template" prepared by Labaton's

[176] Only three of the shared-cost staff attorneys -- D. Alper, D. Fouchong and D. Hong -- were billed by Labaton at the same rate used by TLF, $425/hour. *See* Labaton Lodestar Report at Dkt. No. 104-15. [EX. 88].

settlement counsel, Nicole Zeiss. Several law firms modified that template to provide the Court with accurate information concerning their particular firms. *See e.g.,* McTigue Declaration, Dkt. No. 104-18, ¶ 20 [EX. 90]; Kravitz Declaration, Dkt. No 104-20, ¶ 4 [EX. 92]; Axelrod Declaration, Dkt. No. 104-22, ¶ 8 [EX. 94]. Garrett Bradley, however, did not do so; instead, in petitioning for fees for Thornton, Bradley adopted, without any changes, the template prepared by Labaton. Unfortunately, the narrative in Bradley's sworn Declaration was affirmatively false and misleading in a number of important respects and these misleading statements were a contributing cause of the double-counting errors.

In his Declaration in support of Thornton's individual fee petition, Garrett Bradley declared, under penalty of perjury,

> 3. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request.
>
> 4. The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their service, which have been accepted in other complex class actions.

Dkt. No. 104-16, ¶¶ 3, 4. [EX. 66].

Paragraphs 5 and 6 implicitly incorporate some of these statements.[177]

[177] These paragraphs state:

Exhibit A to Bradley's Declaration identifies 24 staff attorneys (SAs). The total compensation requested on the Thornton petition for these staff attorneys is $4,508,837 -- *i.e.,* more than 60% of Thornton's total lodestar -- at an hourly rate of $425 for each staff attorney (referred to as "SAs"), except Michael Bradley, who is also designated as an "SA" but is billed at $500. Additional compensation requested for four Thornton partners and one associate totals $2,831,187.

Garrett Bradley's Declaration contains numerous untrue statements:

- *Exhibit A is a summary of time spent by attorneys and professional support staff members "of my firm."* None of the SAs were employed by Thornton. 3/7/17 Hearing Tr., p. 87:8-10 [EX. 96]; G. Bradley 6/19/17 Dep., pp. 82:12-21; 83:4-7 [EX. 43].

- *The billing rates for the SAs are "based on my firm's current billing rates."* Thornton did not maintain "current billing rates" for SAs or other attorneys listed on its lodestar calculation in Exhibit A. 3/7/17 Hearing Tr., p. 87:14-19 [EX. 96]; G. Bradley 6/19/17 Dep., pp. 48:24 – 49:4, 64:12-15 [EX. 43]; Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master's First Set of Interrogatories, Response No. 49 [EX. 99]; *see also* Exhibit A to Dkt. No. 104-16 [EX. 66].

- *For personnel "who are no longer employed," the lodestar is based on their rates for the "final year of employment."* Again, none of the SAs were employed by Thornton. 3/7/17 Hearing Tr., p. 87:8-10. [EX. 96].

- *The schedule was prepared from "contemporaneous daily time records regularly prepared and maintained by my firm.*" Thornton did not prepare or maintain daily time records of the hours worked by the SAs listed on its

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5. The total number of hours expended on this litigation by my firm during the Time Period is 15,302.5. The total lodestar for my firm for those hours is $7,460,139.

6. My firms lodestar figures are based upon the firm's billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

.

lodestar. Hoffman 6/5/17 Dep., pp. 63:2-7; 69:19-25; 70:12-16; 79:19-23 [EX. 63]; Kussin 6/5/17 Dep., p. 69:4-17 [EX. 56]. Nor did Thornton maintain sufficiently reliable contemporaneous time records for all of the lawyers working on the *State Street* case. TLF-SST-011246 – 11249 (5/21/14 email from Hoffman to Lesser) ("All of the hours are taken from LCHB's chart where there were mentions of discussions with either 'co-counsel' 'team' or, of course, Mike Lesser and/or MPT, GJB."[178] [EX. 200].

- *The hourly rates "are the same as my firm's regular rates charged for their services."* Thornton did not maintain "regular rates" for the SAs listed on its lodestar report. 3/7/17 Hearing Tr., p. 88:2-5. [EX. 96].

- *These rates "have been accepted in other complex class actions."* With the exception of 4 staff attorneys, the $425 rate charged for the remaining staff attorneys listed on the lodestar, including Michael Bradley, had not been accepted in other complex class actions. G. Bradley 6/19/17 Dep., p. 54:1-7. [EX. 43].

Garrett Bradley admitted -- both in deposition and during the March 7, 2017 hearing before Judge Wolf that these statements were "not accurate." *See* G. Bradley 6/19/17 Dep., pp. 82:17-20, 83:4-7 [EX. 43]; *see also* 3/7/17 Hrg. Tr. p. 87:8-10; 88:6-8; 88:15-16; 88:18-19 [EX. 96].

Bradley testified in his deposition that he did not give his sworn declaration a very "close read" before signing it; that using Labaton's model fee declaration template, Mike Lesser of his firm, with the assistance of Evan Hoffman, drafted his Declaration and they brought him the final version which he signed, without closely reading it. *See* G. Bradley 6/19/17 Dep., pp. 83:17 – 84:24. [EX. 43].

[178] As noted *supra*, while the Special Master finds that Thornton did provide sufficient evidence of contemporaneity with respect to the time records of Mike Lesser and Evan Hoffman, it is questionable whether the handwritten notes and calendars of Garrett Bradley and Michael Thornton are sufficiently reliable to constitute contemporaneous records of their time.

Though Bradley testified in his deposition that he only looked at his declaration before it was filed, *id.*, p. 86:16, the record evidence shows that Bradley had ample opportunity to give the declaration the "close read" that was required. Emails during this time period show that Nicole Zeiss sent the template to Garrett Bradley on August 31, 2016 and asked they be returned on September 8, 2016. *See* TLF-SST-029796 – 29801 (8/31/16 Zeiss email to G. Bradley attaching model fee declaration). [EX. 201]. Emails among Garrett Bradley, Mike Lesser and Evan Hoffman show that drafts of the declaration were circulated among these Thornton attorneys for review. This is confirmed by the testimony of Evan Hoffman: "[w]e put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and ***then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed***" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15. [EX. 63].

At the March 7, 2017 hearing, Garrett Bradley acknowledged the inaccuracy of the information in his Declaration, characterizing the information as "unclear" and admitting that it "should have been clarified by me at the time" it was prepared, but "it was not." 3/7/17 Hearing Tr., p. 88:14-19 [EX. 96]; *see* also p. 91:4-6. At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway. *See e.g.*, 3/7/17 Hearing Tr., p. 87:13-14; 88:2-9; 14-18; 91:5-7; 92:3-8. [EX. 96].

i. Garrett Bradley's Declaration Violated Fed. R. Civ. P. 11

Fed. R. Civ. P. 11 provides, in relevant part:

> **(b) Representations to the Court**. By presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> ***
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

Fed. R. Civ. P. 11(b)(3).

Rule 11(c) provides for sanctions for violation of Rule 11(b):

> (1) If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

Fed. R. Civ. P. 11(c)(1).

Sanctions for violations may be monetary or nonmonetary. Fed. R. Civ. P. 11(c)(4). "The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons." Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendment.

Rule 11(b)(3) required that before submitting his Declaration in support of Thornton's fee request, Garrett Bradley have conducted "an inquiry reasonable under the circumstances," and after such inquiry, submit a Declaration containing only "factual contentions hav[ing] evidentiary support." Garrett Bradley has admitted that the statements in his Declaration listed above are "not accurate," G. Bradley 6/19/17 Dep.,

pp. 82:17-20, 83:4-7 [EX. 43]; *see also* 3/7/17 Hrg. Tr. p. 87:8-10; 88:6-8; 88:15-16 [EX. 96]; 88:18-19. and, hence, lack evidentiary support. A simple reading by Bradley, much less a reasonable inquiry, would quickly have identified the above listed statements as false.

Bradley admits only that he did not take the time to "closely read" the Declaration before signing it. G. Bradley 6/19/17 Dep., p. 84:22-24. [EX. 43]. The Special Master believes Bradley did not read the narrative section at all or if he did, even in a cursory fashion, he turned a blind eye to the falsity of the statements, ignoring the ethical obligations imposed by Rule 11 and the potential impact of the false statements upon the attorney fees approval process. Had he given the Declaration even a cursory reading, he would immediately have known the above sworn statements were untrue and would have -- or certainly should have -- corrected them. Indeed, if he had read them, however fleeting, and left them uncorrected, as his statement at the March 7, 2017 hearing implies, this would increase the likelihood that the sworn statements were intentionally misleading or at least that he attributed no significance -- ethical or otherwise -- to the falsity of the sworn statements.

"Whether a litigant breaches his or her duty [under Rule 11] to conduct a reasonable inquiry into the facts and the law depends on the objective reasonableness of the litigant's conduct under the totality of the circumstances." *Aronson v. Advanced Cell Tech., Inc*., 972 F. Supp. 2d 123, 139 (D. Mass. 2013) (quoting *CQ Int'l Co., Inc. v. Rochem Int'l USA*, 659 F.3d 53, 62 (1st Cir. 2011)). The factors that may be examined by a court include "the complexity of the subject matter, the party's familiarity with it,

the time available for inquiry, and the ease (or difficulty) of access to the requisite information." *CQ Int'l Co*., 659 F.3d at 62–63 (quoting *Navarro–Ayala v. Nunez*, 968 F.2d 1421, 1425 (1st Cir.1992).)

Here the subject matter -- information pertaining to Thornton's own professional staff and billing rates – was hardly complicated, and a matter with which Garrett Bradley, as the firm's managing partner, was certainly intimately familiar -- Thornton was a relatively small firm (18 lawyers). He had ready access to all information necessary to have made a truthful and accurate representation, and the email evidence demonstrates that he was kept apprised of all billing rates and hours of Thornton's professional staff -- including the staff attorneys (SAs) employed by Lieff and Labaton -- throughout the course of the *State Street* litigation. Emails between Bradley and other Thornton attorneys, namely Mike Lesser and Evan Hoffman, and Nicole Zeiss show that Bradley had more than a week to review the Labaton "template" and the information used to complete it. But more than this, Bradley knew without having to even perform a "reasonable inquiry" that the SAs identified in Exhibit A of his sworn Declaration were not employed by his law firm, as well as the inaccuracies attendant to the other misrepresentations in the Declaration.

The Advisory Committee Notes to the 1993 Amendment to Rule 11 identify other considerations that may be appropriate in deciding whether to impose a sanction and what sanctions would be appropriate in the circumstances. These include considering "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only

one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and what amount is needed to deter similar activity by other litigants." Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendment.

Several of these considerations require the imposition of significant and substantive sanctions. First, the Special Master finds that the statements were false, and the false statements were not due to simple mere negligence, but rather Bradley intentionally and willfully identified the SAs in his Declaration as members of his firm and that their hourly rates were the same as the firm's regular rates charged for their services. Bradley's motivation for making the false statements is clear and well supported by the record. The record evidence shows that Bradley intentionally sought to "jack up" Thornton's individual firm lodestar vis-à-vis the other Customer Class firms, and representing the SAs as members of Thornton with billing rates of $425 an hour ($500 an hour, in the case of Michael Bradley) was the way to do it. *See* G. Bradley 6/19/17 Dep., p. 67:4-13 [EX. 43]; TLF-SST-011124 - 11126 (2/6/15 email from Garrett Bradley to Michael Thornton) [EX. 64].[179]

[179] Here, beyond the emails in which Bradley specifically refers to "jacking up" the lodestar, the Special Master's view is informed by the email exchanges between Bradley and Chiplock in which Bradley conveys his belief that Thornton did not receive a fair share of the *BONY Mellon* fee, in part because its lodestar was too low. *See* TLF-SST-031166 - 31173 (G. Bradley, Bob Lieff, Dan Chiplock email chain of 8/28/15.) [EX. 87]. In its *State Street*

Further, Bradley's misrepresentations "infected the entire pleading" as Bradley's Declaration vouched the firm's lodestar, which lead to the approval of an inflated fee award.[180] Although there is no evidence that Garrett Bradley has engaged in similar conduct in other litigation, Bradley is an experienced lawyer who practices regularly in federal court and should be expected to know his obligations under Rule 11.

Bradley's misrepresentations were not, as Thornton's Rule 11 expert, Professor Georgene Vairo, characterized them merely a "technical violation" of Rule 11, and the Special Master declines Professor Vairo's invitation to simply overlook Garrett Bradley's sworn misrepresentations to the Court.[181] This was not simply a failure to "focus on certain aspects" of "boilerplate" language, Vairo 4/10/18 Dep. p. 105:24 – 106:11 [EX. 202]; rather the Special Master concludes that Bradley deliberately and intentionally

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petition, the Labaton and Lieff staff attorneys included in Bradley's Declaration Exhibit A comprised more than 60% of TLF's lodestar.

[180] *See* discussion, *infra*.

[181] Professor Vairo testified as follows:

> THE SPECIAL MASTER: My question is, are you saying to Judge Wolf and to me that courts and in my role here as a special master should simply overlook the clearly inaccurate and misleading statements made in Garrett Bradley's declaration?
> ***
> THE WITNESS [VAIRO]: You know, I'm not saying that you shouldn't think about it. And again, the Rule 11 jurisprudence I think is very clear. Even in many, many cases some of which I have cited in my declaration courts should be concerned about ensuring that attorneys practice law in as professional a manner as possible. But we all know or anybody who's been an attorney -- and you were an attorney for many, many years before you joined the bench -- mistakes get made. People get called out for them. Getting called out is very, very different from sanctioning somebody when a mistake has been made.
> Garrett Bradley made a mistake by not taking a closer look at the template before he submitted it to the Court. But that does not mean that he violated Rule 11. . . .

Vairo 4/10/18 Dep., pp. 60:18 – 61:10. [EX. 202].

Here, Professor Vairo's casual dismissal of the seriousness of sworn misrepresentations to the Court, and their potential impact upon the process, are as surprising as they are unhelpful to the decisional process in this investigation.

misrepresented the make-up of Thornton's professional staff and their hourly rates so that Thornton's lodestar petition would be grossly inflated.

The Special Master is further persuaded that Rule 11 sanctions are necessary because Bradley has admitted that he "should have clarified" the information in his Declaration "at the time" he prepared, reviewed and signed it. *See* 3/7/17 Hearing Tr., p. 88:14-19 [EX. 96]; *see* also p. 91:4-6. But, the violation was not simply at the time he signed the Declaration. Bradly had numerous opportunities after signing to correct the misrepresentations. Yet, despite having been presented with numerous opportunities to do so, he did not take advantage of any of those opportunities and continued to adhere to the falsehoods for more than four months after the Declaration was filed on September 15, 2016, until he was specifically called to the task by the Court on March 7, 2017. In those intervening four months, Bradley could have taken the opportunity to "clarify" his Declaration at the Final Approval hearing which he attended on November 2, 2016. He could have done so immediately after problems with the Fee Petition first surfaced with the *Boston Globe*'s initial inquiry; he could have done so on -- or soon after -- the November 10, 2016 letter to the Court, with which he was involved in drafting; he could have done so after the *Globe* article was published on December 17, 2017; or, at the very latest, immediately after receiving the Court's February 6, 2017 Order directing counsel to respond as to whether a Special Master need be appointed to investigate the accuracy of their lodestar petitions.

Bradley did not avail himself of any of these opportunities to "clarify" his Declaration and never did so until questioned by the Court on March 7, 2017. Even here,

Bradley's admissions were not at his own initiative; it was only after he was directly questioned by the Court that he grudgingly acknowledged the he "could have been clearer" in his Declaration statements.

Beyond these rather obvious factors, several additional factors inform the Special Master's finding that these Rule 11 violations require a significant sanction. The first is obvious. The misrepresentations made here were not made in a routine pleading, motion or other paper -- they were made under oath directly to the Court, by an officer of the Court, with the expectation and intent that the Court would rely upon them in awarding millions of dollars in fees to his law firm. Professor Vairo's opinion that this all should be chalked up to "sloppiness," Vairo 4/18/18 Dep., p. 109:17-18 [EX. 202], or that the sworn misrepresentations were somehow less serious because the focus of the Court's fee award was on a percentage of the total award to the class and that the lodestar was essentially an unimportant part of the award -- and therefore, Bradley's misrepresentations had no significant effect upon the award[182] -- both understates the importance of the lodestar cross-check, which the Court indicated it was using, and

[182] Professor Vairo testified,

> So the Court was not misled in any manner, shape or form. Those [staff attorneys] time were going to be accounted for in somebody's fee petition.
> ***
> But if the agreement was to try to equalize the position of each of the firms within the context of the litigation, then I just fail to see what that has to do with Rule 11.
>
> The Court was using the lodestar check as a means of determining whether the 25 percent fee was an appropriate one. And so the dollar amount, the 41 million, would have been there regardless of how the individual firms manifested them on their individual fee declarations.

Vairo 4/10/18 Dep. pp. 46:19 – 48:8. [EX. 202].

diminishes the obligation of attorneys to be fully truthful and accurate in their submissions to the Court.

The second additional factor is perhaps less obvious, but equally important in the context of the double-counting error. The Special Master finds that had Garrett Bradley fully and accurately described the reason why the Labaton and Lieff SAs were being included on the Thornton petition -- and that these SAs were not employees of Thornton and did not have current billing rates with Thornton -- the entire double-counting error may well have been avoided. This is because if Garrett Bradley had been complete and accurate in his description and sent such an edited version of the Declaration to Nicole Zeiss at Labaton, it is likely her attention would have been drawn to the change in the template language, and she would have been alerted to the fact that Labaton's and Lieff's staff attorneys were included on Thornton's lodestar. So alerted, Zeiss may well have examined all three petitions with greater scrutiny and thereby have caught the double-counting of the SAs.

More importantly, given the Court's fiduciary role to the class, and beyond the possibility that Nicole Zeiss may have been alerted to the double-counting had Bradley accurately described the relationship of the SAs to TLF, the Court would likely have been alerted that something was amiss because claiming another firm's attorneys on your own lodestar would be so unusual as to raise red flags, the Court would have raised questions on its own, either at or before the November 2, 2016 Final Approval Hearing, thereby causing the lawyers to more carefully review their petitions and to catch the double counting.

While it would be saying too much to assign primary responsibility to Garret Bradley for the double-counting error, it is not too much to say that his misrepresentations to the Court were a contributing factor to the double-counting error.

For all of these reasons, the Special Master concludes that Garrett Bradley's Declaration was submitted in violation of Fed. R. Civ. P. 11(b).[183] Accordingly, the Special Master recommends Rule 11 sanctions be imposed on Garrett Bradley and Thornton.[184] For the reasons set forth here, the Special Master concludes that both a significant monetary and a non-monetary sanction is required.

In fashioning a monetary sanction, the Special Master is cognizant of the the financial resources of Bradley and Thornton. Thornton received approximately $18.5 million of the fees awarded in this case. *See* Zeiss 9/14/17 Dep., p. 141: 1-2. [EX. 115]. The result of the double-counting of the staff attorneys in this case was a $4 million plus overstatement of the total lodestar for the case. Under these circumstances, the Special Master recommends as an appropriate and proportionate monetary sanction in a range of $400,000 to $1 million, an amount equal to 10% to 25% of the overstatement

[183] Rule 11(b) contemplates that an attorney will receive notice and an opportunity to respond and correct any misstatements and misrepresentations. Professor Vairo conceded in her deposition that safe harbor does not apply here because sanctions would be court-imposed, not on a motion by a party. Vairo Dep., p. 62:8 -12. [EX. 202]. Nonetheless, Professor Vairo believes that even when a court *sua sponte* imposes sanctions, the "spirit" of the 1993 amendments to Rule 11 contemplates a safe harbor. *Id,* at p. 64:16-18. This seems a stretch, but even if Rule 11 is interpreted as contemplating a safe harbor in this context -- which we do not believe it does -- here, as outlined above, Garrett Bradley had numerous opportunities to correct his misrepresentations but he failed to take advantage of any of them to do so.

[184] In making this finding, the Special Master concludes that there is no evidence to support a finding that Michael Thornton, or any other Thornton attorney was involved in these misrepresentations to the Court. Therefore, no other Thornton attorney was individually in violation of Rule 11. These misrepresentations are simply Garrett Bradley's sole responsibility. However, Rule 11 violations of individual attorneys of a law firm are imputed to the law firm, except in "exceptional circumstances." Fed. R. Civ. P. 11(c). Here, there are no exceptional circumstances.

of the lodestar and appropriately reflects the seriousness of an untrue sworn statement made to a court by an attorney in connection with an application for millions of dollars in attorneys' fees.[185]

ii. Garrett Bradley's Declaration in Support of TLF's Fee Request Violates Mass. R. Prof. C. 3.3(a) and 8.4(c)

Garrett Bradley's false statements in his Declaration and his failure to correct those statements despite having had numerous opportunities to do so also violates several Massachusetts Rules of Professional Conduct.

As the Massachusetts Supreme Judicial Court has recognized, "[a]n effective judicial system depends on the honesty and integrity of lawyers who appear before their tribunals." *Matter of Finnerty*, 418 Mass. 821, 829 (1994) (citing *Matter of Mahlowitz*, 1 Mass. Att'y Discipline Rep. 189, 192-194 (1979)). The Court further has emphatically stated, "[W]e cannot approve of any practice in which an attorney misleads a court." *Finnerty*, 418 Mass. at 829 (quoting *Matter of Palmer*, 413 Mass. 33, 39, 594 N.E.2d 861 (1992)). "Were we to condone such conduct by an attorney, whether as a litigant or as counsel, 'the integrity of the judicial process would be vitiated.'" *Id.*, pp. 829-30 (quoting *Matter of Neitlich*, 413 Mass. 416, 423 (1992)).

Rule 3.3 of the Massachusetts Rules of Professional Conduct "sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." Mass. R. Prof. C. 3.3, Comment [2]. Rule

[185] This proposed sanction is discussed in some detail in the Recommendations section, *infra.*

3.3(a)(1) provides, "A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Mass. R. Prof. C. 3.3(a)(1). Rule 1.0(g) defines "knowingly":

> "Knowingly," "known," or "knows," denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Mass. R. Prof. C. 1.0(g).

In the context of Rule 3.3(a)(1), a fact is "material" if, viewed objectively, it directly or circumstantially "had a reasonable and natural tendency to influence a judge's determination." *In re Angwafo*, 453 Mass. 28, 35 (2009). However, it is not necessary to show that the statement of material fact did, in fact, influence a determination by the judge. *Id.*

The proscriptions of Rule 3.3(a)(1) are encompassed within Rule 8.4(c) which provides that it is professional misconduct to engage in any kind of conduct involving dishonesty or misrepresentation. *See* Mass. R. Prof. C. 8.4(c)

The conduct of Garrett Bradley described in the previous section of this Report is specifically the kind of conduct Rule 3.3(a)(1) and 8.4(c) are intended to deter.

As emphasized by the Court in *In re Diviacchi*, 475 Mass. 1013, 1020 (2016), "[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer *knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry*." *Id.* (quoting Mass. R. Prof. C. 3.3, Comment [3] (emphasis in original)).

As set forth above, Garrett Bradley made the statements in his sworn Declaration knowing that they were false. Further, he failed to make a "reasonably diligent inquiry" to ascertain the truthfulness of the statements.

In *Matter of Schiff*, 677 A.2d 422, 425 (R.I. 1996), the Rhode Island Supreme Court ordered that a lawyer be suspended from the practice of law for a period of eighteen months for violating Rule 3.3 of the Rhode Island Rules of Professional Conduct (which is identical to the Massachusetts Rule)[186] for submitting a false affidavit in support of a petition for attorney's fees -- the same kind of conduct as Garrett Bradley engaged in in the *State Street* case. The Rhode Island Court's handling of *Schiff* informs the Special Master with regard to Bradley's false Declaration in this matter.

In *Schiff*, the attorney filed an application in the United States District Court for Rhode Island for attorney's fees and costs as a prevailing party in a civil action pursuant to 42 U.S.C. § 1988, seeking an award of attorney's fees for herself and others in the amount of $511,951 and payment of costs in the amount of $203,268.28. In support of her application for fees and costs, Schiff submitted an affidavit that stated, in pertinent part:

> "The summary of time and charges for my services attached hereto present an accurate statement of services performed in connection with this litigation and was prepared from contemporaneous time records and with respect to sums for costs and expenses from accounting records."

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[186] Rule 3.3(a)(1) of the Rhode Island Rules of Professional Conduct provides:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

R. I., Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 3.3(a)(1).

677 A.2d at 423.

The U.S. District Judge who heard the fee application ruled that this statement contained in the attorney's sworn affidavit was simply not true: The billing sheets she submitted sought reimbursement for work unrelated to the case, sought payment for time not worked, and indicated that portions of those records had not been made from contemporaneous time records. *Id.* Schiff conceded as much, admitting that these statements in support of her fee application was "*not entirely accurate*" and that some entries on her summary-of-time charges "were not, strictly speaking, derived from contemporaneous records." *Id*. at 423-24. She also acknowledged that she had also made estimates regarding costs she had incurred that were not derived from accounting records. *Id.* at 424.

On the basis of these admissions the Rhode Island Bar's disciplinary board readily concluded that there was clear and convincing evidence that Schiff had violated Rule 3.3(a)(1). *Id*. The Rhode Island Supreme concurred with this finding of the board. "The record discloses that respondent had indeed filed a false affidavit with the Federal Court in support of her application for fees and costs." *Id.*

At her disciplinary hearing, Schiff had pointed to several "mitigating factors" which she claimed demonstrated that her false affidavit statements were unintentional and, therefore, did not warrant disciplinary action. Among those mitigating factors considered by the board were that Schiff "had rushed to prepare her fee application to file

it within the time allowed by the court" and in her haste had borrowed "boilerplate language" from a form submitted by a colleague in an unrelated case. *Id.*

The Rhode Island Supreme Court refused to accept the attorney's claim that her submission of a false affidavit was inadvertent, holding, "*No attorney can sign such an affidavit without being fully responsible for its contents*." *Id.* (emphasis added). The Court also found it significant that Schiff "made no effort to advise the court or opposing counsel about the inaccuracies contained in that affidavit at any time during the period of almost two years during which the application was pending and that she continued to defend the accuracy of her application throughout that time." *Id.*

The disciplinary board had recommended that, for Schiff's violation of Rule 3.3(a)(1), she be publicly censured. *Id.* The However, the Rhode Island Supreme Court did not find a public censure a severe enough penalty for the misconduct:

> Although we accept the findings of fact made by the board, we do not believe that the imposition of a public censure is a sufficiently severe response to the egregious character of the respondent's conduct. She submitted and subsequently defended a false affidavit in support of her claims for fees and costs. *This affidavit is not mere boilerplate or surplusage; rather it is a sworn statement designed to convince the trial court that the respondent's fee application was fair, reasonable, and accurate. The respondent knew or should have known that this statement was not true. Indeed, her misrepresentations to the court bear a close resemblance to an attempt to obtain money under false pretenses.* Her testimony about mitigating circumstances does not reduce or ameliorate the seriousness of her misconduct.

Id. at 424 (emphasis added).

Therefore, instead of censure, the Court ordered that Schiff be suspended from the practice of law for a total period of eighteen months. *Id.*

The facts in *Matter of Schiff* are eerily similar to those here. Just like Schiff's affidavit, Garrett Bradley's Declaration here was a sworn statement designed to convince Judge Wolf that Thornton's fee petition was fair, reasonable and accurate. Further, just like Schiff, for the reasons stated above in this Report, Bradley knew or should have known that his statements were not true. And, just as with Schiff, Bradley's statements were made in conjunction with an attempt to persuade a court to award a large sum of money to his own firm.

Therefore, the Special Master concludes that Garrett Bradley violated Mass. R. Prof. C. 3.3(a)(1).

Even if it were to be determined that that Bradley "*un*knowingly" submitted a false Declaration, the Special Master would nonetheless find that Bradley violated the Massachusetts Rules of Professional Conduct.

Similar to Rule 3.3(a)(1)'s imposition of a duty to correct a false statement of material fact previously made to a tribunal, Rule 3.3(a)(3), requires that a lawyer who unknowingly offers false evidence to a tribunal and comes to know of its falsity must take reasonable remedial measures if the evidence is material. Mass. R. Prof. C. 3.3(a)(3). "This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence." Mass. R. Prof. C. 3.3, Comment [5]. If evidence is offered that is subsequently ascertained to be false, Rule 3.3(a)(3) requires that its false character be "immediately disclosed." Mass. R. Prof. C. 3.3, Comment [6].

Bradley's Declaration is "evidence" in the sense that it is information declared to be true and upon which the Court was invited to issue a ruling,

Even if Bradley did not know his Declaration statements were false -- which, as indicated, the Special Master does not find to be the case -- as set forth *supra*, he certainly was put on notice and should have ascertained the statements the statements were false after the *Boston Globe* inquired about the accuracy of the *State Street* Fee Petition at the beginning of November 2017. He could have -- and should have -- disclosed and corrected the falsehoods in the November 10, 2017 letter to the Court, or after the *Globe* article was published on December 17, 2017, at the latest, immediately after receiving the Court's February 6, 2017 Order. But, as set forth above, Bradley did not avail himself of any of those opportunities to disclose and correct the statements, which by then, he most assuredly should have determined were false.

For all of the foregoing reasons, the Special Master concludes that Garrett Bradley is guilty of professional misconduct for violating Rules 3.3(a)(1) and (3) and 8.4(c) of the Massachusetts Rules of Professional Conduct. Accordingly, for the reasons more fully discussed in the Recommendation section, *infra*, the Special Master recommends that Bradley be referred the Massachusetts Board of Bar Overseers for consideration of appropriate discipline.

5. <u>Lodestar Multiplier</u>

In performing a lodestar cross-check on a proposed percentage-of-fund fee award, a lodestar multiplier is used. A lodestar multiplier is determined by dividing the proposed percentage-of-fund award by the total lodestar. *See, e.g., In re Puerto Rico*

Cabotage Antitrust Litig., 815 F. Supp. 2d 448, 465 (D.P.R. 2011). In the instant matter, Plaintiffs' counsel's combined lodestar was $41,323,895.75. Dividing the proposed fee of 25% of the total fund, $300,000,000, by the lodestar yields a multiplier of 1.8.

A 1.8 multiplier is certainly within the reasonable range. *See In re Relafen Antitrust Litig.*, 231 F.R.D. at 82 ("A multiplier of 2.02 is appropriate."); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (holding that a lodestar multiplier of three would be reasonable and appropriate); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F.Supp.2d 395, 408 (D. Mass. 2008) (applying a lodestar multiplier of 1.97); *In re Tyco Intern., Ltd. Multidistrict Litig.,*, 535 F.Supp.2d at 271 (applying a lodestar multiplier of 2.697); *In re Visa Check Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 524 (E.D.N.Y. 2003) (applying a lodestar multiplier of 3.5); *see also In re Prudential Ins. Co. America Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

Judge Wolf found that a multiplier of 1.8 times the lodestar to be reasonable, *see* 11/2/16 Hearing Tr., Dkt. No. 114, p. 39:1-2 [EX. 78], and subject to the discussion of the rules and ethics issues in other parts of this Report, and the adjustments recommended therein, this is not an unreasonable starting point.

C. ACCURACY AND RELIABILITY – CHARGOIS ISSUES

The most significant issues raised during this investigation arise out of the nondisclosure of a payment of $4,102,549.43 to Damon Chargois, an attorney who neither appeared in the *State Street* docket nor worked on the case. Chargois, who was

never disclosed to ATRS, the other class representatives, or the class members, stands in stark contrast to the numerous other litigating attorneys who, after dedicating a half-decade to skillfully negotiating and engaging in teamwork and assuming substantial financial and legal risk in taking on the litigation, secured an excellent result for the class members. While all three Customer Class firms shared in the payment, the relationship with, and financial obligation to, Chargois was Labaton's alone. By its nondisclosures, however, Labaton shifted its own pre-existing obligation to Chargois to the class and its co-counsel without their informed consent. The responsibility for not disclosing Chargois, therefore, must fall squarely on Labaton.

The evidence produced during the investigation clearly reveals that Labaton engaged in consistent, conscious, and calculated efforts to conceal Chargois from all the participants in the *State Street* litigation: Labaton's client, the class; the other Customer Class Counsel;[187] ERISA Counsel; and most importantly, the Court, upon whom the law imposes a fiduciary duty to protect absent class members. The Special Master finds that Labaton had a duty, or at least a legal obligation, to inform each of these participants in the class action.[188] Labaton's failure to disclose the Chargois Arrangement to anyone

[187] The record evidence shows that Labaton did not fully inform Lieff of the true nature of the Chargois Arrangement, i.e., that Chargois played no substantive role in the litigation and added no value to the case. *See* § II(K)(5)(b), *supra*. Nor did Labaton disclose these critical details about Chargois and his role to Thornton law firm attorneys Mike Thornton, Mike Lesser, and Evan Hoffman. *See* § II((K)(5)(a), *supra*. We find however, that Garrett Bradley had full knowledge of the Chargois Arrangement. *See id*.

[188] After completing a second round of discovery, made necessary by the discovery of the Chargois Arrangement, the Special Master's Counsel retained Professor Stephen Gillers from New York University Law School to opine on potential ethical and legal issues implicated by the Arrangement. Professor Gillers authored an "Ethical Report for Special Master Gerald E. Rosen," sent to the law firms on February 23, 2018. [EX. 232]. In response to Professor Gillers' Report, Customer Class Counsel requested an opportunity to respond. At Counsel's request, the Special Master requested from the Court an eight-week extension for the filing of his Final Report & Recommendation, which the Court granted. Customer Class Counsel retained seven additional experts who opined on the same issues,

else in the case raises serious questions regarding class action attorneys' ethical and legal obligations to clients and co-counsel, as well as considerable concerns about how judges can fulfill their essential fiduciary obligations to the class. We address each of these specific obligations in turn, and why Labaton failed to fulfill them.

1. DUTIES TO THE CLIENT

We begin with Labaton's duties to its direct client, ATRS, and eventually the class.[189] Upon its engagement in the *State Street* case, Labaton owed ATRS the full panoply of fiduciary duties normally owed in an attorney-client relationship. Those duties did not, and do not, exist in a vacuum. They are defined by ATRS's important role as class representative with duties of its own. As Lead Counsel, Labaton also owed fiduciary duties to the class whom it represented as clients, as least as of August 8, 2016, the date on which the Court certified the class for settlement purposes. *See* 8/8/16 Hearing. Tr., Dkt. # 93, p. 11 [EX. 111]; *see also* Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, Dkt. # 97. [EX. 264].[190]

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all but one of whom considered themselves experts in legal ethics -- Professors Wendel [EX. 229] [EX. 243], Joy [EX. 227] [EX. 241], Green [EX. 230] [EX. 240], and Vairo, and Hal Lieberman, Esq. [EX. 228] [EX. 242], and Timothy Dacey, Esq. [EX. 237] [EX. 244] -- as well as Professor Rubenstein [EX. 234], who opined on the interplay of the Federal Rules of Civil Procedure and disclosure obligations in a class action setting. Prompted by the discourse that took place during this intensive discovery process, Professor Gillers supplemented his Report to clarify previous opinions and identify new ones. [EX. 233].

[189] We agree with Professor Gillers' view that, because the *State Street* case was filed and pending in the United States District Court for the District of Massachusetts (Boston), the Massachusetts Rules of Professional Conduct govern the ethical conduct of lawyers involved in the case. *See* Gillers Supp. Report, § IV(A)(i) [EX. 233].

[190] We discuss Labaton's duty to the class members, *infra*.

As it would with any client, Labaton had a fundamental duty to keep ATRS "reasonably informed" about the status of the *State Street* matter. Mass. R. Prof. C. 1.4(a)(1)(3).[191] In the context of a class action case, a class representative such as ATRS must be given the information reasonably necessary to perform its fiduciary duties to the class. Fed. R. Civ. P. 23(a)(4). Such information includes both the identity of any attorney positioned to receive a portion of the final settlement award funding the common fund as well as the basic role played by that attorney, whether it be a referral role or something more substantive. Thus, Labaton had a duty to inform ATRS as its client, but more so as a representative of the class, that Chargois would receive 20% of Labaton's share of the total fee award. Indeed, Rule 1.5(e) governing attorney conduct as to fees speaks directly to this issue. In its current form, Rule 1.5(e) imposes an unequivocal duty upon lawyers to obtain a client's consent before dividing fees with lawyers outside the

[191] Massachusetts Rule of Professional Conduct 1.4(a)(1) is also illustrative of the obligation a lawyer serving as class counsel has to his or her clients. It provides that a lawyer "shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent [] is required by these Rules." Mass. R. Prof. C. 1.4(a)(1). This same obligation was imposed in substantially the same language in 2011. *See* Mass. R. Prof. C. 1.4(a)(1) (eff. Jan. 1, 1998, providing "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information") [EX. 251]. As discussed *infra*, neither the current version of Rule 1.5(e) nor the version in effect in 2011 required a lawyer obtain "informed consent" to share fees with a lawyer outside the firm. For example, the current version of Rule 1.5(e) does not use the exact phrase "informed consent," but rather requires that a lawyer *inform* the client that a division of fees will be made, and that the client *consents* in writing to the joint participation. *See* Rule 1.5(e) ("[a] division of a fees between lawyers who are not in the same firm may be made only if, after *informing* the client that a division of fees will be made, the client *consents* to the joint participation[.]") (emphasis added). We find this incongruence a distinction without a difference. We read Rule 1.5(e) both now and then to require a lawyer seeking division of fees to inform the client of the key parameters of the fee division, including the identity of the recipient lawyer. As written in Comment [7A] to the Rule, this does not, however, include the amount of the payment absent an inquiry from the client.

Rule 1.2 contemplates that material information about the representation be disclosed to the client at the beginning of the representation so that the client can duly authorize his or her attorney: "[a]t the outset of a representation and subject to Rule 1.4, the client may authorize the lawyer to take specific action on the client's behalf without further consultation." Mass. R. Prof. C. 1.2, cmt [3]. Should those circumstances change, a lawyer must again seek authority after disclosing the challenges: "[a]bsent a material change in circumstances, a lawyer may rely on such an advance authorization, The Client may, however, revoke such authority at any time." *Id*.

firm.[192] By failing to inform Hopkins -- or anyone at ATRS -- of the Chargois Arrangement, Labaton deprived its client of the opportunity to make a reasonably informed decision. In so doing, Labaton breached its duty under Rule 1.5(e).

In reaching this conclusion, we rely on the plain language of Rule 1.5(e) as interpreted by Massachusetts' highest court in 2005. While Labaton's experts have attempted throughout this investigation to characterize the firm's 2011 Retention Agreement as "imperfect" compliance,[193] we do not accept their invitation to blur the lines between compliance and noncompliance. While it is admittedly a close call, by not disclosing to ATRS that it had a pre-existing obligation to pay Chargois 20% of its fee for performing no work, we conclude that Labaton simply failed to comply with Rule 1.5(e) and its requirement of disclosure to its direct client, ATRS. Any other interpretation of this Rule would invite a lack of candor and half-measure disclosures to a client and deprive the client of the ability to make a meaningful decision in its own best interest.[194]

[192] For the reasons discussed *infra*, we conclude that the pertinent rule governing Labaton's conduct was the prior version of Rule 1.5(e), as in effect in 2011, which preceded the most recent amendments to Rule 1.5(e). *See* Mass. R. Prof. C. 1.5(e) (eff. Jan 2., 2001) [EX. 225].

[193] *See* Joy 4/3/18 Dep., pp. 19:23 – 20:2 [EX. 227]; Joy Report, § IV(A) [EX. 241]; Lieberman 4/4/18 Dep. pp. 33:6-9, 77:10-12, 87:6 – 88:20 [EX. 228]; Lieberman Report, § IV(A),(B) [EX. 242]; Wendel 4/3/19 Dep., pp. 151:10 – 152:2 [EX. 229].

[194] This interpretation attains even more force where, as here, the client is a possible class representative that in some instances will be making decisions on behalf of the class.

a. Labaton failed to comply with Rule 1.5(e), as effective February 8, 2011.

Since its adoption in 1997, the Massachusetts ethical rules on fee-sharing among lawyers have undergone several revisions.[195] In 2011, at the time ATRS retained Labaton to represent it in the *State Street* case, Rule 1.5(e) read:

> "A division of a fee between lawyers who are not in the same firm may be made only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separate or retirement agreement.

Mass. R. Prof. C. 1.5(e) [EX. 225].[196]

While the current version of Rule 1.5(e) imposes additional requirements,[197] those changes -- while adopted by the Supreme Judicial Court -- had not taken effect at the time

[195] Prior to the adoption of the Massachusetts Rules of Professional Conduct, DR2-107 of the Canon of Ethics and Disciplinary Rules Regulating the Practice of Law, SJC Rule 3:07, 382 Mass. 773 (1981), addressed fee-sharing between lawyers not in the same firm. Like its counterpart in the Rules of Professional Conduct, Rule 1.5(e), DR2-107(A) imposed strict limitations on the division of fees among lawyers not in the same firm. It provided, in pertinent part, that "A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless [1] [t]he client consents to employment of the other lawyer after a full disclosure that a division of fees will be made… [3] [t]he total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client." DR2-107(A) [EX. 226]. In 1997, effective January 1, 1998, Massachusetts transitioned to the Rules of Professional Conduct. As a result, Rule 1.5(e) replaced DR-207(A)(1) as the prevailing ethical rule governing fee divisions between unaffiliated lawyers. As quoted above, Rule 1.5(e) required that an attorney dividing fees inform the client that a division of fees *will* be made, although the rule (as written) did not explicitly state *when* consent would occur nor that it be in writing. On December 20, 2010, the Supreme Judicial Court adopted formal amendments to Rule 1.5(e) requiring that the client be informed "before or at the time" of retention and provide written consent.

[196] The Special Master recognizes that Massachusetts is in the distinct minority in that it permits attorneys to receive referral payments despite performing no substantive work or assuming joint responsibility in a case -- i.e. "bare referrals." By permitting bare referrals, Massachusetts encourages attorneys to refer matters to those lawyers best equipped to handle them. Whether the legitimate policy objectives advanced by permitting bare referral fees are achieved by this practice, however, is a different matter than the potential harm and inequities that result from not informing a client about a payment of referral fees or fee-sharing agreements.

[197] Rule 1.5(e), effective as of March 15, 2011, now requires that "the client is notified *before or at the time* the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation *in writing* and the total fee is reasonable" (emphasis added).

ATRS became a client in *State Street*. Thus, as an initial matter, we look to the pre-2011 version of Rule 1.5.[198] But, as Professor Gillers points out, the Rules of Professional Conduct, like any statute, cannot be read in isolation. *See* Gillers Supp. Report, pp. 66-67. Lawyers are held to know the law beyond what is written in codified rules. Thus, we look beyond the Rule itself and read Rule 1.5(e) in conjunction with the Supreme Judicial Court's decision in *Saggese v. Kelley*, 445 Mass. 434 (2005), in which the Court opined squarely on the issue of what constitutes a valid referral payment under Rule 1.5(e). In answering that query, the SJC held that a lawyer must disclose more than what was written in 1.5(e). Going forward,[199] the Court imposed two new obligations to take effect immediately: (i) all fee-sharing agreements must be disclosed to the client before a referral is made; and (ii) the client must consent in writing to the agreement. *Id*. at 443.[200]

The other experts proffered by Labaton differed as to what extent, if at all, *Saggese* should be read as imposing new requirements -- i.e. a writing -- not appearing in

[198] Our reliance on the previous version, however, does not render Rule 1.5(e), as currently written, inconsequential. While not controlling, we look to the text of the current Rule as reflective of the spirit of Massachusetts' ethical obligations to disclose fee-sharing agreements.

[199] The SJC specifically held that the rules announced therein "will be construed to require this in fee-sharing agreements that are formed after the issuance of the rescript in this decision." Id. at 443. Under Massachusetts Rule of Appellate Procedure 23, rescripts are effective twenty-eight days after issuance of the final decision.

[200] Whether written consent was required in 2011, after the *Saggese* decision but prior to the March 15, 2011 amendments taking effect, is a close question. But we are persuaded that a definitive statement by Massachusetts' highest court requiring that a client consent in writing must be followed as pronounced in a public decision of that Court. In doing so, we reject Mr. Lieberman's opinion that the writing requirement articulated in *Saggese* was "dicta." Lieberman 4/4/18 Dep., pp. 130:12 – 131:1 [EX. 228]. When the highest Court in the jurisdiction specifically says, "[t]he rule will be construed to require this in fee-sharing agreements that are formed after the issuance of the rescript in this decision," lawyers act at their own peril if they treat such a specific pronouncement of a new legal standard as dicta.

the text of the Rule at that time. Professor Joy, for example, agreed with Mr. Lieberman's analysis that *Saggese* did not impose a writing requirement, and took the position that a practitioner is only bound by the Rules as written. Joy 4/3/18 Dep., pp. 69: 20-70: 3 [EX. 227]; Lieberman 4/4/18 Dep., p. 114: 20- 115:3, 121: 19-23 [EX. 228]. While that may well be a consideration in imposing discipline and/or sanction for a violation of the Rule(s), it does not change the scope of Labaton's duties owed to ATRS under Rule 1.5(e) when ATRS engaged the firm in 2011.

Professor Wendel distinguishes *Saggese* on different grounds. He reads the Court's decision in *Saggese* as confined to those instances in which a lawyer attempts to modify the terms of an ongoing client engagement "midstream," rather than as imposing new obligations as to what information a lawyer must provide a client at the beginning of the representation about a division of fees. Professor Wendel, therefore, opines that *Saggese*, despite announcing a requirement that consent to fee-sharing be captured in writing going forward, did not impose upon Labaton a duty to inform ATRS or Hopkins because that obligation arose before and not during the representation. Wendel 4/3/18 Dep., pp. 27: 2-8; 29: 14-19; 30: 22-31:13. [EX. 229].

We disagree with Professors Joy and Wendel and Mr. Lieberman on this point. Even in its pre-2011 form, Rule 1.5(e), alongside the requirements in *Saggese*, required written consent to any fee-sharing arrangement.[201] It is with these obligations in mind that

[201] Because these changes were not codified in the Rules of Professional Conduct until March 15, 2011, after a three-month notice period, we recommend that no disciplinary sanctions be imposed for failure to abide by the requirements added by *Saggese v. Kelley*. *See* Recommendations, § IV, *infra*.

we agree with Professor Gillers (Gillers Supp. Report, pp. 69-70) and conclude that Labaton more than "imperfectly" complied with Rule 1.5(e); it violated the Rule, however technical that violation may now be construed in hindsight. While the violation was not egregious in nature, it is a violation nonetheless, and one that had potentially far-reaching implications given Labaton's obligations as Class Counsel and ATRS's obligations as class representative.

b. Labaton did not adequately inform ATRS about the Chargois Arrangement.

With the emergence of Rule 1.5(e) in this investigation, Labaton argues that, while Hopkins did not have personal knowledge of Chargois, ATRS -- as an institution -- was sufficiently on notice of Chargois' role in the *State Street* case. It reaches this result by conflating three unrelated exchanges between Labaton and ATRS (or its representatives) stretching back to 2008, years before the commencement of the *State Street* case: (1) the joint application of Labaton and Chargois & Herron for, and the acceptance of Labaton only, as monitoring counsel for ATRS in 2008; (2) Hopkins' instruction to Belfi not to inform him about fee allocations in *State Street* or any other case in which ATRS served as a class representative; and (3) the February 8, 2011 Retention Agreement, signed by Hopkins, engaging Labaton. This position is supported to varying degrees by all four Labaton experts, who, while acknowledging that no single event meets Rule 1.5(e)'s requirements,[202] focus on these events in the aggregate as evidence of sufficient notice of

[202] The expert testimony on this topic varied considerably. Professors Joy and Wendel conceded that Belfi's 2008 email exchange with Christa Clark was not alone sufficient. Joy 4/3/18 Dep., p. 172:7 – 173:19 [EX. 227]; Wendel 4/3/18 Dep, pp. 137:24 – 138:11 [EX. 229].

fee-sharing to ATRS. These factual conflations are, at most, constructive notice, and likely something less than that; regardless of the label used, we find that these communications did not satisfy the actual notice requirement of Rule 1.5(e).

Put simply, we are unconvinced by Labaton's strained post-hoc explanation of events and the legal theory that purports to flow from it. None of these communications, taken individually or together, disclosed the true nature of the Chargois Arrangement or Chargois' role in the case.[203]

We begin with the earliest event, Labaton and Chargois & Herron's Joint Response to the RFQ on July 30, 2008. *See* Joint RFQ Response [EX. 128]. There is no question that Damon Chargois' name and the Chargois & Herron firm appeared in the Joint RFQ Response. *See id*. But neither Labaton nor Chargois & Herron revealed, nor intimated, that after Chargois was rejected as co-monitoring counsel, he (or the Chargois & Herron law firm) would receive 20% of Labaton's fees earned from any and all future ATRS/Labaton litigation, regardless of whether Chargois worked on the cases.[204] More

[203] While Labaton had a duty to disclose to its clients, ATRS and the class (at least through its class representatives), that Chargois was entitled to a significant portion of the fees awarded in the case based on an existing agreement that required Chargois to perform no work, under Massachusetts law, Rule 1.5(e) did not go so far as to require that Labaton inform ATRS the exact percentage that was allocated to Chargois unless asked. *See* 1.5(e), cmt [7a] ("The Massachusetts rule differs from its ABA counterpart in that it does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.") Had Hopkins learned of Chargois' role in the case, he may well have asked Labaton about the financial division between firms, and Labaton would have been required to respond truthfully.

[204] Specifically, the RFP (§ 5.10) solicited the firms to "describe proposed billing arrangements, including contingency fees, for securities litigation…. state what discounts, if any, to these rates the firm proposes to provide to ATRS." Joint RFQ Response [EX. 128]. In the Joint RFQ Response, neither Labaton nor Chargois and Herron informed ATRS of a contemplated agreement to pay referral fees to Chargois and Herron. If Labaton now wishes to rely on the RFQ approval process to prove that it gave ATRS notice of Chargois, Labaton must also bear responsibility for the incomplete answer it gave to the RFQ questions as to the terms of the Chargois Arrangement.

There is some evidence that both Labaton and Chargois believed Chargois would serve as local counsel to Labaton in future litigation involving ATRS. Belfi 9/5/17 Dep., pp 27:11-15 [EX. 122]; Chargois 10/2/17 Dep., pp. 38:23- 39:1 [EX. 125]. That Chargois and Labaton intended for Chargois to perform substantive legal work on

importantly, ATRS, through its Chief Legal Counsel Christa Clark, explicitly rejected the joint relationship as proposed. She wrote that Chargois and Herron would *not* be added to the monitoring panel, and instead "add[ed] [Labaton] independently to the list of approved firms." [EX. 129]. While Labaton could, in its discretion, affiliate with Chargois and Herron as it "deem[ed] appropriate, on a case-by-case basis," if it was "a necessary and appropriate expense of the case," the Clark email left no doubt that only *Labaton* -- not Chargois and Herron -- would be appointed, and thereby serve the organization, as monitoring counsel. *See id*.

Moreover, neither the Joint RFQ Response itself, nor the Response when read in conjunction with Clark's email, met the requirements of Rule 1.5(e) read with *Saggese*. *See* Gillers Supp. Report, 69 [EX. 233]. Neither sufficiently informed ATRS of the Chargois Arrangement, as opposed to the identity of Chargois or his firm; that is, nothing in that response alerted ATRS that Chargois would receive 20% of Labaton's gross attorneys' fees earned in cases where ATRS served as lead or co-lead counsel.[205] Just the opposite. If anything, the Joint RFQ Response gave ATRS and Clark the false impression that Chargois would be performing substantive work alongside Labaton. While that may have been the intent early on, those discussions very soon thereafter gave

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future cases involving ATRS does not change our analysis. As all the parties acknowledge, under the ultimate agreement reached (which we now refer to as the "Chargois Arrangement") Chargois was to receive 20% of any fees awarded to Labaton in an ATRS-lead (or co-lead) case. It is this sharing of fees that triggers Labaton's duty to inform under Rule 1.5(e). We read the rule as matter-specific. Thus, even if we accept Labaton's argument that the initial monitoring disclosures constituted notice and consent under Rule 1.5(e), Labaton had a duty to inform ATRS about the change in the relationship at the time it began representing ATRS in the *State Street* case.

[205] Belfi testified that he had subsequent telephone conversations with Christa Clark.

way to what is now known as the Chargois Arrangement. Under that agreement, Chargois' entitlement to 20% of the firm's gross fees -- whatever the amount -- was not up for discussion; it effectively created a floating lien interest on every Labaton/ATRS case. *See* Chargois 10/2/17 Dep., pp. 50:18 - 51:12. [EX. 125].

We are equally unpersuaded that Hopkins' statement to Belfi that Hopkins did "not want to know" (or otherwise be involved with) the specifics of Labaton's fee agreements effectively relieved Labaton of its ethical obligation to inform ATRS about Chargois. *See* Hopkins 9/5/17 Dep., pp. 60: 13 – 61: 13 ("…[w]hen I do these cases, I have one focus, and that is to get a good outcome. I'm not trying to be a referee. I'm not trying to be a bank teller. I'm not trying to be somebody that directs fees to one law firm or another, and I – I didn't want that. And I don't want that.") [EX. 12];[206] Hopkins Declaration, ¶14 ("Because of my instructions to Mr. Belfi regarding my desire *not to know or otherwise be involved with* the specifics of Labaton's fee agreements, I do not feel misled…") (emphasis added). [EX. 130].[207] As Professor Gillers so effectively puts

[206] In his first deposition, before the Special Master learned of the Chargois Arrangement, Hopkins testified that in the *State Street* matter, he "wasn't trying to figure out -- I wasn't trying to control how the attorneys divided up their fee." Hopkins Dep., p. 79: 9-11. But it is clear from his testimony that his deference to Labaton was in relation to how the fees would be divided between ERISA and Customer Class Counsel, not among counsel, in general. *See id*. p. 78:20-22 (Q: were you aware of the amounts in attorneys' fees that were ultimately awarded to the ERISA attorneys?"), p. 79: 12-16 ("If they divided [their fee] up in a way that -- in an amount that the judge ordered that they could all live with, you know, happiness to them. I 've got plenty to do – enough to do without trying to divide up the attorney fees.").

After the Chargois Arrangement came to the Special Master's attention, Hopkins testified a second time, this time addressing specifically his knowledge of Chargois' involvement in the *State Street* case. In his testimony, Hopkins stated (for the first time in this record) that "[Belfi] wanted me to understand everything about what all [the lawyers] were doing," but that Hopkins informed Belfi that he "expected the attorneys to handle the attorney stuff because, you know, once you become the gatekeeper of what law firms are hired…the last thing I wanted was to have any knowledge or power about what law firms were hired." Hopkins 9/5/17 Dep., p. 60: 8-12, 17-22. Hopkins later purported to ratify the agreement. *See* Hopkins Declaration, ¶¶ 11-12, 14.

[207] Hopkins' statements in his recent Declaration that he told Belfi "if [he] ever wanted to know the details of Labaton's fee-sharing agreements, [he] would ask him," and that Hopkins was "not concerned with how that

it, Labaton deliberately *chose* not to tell Hopkins about Chargois based on its own perception that the Chargois Arrangement would not matter to Hopkins. *See* Gillers Supp. Report, p. 76 [EX. 233].

Contrary to Labaton's recent assertions, a client's request not to be informed does not constitute consent under Rule 1.5(e). Far from it. Even Labaton's distinguished panel of experts acknowledge that a client's desire, however explicit, not to know certain facts does not relieve lawyers of their ethical duty to inform that client of fee-sharing. *See* Lieberman 4/4/18 Dep., p. 30:3-5 [EX. 228]; Green 4/4/18 Dep., pp. 158: 6-159:10-15 [EX. 230]; Wendel 4/3/18 Dep. p. 151: 14- 152: 3. [EX. 229]. We cannot accept the notion raised by Professor Wendel that these inherent ethical duties are obviated simply because the client is sophisticated or familiar with the practices of the securities class action bar, or knows "the players" in class action cases. *See* Wendel 4/3/18 Dep., p. 100: 2-6 [EX. 229]. While such a position is belied by black-letter ethical law, it is also particularly troublesome because, by shifting the burden to the client, it eviscerates the deep-seated protections built into the ethical rules to protect clients. These protections are particularly critical where Labaton was anticipating an appointment as Lead Counsel,

aggregate fee is distributed among lawyers or law firms" in any way, raise serious questions about Hopkins' adequacy to serve as a class representative moving forward. *See* Hopkins Decl., ¶¶ 10-11 [EX. 130]; Fed. R. Civ. P. 23(a)(4) ("One or more members of a class may sue or be sued as representative parties on behalf of all members *only if* … the representative parties will fairly and adequately *protect the interests of the class*.") (emphasis added). These concerns are not assuaged by Hopkins' blanket statement that "[i]n his view, this payment had no effect on the interests of the class." Hopkins Decl., ¶ 15 [EX. 130]. The class had a right to know that Lead Counsel intended to, and did, pay $4.1 million out of settlement funds to a person who performed no work in the case, as a result of Lead Counsel's own pre-existing obligation, whether or not the payment itself was permitted under Massachusetts ethical rules. We cannot see how, in light of a clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately protect the class's interests moving forward.

and of ATRS as a class representative, and was well aware of the obligations to the class that are inherent in that position.

While shifting the burden to a client is inappropriate in any case, it is especially so here where the client was serving in a fiduciary role and owed ethical duties of his own to the class he represented. In this context, a client such as Hopkins speaks not only for himself but for the absentee class members, a duty Hopkins clearly took seriously. Hopkins 6/14/17 Dep., p. 85:14-25 ("ultimately my duty is to ensure that the class got as good an outcome as they could under the circumstances presented to us.") [EX. 4]. Labaton, therefore, had a clear obligation to affirmatively inform Hopkins of the full parameters of the Chargois Arrangement -- that pursuant to a pre-existing obligation of Labaton's, Chargois would receive a substantial payment if Labaton successfully recovered fees but had no obligation to do any work on the case -- and obtain his written consent. *See* Chargois 10/2/17 Dep., pp. 50:18 - 51:12 [EX. 125]. Hopkins' instruction to Belfi did not waive that critical duty, much less rise to the level of informed consent contemplated by Rule 1.5(e).

Finally, in what is perhaps the most compelling of Labaton's three-part argument for compliance under Rule 1.5(e), Labaton argues that the February 8, 2011 Retention Agreement -- and specifically a single two-word phrase within it -- sufficiently notified ATRS of the Chargois Arrangement. [EX. 138]. The Retention Agreement reads: "[ATRS] agrees that Labaton Sucharow may allocate fees to other attorneys who serve as local or liaison counsel, *as referral fees*, or for other services performed in connection with the Litigation." (emphasis added). One can read this sentence in one of two ways.

The sentence can be read, according to Labaton's experts, as (1) permitting fee allocation (a) to local or liaison counsel; (b) paid out as referral fees; *or* (c) paid for other services performed in the litigation (*See* Wendel 4/3/18 Dep., pp. 25:15 – 26:2 [EX. 229]; Green 4/4/18 Dep., pp. 119: 11-17; 120:8-16 [EX. 230]; and Lieberman 4/4/18 Dep., pp. 30:6-20, 37:1-11 [EX. 228]), or (2) providing only two options, (a) referral fee payments to local/liaison counsel *or* (b) fees to other attorneys performing work on the case (in other words, with "as referral fees" modifying "local or liaison counsel"). While the latter interpretation is more plausible, this fact is of no moment. Even if we were to read the Retention Agreement as Labaton's experts suggest, that letter falls well short of compliance under Rule 1.5(e).

On this point, we agree with Professor Gillers and part ways with Labaton's various experts. While Labaton's experts disagree whether the letter alone satisfies Rule 1.5(e) (Joy says that it does), or whether the letter must be read in conjunction with the monitoring relationship and Hopkins' instruction to Belfi (as Green and Lieberman say), they agree that the Retention Agreement adequately conveyed what was required under Rule 1.5(e). We simply do not agree.

Rule 1.5(e) contemplates disclosure of more than just the words "referral fees." This is the only conclusion that reflects both the plain meaning of the Rule -- historical and current -- and the significance of client consent in a "bare referral" state. The history of Rule 1.5(e) reinforces our view that a mere mention of "a division of fees" or "referral

fee," absent some explanation, does not suffice for the nature of the consent required.[208] Reading the rule in this more meaningful fashion further enhances the significance of obtaining a client's consent in a bare referral jurisdiction. In bare referral states, such as Massachusetts, an attorney is rewarded, if not encouraged, to refer matters to substantially more capable counsel by making a referring attorney eligible to earn a fee simply for making such a referral. Because no work is required to receive this fee, the only safeguard in place to prevent an attorney from abusing his or her discretion to share fees with attorneys is Rule 1.5(e)'s consent requirement.[209] By apprising the client of any fee divisions up front, the client is empowered to ask questions, renegotiate, decline representation, or agree to the arrangement as explained. Such decisions are the client's prerogative and the client must have sufficient information to knowledgeably exercise that prerogative. We, therefore, view this obligation as an important one, not as a casual or pro-forma empty one.

[208] On this point, we are informed by the original language of DR2-107(A)(1), the predecessor to Rule 1.5(e), which provided that "[a] lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his firm or law office, unless… [t]he client consents to employment of the other lawyer after a *full disclosure* that a division of fees will be made." (emphasis added). [EX. 226]. While that phrase no longer appears in the current version of the Rule or in the version effective in 2011, its inclusion in Massachusetts' ethical canon suggests that steps beyond those taken by Labaton are required to comply with Rule 1.5(e).

[209] Professor Gillers opines that Rule 1.5(a), prohibiting excessive fees, also applies to any division of fees paid to a lawyer under a fee-division agreement under Rule 1.5(e). *See* Gillers Supp. Report, pp. 126-127 [EX. 233]. As he points out, this is a logical reading of Rules 1.5(a) and 1.5(e) -- intended to protect the client from unduly burdensome fees -- because it prevents lawyers from "teaming up" with other lawyers and dividing their fees to circumnavigate the reasonableness check imposed by Rule 1.5(e). On the other hand, Labaton construes Rule 1.5(a) as limited to a singular fee with no bearing on fee divisions under 1.5(e). Labaton 4/12/18 Rebuttal, pp. 21-23. [EX. 161] And, as the firm notes, at least one of the factors enumerating the "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly" is incompatible with a bare referral fee (that requires no substantive work to be performed). *Id.*, p. 22. Although a $4.1 million fee paid to someone who does no work on a case is excessive by any definition of that word, we make no finding with regard to Rule 1.5(a).

Labaton's reliance on a multi-year, multi-topic dialogue with ATRS fails for the additional reason that consent under Rule 1.5(e) must be matter-specific.[210] *See* 1.5(e) (fee division may occur only after informing the client that a division of fees "will be made.") That is, it requires consent to division in every matter, regardless of a past or existing relationship with the client, however robust. This is surely true of ATRS, whose relationship with Labaton predated the *State Street* case by three years, during which time ATRS's leadership turned over and the Executive Director (Paul Doane), with whom Chargois and Herron had the initial contact, was replaced by a new Executive Director, George Hopkins, who was told nothing about Chargois or the evolving nature of the Arrangement. *See* Hopkins 9/5/17 Dep., pp. 21:5-10, 64:4-67:11. [EX. 12]. On this point we firmly reject Labaton's attempts to bootstrap its own then-existing monitoring relationship and/or one-off conversations between Belfi and Hopkins to comprise meaningful consent to the fee-sharing agreement with Chargois. This is simply a bridge too far.

Finally, the Special Master's view on the issue of the nature of the consent required under Rule 1.5(e) is informed by the unique and troubling nature of the entire Chargois Arrangement, itself. It was not a relationship in which an attorney was

[210] Professor Wendel opines that the consent required for Rule 1.5(e) is not matter-specific absent a midstream modification of an existing attorney-client relationship. *See* Wendel 4/3/18 Dep., pp. 30:15 – 31:17, 40:5-14. [EX. 229.] It defies logic that Rule 1.5(e), which requires that the client be told that a division of fees "will be made" can be satisfied by disclosing a *potential* referral arrangement in response to a securities monitoring rather than litigation-based RFQ, three years before the referred matter is initiated. In short, a lawyer cannot advise his or her client that a referral *will* be made in the future, as required by the Rule, unless the matter triggering the referral obligation is underway. This is the only reasonable reading of the Rule.

receiving a simple referral fee. Rather, it was a fee that grew out of a pre-existing obligation of Labaton, alone. Because ATRS was likely going to be a class representative in a class action, the phrase "as referral fees" takes on a more far-reaching meaning, as it would mean that ATRS was giving permission for the payment of this pre-existing obligation to be satisfied from class funds, effectively permitting Labaton to shift its own obligation to Chargois to the class.[211]

c. Application of Rule 7.2(b)

A separate but related issue arising out of Labaton's noncompliance with Rule 1.5(e) is whether the firm's conduct also violated Rule 7.2(b)'s proscription on paying for a recommendation of a lawyer. Rule 7.2(b) prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services." Mass. R. Prof. C. 7.2(b).[212] This rule must be read in tandem with Rule 7.2(b)(5), which explicitly carves out fee-sharing agreements that comply with Rule 1.5(e). Mass. R. Prof. C. 7.2(b)(5).[213] Professor Gillers opines that a failure to comply with Rule 1.5(e) is a *per se* violation of Rule 7.2(b). *See* Gillers Supplemental Report, § IV(B)(i)-(ii). Labaton's experts respond

[211] This situation is exacerbated by the fact that Labaton similarly did not give notice of the pre-existing Chargois obligation to the class, *see infra*.

[212] This language previously appeared as Rule 7.2(c), with language substantially similar to Rule 7.2(b). *See* Mass. R. Prof. C. 7.2(c) (eff. 2011) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may: … [4] pay referral fees permitted by 1.5(e).) [EX. 231].

[213] In addition to Rule 7.2(b)(5), the broader language of Rule 7.2(b) also exempts from its general prohibition against payments for recommendations another category of fee division among lawyers: those made pursuant to reciprocal referral agreements under Rule 7.2(b)(4). Rule 7.2(b)(4) permits *lawyers* to receive payment from another lawyer or nonlawyer professional under a non-exclusive reciprocal referral agreement, of which the client is informed "of the existence and nature," and where payment of fees is not otherwise prohibited. While we recognize that the Chargois Arrangement did not involve a reciprocal referral arrangement, the carve-out in this section is further evidence (on top of the unambiguous language in Rule 7.2(b)(5)), that Rule 7.2(b) applies to lawyers and nonlawyers alike. To read these two textual exceptions otherwise is to render both of them meaningless.

that the two provisions are unrelated; in their view, Rule 7.2(b) governs payments to a nonlawyer or non-referral fees, and Rule 1.5(e) governs fee-sharing. *See* Wendel 4/3/18 Dep., p. 209:1-9 [EX. 229]; Joy 4/3/18 Dep., 31:21 – 32:9 (Rule 7.2(b) may apply to lawyers not acting in the capacity of a lawyer) [EX. 227]; Green 4/4/18 Dep., p. 63:4-14 (Rule 7.2(b) applies to payments for recommendations *not* in the context of fee-sharing) [EX. 230]; Lieberman 4/4/18 Dep., p. 79:8-10 (membership in the bar takes a monetary arrangement outside 7.2(b)) [EX. 228]. For the reason below, we find that Professor Gillers has the stronger argument.

We must begin with the meaning of the word "person" under Rule 7.2(b). To the uninformed, the answer to this question may appear obvious, based on common sense and the application of a common dictionary term. But on this point Professor Gillers and Labaton's experts sharply disagree.

On its face, Rule 7.2(b) proscribes giving anything to value to a *person*. As Professor Gillers indicates, the most plausible reading, if not the only reading, is that a person means just that, an individual, and applies equally to lawyers and nonlawyers. *See* Gillers Supp. Report, p. 67-68. [EX. 233]. This commonsense approach is consistent with, but not made explicit in, the Rules of Professional Conduct. The Rules define "person" as a corporation, an association, a trust, a partnership, and any other organization or legal entity, but are silent as to which *individuals* come within this category.[214] Mass. R. Prof. C. 1.0(i). Perhaps because it defies logic that a lawyer would

[214] As used throughout the Rules of Professional Conduct, "person" refers broadly to all individuals, whether a lawyer or nonlawyer; the terms person and lawyer are not mutually exclusive. *See* Rule 1.0, cmt. [6] ("any explanation reasonably necessary to inform the client *or other person* of the material advantages and disadvantages

not be considered a person under the law, the omission of the common dictionary meaning -- that a person is a human being -- does not give us reason to pause. *See Merriam-Webster Dictionary*; "Person" ("human, individual – sometimes used in combination especially by those who prefer to avoid man in compounds applicable to both sexes.")

But Labaton's experts, seizing on these semantic shortcomings, opine that "person" refers only to *non*lawyers. Therefore, they argue, Rule 7.2(b) has no application to Labaton's payment to a licensed attorney such as Chargois.[215] To justify this strained reading of the rule, Labaton's experts point to the title assigned to Rule 7.2(b) -- "advertising" -- as evidence that Rule 7.2(b) has nothing to do with "fees" (the subject of Rule 1.5(e)) or fee-sharing. Hence, "person" does not include lawyers.[216] Wendel Report, p. 16 [EX. 243]; Lieberman 4/4/18 Dep., pp. 81:20 – 82:4 [EX. 228]. Mr. Lieberman, pushed to defend this position in the extreme during depositions, testified that a law

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of the proposed course of conduct and a discussion of the client's or other person's options and alternatives") (emphasis added). "Nonlawyer," on the other hand, is used less frequently but with deliberation, mainly to indicate a difference between the responsibilities owed by lawyers and nonlawyers in particular circumstances. *See* Rule 3.8, cmt. [6] ("Special Responsibilities of a Prosecutor"); Rule 4.2, cmt. [4] ("Communication with Person Represented by Counsel"); Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants").

[215] Professors Wendel and Joy point out that the Rule has historically been applied to "runners" or "touts" or other individuals pursuing clients in a lawyer's stead. *See* Wendel Report, pp. 15-17 [EX. 243]; Joy Report, pp. 20-21 [EX. 241]. This is one fact to consider but does not persuade the Special Master that Rule 7.2(b), as written, is inapplicable to lawyers.

[216] Labaton argues that the title of Rule 7.2, "advertising," is indicative of the Rule's limited scope. This is particularly evident when read alongside Rule 1.5(e), a subsection of the rule on "fees," which has nothing to do with advertising conventions. We do not agree. Captions and titles of Rules are not substantive parts of a Rule. *See INS v. St. Cyr*, 533 U.S. 289, 309 (2001) (citing *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("The title of a statute … cannot limit the plain meaning of the text."); *see also Opinions of the Justices*, 309 Mass. 631, 639 (1941) ("[T]hough the title of an act of the General Court is part of such act in a legal sense, such title cannot be given the effect of extending or restricting the scope of the act manifested by unambiguous language in the body thereof.").

degree and membership in a legal bar fully insulates a lawyer from Rule 7.2(b). *Id.*, p. 79:8-10.

The Rules of Professional Conduct themselves suggest otherwise. "Nonlawyer" is a term of art. That phrase appears several times throughout the Rules of Professional Conduct -- at least thirty-six times by our count -- and describes a lawyer's duties vis-à-vis a nonmember of the bar. Despite the drafters' liberal use of the word throughout the Rules, "nonlawyer" does not appear anywhere within the text of Rule 7.2(b), or its predecessor, Rule 7.2(c). Had the drafters intended "person" to refer only to nonlawyers, they could have used the term "nonlawyer" as they did in so many other instances.[217] We do not accept Mr. Lieberman's testimony that omission of "nonlawyer" is simply "bad drafting." Lieberman 4/4/18 Dep., p. 99: 1-3. [EX. 228].

We do not accept Labaton's strained reading of the rules for several other reasons, not the least of which is that none of the distinguished experts testifying in this case could point to any legal authority that has found a person to mean a nonlawyer. Nor have we found any. Labaton's experts focus, instead, on a handful of non-Massachusetts decisions and ABA or non-jurisdiction-specific guidance categorizing the conduct of nonlawyers as violations of Rule 7.2(b) or its equivalent. *See* Joy Report, pp. 20-24 [EX. 241]; Wendel Report, pp. 15-16 [EX. 243]. The absence of decisions condemning

[217] A more reasonable interpretation of Rule 7.2(b)'s "person" requirement is that offered by Professors Joy and Green, who concede that a lawyer *can* be a person under Rule 7.2(b). Joy 4/3/18 Dep., p. 31:9-20 [EX. 227]; Green 4/4/18 Dep., pp. 62:7 – 63:14 [EX. 230]. This is true, for example, when a lawyer is not acting in a legal capacity. A quintessential example is a lawyer who drives a taxicab. The taxicab driving lawyer cannot avoid Rule 7.2(b) merely because he holds a license to practice law. *See* Joy 4/3/18 Dep., p. 31:1-7. [EX. 227].

lawyers for engaging in similar conduct is evidence, they argue, that a lawyer is not a person under Rule 7.2(b). But we do not make this logical leap. The fact that several bar authorities charged with enforcing Rule 7.2(b) (or its equivalent) have disciplined lawyers for paying nonlawyers for a recommendation in no way restricts the scope of Rule 7.2(b) to the nonlawyer population. To do so runs the risk of disciplining conduct involving nonlawyers while exculpating the identical conduct of a lawyer.[218] We cannot read the judicial silence as limiting the plain language in that way.[219]

Finally, we disagree with Labaton's view that "person" refers only to nonlawyers for two additional but equally important reasons: Rules 7.2(b)(4) and 1.5(e), the two exceptions written into Rule 7.2(b) that expressly permit referral payments between *lawyers*. Rule 7.2(b)(4) permits lawyers to enter into non-exclusive reciprocal referral arrangements with lawyers and nonlawyers with client consent. Rule 7.2(b)(5), likewise, carves out an exception for referral fees between lawyers that meet the division-of-fee requirements of Rule 1.5(e). It would make little sense to insert not one, but *two*, provisions that have no bearing on the conduct of those whom the Rule itself governs. Neither exception would be necessary if we were to read the rule in the manner urged by Labaton and its experts (that a lawyer is not a person). Labaton's experts provide only a facile explanation for these explicit carve-outs of permissible payments by lawyers.

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[218] Labaton's experts contend that monetary payments made by a lawyer are sufficiently governed by a combination of Rule 1.5(e) and Rule 7.3 (solicitation).

[219] While the lack of existing legal authority applying Rule 7.2(b) to lawyers specifically factors into our analysis as to whether sanctions are warranted, and is as a mitigating factor, it does not alter our analysis as to whether Chargois' early contact with Doane/ATRS violated Rule 7.2(b).

Professor Green says the exception in Rule 7.2(b)(5) for agreements complying with Rule 1.5(e) is merely "surplusage;" Mr. Lieberman says Rule 7.2(b)(5) is "redundant." Green 4/4/18 Dep., pp. 60:15-22, 63:19 – 64:5 [EX. 230]; Lieberman 4/4/18 Dep., p. 82:13-14 [EX. 228]. It is a basic rule of statutory construction that statutes and rules are to be read as they are written. We cannot accept the explanation that clear language in a Rule of Professional Conduct should be deemed surplusage or a redundancy. Such an argument ignores the tenets of statutory construction and offends notions of common sense.

In sum, we find the position of Labaton's experts belied by the construction of the rule -- cross-referencing fee-referral between *lawyers* in Rule 1.5(e) -- and largely conflating the lack of legal authority framing noncompliance with Rule 1.5(e) as a Rule 7.2(b) violation with Chargois' immunity from the rule as a lawyer. While informative, this argument ultimately does not persuade us to accept their view.

Beyond the plain language of Rule 7.2(b), its application to lawyers and nonlawyers who engage in proscribed conduct is evidenced from its historical application. In fact, the very cases upon which Labaton's experts rely to argue that Rule 7.2(b) categorically does not apply to lawyers involve recommendations factually similar, if not analogous, to what Chargois did in connecting Labaton and ATRS.[220] More to the point, Labaton's working arrangement with Chargois, and Chargois' conduct, raise the

[220] The Rules of Professional Conduct define recommendation as "[a] communication [that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." Mass. R. Prof. C. 7.2(b), cmt. [5].

same concerns that have led commentators to condemn more avaricious payment-for-referral models intended to be disciplined by 7.2(b).[221]

In evaluating Chargois' conduct under Rule 7.2(b), we again distinguish the payment to Chargois from a traditional referral fee. Unlike cases where one lawyer pays another a fee for referring a client which the referring lawyer is not competent or able to represent, Chargois initiated the relationship between Labaton and ATRS at Labaton's request. ATRS did not come to Chargois for legal representation or seek out Chargois for a referral, or even his opinion, on counsel; rather, it was the other way around. While Chargois was licensed to practice in Arkansas, ATRS did not consult Chargois in his capacity as a licensed member of the bar. In other words, ATRS did not ask Chargois to find it additional monitoring counsel, nor is there any evidence in the record that ATRS had such a need; in fact, it already had three firms performing monitoring. Rather, it was Chargois who cold-called Doane, and soon after establishing contact, volunteered that he was working with a New York law firm that "specializes" in institutional investors.[222] Chargois 10/2/17 Dep., p. 34:20-23. [EX. 125]. From there, Chargois attended an initial meeting with Labaton, at which Labaton successfully persuaded ATRS to hire it as a fourth monitoring counsel. In all of this, Chargois was effectively acting as a "tout" of the same kind toward which Rule 7.2(b) was directed.

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[221] *See* Ellen J. Bennett, et al., *Annotated Model Rules of Professional Conduc*t (7th ed. 20Il); Charles W. Wolfram, *Modern Legal Ethics* § 14.2.5, at 786 (1986).

[222] In fact, Chargois testified that he did not even know what an "institutional investor" was at the time Belfi first inquired about an introduction to Arkansas pension funds. According to Chargois, whose testimony we credit, Chargois had to first explain to Doane who he was and why he was calling. Chargois 10/2/17 Dep., p. 32: 19-24; 34:6-9. [EX. 125].

Professor Gillers opines that these facts are evidence of a "recommendation" within Rule 7.2(b). *See* Gillers Supp. pp. 71-72, n. 80. [EX. 233]. We agree. Chargois' efforts went far beyond a neutral introduction; it was simply solicitation by another name. Chargois himself boldly described his extensive efforts later in the relationship, saying he spent "political favors" and considerable money to secure the introduction. *See* LBS017593-7594 (10/18/14 email from Chargois to Eric Belfi). [EX. 177]. Professor Green's attempt to parse between an implicit recommendation (not covered by Rule 7.2(b)), on the one hand, and the explicit statement by Chargois describing Labaton's securities practice as "specialize[d]" -- which Green opines does not rise to the level of a recommendation -- is awkward and unconvincing. *See* Green 4/4/18 Dep., pp. 43: 19-44:2; 45: 11- 46:4. [EX. 230]. The facts here are not that complicated. Chargois had no relationship with ATRS or Doane, was not sought out for legal advice or a referral, and effectively vouched for Labaton's specialized securities monitoring services, a recommendation that was given emphasis by Chargois attending a meeting between Doane, Belfi, and Keller.

This type of solicitation is analogous to *In re Disciplinary Action Against McCray*, 755 N.W.2d 835 (N.D. 2008), a case cited by Professor Joy in his Report (p. 23).[223] [EX. 241]. In *McCray*, the Court imposed Rule 7.2(b) discipline[224] on a lawyer who paid a

[223] The *McCray* disciplinary decision is not unique in its facts or its finding of a violation of Rule 7.2(b) on those facts. *See, e.g., Disciplinary Counsel v. Mason*, 925 N.E.2d 963 (Ohio Sup. Ct. 2010) (finding violation of Rule 7.2(b) where attorney paid a consultant to refer him cases).

[224] The discipline and appeal discussed in this case related to North Dakota Rule of Professional Conduct 5.4(a), which provided, "[a] lawyer or law firm shall not share legal fees with a nonlawyer." *See In re Discipline Action Against McCray*, 755 N.W. 2d 835, 845 (N.D. 2008).

nonlawyer marketing firm for recommending that attendees of bankruptcy seminars hosted by the marketing firm use the services of the lawyer, whose specialty was assisting individuals with improving their poor credit after bankruptcy.

Chargois' introduction to Doane parallels the *McCray* case in several ways. First, in both cases, the referring source (the nonlawyer) unilaterally recommended the lawyer. As noted above, Chargois had no preexisting relationship with ATRS, nor did ATRS consult Chargois seeking an attorney referral. Second, neither Chargois nor the nonlawyer in *McCray* worked on the referred securities or credit-related matter. While Massachusetts, as a bare referral state, does not require a lawyer to perform any work on a case to receive a fee, the failure to participate in any way in the *State Street* case -- or the other eight cases for which Labaton paid Chargois a fee -- is a fact of great significance. In fact, Chargois only learned of the progress in *State Street* through periodic updates from Belfi, who, as a practice, often forwarded Chargois correspondence originally sent to the client, thereby avoiding putting Chargois and Hopkins on the same email and keeping Chargois' identity from the client. *See* Chargois 10/2/17 Dep., p. 74: 9-15. [EX. 125] *see also supra*. Third, in both cases, the proscribed payments were not isolated incidents but rather part of a pattern of payments for the original recommendation. In *McCray*, the lawyer sponsored twenty-five seminars in one year. 755 N.W.2d at 839. The record in this case shows that, while Chargois' payment in the *State Street* case was the most lucrative, it was hardly his only compensation for the original recommendation. Under the Chargois Arrangement, Chargois received

payments in at least eight class action litigations involving ATRS. *See* Findings of Fact, § II(K)(8), *supra.*

Chargois' role vis-à-vis Labaton and ATRS, therefore, is functionally indistinguishable from the role played by the nonlawyers in the cases cited by Labaton's experts. We read these critical facts as taking Chargois' initiative to secure ATRS as a client for Labaton outside the fee-sharing context altogether and, thus, outside Rule 1.5(e). This was not a "referral fee" as that term is used and understood in the legal profession. As Professor Green recognized, a "referral" is rationally understood as recommendation to another, more competent attorney. *See* Green 4/4/18 Dep., pp. 77:16 – 78:5; 129: 19-14 [EX. 230]; s*ee also* Sarrouf 3/21/18 Dep., p. 34:12-20 [EX. 252]. Labaton's payments to Chargois were, instead, purely payments for a recommendation, payments that Green himself acknowledges fall outside the fee-sharing context, and are quite different from imperfect attempts to comply with fee-sharing rules. Green 4/4/18 Dep., pp. 69:19 – 70:3, 72:6 – 73:15. [EX. 230]. These payments were not made to Chargois for directing ATRS to a more competent securities firm, though that may well have turned out to be the case. The financial obligations turned solely on ATRS's involvement as class representative in a class action, not Labaton's competency to represent ATRS. Labaton also paid Chargois in numerous other ATRS cases, in various jurisdictions, and yet never told Hopkins. Indeed, evidence of an "attempt" to "notify" ATRS of the Chargois Arrangement is extremely thin and is comprised mainly of the fact that the word "referral" appears in the Retention Agreement signed by Hopkins. *See* 2/8/11 Retention Agreement. [EX. 138].

On balance, the scales tip toward a pure payment for recommendation. The entire Chargois/Labaton Arrangement seems more in the nature of providing Chargois with a finder's fee and a future floating lien over all Labaton/ATRS cases than a legitimate, professionally-based referral fee for professional services.

This finding takes us back to where we began this analysis, with Professor Gillers' view that Labaton's failure to sufficiently inform its client of a referral fee under Rule 1.5(e) implicates Rule 7.2(b). Despite a pattern of creative yet unconvincing arguments to the contrary by Labaton's experts, Professor Gillers makes a far stronger case to draw such a connection. This conclusion is warranted in large part by the construction of the Rule itself, which includes an explicit safe harbor provision in Rule 1.5(e). A lawyer who does not comply with Rule 1.5(e)'s safe harbor must then fall within the ambit of Rule 7.2(b).

Having found this, however, does not end the discussion. What does give us some pause before recommending redress for a violation of Rule 7.2(b) is the fact that, apparently, no bar disciplinary authority or Court has ever imposed discipline upon an attorney for a violation of this Rule by paying another attorney. Therefore, this factor must be weighed in the context of the larger questions raised by Labaton's involvement in the Chargois Arrangement and what redress is appropriate to remedy this pattern of conduct. These questions will be addressed in the Recommendations section below.

2. DUTIES TO THE CLASS

As Lead Counsel for the class, Labaton owed not only a duty to disclose the Chargois Arrangement to its direct client, ATRS, but equally, if not more importantly, a

fiduciary and ethical duty to disclose to the members of the class, including the ERISA class members, that an attorney who did no work on the case would receive $4.1 million from the Settlement Fund, and that this payment obligation arose from a pre-existing obligation of Labaton's own.

a. Rule 23 Requirements

From a procedural perspective, disclosure of the Chargois Arrangement falls within the scope of Fed. R. Civ. P. 23, specifically subsections (e) and (h) of the Rule.[225]

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[225] Rule 23(e) states:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> **(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> **(2)** If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> **(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> **(4)** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> **(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Subsection (h) provides:

> **(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> **(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> **(2)** A class member, or a party from whom payment is sought, may object to the motion.

By its terms, with respect to informing class members, Rule 23(e) prescribes only that a notice of a settlement be provided to class members "in a reasonable manner." Fed. R. Civ. P. 23(e)(1). There is no direct prescription as to the content of the notice. Rather, the content of the settlement notice is dictated by two other aspects of Rule 23: the requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement. Fed. R. Civ. P. 23(e)(5). To safeguard class members' opportunity to object, "notice must be sufficiently clear and informative to make those opportunities meaningful." Rubenstein Report, p. 29 [EX. 234]; *see also* Rubenstein 4/9/18 Dep., p. 116:6-11. [EX. 235].

With respect to the attorneys' fees aspect of any class action settlement, Rule 23(h) requires that a claim for an award be made by motion under Rule 54(d)(2).[226]

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(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed. R. Civ. P. 23.

[226] Rule 54(d)(2) provides:

(2) *Attorney's Fees.*

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

The Advisory Committee's note to the 2003 amendment of Rule 23 contemplates that when a class settlement is proposed for Rule 23(e) approval, "notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself." Fed. R. Civ. P. 23(e), Advisory Committee Note to 2003 Amendment. The fee notice's content is primarily dictated by Rule 23(h)(2)'s guarantee that class members have a right to object to the fee motion.[227] As with the right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. *See* Rubenstein Report, p. 30. [EX. 234].

Here, the caption of the Notice identifies ATRS, Henriquez, and the Andover Companies as named plaintiffs. *See* Notice, Dkt. # 95-3, Ex. C. [EX. 81]. It refers to the "class action lawsuits (collectively, the 'Class Actions')." *Id*. It defines the "Settlement Class" as follows:

> All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 2, 1998 through December 31, 2009, inclusive.

Id., 3.

> **(iii)** state the amount sought or provide a fair estimate of it; and
>
> **(iv)** disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.
>
> Fed. R. Civ. P. 54(d)(2).

[227] *See* Fed. R. Civ. P. 23(h)(2) and *supra*.

Labaton Sucharow and Lawrence Sucharow are identified as "Lead Counsel." *Id.*, pp. 2, 14. The Notice further states that "Labaton Sucharow LLP has been appointed Lead Counsel for the Settlement Class." *Id.*, p. 13. No other law firm or lawyer is identified. Recipients were told "Lead Counsel, on behalf of ERISA Counsel and Customer Counsel, will apply to the Court for an order awarding attorneys' fees in an amount not to exceed $74,541,250.00." *Id.,* pp.4, 13. Recipients were also told that attorneys' fees for ERISA counsel would not exceed $10.9 million, and they were told how fees for the other counsel would be computed "if the Court awards the total amount of fees that Lead Counsel intends to request." *Id.* at 9. They were told that additional fee information would be posted on the case website by September 15, 2016, and they were provided the website address. *Id.*, p. 13. Labaton's phone number, website, and email address were given as a source of "[a]dditional information." *Id.*, p. 2. Recipients were told their right to opt out and/or to object, and how to do so. *Id.*

However, the Notice did not identify Damon Chargois or his law firm, Chargois & Herron, nor did it disclose the Chargois Arrangement or make any mention of a $4.1 million payment to Chargois pursuant to his pre-existing arrangement with Lead Counsel Labaton. It defies common sense to believe that information that a lawyer who never appeared in the case and who did no work to produce the class recovery stood to receive more than $4 million from the class fund would not reasonably have influenced members of the class in deciding whether to exercise their right to object to the settlement and the fees contemplated to be awarded as summarized in the Notice. The fact that this payment grew out of a pre-existing obligation of Lead Counsel's alone only underscores this point.

Unfortunately, the Notice did not include any reference to that payment, and the class members never had an opportunity to consider this information and object to it.

Under Fed. R. Civ. P. 23(e)(3), "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money elsewhere that they may have received. *Manual for Complex Litigation, Fourth*, § 21.631. [EX. 248]. Precisely because the Chargois Arrangement allocated money that the class may have received elsewhere (i.e., to Chargois), Rule 23(e)(3) would appear to require that the class -- through a filing with the Court -- have been informed about it.[228] According to Professor Rubenstein, however, in general, fee allocation agreements do not need to be included in the notice to the class. Rubenstein 4/9/18 Dep., p. 116: 6-17. [EX. 235]. Professor Gillers acknowledged that the plain language does not require as much. *See* Gillers 3/20/18 Dep. pp. 150: 3-7 – 151: 17-22. [EX. 253].

Although he admits that Rule 23 is "peculiarly written," relying on the plain language of Rule 23(h)(2)(B)(iv),[229] Professor Rubenstein -- as he does with the duty to disclose to the Court itself -- contends that Labaton was under no duty to disclose the Chargois Arrangement to the class absent an order from the Court directing it to do so.

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[228] Rule 23(e)(3)'s requirement that a statement be filed disclosing "any agreement made in connection with the [settlement] proposal" is addressed more fully in the "Duty to the Court" section, *infra.*

[229] Rule 54(d)(2)(B)(iv) states that a motion for fees must "disclose, *if the court so orders*, the terms of any agreement about fees for the services for which the claim is made." Fed. R. Civ. P. 54(d)(2)(B)(iv) (emphasis added).

Rubenstein 4/9/18 Dep., pp. 119:7, 121:10-17. [EX. 235]. "I'm saying Rule 23 says that the burden's on the Court. That's how the framers wrote it. They -- the experts who wrote this picked up the language of Rule 54 and put that burden on the Court." *Id.*, p. 121:10-17.[230]

[230] Rubenstein conceded this is a lot to ask of the judge:

> THE SPECIAL MASTER: So I believe what you're saying here again is that the burden is on the Court at the notice stage to make sure that fee allocation agreements are in the class notice?
>
> THE WITNESS [PROF. RUBENSTEIN]: I'm saying Rule 23 puts that burden on the Court, that's correct. I'm not saying it's the burden. I'm saying Rule 23 says that's the burden's on the Court. That's how the framers wrote it. They -- the experts who wrote this picked up the language of Rule 54 and put that burden on the Court.
>
> THE SPECIAL MASTER: And the obligation under Rule 23(h)(2) that class members be given sufficient information to do so, meaning to object to a fee petition, is an obligation as to fee agreements and allocation agreements that is on the Court ? . . .
>
> THE WITNESS: Yes. . . .
>
> THE SPECIAL MASTER: And the obligation to provide sufficient information for the class means that as to fee allocation agreements the Court has to ask? Yes?
>
> THE WITNESS: Yes. That's what Rule 23 says. That's correct.
>
> ****
>
> THE SPECIAL MASTER: It's a lot to put on a judge. Separate and aside from what Rule 54 says and the incorporation of Rule 54 into Rule 23, you said earlier the class only knows what it knows and can only object to what it knows, right? Is that -- obviously that's a --
>
> THE WITNESS: Sounds like a truism.
>
> THE SPECIAL MASTER: -- truism. That was the word I was going to use. It's also true of a judge. And this burden of requiring the judge to ask in every case tell me everything about every fee agreement, you know, that is in this case, don't judges have the right to rely upon what the lawyers are giving them as to be all of the necessary and material important information? . . . Without having to ask is anybody getting a fee here that didn't work in the case, this didn't appear in the lodestar, that didn't appear in the case? . . .
>
> *****
>
> THE WITNESS: I -- the sense that you're -- it's a lot to ask of a judge. I think we ask an enormous amount of federal judges. They're incredibly busy in a wide range of things. And then at this moment in a class action lawsuit we say to the federal judge, hey, you're now a fiduciary for absent class members is an enormous burden to put on judges, but I think the courts that use

Although Professor Rubenstein is in agreement with the Special Master and advocates that, in the interest of transparency, fee allocation agreements should be made known to the class, *see* Rubenstein, *5 Newberg on Class Actions*, at § 15:12, as nothing in Rule 23 requires disclosure of fee agreements absent a court order, the Special Master cannot conclude with certainty that as a matter of law the nondisclosure of the Chargois Agreement in the Notice provided to the class members violated any Rule of Civil Procedure.[231] [EX. 236].

> that language do so specifically to remind the judge you're the backstop. It's up to you. And you have to do something here.
>
> THE SPECIAL MASTER: . . .[D]oesn't the judge have the right to expect the lawyers to tell him or her everything that the judge should know so that the judge can fully perform his or her fiduciary duties to the class? []
>
> THE WITNESS: I'd answer it this way, your Honor. I think that lawyers have the right to rely on the rules, and the rule is the Court can ask for the fee agreements if they want. I think beyond that, it's a tough question for a lawyer to answer because you're now asking them to interpret what would be pertinent to a judge, and it varies wildly.
>
> *****
>
> But if a judge doesn't ask for it, are they supposed to predict that the judge really means to ask for it and didn't? . . .
>
> *****
>
> And so I think that lawyers appearing in [class action] cases have the right to rely on the rule structure, and it's hard to put on them a burden to predict what else would be important for the judge to know.

Rubenstein 4/9/18 Dep., pp. 121:6 – 125:19; 126:13 – 127: 23. [EX. 235].

[231] In the absence of clear law to the contrary, and with Professor Gillers in agreement, the Special Master is constrained to reach this conclusion. But this surely is a strained and unsatisfactory result, given the clear, plain-English mandates of Rule 23(e)(3) that "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." Certainly, the agreement to pay Chargois $4.1 million is an "agreement made in connection with the proposal." While Rule 23(e)(3) appears to only require the *filing* of such a statement with *the Court*, absolving class counsel of any responsibility to give *the class* notice of a fee agreement such as the one with Chargois and placing that burden only upon the Court to do so seems to stand common sense and the realities of class action litigation upon its head.

Courts can only know what they are told by the class attorneys, and to reverse the burden and put it on the Court to ask the lawyers seems not only a direct contravention of the plain language of Rule 23(e)(3), but also a misapprehension of the responsibilities of the respective players in the class action process. It is the lawyers who

b. Ethical Obligations

However, the presumed procedural mandates of Rule 23 do not in any way diminish Labaton's ethical duties toward members of the class (and the Court). The Massachusetts Rules of Professional Conduct make it clear that an attorney must provide the client with "sufficient information" to participate intelligently in decisions concerning the objectives of the representation. *See generally* Mass. R. Prof. C. 1.2, 1.4 (and cmt. [5]). The class members' decisions whether to accept or object to the *State Street* settlement and/or the proposed award of attorneys' fees falls within the scope of those ethical rules governing any attorney-client relationship.

It cannot be disputed that at least as of August 8, 2016, when the Court certified the Settlement Class, Labaton's client was no longer only ATRS; as of that point the ERISA class members were also Labaton' clients. This is abundantly evident in the Notice that Labaton prepared and then sent to the class members, including the ERISA Plaintiffs.[232] *See* Notice, Dkt. # 95-3. [EX. 81].

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are requesting fees from class funds and know of all the agreements between counsel as to these fees. It is surely not asking too much of class counsel to require them to tell the class of such agreements so that class members -- their clients -- can make an informed decision, rather than requiring the Court to ask.

Even Professor Rubenstein acknowledges that "some agreements among counsel would impact settlement terms and hence should be disclosed to the class." 5 *Newberg on Class Actions*, § 15:12 (emphasis added). [EX. 236]. The Special Master recommends that courts and academics consider revisiting and reallocating this responsibility under the Federal Rules of Civil Procedure.

[232] Customer Class Counsel, in fact, recognized the ERISA plaintiffs as their clients even before the class was certified. *See* Chiplock 9/8/17 Dep. pp. 97:3- 10 ("I felt that customer class counsel had a responsibility to the entire customer class with no distinctions. We didn't discriminate in our class definition. We didn't see the need to when we filed our case."); Goldsmith 9/20/17 Dep., pp. 42:11-14 ("[W]e did not assert an ERISA claim in our complaint, but we did allege a class which was broad enough to encompass ERISA governed assets."); 61:11-14 (How much of the settlement would go to ERISA clients "was something that [DOL] were focused on. Of course, we were focused on it as well because they were our clients"). *See also* 11/15/12 Lobby Conference:

In *Fulco v. Continental Cable Vision, Inc.*, 789 F.Supp. at 47, the Court recognized that an attorney-client relationship is formed between class counsel and the class after the class is certified. "While this is apparently a case of first impression in the First Circuit, I agree with courts which have held that 'once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel.'" *Id*. Unquestionably, the attorney-client relationship is a fiduciary one. *See Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 974 (1st Cir. 1993) ("The relationship between lawyer and client in Massachusetts is fiduciary as a matter of law.") Courts have acknowledged that the attorney-client relationship imposes on class counsel a fiduciary responsibility with regard to the members of the class. *See Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985) ("The lawyers who bring these [Rule 23] cases have a heavy fiduciary responsibility to their clients -- especially those who are absent and those in the minority whose interests are at odds with the named plaintiffs and their group -- to the trial judge and to the people who provide the forums and governmental resources for these suits."); *Singer v. AT&T*

MICHAEL THORNTON: I just want to clarify one thing of Mr. Rudman's [State Street's attorney's] excellent summary that we might differ on. There are two clear ERISA cases, *Henriquez* and *Andover*, and in the third case, *Arkansas*, um, the ERISA claims are included in the class definition. So we also have a claim.

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ROBERT LIEFF: . . . There is an overlap, that's all we're trying to say. We represent the same people.

THE COURT: You do represent the same people?

MR. LIEFF: Yes.

11/15/12 Lobby Conference Tr., pp. 16-17, Dkt. # 64. [EX. 22].

Corp., 185 F.R.D. 681, 690 (S.D. Fla. 1998) ("The class attorney has a fiduciary duty to the court as well as to each member of the class.").

However, due to the practical challenges of communicating with every class member and the unique posture of class members in class action cases, the scope of the fiduciary duties owed in this circumstance is something less than that owed to an individual client.

In this attorney-client-type relationship, class members are considered "clients" for some purposes but not others. For example, individual class members are considered clients for purposes of bringing their communications within the protection of the attorney-client privilege, effectively barring defense counsel from communicating directly with current or potential class members. *See e.g., Dodona I, LLC v. Goldman, Sachs & Co*., 300 F.R.D. 182, 187 (S.D.N.Y. 2010); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986); *In re School Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985); *see also* Rubenstein Dep. p. 147. On the other hand, conflict rules are far more relaxed in the class action context than in the traditional sense. *See e.g., Radcliffe v. Hernandez*, 818 F.3d 537, 545-46 (9th Cir. 2016); *Lazy Oil Co. v. Witco Corp*, 166 F.3d 581, 590 (3d Cir. 1999); *In re Agent Orange Prod. Liab. Litig.,* 800 F.2d 14, 19 (2d. Cir. 1986); *see also* Rubenstein Dep. pp. 148-49. Moreover, individual class members cannot bring suits against class counsel for legal malpractice, *see id.*, nor can the reasonable communication expectations articulated in Mass. R. Prof. C. 1.2 and 1.4 be "transferred one to one with

class members." Dacey Dep., p. 44 (analogizing attorney-client communication to publishing notice in the newspaper).

Thus, the class is not a client for all purposes.

While courts have found that the fiduciary duty imposed on class counsel vis-à-vis the individual members of a large class (such as the approximate 1,900[233] members of the consolidated class in this case) is lessened, principally due to the burdens inherent in dealing with a large number of individual "clients," we find a heightened duty to class members in the *State Street* case because the Settlement Class here was atypical; it was a "hybrid" class that included not only Customer Class members -- of which ATRS, Labaton's direct client, was one -- but also separate ERISA plan and group trust members. Our view is informed by Professor Gillers' observation that those special circumstances -- "few and tailored" -- that require a less stringent application of the Rules of Professional Conduct are exceptions, not the rule, and do not support the purported notion that class actions operate entirely outside the traditional bounds of the attorney-client privilege. Gillers Supp. Report, pp. 101-102. [EX. 233]. To require disclosure of the Chargois Arrangement to unnamed class members here would not impose the same undue burdens on class counsel which led courts to originally place limitations on the attorney-client relationship in conflicts situations.

Here, it would be no great burden at all for Labaton to disclose the Chargois Arrangement to the handful of named ERISA class representatives, i.e., the named

[233] *See* Declaration of Eric J. Miller, A.B. Data. Dkt # 104-13. [EX. 256].

plaintiffs in the *Henriquez* and *Andover* actions -- Arnold Henriquez, Michael Cohn, William Taylor, Richard Sutherland, the Andover Companies (through Janet Wallace and/or Alan Kober), and James Pehoushek-Stangeland.[234] Since informing this significantly smaller number of "clients" is not a great imposition, we find that the attorney-client relationship imposed a duty on Labaton to ensure that the Chargois Arrangement was disclosed at least to these named plaintiffs/class representatives.[235] As Professor Rubenstein noted, these class representatives "play[] the function of being the client for the absent class members, stand[ing] in as the client to the lawyer for the absent class members." Rubenstein 4/9/18 Dep., p. 141:9-13. [EX. 235].

Indeed, to meet its ethical duty under the Rules of Professional Conduct to provide these ERISA clients with sufficient information to enable them to make intelligent decisions about accepting or objecting to the Settlement and the application for attorneys' fees here,[236] it would have been even less burdensome as the ERISA plaintiffs had their own attorneys, who were active participants in the mediation and settlement process.

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[234] Though no separate ERISA sub-class was ever designated by the Court, no one disputes that these named ERISA Plaintiffs were the designated representatives for the classes identified in the *Henriquez* and *Andover* complaints, which were consolidated with the ATRS action for settlement purposes.

[235] And as Professor Gillers points out, Labaton could easily have included a basic description of the Chargois Arrangement in the Notice sent to *all* class members, thereby discharging their fiduciary duties to inform the class and allowing the class to decide whether to object to the fee award as proffered. *See* Gillers Supp. Report, pp. 98-99. [EX. 233].

[236] This ethical duty is highlighted in several of the Massachusetts Rules of Professional Conduct. For example, Mass. R. Prof. C. 1.4(a)(1) provides that "[a] lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f) is required by these Rules." Rule 1.0(f) states that "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct *after the lawyer has communicated adequate information and explanation* about the material risks of and reasonably available alternatives to the proposed course of conduct" (emphasis added). Similarly, Mass. R. Prof. C. 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See also* Mass. R. Prof. C. 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.")

As Professor Gillers points out, to fulfill its ethical obligation to provide all of its clients all of the information necessary to make informed decisions concerning the settlement and fee award, Labaton needed only inform ERISA Counsel of the Chargois Arrangement, who, in turn, would be obligated to communicate the information to their individual clients. *See* Gillers Supp. Report, pp. 99-100 & n.91. [EX. 233]. As Lynn Sarko, counsel for the *Andover* Plaintiffs, testified, knowledge of the Chargois Arrangement would have affected the advice he gave to his clients, and he believed they would not have agreed to the Chargois payment. Sarko 9/8/17 Dep., p. 75:18-22. [EX. 37]. However, as indicated above, Labaton did not disclose the Chargois Arrangement to ERISA Counsel. *See* Findings of Fact, Section II(K)(6), *supra.*

Here, class members were told their "legal rights," which included their right to object to the anticipated fee application, but they were not given information that could reasonably have prompted an objection. *See* Gillers Supp. Report, p. 103. [EX. 233]. Such an omission undermines the purpose of the Notice, because, as Professor Gillers opines, the central purpose of the Notice is to present the class with information upon which it can decide whether to settle its legal rights. *Id*.

In the context of this case, we conclude that Labaton's failure to disclose the Chargois Arrangement to members of the consolidated Settlement Class was in derogation of its ethical duties under Mass. R. Prof. C. 1.2 and 1.4 to provide its clients with information necessary to make informed decisions with regard to the settlement.[237]

[237] Remedies for this derogation of Labaton's ethical duties are discussed, *infra.*

3. DUTIES TO CO-COUNSEL

The ultimate responsibility for not disclosing the Chargois Arrangement falls on Labaton alone. Labaton's disregard of its duties to its client, to class members, and to the Court is compounded by the firm's neglect of its important duties to its co-counsel in the *State Street* litigation. These duties were rooted both in Labaton's status as Lead Counsel appointed by the Court (and the attendant expectations that accompany that important designation in the class action context) and in the firm's contractual relationships with both Customer Class Counsel and ERISA Counsel. These duties of disclosure to co-counsel are particularly enhanced here as to the Chargois payment because the Chargois obligation had nothing to do with the *State Street* case -- and indeed, it preceded the case by several years -- and no value to the class or counsel was derived from it. Rather, the obligation was Labaton's and Labaton's alone. By paying Chargois from class funds, and having Lieff and Thornton share in the payment, Labaton shifted its own obligation onto the class and co-counsel.

Though the parties and their experts disagree on the exact disclosure requirements carried by Labaton in this case,[238] the weight of the testimony in the investigation makes

[238] Expert testimony that implicated the disclosure obligations among co-counsel (in relation the Chargois Arrangement or to fee allocations generally) varied, and rested on different sources of authority. *See*, *e.g.*, Wendel 4/3/18 Dep., pp. 170: 3 -172: 12 (Massachusetts Rules of Professional Conduct did not govern Labaton's duty to disclose the Chargois Arrangement to ERISA counsel or to fully inform Lieff and Thornton as to the nature of the Chargois Role) [EX. 229]; Green 4/4/18 Dep., at pp. 167: 23 –169: 13 (Massachusetts Rules of Professional Conduct do not govern fairness in the division of fees amongst attorneys, though principles of contract law may) [EX. 230]; Joy 4/3/18 Dep., pp. 112: 4- 114:5 (testimony from ERISA counsel regarding the effect of nondisclosure on ERISA counsel's conduct does not impact expert's opinion that notice of the Chargois Arrangement to class members, and specifically ERISA class members, was not required) [EX. 227].

Regarding whether there was an obligation for Labaton to provide material information about the Chargois Arrangement to co-counsel, Professor Rubenstein testified, 4/9/18 Dep., p. 47:13-15, "I'm breaking it down into a legal obligation. I don't know anything in class action law that addresses this directly." [EX. 235] He testified further:

apparent that the nondisclosure had a rippling effect throughout the case. Counsel from all firms have testified at length about the nondisclosure, or incomplete disclosure, to co-counsel firms during the litigation and settlement process. As set forth in the Findings of Fact, § II(K)(6) *supra*, ERISA counsel testified that, had they been told about the Chargois Arrangement, they would have proceeded differently in multiple material respects -- from disclosing the Arrangement to their clients to considering the arrangement in their own fee negotiations. Co-counsel Bob Lieff also testified that Lieff would not have agreed to share in the Chargois payment had he known the true nature of Chargois' role, rather than being led to believe by Labaton that Chargois was serving as local counsel. *See* § II(K)(5), *supra*. Bob Lieff also testified that he would have

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THE WITNESS: I think what you're asking, if I understand it correctly, is you're using Mr. Lieff's testimony to say that this is a material fact.

THE SPECIAL MASTER: Correct.

THE WITNESS: Yeah.

THE SPECIAL MASTER: At least it was material to him.

THE WITNESS: Yeah. And given that it's a material fact, does that increase their duty to disclose it?

THE SPECIAL MASTER: Obligation.

THE WITNESS: Obligation. And, again, I -- I go back to the same answer I had before. If the Court is involved and the Court asks, absolutely. If you're talking about a private agreement among them, I don't know any law on the subject. It would be my testimony that if I were wanting to be lead counsel repeatedly, I'd be as forthright as possible in these circumstances.

THE SPECIAL MASTER: So more in the nature of a best practice than an obligation?

THE WITNESS: I think that sounds right. But again it's not... It's not something I prepared, I think, to testify on that point specifically and I've thought a lot about. As I'm right here, most judges leave this to the lawyers. I think a lot of the allocation stuff goes to the lawyers' reputational interests and trust that they build up with other lawyers in these cases."

Id., pp. 49:17:8-51:1. [EX. 235].

encouraged Labaton to disclose the Chargois Arrangement to the Court. Lieff 9/11/17 Dep., p. 97:13-16. [EX. 139].

Labaton has maintained that it had no obligation to disclose the Chargois Arrangement to ERISA Counsel because the agreement had no impact on ERISA Counsel's fee, and had no duty to disclose further details to Lieff and Thornton because those firms had a sufficiently detailed understanding of the agreement. *See e.g.*, 11/3/17 Response by Labaton to Special Master's 9/7/17 Request for Supp. Submission, pp. 29-30, 35-36 [EX. 238]; 4/12/18 Rebuttal Response by Labaton, pp. 34-35. [EX. 161]. Because Labaton's position ignores the important duties the firm owed to its co-counsel firms, the Special Master credits neither of these arguments.

Labaton's evasion of its disclosure obligations materially affected both its fellow Customer Class Counsel and ERISA Counsel -- each of whom relied significantly on Labaton in its role as Lead Counsel -- by preventing them from executing their *own* duties to the Court, to their clients, and to the class. Moreover, Labaton's failure in its duties as Lead Counsel, and its conscious effort to conceal the existence or true nature of the Chargois obligation, prevented the co-counsel firms from being fully informed as to the fee-allocation arrangements to which they consented based on misinformation or outright material omissions. Labaton's failures thus prevented its co-counsel from carrying out their own obligations in the litigation, and also call into serious question the validity of the multiple fee agreements reached between the firms.

a. Governing Principles of Fairness and Transparency

Though perhaps falling short of imposing a true *fiduciary* duty on Labaton in its relationship with its class action co-counsel, general principles of fairness and professional responsibility toward co-counsel, and toward the Court, strongly suggest that Labaton was required to disclose the Chargois agreement. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 111 F.3d 220, 234 (1st Cir. 1997) (noting that the *Manual for Complex Litigation* counsels courts to remind lead attorneys of "their responsibility to the court and their obligation to act fairly, efficiently, and economically in the interests of all parties and their counsel"); *see also Bartle v. Berry*, 80 Mass. App. Ct. 372, 378 (2011), quoting *Lamare v. Basbanes,* 418 Mass. 274, 276 (1994) ("In the absence of an attorney-client relationship, an attorney has a duty of reasonable care to a nonclient if the attorney knows or has reason to know the nonclient is relying on the attorney's services. 'However, the court will not impose a duty of reasonable care on an attorney if such an independent duty would potentially conflict with the duty the attorney owes to his or her client.'"). [239]

[239] We recognize that a number of state and federal courts have declined to find fiduciary duties *between* co-counsel, on public policy grounds, because such duties could create potential conflicts with respect to each counsel's undivided loyalty to its client. *See*, *e.g.*, *Skepnek v. Roper & Twardowsky, LLC*, No. 11–CV–4102–DDC–JPO, 2015 WL 4496301, at *23 (D. Kan. July 23, 2015) (discussing decisions in California, Louisiana, and Washington, and "predict[ing] that the Supreme Court of New Jersey would hold, as a matter of public policy, that no fiduciary duties exist between co-counsel for lost prospective fees."); *Appel v. Schoeman Updike Kaufman Stern & Ascher L.L.P.*, 2015 WL 13654007, at *23, n. 9 (S.D.N.Y. Mar. 26, 2015) (citing state cases and rejecting breach of fiduciary duty claim on an additional basis that "co-counsel generally do not owe each other a fiduciary duty"). Some courts, usually in the context of a fee dispute between counsel, have dismissed the concept of counsel's fiduciary duty to co-counsel with respect to ensuring and protecting co-counsel's expected fees. *See*, *e.g.*, *Bartle*, 80 Mass. App. Ct. at 379 (collecting cases from jurisdictions that have rejected a duty of care owed by one attorney to another to protect an interest in a fee); *Beck v. Wecht*, 28 Cal. 4th 289, 298 (2002) ("The better approach… is a bright-line rule refusing to recognize [ ] a fiduciary duty" to conduct joint representations in a way that doesn't diminish expected fees).

One Court in the District of Massachusetts, citing the *Manual for Complex Litigation*, has elaborated on the duties of courts and litigants in complex multi-district litigation:

> In complex multi-district litigation, courts are encouraged to:
>
> invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel.
>
> *Manual for Complex Litigation*, § 10.22. [EX. 248].
>
> Complex litigation requires particularly professional conduct from attorneys, as judges are especially dependent on the assistance of counsel. *Id.* § 10.21, at 22–23. "Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court." *Id.* at 23. In a class action, lead counsel must meet a demanding standard of trustworthiness because the Court must rely on representations made by counsel. *See, e.g., In re Vitamins Antitrust Litig.,* 398 F.Supp.2d 209, 237 (D.D.C.2005); *In re Organogenesis Sec. Litig.,* 241 F.R.D. 397, 408 (D.Mass. 2007) ("to understand the facts and issues presented to it in any case, including a class action, the court must employ and to some extent rely on representations made to it by counsel.")

In re Pharm. Indus. Average Wholesale Price Litig. 2008 WL 53278, at *1–2 (D. Mass. Jan. 3, 2008).

Thus, while a firm's appointment as lead counsel does not create a true fiduciary obligation to co-counsel, the relationship created is one rooted in trust, and co-counsel may reasonably rely upon a level of candor and trustworthiness from appointed lead counsel.

Similar notions of fairness and responsibility underlie a court's execution of "well-established class action principles and basic judicial standards of transparency and fairness" that require a court's scrutiny of the accuracy, fairness, and equitable implications of a proposed fee allocation among counsel -- a fundamental function that disclosure of the Chargois Arrangement would have permitted the Court to carry out in the *State Street* litigation. *See In re: High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220, 227 (5th Cir. 2008) (noting the need for sufficient procedures and oversight so as to determine the accuracy and reasonableness of a proposed fee allocation in a class action settlement for which district court had appointed fee committee to propose allocation affecting all other counsel); *see also*, *e.g.*, Rubenstein Dep., at pp. 35-54 (citing *In Re: High Sulfur* and discussing notions of transparency in disclosures amongst co-counsel in relation to fee allocation); *In re Nortel Networks Corp.*, 2002 WL 1492116, at *2 (S.D.N.Y. Feb. 4, 2002) ("the Court is aware of the importance of controlling attorneys' fees and the need to adopt appropriate procedures to that end"). As noted *supra*, while Labaton's failure to disclose the Chargois obligation directly to the Court prevented the Court from executing its gatekeeper role as a fiduciary to the class and from properly examining the equity of the fee allocation, the firm's concealment from co-counsel, despite its obligation of candor toward all parties and parties' counsel, further ensured that the Court would be constrained from doing so.

b. Interference with Co-Counsel's Duties to Class Members

Perhaps the most significant ramification of Labaton's non-disclosure (to ERISA Counsel) and limited disclosure (to Lieff and Thornton) is the preclusion of these

attorneys from fulfilling their own fiduciary duties to their individual clients and to absent class members. Courts have long recognized the existence of fiduciary duties (if not yet a full attorney-client relationship) owed by class counsel to the class prior to the point of class certification.[240] Beyond this, it is widely accepted that "once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel." *See Fulco*, 789 F. Supp. at 47, quoting *Bower*, 689 F.Supp. at 1033.[241] Customer Class and ERISA Counsel owed fiduciary duties to class members by the time of preliminary settlement approval in August 2016 or, at the latest, class certification and ultimate settlement approval. "It is well-settled law, regardless of jurisdiction, that attorneys owe their clients a fiduciary duty" which "includes undivided loyalty, candor, and provision of material information." *Huber v. Taylor*, 469 F.3d 67, 81 (3d Cir. 2006) (suit by putative class against class action plaintiffs' attorneys for breach of fiduciary duty and related counts, on basis of undisclosed conflict of interest and improper disclosure of full terms of settlement offers).

As previously noted, co-counsel in large class action litigation *share* responsibilities to the clients and the class. Here, the co-counsel firms relied heavily on

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[240] *See, e.g.*, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."); *Schick v. Berg*, 2004 WL 856298, at *5 (S.D.N.Y. Apr. 20, 2004), *aff'd*, 430 F.3d 112 (2d Cir. 2005) ("[A]t least some fiduciary duties attach prior to class certification, at the time the class action is filed.").

[241] The precise contours of the relationship in the class action context differ in some respects from a traditional attorney-client relationship. S*ee In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 313 (3d Cir. 2005); *see also* Joy Dep., at pp. 110-14 ("Labaton had certain duties to the class as a whole, but they weren't a client like an individual client is.").

Labaton to enable them to effectively carry out their own duties to each of these groups. Whatever the allocation of duties and responsibilities between attorneys or firms involved in a co-counsel representation, each counsel's duty of loyalty to the client is, inherently, a non-delegable duty. *Id.* at 82, and n.18. Whatever its scope, class counsel owe a fiduciary duty to the class, which requires class counsel to "refrain from misconduct and prosecute the case with loyalty to the class." *In Re: Sw. Airlines Voucher Litig.*, 2016 WL 3418565, at *2 (N.D. Ill. June 22, 2016), *appeal dismissed sub nom. In re Sw. Airlines Voucher Litig.*, 2017 WL 5485463 (7th Cir. Feb. 2, 2017). To the extent that Labaton's incomplete disclosures, or complete nondisclosures, affected the ability of other firms to carry out their duties to the class, Labaton failed in its responsibility as Lead Counsel to act fairly and in the interests of all parties and all counsel, exacerbating the firm's failure to fulfill its own obligations to the class.

The significant and malignant impact of Labaton's nondisclosure can be seen in its intentional decision to not tell the ERISA attorneys about the Chargois Arrangement, in general, and the proposed payment of $4.1 million to Chargois. First and foremost, failure to share this information prevented the ERISA attorneys from disclosing the payment to their class representative clients and advising them about it. Lynn Sarko testified that, had he known about the Arrangement, he "absolutely" would have felt an obligation to disclose it to the ERISA class representatives and advise them about it, and would have felt that the arrangement could not have been carried out without their consent. Sarko 9/8/17 Dep., p. 91:4-15. [EX. 37]. Sarko also testified that, had he known of the Arrangement, he would not have agreed to file a joint fee petition because

he "would have had to get approval from the named plaintiffs who would not have agreed." *Id*., pp. 75:2-22.

Just a half-step removed in importance from this impact is that the nondisclosure to the ERISA attorneys ensured that the DOL was kept in the dark. As noted elsewhere, State Street was insistent upon a fully global settlement, a critical piece of which was DOL's agreement to the settlement. As all agree, Lynn Sarko, who had DOL's confidence, was the primary attorney negotiating with the Department. Sarko testified that had he been told of the proposed Chargois payment, he would have been obligated to tell the DOL about Chargois and his Arrangement with Labaton; that the DOL likely would have had questions about the Arrangement; and that the entire settlement may have "blown [] up" if those questions affected the DOL's approval, which was necessary for the global settlement. *Id*., pp. 76:14-22; 84:3-5.

Thus, the full impact of not telling the ERISA lawyers about Chargois is not theoretical or attenuated. This non-disclosure had a direct and profound impact upon other important actors in the class action.

c. Contractual Implications of Nondisclosure

Apart from principles of fairness and transparency that should govern conduct between co-counsel, courts have recognized that contract principles may also impose duties within a co-counsel relationship (frequently in the context of fee disputes).[242] *See*,

[242] For example, to succeed on a breach of contract claim, one must prove (1) that the parties reached a valid and binding agreement; (2) that one party breached the terms of the agreement; and (3) that breach caused the other party to suffer damages. *Michelson v. Digital Fin. Servs*., 167 F.3d 715, 720 (1st Cir. 1999).

e.g., *Sobran v. Millstein*, 148 F. Supp. 3d 71, 72 (D. Mass. 2015) (in dispute over division of fees in a large class action settlement, dismissing counts of breach of contract, breach of fiduciary duty and quantum meruit, but allowing promissory estoppel claim to advance); *Vita v. Berman, Devalerio & Pease, LLP*, 81 Mass. App. Ct. 748, 748–49 (2012) (affirming jury award for breach of contract claim stemming from an unpaid referral fee); *Marks v. Swartz*, 174 Ohio App. 3d 450, 460 (2007) (local counsel's breach of contract action against co-counsel); *Parker & Waichman v. Napoli*, 815 N.Y.S.2d 71, 74 (2006) (breach of contract related to fee splitting agreement).

Here, contract principles are most relevant to the enforceability, or voidability, of the fee-sharing agreement among Customer Class Counsel and the agreement between the Customer Class Counsel and ERISA Counsel. "The load-bearing element of a contract is the mutual assent of the parties to the essential terms of the agreement, the so-called meeting of the minds." *Enos v. Union Stone, Inc.*, 732 F.3d 45, 48 (1st Cir. 2013) (quotation omitted). Cognizant of the limitations of contract principles in this particular context -- outside a typical dispute between bargaining parties -- contract principles nevertheless further inform the Special Master's assessment of the equitable implications of the nondisclosure to co-counsel, and consideration of a court's fiduciary duty to safeguard class settlement funds and its equitable authority to modify an unfair and unreasonable fee allocation among class counsel.[243]

[243] While the Special Master recognizes that a contract is rendered void *ab initio* in limited circumstances, a court may, on equitable grounds, set aside a contract invalidated by omission. *See*, *e.g.*, *Cathcart v. Robinson*, 30 U.S. 264, 266 (1831) ("The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific

i. Misrepresentations and Material Omissions

"A contract is voidable (and thus unenforceable) if 'a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying.'" *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 20 (1st Cir. 2009), quoting *Restatement (Second) of Contracts*, § 164 (1979).[244] "Massachusetts law regarding fraud in the inducement follows the widely-accepted model set forth in [the *Restatement]." Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 967 (1st Cir. 1991). To establish fraud in the inducement, and thereby be relieved of the effect of a contract, a party must establish the elements of common law deceit, which include "misrepresentation of a material fact, made to induce action, and reasonable reliance on the false statement to the detriment of the person relying." *Commerce Bank & Tr. Co. v. Hayeck*, 46 Mass. App. Ct. 687, 692 (1999), quoting *Hogan v. Riemer,* 35 Mass. App. Ct. 360, 365 (1993).

In considering the validity of the fee-sharing agreement between Customer Class Counsel and ERISA Counsel, the Special Master considers evidence of

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performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid.").

[244] *See also Wamester v. Karl*, No. 13–P–389, 85 Mass. App. Ct. 1106 (March 14, 2014) ("To be sure, a contract can be avoided by showing it was procured by fraud."); *NPS, LLC v. Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 169 (D. Mass. 2010) ("Massachusetts law follows the Restatement's model for fraud in the inducement: 'If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.'") (quoting *Nash v. Trustees of Boston Univ.,* 946 F.2d 960, 967 (1st Cir.1991). "In obedience to the demands of a larger public policy the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it." *Bates v. Southgate*, 308 Mass. 170, 182 (1941).

misrepresentations actually made to ERISA Counsel such that the fee agreement could be subject to rescission. "Mere nondisclosure, absent a duty to speak such as with a misleading partial disclosure, generally will not support any cause of action for misrepresentation." *Davis v. Dawson, Inc.*, 15 F. Supp. 2d 64, 137 (D. Mass. 1998) (alterations and internal quotations omitted). However, "[a]lthough mere silence or nondisclosure does not constitute fraud in the absence of a duty to speak… silence may be actionable where the relationship of the parties creates a particular legal or equitable obligation to communicate all facts." *DeMarco v. Granite Sav. Bank*, 1993 Mass. App. Div. 122, *2 (Dist. Ct. 1993) (citations omitted).[245]

The existence of the Chargois Arrangement was undoubtedly information material to class members, upon which class members could base decisions to object to or opt out of the proposed settlement. But it was also material to Labaton's co-counsel in the litigation, both because this information would have enabled those firms to discharge

[245] Here, while the relationship between co-counsel falls short of a fiduciary one, Lead Counsel is held to a "demanding standard of trustworthiness" required in its relationship with co-counsel and the court, and co-counsel can reasonably expect appropriate candor and trustworthiness from lead-counsel. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 2008 WL 53278, at *1–2. Further illuminating expectations of trustworthiness in this context -- to the extent that a sufficiently important relationship of trust can be recognized between co-counsel -- are principles recognized in the *Restatement of Contracts* and *Restatement of Torts* suggesting that a material omission can equate with of a false assertion between certain parties in limited circumstances. "A person's nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist… where the other person is entitled to know the fact because of a relation of trust and confidence between them." *Restatement (Second) of Contracts* § 161(d) (1981). "Even where a party is not, strictly speaking, a fiduciary, he may stand in such a relation of trust and confidence to the other as to give the other the right to expect disclosure." *Id*., comment (f). "One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question. *Restatement (Second) of Torts* § 551(1) (1977). "One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated… matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Id*., subsection (2)(a).

their fiduciary duties toward the class and because it would have affected the negotiation of the fee-allocation agreements among counsel.

Here, it bears re-emphasizing that the Chargois payment grew out of a pre-existing obligation that was Labaton's alone, and that by satisfying this obligation from class funds, Labaton was effectively having the class and its co-counsel shoulder a share of its own separate obligation. This fact alone creates an enhanced duty upon Labaton not only to disclose the Chargois Arrangement and payment to co-counsel but to ensure its disclosure to the class, the client and the Court. This goes to the heart of Labaton's obligations as Lead Counsel.

Labaton was Lead Counsel, and other counsel could be expected to rely upon its attorneys to fully disclose all material facts necessary for co-counsel to make an informed decision on issues relating to the fee-allocation agreements. Though lacking a fiduciary relationship, the expectation of trust and confidence between co-counsel rendered the fee-allocation negotiations distinct from traditional arm's-length bargaining between contracting parties. The existence of the $4.1 million payment, based upon a pre-existing obligation to a lawyer who never appeared in the case, did no work on the case, and was hidden from the Court and all participants in the case, was a material fact that would clearly have informed ERISA Counsel's decision about the fee-allocation agreement. Labaton knew that ERISA Counsel was uninformed about the Chargois Arrangement, and Labaton was aware that the information would be material to ERISA Counsel even long after the initial fee-allocation agreement, as evidenced by Larry Sucharow's November 2016 email correspondence in which he ordered that two separate claw-back

letters be sent to class co-counsel and to ERISA Counsel, noting, "[i]n short, no reason for ERISA to see Damon's split. They only need to see their 10 percent and then split three ways." TLF-SST-012272 – 2274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller, Belfi).[246] [EX. 160].

Rendering the materiality of the Chargois payment to ERISA Counsel even clearer is the brute fact that Chargois' $4.1 million payment is more than any ERISA firm received -- and significantly more. The Keller Rohrback firm received total fees and expenses of $2,829,160.22, the Zuckerman Spaeder firm received total fees and expenses of $2,525,063.88, and the McTigue law firm received total fees and expenses of $2,536,569.99; other smaller firms received far less. That Chargois was receiving a payment in an amount of $1.2 to $1.6 million *more* than any of the primary ERISA firms makes the Chargois Arrangement a material fact. Lynn Sarko, Carl Karvitz and Brian McTigue each testified that, had they known of the Arrangement prior to signing the fee-allocation agreement in 2013, each of them would not have agreed to the sign the agreement as negotiated at that time. Sarko 9/8/17 Dep., pp.75:2-22, 78:19-79:4 [EX. 37]; McTigue 9/8/17 Dep. p. 21:15-24 [EX. 159]; Kravitz 9/11/17 Dep., pp. 83:3-20. [EX. 117]. Moreover, as late as June 2016, Labaton's Of Counsel, Garrett Bradley, who spearheaded Labaton's negotiation with Chargois concerning his fee percentage in the *State Street* case, ostensibly understood that the agreement with ERISA Counsel was by

[246] *See also* LBS039936 – 9937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois) (discussing fee allocation among customer class attorneys, ERISA attorneys and Damon Chargois, and noting that "[g]iven that [the Chargois percentage] is off the total number their [sic] is no need to add the ERISA counsel to this email chain.") [EX. 157].

no means a done deal. That the ERISA fee negotiation remained ongoing until the end of settlement discussions in the case underscores the continuing materiality to ERISA Counsel. *See* TLF-SST-060973 (6/21/16 Bradley email to Chargois regarding proposed 5% fee to Chargois, noting that "The fee we will apply for is $70,9000,000, This will be for Lief [*sic*], Thornton, Labaton, you and now three Erisa [*sic*] firms. We are attempting to hold the Erisa [*sic*] firms to 10% because that is what they agreed to several years ago, but the Erisa [*sic*] part of the settlement is now 20%. I think we can hold them to 10%..."). [EX. 260].

Beyond this, the incomplete disclosure to Lieff and Thornton was also material and impactful. The non-disclosure to Lieff, in particular, is significant. Bob Lieff and Dan Chiplock testified that they were led to believe that Chargois was performing some of the work and services local counsel routinely do, assisting the ATRS client locally in Arkansas. *See* Lieff 9/11/17 Dep., pp. 58-80 [EX. 139]; Chiplock 9/8/17 Dep., pp. 101-116. [EX. 41]. Bob Lieff in particular testified that had he known that Chargois actually did no work, and provided no value to the case, he would not have agreed to his firm sharing in the Chargois $4.1 million payment obligation. Lieff 9/11/17 Dep., p. 97:13-16. [EX. 139]. Lieff also testified that he would have encouraged Labaton to disclose the Chargois payment to the Court. *Id.*, p. 97:13-16. [EX. 139].

Supporting Lieff's testimony that he was misled is the fact that in all the emails between Labaton, Lieff, and Thornton, Chargois was always referred to as "local counsel" or "the local" or a similar variant. *See*, *e.g.*, LBS025771 (4/24/13 "Dublin email," in which Garrett Bradley referred to Chargois as "the local counsel who assists

Labaton in matters involving Arkansas Teachers Retirement System") [EX. 140]; TLF-SST-040617-0618 (8/6/15 Bradley email to Lieff and Thornton regarding *BONY Mellon* and *State Street* fee discussions, with reference to "arkansas local") [EX. 147]; TLF-SST-038574-8579 (8/28/15 Lieff email to Bradley and Thornton referring to Arkansas local counsel) [EX. 150]; TLF-SST-053117-3126 (8/28/15 Chiplock email to Sucharow, Bradley and Thornton regarding fee allocation among the firms, and referencing payments to ERISA counsel and "local Arkansas counsel" in relation to the distribution of Customer Class Counsel fees) [EX. 151]; LBS039936 – 9937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois referencing fee to "Damon Chargois, the local attorney in this matter who has played an important role"). [EX. 157].

It is significant that Labaton never corrected these characterizations. The mischaracterization, made in the context of persuading co-counsel to share Labaton's separate and independent $4.1 million obligation, clearly constitutes a materially misleading misrepresentation of the true and complete story behind the Chargois payment.[247]

The redress and remedies for Labaton's conduct vis-à-vis its various co-counsel will be discussed in the Recommendations section, *infra*. The duties owed between co-

[247] The situation with Thornton is more complex and nuanced. As noted, there is no evidence that Michael Thornton knew the complete story behind the Chargois payment, and he testified that he did not know. *See* Findings of Fact, § II(K)(5) *supra*. "Thornton's Knowledge of the Chargois Arrangement"). However, as noted elsewhere, the Special Master believes that Thornton's managing partner (and Labaton's Of Counsel) Garrett Bradley surely did know all about Chargois. We will not repeat here all of the reasons why the Special Master finds that Garrett Bradley was fully apprised of the Chargois Arrangement. Suffice it to say that Garrett Bradley's testimony that he believed Chargois was performing local counsel work on the case, *see id*., is simply not credible.

counsel in class action litigation, and the related and instructive contract and equitable principles, inform the Special Master's analysis of recommendations to the Court.

4. DUTIES TO THE COURT

The most troubling issue in this case is Labaton's failure to disclose to the Court the $4.1 million payment to Chargois. At the settlement approval stage, the Court stands as the final gatekeeper to protect the class, and in that role, is the fiduciary of the class. Class counsel must assist the Court in performing that obligation to the class by providing it with all the information necessary to discharge its fiduciary responsibilities. As Lead Counsel here, Labaton had a legal and ethical duty to provide the Court with all information it needed to make an informed decision as to the award of attorneys' fees out of the *State Street* settlement fund. This included disclosure of the identity of all attorneys -- including Damon Chargois -- who would be sharing in the award and what the share of each attorney would be.

Case law, much of which is quoted in greater detail by Professor Gillers (pp. 79-83) -- including cases from within the District of Massachusetts -- recognizes the Court's responsibility to protect the class and the class's interests, and the Court's reliance on counsel to be forthcoming with the information needed in order to do so. *See, e.g., In re Relafen Antitrust Litig.*, 360 F. Supp. 2d 166, 193 (D. Mass. 2005) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.") (quoting *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 279-80 (7th Cir. 2002) (Posner, J.)); *In re Lupron Marketing and Sales*

Practices Litig,, 228 F.R.D. 75, 93 (D. Mass. 2005) ("[T]he court has a fiduciary duty to absent members of the class in light of the potential for conflicts of interest among class representatives and class counsel and the absent members," citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods*., 55 F.3d at 805 ("Rule 23(e) imposes on the trial judge the duty of protecting absentees. . . .")); *In re Volkswagen and Audi Warranty Extension Litig.,* 89 F. Supp. 3d 155, 183 (D. Mass. 2015) ("While fee sharing agreements among counsel may be respected . . . [m]ore important than the terms of a private agreement are the actual contributions each firm made to the prosecution of th[e] case and the interests of the class." (citations omitted)); *see also In re Agent Orange Prod. Liab. Litig.,* 818 F.2d at 223 (rejecting authority that "allows counsel to divide the award among themselves in any manner they deem satisfactory under a private fee sharing agreement. Such a division overlooks the district court's role as protector of class interests under Fed. R. Civ. P. 23(e)… In addition, this approach overlooks the class attorneys' duty. . . to be sure that the court, in passing on [the] fee application, has all the facts" as well as their "fiduciary duty to the . . . class not to overreach" (quoting *Lewis v. Teleprompter Corp.,* 88 F.R.D. 11, 18 (S.D.N.Y. 1980) (internal citations omitted))).[248]

As a significant element in analyzing this section, it must be borne in mind that the obligation to Chargois was Labaton's and Labaton's alone, and the payment to him without disclosing it to the Court significantly and adversely impacted the Court's ability to protect the class from an enormous payment for which the class received no value and

[248] We agree with Professor Gillers that, in total, federal case law makes clear that counsel must be transparent in providing the court all available information when seeking a fee award in class action cases. *See* Gillers Supp. Report, p. 82. [EX. 233].

of which the class representatives were never informed. In a very real sense this created a potential conflict between Labaton and the class, a conflict the Court could not protect the class against because it was hidden from the Court.

As a significant element in analyzing this section, it must be borne in mind that the obligation to Chargois was Labaton's and Labaton's alone, and the payment to him without disclosing it to the Court significantly and adversely impacted the Court's ability to protect the class from an enormous payment for which the class received no value and of which the class representatives were never informed. In a very real sense this created a potential conflict between Labaton and the class, a conflict the Court could not protect the class against because it was hidden from the Court.

a. Rule 23 Requirements

We begin with the fact that full and accurate disclosure to the court is the underpinning of Fed. R. Civ. P. 23(e)'s requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement and any attendant fee petition under Fed. R. Civ. P. 23(e)(5) and (h)(2). As with the right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. *See* Rubenstein Report, p. 30. Unfortunately, by not disclosing to the Court that $4.1 million of the settlement funds would be paid to an attorney who did no work on the *State Street* case, Labaton deprived the Court information it needed to discharge its fiduciary obligations to protect the class's interests.

As indicated above, Professor William Rubenstein places the entire blame for the nondisclosure of the Chargois payment in this case upon the Court. He has opined that Rule 23(h), by its incorporation of the procedures for making a claim for attorneys' fees under Fed. R. Civ. P. 54, places the burden on the Court to order disclosure of a fee agreement or payment such as the $4.1 million payment to Chargois out of the class funds in this case, and, absent such a court order -- or the court specifically asking -- disclosure is not required:

> THE SPECIAL MASTER: [W]hat you're saying here again is that the burden is on the Court at the notice stage to make sure that fee-allocation agreements are in the class notice?
>
> THE WITNESS [Rubenstein]: I'm saying Rule 23 puts that burden on the Court, that's correct. I'm not saying it's the burden. I'm saying Rule 23 says that the burden's on the Court. . . .
>
> THE SPECIAL MASTER: And the obligation under Rule 23(h)(2) that class members be given sufficient information to do so, meaning to object to a fee petition, is an obligation -- as to fee agreements and allocation agreements that is on the Court? . . .
>
> THE WITNESS: Yes. . . .
>
> THE SPECIAL MASTER: And the obligation to provide sufficient information for the class means that as to fee-allocation agreements the Court has to ask? Yes?
>
> THE WITNESS: Yes. That's what Rule 23 says. That's correct. . . .

Rubenstein Dep., pp. 121:6 – 122:22.[249]

However, separate and apart from Rule 23(h) and its incorporation of the Rule 54 procedures for making a claim for attorneys' fees, Fed. R. Civ. P. 23(e)(3) requires that

[249] Professor Rubenstein's deposition testimony regarding it being the Court's obligation to inquire about and order disclosure of any fee-allocation agreements is further detailed in discussion, *supra.*

"parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money that they may have received elsewhere. *Manual of Complex Litigation*, § 21.631. [EX. 248].

In his treatise, Professor Rubenstein himself recognized counsel's independent obligation of disclosure under Rule 23(e)(3). Section 15.12 of *Rubenstein and Newberg on Class Actions*, entitled "Fee procedures at a class action's conclusion -- Disclosure of fee-related agreements requirement," first speaks to the Rule 23(h) and Rule 54(d)(2)(B) requirement to disclose any agreements as to fees when so ordered by the court. The Section goes on to recognize, however:

> [I]n addition to Rule 54's disclosure requirements, Rule 23(e), governing class action settlement -- not fee -- approval, states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal." This generally references the settlement agreement itself, but, *given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself -- such as any agreements about fees -- may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests. There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class. . . . Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.* [250]

[250] Professor Rubenstein's deposition testimony and Report are curious in light of the position he has taken in his treatise, particularly as emphasized in this quote. Beyond this, at his deposition, Professor Rubenstein continually professed to be a "strong advocate" for transparency to the class and the Court. *See e.g.,* Rubenstein Dep., pp. 35:19 – 36 :4; 169:20 – 170:1; 179:8-9. [EX. 235]. These protestations, however, ring hollow given the positions he has taken in this case, particularly his position that the burden of ensuring disclosure to the class is the Court's and the Court's alone.

5 *Newberg on Class Actions,* § 15.12 (5th ed.) (footnotes omitted; emphasis added). [EX. 236].

As Professor Rubenstein observed, the broad language of Rule 23(e)(3) itself requires disclosure to the Court of "*any* agreement made in connection with the [settlement] proposal." Certainly, the agreement to pay Chargois $4.1 million was an "agreement made in connection with the proposal," and Rule 23(e)(3) required that the agreement be disclosed to the Court. While Rubenstein notes that "courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests,"[251] he acknowledges that there may be cases where agreements would impact the class's interests, in which case disclosure would be required. *Newberg*, § 15.12. [EX. 236]. Labaton's obligation -- which pre-existed the case and was Labaton's alone -- to pay Chargois $4.1 million out of the settlement fund for contributing no value to the class is one such agreement impacting the class's interests, as it "allocates money that the class members may have received elsewhere," *i.e.*, to Damon Chargois. *See Manual on Complex Litigation,* § 21.631. [EX. 248]. Indeed, the payment to Chargois not only

[251] By way of example, Rubenstein cites *Hartless v. Clorox Co.*, 273 F.R.D. 630 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012). In *Hartless*, the parties identified the agreement for attorneys' fees and the defendant, Clorox, agreed not to oppose a request for attorneys' fees and costs not to exceed $2.25 million. The court found that "the agreement as to the amount of attorneys' fees could affect the class members [but] [t]he allocation of those fees amongst class counsel does not affect the monetary benefit to class members." *Id.*, p. 946.

allocates money elsewhere, it allocates its own private obligation elsewhere -- to the class (and co-counsel).

Here we have an *un*disclosed agreement to pay $4.1 million out of the settlement funds -- funds that could otherwise be allocated to the class members -- to an attorney who did no work on the case whatsoever. In order to assist the Court in performing its fiduciary function to protect the interests of the class, Labaton was obligated to disclose to the Court its pre-existing agreement to pay Chargois this substantial amount of the settlement fund.[252] Labaton's failure to do so was in derogation of the duties imposed upon it by Fed. R. Civ. P. 23(e)(3).

b. Failure to Disclose the Chargois Agreement in the Fee Petition

i. Sucharow's and Labaton's Obligations Under Fed. R. Civ. P. 11

[252] On April 26, 2018, the Supreme Court adopted amendments to Fed. R. Civ. P. 23(e), to take effect December 1, 2018. Among the amendments is a new subsection 2 which specifically requires the court, in determining whether a proposed settlement is fair, reasonable, and adequate to take into account "any agreement required to be identified under Rule 23(e)(3)." The amended Rule 23(e)(2) provides:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> *(iv) any agreement required to be identified under Rule 23(e)(3);* and
> (D) the proposal treats class members equitably relative to each other.

See 2018 US Order 0020.

That the Supreme Court saw fit to make it explicit that courts are to consider all agreements made in connection with a proposed settlement reaffirms that the Chargois Agreement should have been disclosed to the court in this case.

As part of its Lead Counsel obligation in this case, Labaton submitted to the Court the "Declaration of Lawrence A. Sucharow in Support of Plaintiff's Assented-To Motion for Final Approval of the Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for Award of Attorney Fees" (the "Omnibus Declaration"). *See* Dkt. No 104. [EX. 3]. In two separate places in the Omnibus Declaration, at footnotes 2 and 6, Sucharow purports to identify all "Plaintiffs' Counsel." *Id*. These footnotes identify all attorneys receiving fees from class funds – except one: Chargois.

In footnote 2, Sucharow identifies as "Plaintiffs' Counsel" his own firm, Labaton Sucharow, and "the Thornton Law Firm LLP ('TLF'), Lieff Cabraser Heimann & Bernstein LLP ('Lieff Cabraser'), Keller Rohrback L.L.P. ('Keller Rohrback'), McTigue Law LLP ('McTigue Law'), and Zuckerman Spaeder LLP ('Zuckerman Spaeder')," *Id.,* note 2, p. 1. In footnote 6, Sucharow identifies Labaton Sucharow, Thornton, Lieff Cabraser, Keller Rohrback, McTigue Law, Zuckerman Spaeder, and Beins, Axelrod, P.C. (which partnered with McTigue Law and Zuckerman Spaeder in representing the *Henriquez* plaintiffs); Richardson, Patrick, Westbrook & Brickman, LLC (former co-counsel for the *Henriquez* plaintiffs); and Feinberg, Campbell & Zack, P.C. (local counsel for McTigue Law in the *Henriquez* action) as Plaintiffs' Counsel who submitted individual fee petitions. *Id*., note 6, p. 41.[253] Within Labaton's lodestar report attached as

[253] In Lynn Sarko's Declaration in support of Keller Rohrback's individual fee petition, Sarko identified fees to be paid to Theodore Hess-Mahan of the Massachusetts firm of Hutchings Barsamian Mendelcorn LLP, which served as local counsel for Keller Rohrback in the *Andover* matter. *See* Dkt. No. 104-18. Because Hess-Mahan's lodestar and expenses were not significant, Labaton requested that Hess-Mahan not submit an individual fee declaration. *See* KR00001192-1198 ("8/31/16 Zeiss email to Keller Rohrback). [EX. 97]. Sarko complied with that request and

Exhibit A to Labaton's individual fee declaration at Dkt. No. 104-15, Sucharow further identifies fees paid to a non-Labaton "of counsel" attorney, P. Scarlato (Paul Scarlato of Goldman Scarlato, a Pennsylvania law firm).[254]

On the surface, these Declaration statements could reasonably lead the Court to believe that these were all the lawyers being paid from class funds. However, by a calculated omission, only Chargois, who was also paid from class funds, is not mentioned anywhere in Sucharow's Omnibus Declaration or in Labaton's individual fee declaration -- which was also signed by Lawrence Sucharow -- or on Labaton's lodestar reports annexed thereto.

This omission is striking. It is true, strictly speaking, that Chargois is not "Plaintiffs' Counsel." But this description seems an artifice that, while technically accurate, created a subterfuge to camouflage the fact that Chargois received $4.1 million from class funds and that this payment was not being disclosed.

Sucharow admitted that he knew of Chargois and Labaton's fee arrangement, and that Chargois would receive a portion of the fees in the *State Street* case *before* he filed the *State Street* fee declarations. The Omnibus Declaration, along with all the individual fee declarations appended thereto, was filed on September 15, 2016. Sucharow testified:

> Q: And when did you become aware that Damon Chargois had as a referring attorney -- a significant stake in this case?

---

included Hess-Mahan's fees within Keller Rohrback's lodestar. *See* Keller Rohrback's 10/6/17 Responses to Special Master's Second Supplemental Interrogatories, Response No. 4.

[254] *See* Zeiss 9/14/17 Dep., p. 43:3-4 [EX. 115]; Politano 6/14/17 Dep., pp. 69:25 – 70:12 [EX. 98]; Keller 10/25/17 Dep., p. 466:9-10. [EX. 83].

> A [by Sucharow]: At some point -- I'm trying to think what year; 2015 -- I happened to be speaking with Garrett, and he mentioned that there was an obligation that had to be dealt with, and Eric confirmed that to me. So I knew there was an obligation. It was not described to me in any further detail.
>
> Q: And by obligation you mean that he was owed a piece of any settlement or --
>
> A: No.
>
> Q: -- judgment?
>
> A: A piece of our attorneys' fees.

Sucharow 9/1/17 Dep., p. 18:17 – 19:6. [EX. 38].

Sucharow knew of the obligation to pay Chargois a portion of the *State Street* fee award more than a year before he filed the Fee Petition. Yet Chargois is conspicuously not even mentioned in the Sucharow's Omnibus Declaration, Labaton's individual fee declaration, or anywhere else in the Fee Petition.

Sucharow further admitted that he knew or assumed that Chargois did no work on the case that would support a payment of a portion of the attorneys' fees award to him:

> Q: It's fair to say though, Larry, that Chargois other than that original referral played absolutely no role in this case?
>
> A: That would be an assumption I would make. I only saw what I saw…. No application was submitted for time and work on the case. So you can draw a conclusion from that.
> And I never called upon him to do any work when I was -- I think I described myself as the lead negotiator and lead strategist. . . .
>
> Q: He never entered an appearance in this case, correct?
>
> A: Matter of record. I would doubt it.

Id., pp. 86:15 – 87:6.

Labaton contends that the Court had no interest in the $4.1 million Chargois payment because Customer Class Counsel was paying it out of their own fee award, so there was no need to disclose it. This argument is legally and factually wrong. Labaton's and the other Customer Class Counsel's fee did not, and would not, exist unless and until the Court awarded it. Labaton itself recognized as much in the Notice. The Notice states, "Lead Counsel *will apply* to the Court for an order awarding attorneys' fees…." Dkt. No. 95-3, p. 4. [EX. 81]. *See also* page 9 of the Notice ("*If* the Court awards fees" at a particular rate….) (emphasis added). *Id*.

In deciding the amount of fees to award class counsel -- and to whom to award it -- the Court, as a fiduciary for the class, including unnamed class members, needed *first* to know -- and Labaton had a duty to tell it -- who would be participating in any fee the Court in its discretion might award from the class recovery, and the basis for the claim. By not disclosing the intended payment of $4.1 million to Chargois, Labaton kept the Court in the dark and denied it the very information it needed in order to decide how much of the settlement funds should go to counsel, and which counsel, and how much should go to the class. As Professor Gillers observed, "Quite simply, until the Court made that decision, *there was no fee to divide.*" Gillers Supp. Report, p. 97. [EX. 233]. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the recovery to Chargois, who never appeared, did no work, and made no contribution whatsoever to the success of the *State Street* litigation, and instead to direct that the money intended for Chargois should instead go to the class. The

Court, however, never had an opportunity to make that decision because of the material omission of Chargois from Sucharow's Declaration.

1. Omission of a Material Fact is Sanctionable under Fed. R. Civ. P. 11.

Rule 11 applies both to disclosures and omissions. *See In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988) (cautioning that the omission of facts is "highly relevant to an accurate characterization of the facts stated" and can be "just as misleading, sometimes more misleading, than an absolutely false representation."); *see also Gurman v. Metro Housing and Redevelopment Auth.,* 842 F. Supp. 2d 1151, 1154 (D. Minn. 2011) ("[A]s required by Rule 11(b)(3), plaintiffs' factual contentions must 'have evidentiary support' and must not be misleading by omission.") "'[O]nly those factual omissions that are material' ... may warrant Rule 11 sanctions." *Campmor, Inc. v. Brulant, LLC*, Civ. No. 2:09-cv-05465 (WHW) (CLW), 2014 WL 5392036, at *7 (D.N.J. Oct. 21, 2014) (quoting *In re Kouterick*, 167 B.R. 353, 364 (Bankr. D.N.J. 1994)). The intentional omission of material facts in a pleading constitutes a falsehood and may result in the imposition of sanctions under Rule 11. *Lamon v. Armheign,* No. 1:12–cv–00296–AWI–GSA–PC, 2014 WL 3940286, at *6, n.1 (E.D. Cal. August 12, 2014).

Rule 11(b)(3) required that before submitting his Declaration, Sucharow have conducted "an inquiry reasonable under the circumstances" to ascertain that all factual contentions contained therein had evidentiary support and were not misleading by omission. Here, Sucharow's Declaration could reasonably have led the Court to believe that all the attorneys who would be sharing in the *State Street* fee award were identified

therein. Damon Chargois and his firm, Chargois & Herron, are not identified in the Declaration.

As noted *supra*, whether a litigant breaches his or her duty under Rule 11 to conduct a "reasonable inquiry" into the facts or the law depends on the objective reasonableness of the litigant's conduct under the totality of the circumstances. *See Aronson*, 972 F. Supp. 2d at 139. Several considerations for courts to consider are delineated in the Advisory Committee Notes to the 1993 Amendment to Rule 11. The Special Master finds that several of these considerations weigh in favor of finding Sucharow's conduct sanctionable.

The factors delineated in the Advisory Committee Notes include: "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; and whether the responsible person is trained in the law." Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendment.

Courts have also examined factors to be considered, including "the complexity of the subject matter, the party's familiarity with it, the time available for inquiry, and the ease (or difficulty) of access to the requisite information." *CQ Int'l Co*., 659 F.3d at 62–63 (quoting *Navarro–Ayala*, 968 F.2d at 1425).

Sucharow admitted that he knew about Chargois and his arrangement to share in the fees to be awarded in the *State Street* case a year before he submitted his Declaration.

A reading of his Declaration before signing it would have disclosed to Sucharow that there was no mention of Chargois anywhere in it. Granted, Sucharow's Declaration was lengthy and covered numerous issues. But the information as to which firms were sharing in the fee award was readily accessible to him, and the completeness of his listing of firms sharing in the *State Street* fee award was readily discernable.

While the evidence here shows that Sucharow did not draft the declaration -- Labaton's Settlement Counsel, Nicole Zeiss, and Chief Litigator, David Goldsmith, did, *see* Zeiss 6/14/17 Dep., pp. 15:25 – 16:6 [EX. 79] -- Sucharow admitted, "I was presented with drafts [of the declaration], I reviewed and made corrections where I thought corrections were appropriate, and then executed it." Sucharow 6/14/17 Dep., p. 45:2-5. [EX. 16]. Mr. Sucharow is trained in the law and well versed in federal practice and hence should be well aware of his Rule 11 obligations.

Also weighing in favor of finding Sucharow's conduct sanctionable is that the nondisclosure of Chargois in Sucharow's Declaration is a part of a pattern of activity to keep Chargois' identity and his fee arrangement with Labaton concealed from all participants in the *State Street* case, including the Court. Sucharow himself actively engaged in this pattern of concealment by intentionally hiding Chargois' identity and his sharing of the *State Street* fee award from ERISA counsel -- Sucharow, in fact, personally directed that a separate claw-back letter be sent to Chargois (rather than copying him along with all the other *State Street* counsel) because there was "no reason for ERISA to see Damon's split." TLF-SST-012272-12274 (Sucharow response to G. Bradley email

regarding proposed claw-back letter) [EX. 160]; *see also* LBS039936-39937 (Sucharow email to Goldsmith, G. Bradley, Keller, and Belfi). [EX. 157].

Beyond this, Labaton did not disclose payments to Chargois to courts in eight other cases. This is similarly indicative of a pattern of material omissions.[255]

For the foregoing reasons, the Special Master concludes that the nondisclosure of the payment to Chargois was a material and intentional omission from Sucharow's Declaration.

However, whether to impose sanctions for the apparent violation of Rule 11 gives the Special Master pause because there is no First Circuit case, either appellate or district, holding that a material omission warrants the imposition of Rule 11 sanctions. Furthermore, while the Special Master believes that Sucharow's firm, Labaton Sucharow, violated Fed. R. Civ. P. 23(e)(3) by failing to disclose the Chargois agreement to the Court during the settlement and fee-petition process, he is cognizant that courts generally do not read Rule 23(e)(3)'s disclosure requirement as requiring disclosure of fee agreements among counsel, and we have found no First Circuit cases squarely holding that disclosure is required under that Rule.[256]

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[255] In these eight other cases, Labaton was either lead or co-lead counsel and ATRS was lead or co-lead plaintiff. Chargois was not disclosed in any of these cases. Although Sucharow did not file declarations in any of these cases, this nonetheless shows a pattern of nondisclosure on the part of Labaton.

[256] On May 2, 2018, Labaton submitted to the Special Master a "Memorandum of Labaton Sucharow LLP Regarding Rule 11," in which Labaton argues that because it acted in accordance with the directives of Fed. R. Civ. P. 23(h) and 54(d)(2), which do not require disclosure of fee agreements absent an order of the Court, the Special Master cannot find that the nondisclosure to the Court of the Chargois Arrangement violated Rule 11. [EX. 262]. Labaton posits that if complying with Rules 23(h) and 54(d)(2) simultaneously constitutes a nondisclosure that violates Rule 11, "the Federal Rules of Civil Procedure are internally inconsistent and directly contradict each other." 5/2/18 Memorandum, p. 8. [EX. 262]. Labaton, however, does not mention, let alone discuss in its Memorandum, the separate and independent obligation imposed on Labaton by Rule 23(e)(3) to "file a statement identifying any agreement made in connection with the [settlement] proposal." It is in the context of this separate

For these reasons, the Special Master believes that, although the omission of the $4.1 million payment from the Declaration is both material and intentional, it presents a close case as to whether it merits Rule 11 sanctions. On balance, the imposition of Rule 11 sanctions, although certainly supportable, is unnecessary in view of the finding below of violations of the Rules of Professional Conduct which are sufficient to address the conduct here.

ii. Violation of Mass. R. Prof. C. 3.3

Separate and apart from any of the imperatives of the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct required disclosure of the Chargois Arrangement to the Court. Mass. R. Prof. C. 3.3 imposes upon attorneys practicing in Massachusetts a "duty of candor toward the tribunal." Rule 3.3(a) provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

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obligation the Special Master finds a material omission in the Sucharow Declaration. However, as noted, the Special Master acknowledges that the imposition of Rule 11 sanctions for this material omission presents a close question and one on which the First Circuit has not spoken. Accordingly, the Special Master is not recommending Rule 11 sanctions. Therefore, it need not further address the eleventh-hour arguments raised in Labaton's May 2, 2018 Memorandum.

Mass. R. Prof. C. 3.3(a).

Comment 3 to Rule 3.3 makes clear that an attorney's failure to make a disclosure in an affidavit or in open court can be the equivalent of a misrepresentation within the purview of Rule 3.3(a). *Cf.*, Mass. R. Prof. C. 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving… misrepresentation").

As Professor Gillers points out, several decisions of the Massachusetts State Bar Disciplinary Board further make clear that a true statement can violate these rules through omission. *See e.g., In re O'Toole*, 2015 WL 9309021, at *5 (Mass. St. Disp. Bd. 2015) ("'[H]alf-truths may be actionable as whole lies.'. . . Statements that are 'technically accurate' or 'literally true,' but nevertheless are 'clearly intended to mislead' or 'beg[] [a] false inference' amount, in appropriate cases to false statements within the meaning of Rules 3.3(a)(1) and 4.1(a)"); *In the Matter of An Attorney*, 2007 WL 4284758, at *4 (Mass. St. Disp. Bd. 2007) ("It is not a defense to these charges that the individual statements made in the letter could be read as literally true. Literal truth may be a defense to a criminal charge of perjury, [b]ut Rule 8.4(c) prohibits more than outright perjury") (citations and some internal punctuation omitted); *see also Matter of Harlow*, 20 Mass. Att'y Disc. R. 212, 216-218 (2004) (misleading partial disclosure violated Rule 8.4(c)).

Compliance with Rules 3.3(a) and 8.4(c) required Sucharow to disclose Chargois and his fee arrangement with Labaton in his Omnibus Declaration and/or his "small fee" declaration in support of the *State Street* fee petition. As noted, that information was highly relevant to the Court's exercise of its fiduciary duty to protect the class because

the Court could find that the class had no interest in paying Chargois for his introduction of Labaton to ATRS years before the *State Street* litigation even commenced. In fact, as also noted, the Court may have found this an inherent conflict. Given these considerations, the court may well have decided that, given the size of Chargois' share of the fees, the $4.1 million should be in whole or in part redirected to the class.

That Sucharow had a duty to disclose the Chargois Arrangement to the Court is further made clear by Comment 14A to Rule 3.3, which provides:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit . . . the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Mass. R. Prof. C. 3.3, cmt. [14A].

> Rule 3.3(d) provides:
>
> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Mass. R. Prof. C. 3.3(d).[257]

[257] Labaton and its expert, Professor Peter Joy, contend that Comment 14A and Rule 3.3(d) do not apply here because the fee petition was not presented jointly by true adversaries, i.e., the Plaintiff class and the Defendant, State Street; it was only presented by the various members of the Plaintiff class. *See* Joy 4/3/18 Dep., pp. 187:19 – 188:20 [EX. 227]; 4/13/18 Oral Argument Tr., pp. 187:19 – 188:20. [EX. 162]. Professor Gillers maintains that at the fee determination stage, the interests of class counsel and the class are adverse. The fee will come out of the class recovery. Consequently, although class counsel remains counsel for the certified class, with the fiduciary duties that lawyers owe clients, they are understood to be advocating their own interests, not the class's interests. Since the class interests are not represented when lawyers petition for a fee, the proceeding is properly understood to be *ex parte*. *See* Gillers Supp. Report, p. 91. [EX. 233]. This is particularly true here, given the aforementioned potential for conflict between the class and Labaton and the underlying factors.

In any event, there *is* evidence indicating that lawyers viewed this as a non-adversarial, *ex parte* proceeding. In an email exchange between Garrett Bradley, Lawrence Sucharow and David Goldsmith dated August 17, 2016, Customer Class Counsel discussed Bill Paine's (State Street's counsel's) support of the fee petition. The topic arose out of a discussion about the appropriate time to file a different lawsuit on behalf of a different plaintiff (Swift) against State Street. The concern in filing the Swift litigation was that it might prompt Bill Paine not to support the Customer Class's fee request at the final approval hearing. In that email exchange, counsel

As Professor Gillers observed, Comment 14[A] "recognizes that when there is no adverse party, the Court is denied the benefit of an adversary proceeding. There is no opponent who can bring to the Court's attention facts or legal authorities that challenge the contentions or citations of the lawyer appearing before the court." Gillers Supp. Report, p. 89. [EX. 233]. Hence, it is incumbent on the lawyer, given the duty of candor owed to the tribunal, to bring all facts, including adverse facts, to the Court's attention.

Sucharow violated these Rules of Professional Conduct by failing to disclose the Chargois Arrangement in his Omnibus Declaration and small fee declaration in support of the Fee Petition. By not disclosing the intended payment of $4.1 million to Chargois, the Court was denied information it needed in order to decide how much of the settlement funds should go to counsel, and which counsel, and how much should go to the class. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the recovery to Chargois, who never appeared, did no work, and made no contribution whatsoever to the success of the *State Street* litigation, and instead to direct that the money intended for Chargois should go to the class. But the Court was never afforded an opportunity to make any such decision because of Sucharow's failure to disclose the payment to Chargois.

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discussed the possibility of Paine filing an affidavit in support of the *State Street* Fee Petition. Goldsmith expressed concern that Paine filing an affidavit stating State Street's approval of the fee request "could draw a big objection and suggest collusion," and it could draw the attention of Judge Wolf who had specifically noted his concern about the adversary system breaking down in the fee context at the preliminary approval hearing. TLF-SST-032617-2618 (8/17/16 email exchange between Garrett Bradley, David Goldsmith, Michael Sucharow, and others at the Thornton and Labaton firms). [EX. 203].

Moreover, as Professor Gillers notes, this is not a situation where disclosure to the Court would have harmed a client or waived a privilege. If it were, a lawyer might sometimes be able credibly to resolve real doubts as to disclosure in favor of the client. Here, "disclosure could only *benefit* the client, the class, by giving the Court (and the class members) the opportunity to consider the Chargois Arrangement. Indeed, it is hard to understand what countervailing interests could have justified nondisclosure. To whom did Labaton owe a competing duty not to disclose?" Gillers Supp. Report, p. 88. [EX. 233].

For all of these reasons, the Special Master concludes that Sucharow deliberately concealed the Chargois Arrangement from the Court and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class. Sucharow's concealment of this very relevant information violated Massachusetts Rule of Professional Conduct 3.3.

iii. Violation of the General Duty of Candor to the Court

As Professor Gillers notes, in arguing that Rules 23 and 54 were the sole sources of its duty to the Court and that Comment 14A does not literally apply, Labaton subordinates any duty its lawyers may have had as officers of the Court. While "the phrase 'candor to the Court' is not an unbounded source of duty, entirely untethered to rules, custom, or case law. . . the word 'candor' should at least guide a lawyer's understanding of his or her duties as officers of the court." Gillers' Supp. Report, p. 88. [EX. 233]. This broad duty of candor was recognized by the First Circuit in *Pearson v. First NH Mtg. Corp.*, 200 F.3d 30, 38 (1st Cir. 1999). In addition to finding that the

attorney in that case violated New Hampshire's version of Rule 3.3(a)(1), the *Pearson* court found he also violated his general duty of candor to the court that exists in connection with an attorney's role as an officer of the court:

> Here, Attorney Gannon made an affirmative misrepresentation to the court, which did not comport with his duty of candor. *See*, *e.g.,* NHRPC 3.3(a)(1), comment ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."); *In re Tri–Cran,* 98 B.R. at 616 ("'Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.'") (citation omitted); *cf. Burns v. Windsor Ins. Co.,* 31 F.3d 1092, 1095 (11th Cir.1994) ("Every lawyer is an officer of the court ... [and] he always has a duty of candor to the tribunal"; *United States v. Shaffer Equip. Co.,* 11 F.3d 450, 457 (4th Cir.1993) ("[A] general duty of candor to the court exists in connection with an attorney's role as an officer of the court"); *cf. also Erickson v. Newmar Corp.,* 87 F.3d 298, 303 (9th Cir.1996) ("[I]t is th[e] court which is authorized to supervise the conduct of the members of its bar ... [and has] a responsibility to maintain public confidence in the legal profession").

200 F.3d at 38.

As indicated, *Pearson* cites, among other cases, the Fourth Circuit's decision in *Shaffer Equipment* to recognize a "general duty of candor to the court." In *Schaffer,* the government failed to disclose false testimony at the deposition of its expert witness in a civil environmental case, and then moved for summary judgment without relying on his opinion. The government claimed that it had not violated the terms of West Virginia's Rule 3.3. The District Court dismissed the government's case because of its nondisclosure, citing both Rule 3.3 and the general duty of candor to the Court. The government appealed. The Fourth Circuit wrote that the professional conduct rules are not the sole source of a lawyer's duty of candor:

> It appears that the district court, in finding that the government's attorneys violated a duty of candor to the court, applied the general duty of candor imposed

> on all attorneys as officers of the court, as well as the duty of candor defined by Rule 3.3. Although the court referred to Rule 3.3, it also described the duty of candor more broadly as that duty attendant to the attorney's role as an officer of the court with a "continuing duty to inform the Court of any development which may conceivably affect the outcome of litigation." It concluded, "Thus, attorneys are expected to bring directly before the Court all those conditions and circumstances which are relevant in a given case." In its brief, the government did not address the existence, nature, and scope of any general duty of candor and whether its attorneys violated that duty. Nevertheless, we are confident that a general duty of candor to the court exists in connection with an attorney's role as an officer of the court.
>
> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions -- all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent. (internal citations omitted.)[258]

United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).

As Professor Gillers observed, these cases establish that lawyers have a duty of candor to the court that goes beyond the text of Rule 3.3. Gillers Supp. Report, p. 92. The Special Master agrees. Further, it is not only Mr. Sucharow that owed a duty of candor to the Court. Rather, all other Class Counsel who knew about Labaton's agreement to pay Damon Chargois $4.1 million out of class funds for doing no work on

[258] Further distinguishing duties under Rule 3.3 from the duty of candor, the *Shaffer* court wrote: "While Rule 3.3 articulates the duty of candor to the tribunal as a necessary protection of the decision-making process, and Rule 3.4 articulates an analogous duty to opposing lawyers, neither of these rules nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process." *Shaffer Equipment*, 11 F.3d at 458 (internal citation omitted).

the *State Street* case had a duty to disclose that arrangement to the Court to ensure that the Court met its fiduciary obligations to the class.

At the November 2, 2016 hearing on the Motion for Final Approval of Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Service Awards, David Goldsmith of Labaton, accompanied by Nicole Zeiss, Labaton's Settlement Counsel, represented the "plaintiffs and the settlement class." 11/2/16 Hearing Tr., Dkt. # 114, pp. 3:7-9, 10-11. [EX. 78]. Goldsmith argued the motions before Judge Wolf. Dan Chiplock of Lieff Cabraser and Carl Kravitz of Zuckerman Spaeder also attended the hearing. *See id*., pp. 2-3. Garrett Bradley and Michael Thornton of Thornton also were in attendance. *See* G. Bradley 9/14/17 Dep., pp. 152:19 – 153:11.

The hearing presented another opportunity to inform the Court of the intended Chargois payment. Unfortunately, that opportunity was not taken. At the conclusion of the hearing, stating that he was "relying heavily on the submissions and what's been said today," Judge Wolf approved the $300 million gross settlement and approved a 25% award of attorneys' fees in the amount of $74,541,250.00 plus expenses in the amount of $1,257,699.94. *Id.* p. 35:7-8. But as indicated above, the written submissions and what was said by Goldsmith at the hearing did not inform the Court of all material facts needed to make a fully informed decision.

Goldsmith testified he personally did not learn of his firm's fee arrangement with Chargois until November 21, 2016 – more than two weeks after the Final Approval Hearing. *See* Goldsmith 9/20/17 Dep., pp. 108:24 – 109:3. [EX. 42]. No evidence was

presented that would discredit Goldsmith on this. Due to the compartmentalization of its practice, knowledge of the Chargois Arrangement within the Labaton firm was largely limited to Sucharow and the firm's "relationship partners," Eric Belfi and Christopher Keller; Goldsmith, who was not a "relationship partner" but rather a litigator, was not informed about Chargois or the Chargois Arrangement. Nor did Nicole Zeiss, the settlement attorney from Labaton who accompanied Goldsmith at the hearing, have information concerning the Chargois Arrangement. Zeiss 9/14/17 Dep., pp. 19:17-22; 25:24 – 26:6. [EX. 115].

Carl Kravitz, one of the ERISA Counsel, attended the hearing but, as discussed in the previous section, did not know about Chargois. Dan Chiplock of Lieff Cabraser knew of the Chargois Arrangement but was led to believe that Chargois served as "local counsel," not that he was being paid for doing no work on the case.[259]

For all the foregoing reasons, the Special Master concludes that Labaton, through Sucharow, intentionally concealed the $4.1 million Chargois Arrangement from the Court and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function.

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[259] The Special Master has found that Garrett Bradley of the Thornton firm, who attended the Final Settlement and Fee Approval Hearing, did know the full Chargois story. The Special Master does not credit Bradley's testimony to the contrary on this point, for all of the reasons set forth, *supra*. (See discussion of Garrett Bradley's knowledge in the Findings of Fact, § II(K)(5) and Conclusions of Law, § III(C), *supra*. He, like all the other counsel, was provided with copies of Sucharow's Omnibus Declaration and all the other small fee declarations and exhibits, and should have known upon reading it that the payment of $4.1 million to Chargois was not mentioned in any of the fee petition documents. While certainly the obligation to disclose the Chargois Arrangement fell primarily upon Labaton, the opportunity was presented for Bradley, who at this time was also Of Counsel to Labaton, to exercise his duty of candor as an officer of the Court to bring this omission to the Court's attention, but he did not do so. However, it seems somewhat of a stretch to hold Bradley responsible for violating a duty of candor to the Court for not speaking up about an omission in another lawyer's declaration.

The remedies for this conduct are addressed in the Recommendations section below.

IV. SPECIAL MASTER'S RECOMMENDATIONS

Introduction

Beyond the investigation and analysis of the myriad irregularities in the attorneys' fees petitions and the fee approval process outlined in the previous sections, the most challenging yet important aspect of this assignment has been to determine for recommendation to the Court appropriate and proportionate remedies and sanctions that fairly but adequately balance the interests of the class, the law firms, the legal profession, the public and the institutional needs of the Judiciary to enable judges to perform their critical fiduciary obligations in class actions. Arriving at appropriate redress is not a simple or straight-forward task, both because the law in a number of the relevant areas is not entirely clear and precise -- with, at times, arguably conflicting requirements of the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct and state and federal case law – and the fact that the questionable conduct of some, but not all, of the lawyers and law firms spans the spectrum from clear and unquestionable misconduct, on the one hand, to "grey area" activity that skates along the edges of misconduct and raises the specter of at least sharp practice, but is perhaps not clearly defined as outside the bounds of the rules and the law.

Complicating this piece of the assignment is the need to weigh in the balance of appropriate and proportionate redress, the truly laudable result achieved by the lawyers for their clients, the class members, through their dedicated and highly skilled hard work

and professional acumen in a case which posed real risks and the uncertainty of perhaps never achieving any award for the class or any fee at all for themselves. As noted in this Report's Introduction, perhaps the most lamentable aspect of this investigation is that the outstanding result achieved for the class has become tainted by the questionable conduct described in these pages.

In recommending appropriate remedies and redress for the various shades of conduct discovered in this investigation, the Special Master has attempted to strike a balance that recognizes and addresses both the serious and sustained ethical violations and quasi-violations raised by the conduct of some of the lawyers with the excellent result achieved that not only provided a substantial recovery to the class for the troublesome conduct of the defendant in the main case, but which in the process also shined a light upon a heretofore hidden corner of abuses in the trading world which will likely benefit the general trading public.

While others may disagree, the Special Master believes that the remedies and sanctions recommended here effect, to the extent possible, a fair, legal, and equitable balance of the sometimes-conflicting law and interests discussed in these pages.

After a brief overview, the recommendations for legal findings, remedies and sanctions in this section are set out as they relate to the various duties and obligations the lawyers in this case had to their clients, to the class, to other counsel in the case, and last, but by no means least, to the Court. This section ends with a brief discussion of lessons which can be learned from this investigation and "best practices" going forward for lawyers and courts in large, complex class actions.

Recommended Legal Findings

As described in some detail in the body of this Report, the questionable conduct breaks down roughly into two separate but broadly related areas, all under the larger rubric of what should have been included in the fee petitions and disclosed to the clients, the class, co-counsel and the Court – the Chargois Arrangement and payment – and what should not have been included in the fee petitions of Labaton, Lieff and Thornton – the double-counted hours of the staff attorneys and the contract attorneys. Because there has already been extensive discussion of the underlying factual record and applicable law in the previous sections of this Report along with the attendant findings and conclusions, these areas will be revisited only in summary fashion as necessary to provide context for the recommendations of legal findings, remedies and/or sanctions.

As a broad proposition, where violations are minor or close calls under the law or applicable rules of professional conduct, the Special Master recommends that these be addressed with remedies, as opposed to formal disciplinary sanctions or other action. The caveat to this is that because some of the conduct that may have presented close legal questions or resulted from true inadvertence or sloppiness nonetheless had a profound impact upon the class or other counsel, and the Court's ability to perform its fiduciary obligations to the class, the redress recommended, although intended to be remedial in nature, is nonetheless substantial. As to these categories of conduct, although professional discipline is not warranted, some of the remedies recommended will be strong medicine for the subject law firms.

Another class of conduct that is both intentional and a clear violation of the law and rules of professional conduct, as well as impactful, requires more rigorous redress, including a recommendation of professional discipline.

Finally, as to two law firms, Labaton and Thornton, because the conduct discovered in this investigation was endemic and the result of pervasive practices within the respective firms, a remedy more prophylactic and future-leaning in nature is appropriate.

Recommended Legal Findings for Breach of Duties to the Client (ATRS)

It is established without contest that after attorney Damon Chargois helped Labaton secure ATRS as a client (initially to help monitor ATRS' portfolio) sometime in 2007 or 2008, well before the inception of the State Street case, Labaton agreed to pay attorney Chargois twenty percent of every fee Labaton received for cases in which Labaton served as lead (or co-lead) class counsel and ATRS served as a class representative. Although this agreement was never successfully reduced to a signed writing, it is also undisputed that Labaton never informed anyone at ATRS about this obligation to Chargois in the State Street litigation, or at any other time, including in the eight other cases in which Chargois was paid. In fact, as discussed in the Findings of Facts and Conclusions of Law sections, lawyers at Labaton were at pains to ensure that George Hopkins, Executive Director of ATRS, did not find out about the Chargois Arrangement, and intentionally kept this information from him.

The most disturbing aspect of what was learned during the entire investigation is the pervasive secrecy and concealment that attended Labaton's relationship with

Chargois. As discussed in detail in the other sections of this report and below in this section, not only did Labaton not tell the client, in its role as Lead Counsel, it did not tell the class, the ERISA attorneys or the Court anything about the Chargois Arrangement. Beyond this, when they sought to have Lieff and Thornton share in the obligation to Chargois by splitting equally the $4.1 million payment to him, they told them only a portion of the story, leading them to believe that Chargois was local counsel and performing work of value in the case. (However, for the reasons set out in the previous sections, the Special Master believes that Garrett Bradley – who was wearing the two hats of managing partner at Thornton and Of Counsel at Labaton -- knew at least the most important parts of the whole story of the Chargois Arrangement, and that Bradley's testimony to the contrary is simply not credible.)

Despite all of this, however, the Massachusetts Rules of Professional Conduct regarding what must be disclosed to a client -- and how and when -- as they apply to these facts, are not as clear as one might hope. As set out in the Conclusions of Law above, the Special Master has found that the Labaton lawyers technically violated Rule 1.5(e) of the Massachusetts Rules of Professional Conduct, as it existed at the time of the retention letter in this case and informed by a Massachusetts Supreme Judicial Court decision, *Saggese v. Kelly*, 445 Mass. 434, 443 (2005) (requiring disclosure of a fee-sharing agreement to the client before the referral is made and obtaining the client's consent in writing). The SJC's decision was, of course, the law of the jurisdiction, and it is axiomatic that lawyers are held to know the law. However, the rule announced in *Saggese* was not enacted into the Rules of Professional Conduct until March 15, 2011,

just after the retention letter in this case was signed, and even the decision in *Saggese* and the amended Rule, do not make clear the degree of information that lawyers must provide to clients concerning a fee-sharing agreement so that the client may make an informed decision before giving consent.

The retention letter signed February 8, 2011 in this case permitted Labaton to allocate fees to other attorneys "who serve as local or liaison counsel, as referral fees, or for other services performed in connection with the litigation." This was the only notice to ATRS that there might be a referral fee in the State Street case, although Hopkins was told about the division of fees with Lieff and Thornton. Labaton's experts on this point (Professors Green, Joy and Wendel) both in their reports and in their depositions say that this was sufficient notice to the client – that the Rule requires only that ATRS have been told that a division of fee may be made, with no obligation whatsoever to disclose details or the identity of who was receiving the fee or how much it would be. In making this point, they observe that Massachusetts has a more lenient division-of-fee rule than most other states, including that it permits "bare referrals" to be paid to lawyers who perform no work on a case and never appear in the case. They also argue that neither *Sagesse*, nor the rule in effect at the time, nor the subsequent rule specify the nature or amount of information a client must be given about a fee division, nor is the nature of the consent required from the client spelled out. They also point out that Hopkins instructed Labaton's Eric Belfi that he did not want to know about any division of fees, and that if he wanted to know about a division of fees, he would ask. Labaton's experts also point out that even if there was a technical failure to comply with Rule 1.5(e), there was at least

an effort to comply through the retention letter and such "imperfect compliance" does not merit a finding of a violation of the Rule. As to any differences between the compliance required under *Sagesse* and the Rule in effect at the time of the retention letter, Labaton's experts point out that a lawyer in Massachusetts has never been disciplined for not following an SJC decision that has not been codified in the Rules of Professional Conduct.

The Special Master's expert, Professor Gillers, disagrees with Labaton's experts, pointing to a raft of other evidence indicating Labaton never intended to comply with the Rule, that the Chargois Arrangement was not a true division of fee agreement because it was never formalized and did not comply with the division of fee rules in every jurisdiction ATRS and Labaton did business and that, under the circumstances, the fact that the client was told nothing about the Chargois Arrangement meant that the client had insufficient information upon which to give consent in this case – the troubling position of the class representative's Executive Director, George Hopkins, that he instructed Labaton attorneys that he did not want to know about fee allocations among counsel to the contrary notwithstanding.

As described in the Conclusions of Law, the Special Master believes that the requirements of Rule 1.5(e) were not complied with and that given all of the circumstances here, particularly that ATRS would be acting as class representative -- with all of the obligations to the class that would entail -- Labaton should have at least informed Hopkins and ATRS of the agreement it had with Chargois and the fact that if there was a successful result, he would be receiving a substantial portion of the fee.

Beyond this, it is significant that the "fee" owed to Chargois was Labaton's own obligation that arose out of a pre-existing agreement with Chargois. It was unrelated to the *State Street* case. In this sense, the payment to Chargois can hardly be said to be a "referral fee."

Nevertheless, the Special Master acknowledges that, given Massachusetts' unique rules and history on fee division, and the fact that Hopkins told Belfi he did not want to know about fee divisions, this is a close case, made closer by the fact that apparently lawyers in Massachusetts are not disciplined for not complying with rules announced by courts but not codified into the Rules of Professional Conduct.

Although the Special Master believes that Labaton had a professional obligation to tell its client ATRS, a class representative, the salient details of the Chargois Arrangement so that the client could make an informed determination of whether to give consent, and how this might impact its obligations as class representative -- rather than intentionally keeping the information from the client -- the intersection of the law and the facts here do not rise to the level of requiring disciplinary action. The obligations to the client, and the timing of them, were simply too unclear at the time to merit the imposition of professional discipline or any kind of disciplinary sanction.

Closely related to the issues surrounding Rule 1.5(e) are questions of whether Labaton violated Rule 7.2(b), the rule forbidding a lawyer from giving "anything of value to a person for recommending the lawyer's services." The reason Rule 1.5(e) is implicated in this discussion is that subsection (5) of Rule 7.2(b) includes an exception to the prohibition of paid recommendations for valid division-of-fee agreements under Rule

1.5(e). Rule 7.2(b)(5). In other words, if there is a valid division-of-fee award under Rule 1.5(e), it is permissible to pay a lawyer for recommending another lawyer without implicating Rule 7.2(b)'s proscriptions.

As noted, Professor Gillers believes that there was not compliance with Rule 1.5(e) and, therefore, goes on to analyze whether the Chargois Arrangement, and the history of how the Arrangement began, constitute a violation of Rule 7.2 (b). He believes that there was a violation. Contrary to the opinions of two of Labaton's experts (Wendel and Lieberman) -- who believe that Rule 7.2(b) does not apply to lawyers at all because a lawyer is not a "person" for purposes of the Rule -- Professor Gillers opines that payments by a lawyer to another lawyer for recommendations that do not comply with Rule 1.5(e) are within the proscriptions of Rule 7.2(b). In other words, Professor Gillers believes that a lawyer is a "person" under the Rule. Professor Gillers, commonsensically, points out that if the word "person" was intended to exclude lawyers from its ambit, there would be no need for the exception in Rule 7.2(b)(5) for fee agreements that divide fees between *lawyers.* Beyond this, the Rule or its comment use the word "non-lawyer" five times, and if the drafters of the Rule wished to limit the category of covered persons to non-lawyers, they would have used the word non-lawyer, rather than person. Thus, the purpose of using the word "person" was to make clear the Rule covered both lawyers and non-lawyers.

Further, Labaton's experts say that the entire history of the Rule was directed toward advertising and solicitation for lawyers by touts, taxi drivers and other non-lawyers, and was not intended to cover recommendations by a lawyer to others for the

services of another lawyer. Therefore, as noted, they reason, a lawyer is not a "person" within the meaning of the Rule. Two experts (Joy and Green) opine further that because the Rule covers only the "recommending" of a lawyer's services, and what Chargois did was to introduce Labaton to ATRS and facilitate a relationship, the Chargois Arrangement is not the product of a "recommendation" and, therefore, covered under the Rule. Finally, and more persuasively, at least one of Labaton's experts (Professor Green) pointed out that a lawyer has never been disciplined in Massachusetts under Rule 7.2(b) and there are no cases in Massachusetts -- or in fact in any jurisdiction in the country -- that have ever been brought against a lawyer for a violation of Rule 7.2(b).

In the Conclusions of Law section, the Special Master finds that Professor Gillers has the stronger argument on this point as a strict matter of law and statutory construction. In reaching this decision, it resonates with the Special Master that the Rule creates a specific exception for valid fee divisions between lawyers and if lawyers were not intended to be covered by the Rule, this exception would be unnecessary. When one of Labaton's experts (Green) was questioned about this, he simply said the language was "surplusage"; another expert (Lieberman) said it was "redundant." The Special Master cannot accept these rather facile explanations -- one must presume that drafters of laws mean what they say and do not adorn statutes, regulations and rules with unnecessary language -- and finds that Rule 7.2(b) covers recommendations made by lawyers for the services of other lawyers, unless there is compliance with Rule 1.5(e). Further, after a careful review of the record, the Special Master is persuaded that the entire origin and nature of the Chargois Arrangement fit easily within the ambit of Rule 7.2(b) and,

therefore, the payments by Labaton to Chargois for his recommending of Labaton at the inception of the Labaton/ATRS relationship falls within Rule 7.2(b)'s proscriptions. Therefore, because, as discussed, the fee division agreement did not comply with Rule 1.5(e), the entire Chargois Arrangement violated Rule 7.2(b).

However, this does not end the discussion, as it begs the question of whether professional discipline is merited to address the conduct. The Special Master concludes that it does not, for several reasons. First, as noted, the question of compliance with Rule 1.5(e) is a close question upon which reasonable experts and lawyers may differ and if there was compliance with that Rule, there was no violation of Rule 7.2(b). Because the violation of Rule 1.5(e) found here does not merit professional discipline, it would be hard to say that the connected violation of Rule 7.2(b) merited discipline. Beyond this, the Special Master is struck by the fact that apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer for paying another lawyer under Rule 7.2(b).

Although Professor Gillers analysis and opinion makes absolute sense, this goes to the question of notice to the practicing bar. Perhaps going forward, if the Court adopts Professor Gillers' and the Special Master's views on this Rule, the practicing profession will be on notice that bare recommendations that are not made pursuant to a valid division-of-fee agreement under Rule 1.5(e) could subject lawyers to discipline under Rule 7.2(b). But, because this appears to be an issue of first impression and not one of which the profession might have been well- advised in advance, it would not be

appropriate to impose professional discipline in these circumstances. Accordingly, no professional discipline or sanctions is warranted here and none is recommended.

But even this does not end the matter. Whether the conduct here merits professional discipline or sanction under the Rules of Professional Conduct, it is nonetheless sharp practice and requires redress and remedial action. The intentional and pervasive withholding of the history and details of the Chargois Arrangement from George Hopkins and ATRS (and every other actor in the case), combined with the blatantly commercial nature of the relationship at the inception of the relationship, and the continuing payments to Chargois -- apparently in perpetuity -- without ever telling the client, seems more like the payment of a finder's fee with a resulting floating lien on all subsequent cases than a true professional relationship intended for the good of the client, or for that matter, the public. The secretiveness that surrounded the Chargois Arrangement only exacerbates its unseemliness.

Labaton's conduct in not disclosing the Chargois Arrangement to the client and obtaining effective consent merits some remedial action. This remedy will be imposed as part of the larger remedy for Labaton's nondisclosure to other important actors here from whom the Chargois Arrangement was intentionally hidden, including the ERISA lawyers, the class (who, as discussed, are also Labaton's clients), and the Court, and will be discussed separately.

Recommended Legal Findings as to Breaches of Duties to the Class

Before moving to a specific discussion of the implications of Labaton's failure to provide information and notice to the class about the Chargois Arrangement and $4.1

million payment, it bears noting that in all of Labaton's legalistic arguments against any notice requirement, it never even gives a nod to what would be in the best interests of the class members, nor does it in any way acknowledge that in keeping this information from the class, Labaton in its role as Lead Counsel may have deprived the class members of their fundamental right to control the outcome of their case by exercising rights that can only have real meaning if they are informed of the necessary information upon which to make a decision. This reliance on formalistic and legalistic defenses to their conduct, although it is certainly Labaton's right to do so, is a troubling response from one of the nation's leading plaintiffs class action law firms in whom countless class members have placed their trust and confidence.

In addition to not disclosing the Chargois Arrangement to ATRS, the class representative, Labaton did not disclose it to the class itself in the Notice of Pendency of Class Action after the class was certified in August of 2016, or on its class action website where the fee petition was posted in September, nor at any other time. This fact raises one of the most challenging and tangled mixed questions of law and fact in the investigation, as the issue of whether Labaton had a duty to disclose the Chargois Arrangement and resulting payment to the class, at least as of the time the class was certified, is the subject of much uncertainty among courts, lawyers and academics and both the governing Federal Rules of Civil Procedure and ethics rules again provide no clear answer on the facts here. Among other reasons for this complexity are the facts that the certified class not only has rights to notice of a motion for award of attorney fees, and an opportunity to object to the fees, under Rule 23(h)(1) and (2), and also agreements that

affect settlement under Rule 23(e)(3), but also that the certified class is a client (at least for some purposes) and class counsel have fiduciary obligations to the class as a client.

Beyond this, the nature of the certified class here presents further factual and legal nuances because the certified class included class members which overlapped between the classes alleged in the original "customer class" complaint and those in the two ERISA cases that were consolidated by the court for pretrial purposes, *see* 11/19/12 Stipulation and Motion to Stay, and Order, Dkt. # 62 [EX. 51], and each of the complaints proposed different sets of class representatives. While these three cases may have had overlapping membership, the legal claims brought in the customer class case were grounded in state law and were distinct from those in the two ERISA cases, which were grounded in that federal statute.

In at least one instance, the court was reassured by class counsel that all of the class members were their clients. 11/15/12 Lobby Conference Tr., Dkt. No. 64 [EX. 22]. In addition, during depositions, class counsel indicated that they viewed the ERISA class members as their clients. *See* Chiplock 9/8/17 Dep. pp. 93:24 – 94:2 ("We had a responsibility as class counsel to the class. And that included ERISA plans.") [EX. 41]; Goldsmith 9/20/17 Dep., p. 61:11-14 (How much of the settlement would go to ERISA clients "was something that [DOL] were focused on. Of course, we were focused on it as well because they were our clients.") [EX. 42].

The potential divergence of interests arising out of these facts, and others, are myriad. First, ATRS was formally the class representative for the entire certified settlement class, while the ERISA class representatives had no specific standing as to the

certified settlement class. As noted, ATRS Executive Director George Hopkins was not told of the Chargois Arrangement or payment, so it cannot be said that the class had notice of it through him, even if he had authority to speak for the class on this issue, which is doubtful. But, he both testified in his deposition that he told Eric Belfi that he did not want to know about specific allocation of fees to other counsel and filed a declaration toward the end of the investigation both reiterating that he had told Belfi this and purporting to ratify post-hoc the $4.1 million payment to Chargois. *See* Hopkins 3/15/18 Declaration. [EX. 130]. (As discussed in the Conclusions of Law section, this raises some serious questions as to Hopkins' adequacy to serve as a class representative.)

However, the ERISA lawyers were not told anything about the Chargois Arrangement or payment either, and the potential for conflict here arises because a number of the counsel for the ERISA class members raised serious questions about the Chargois Arrangement and payment once they learned of it during this investigation. Lynn Sarko, counsel for the *Andover* class, said had he known of the Chargois Arrangement, he would have had to advise his ERISA clients and he believed they would have objected to it. Sarko 9/8/17 Dep., p. 75:18-19 [EX. 37]; Kravitz 9/11/17 Dep., p. 85:1-17. [EX. 117].

So, the question fairly arises as to what obligations Labaton, which knew the entire Chargois story and was class counsel, had to disclose it to the certified settlement class. Not surprisingly, the experts differ dramatically in their testimony. One expert, Professor Rubenstein, testified that Fed. R. Civ. Pro. 23(h) -- the Rule governing notice to the class of proposed attorneys' fees -- does not require disclosure to the class of the

Chargois Arrangement or payment in the class notice, and that the only information that must be provided to the class is the total aggregate fee award to the lawyers. Rubenstein 4/9/18 Dep., p. 181:7-13. [EX. 235]. Professor Rubenstein testified that the obligation to inform the class falls exclusively upon the Court, and not the class attorneys, because Rule 23(h) incorporates Rule 54(d)(2), and that Rule puts the entire burden of finding out about fee allocations upon the court because the obligation to tell the Court about fee allocations only arises, in Rubenstein's view, if the Court orders disclosure or specifically asks about them. Here, Professor Rubenstein opines that because the Court did not specifically ask the lawyers about the allocation of fees, there was no obligation under Rules 23(h) of 54(d)(2) to tell the court, and because of this, no obligation to provide notice to the class of the Chargois payment. *Id.,* p. 70:13-19.

In this context, Professor Rubenstein believes that the Court's specific statement in approving the settlement and the attorneys' fees that it was "Relying heavily the submissions and what's been said today," 11/2/16 Hearing Tr., Dkt. # 114, p. 35, is not sufficient to trigger the obligation to tell the Court anything about the Chargois payment. [EX. 78]. In the Conclusions of Law section, the Special Master has expressed his concern and frustration that Rule 23(e)(3), which requires that parties seeking approval of a settlement "must file a statement identifying any agreement made in connection with the proposal," and Rule 23(h), either taken separately or together, are apparently not sufficient to trigger a duty to disclose the Chargois payment, at least in the circumstances here, to the class, and that putting the entire burden on the court by requiring it to ask about fee allocation agreements is unsatisfactory and ignores the realities of class action

litigation. (The question of whether the attorneys had an obligation to tell the Court about the Chargois Arrangement and payment is the subject of discussion in the Conclusions of Law section and in the section below on class counsel's duties of disclosure to the Court.)

Beyond any obligations imposed under the Federal Rules of Civil Procedure, Labaton's other experts testified that class counsel had limited ethical duties to the class as a client, and that class counsel did not have an ethical duty to inform the class of the Chargois Arrangement or payment. Wendel 4/3/18 Dep., pp. 131:18 – 132:5. [EX. 229]. Another Labaton expert, Professor Peter Joy, testified that the disclosure and consent requirements of Rule 1.5(e) did not apply to "every individual class member ... Labaton had a fiduciary duty but not one that encompasses the fee-sharing arrangement." Joy 4/3/18 Dep., pp. 136:7-8, 154:12-14. [EX. 227]. Joy testified that this lack of duty applied equally to the ERISA class members to whom they owed no duty beyond the generalized duty owed to all class members to receive fair and equitable fees. *Id.*, pp. 178:24 – 179:12. This, of course, raises the question of whether in this context the Chargois payment was a fair and equitable fee.

Professor Gillers again disagrees. Although he does not find a duty to provide notice of the Chargois Arrangement or payment under the Federal Rules of Civil Procedure, he opines that the class members are clients (at least as of the class' certification in August 2016), and that counsel have fiduciary duties. He notes that class members were provided in the Notice information only that counsel would apply for fees not to exceed $74,541,250, that of this, fees for ERISA counsel will not exceed $10.9

million, and how fees for other counsel would be computed if the court awards the requested amount. The class members were also told that additional fee information would be posted on the case website (with the website address) as well as Labaton's phone number, website and email address. Professor Gillers notes that the notice tells class members they have a right to opt out or to object, and how to do so -- in fact, he points out, at the August 8, 2016 hearing on preliminary approval, the Court specifically said "As I understand it, counsel will seek up to 25 percent, roughly $76 million dollars, of the common fund. The class members will have an opportunity to be heard on the propriety of that." Gillers Supp. Report, p. 100 (quoting 8/8/16 Hearing. Tr., pp. 24:23 – 25:1). [EX. 233].

Professor Gillers points out that counsel's relationship to the class carried with it heavy fiduciary duties to the class as clients under various Rules, and that these duties included the duty to give their clients information relevant to a decision as to whether to accept the settlement, or to object, or to opt out. Professor Gillers further observes that while class actions do not always fit within the framework of ethical rules, these situations are few and tailored, and also tend to be situations in which doing so favor the class or a segment of it. He opines that these situations are not a reason to relieve class action lawyers from ethical obligations that would benefit the class and supplement, not contradict, duties to clients under Rule 23.

In finding duties to the class members as clients, Professor Gillers notes that class counsel are fiduciaries for their clients as a matter of law, and as such, class counsel had a duty to give their clients information relevant to decisions that belong to the client – and

that one of these decisions is whether or not to settle the case. In particular, Professor Gillers finds instructive Rule1.4(a), which requires the lawyer to promptly inform the client of any circumstance with respect to which the client's informed consent (as defined in Rule 1.0(f)) is required. Rule 1.0(f) defines informed consent to be such information from the lawyer that "communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Professor Gillers opines that the extraordinary circumstances of the Chargois Arrangement and $4.1 million payment to Chargois triggered the legal rights of the class members to object to the anticipated fee application, and that the class could rely upon ATRS, as the class representative, and Labaton, as class counsel, to fulfill their fiduciary duties to the class and protect their interests.

But, ATRS did not know about Chargois because Labaton did not tell it, and Labaton did not independently put the Chargois payment information in the class notice or on its class website. Nor did Labaton disclose to the ERISA Counsel anything about Chargois so that they could inform their class representative clients, and Labaton did not fully disclose the Chargois Arrangement and resulting payment to the other customer class lawyers, Lieff and Thornton, so that they could have weighed in on the question of whether to provide notice to the class members.

Given the true and complete circumstances here, the Special Master finds that the Chargois payment would have been material information upon which at least some of the class members may have based a decision to either object or opt out. In not disclosing the information to the class members, or at least to all of the class counsel and class

representatives, the Special Master finds that Labaton as Lead Counsel for the class failed to meet its fiduciary duties to the class members as clients. In reaching this finding, the Special Master considers particularly significant not simply the size of the Chargois payment itself, or even the facts that Chargois did no work and contributed no value to the case, but also that the Chargois payment obligation preceded the *State Street* case and was Labaton's obligation alone and had no connection to the result achieved in the case.

However, given the lack of clarity and differences of opinion -- and the possible conflicts between class counsel's legal obligations under the Federal Rules of Civil Procedure and the applicable Massachusetts Rules of Professional Conduct -- the Special Master must again stop short of recommending to the Court that professional disciplinary sanctions or other formal action be imposed upon Labaton attorneys. Although the Special Master believes that Labaton breached its fiduciary duty to the class, the questions are simply too close to merit formal discipline, with all of the potentially harsh professional ramifications and consequences that may attend to such action. However, the fact remains that the class members were deprived of important and material information, and the Special Master finds that the failure to provide sufficient information to the class such that class members could make an informed decision about whether to agree to the payment to Chargois, or to object, or to opt out of the settlement, requires significant remedial measures to correct this serious flaw in the notice process.

The appropriate remedies for this conduct will be addressed separately.

Recommended Legal Findings for Breach of Duties to Co-Counsel

In its role as Lead Counsel, Labaton failed in its duties of fairness, trustworthiness and transparency to its co-counsel, and this failure had serious and wide-ranging adverse ramifications for its co-counsel and class members.

The breaches of duty to its co-counsel spring from two separate but related sources. First, in its role as Lead Counsel, Labaton had a duty to act fairly, efficiently, and economically in the interests of all parties and parties' counsel. *In re Pharm. Indus. Average Wholesale List Price Litig.,* 2008 WL 53278, at *1-2 (quoting *Manual for Complex Litigation*, § 10.22, at 24 (4th ed.)) Although courts generally do not find a fiduciary duty between lead counsel and co-counsel, "lead counsel must meet a demanding standard of trustworthiness because the Court must rely on representations made by counsel." *Id.* By this responsibility, lead counsel should be expected to deal forthrightly and honestly with its co-counsel so that all counsel can discharge their responsibilities to class members and be fully informed themselves as they make decisions about their own fee allocations. By failing to disclose the Chargois Arrangement and payment to ERISA counsel, Labaton failed to provide sufficient information upon which ERISA counsel could act in the best interests of their clients, the ERISA class representatives, and in their own interest in negotiating their fees with Labaton and the other customer class counsel.

A second but related failure arises under settled principles of contract law. Apart from the principles of fairness and trustworthiness that accompanied Labaton's role as Lead Counsel, courts have recognized that contract principles also impose duties within a co-counsel relationship. *See, e.g., Sobran*, 148 F. Supp. 3d at 72; *Vita*, Mass. App. Ct. at

748-49; *Marks*, 174 Ohio App. 3d at 460; *Parker & Waichman*, 815 N.Y.S. 2d at 74. A basic element of contract law is the mutual assent of the parties to the essential terms of an agreement. *Enos*, 732 F.3d at 48-49. Although mere nondisclosure or silence by itself will generally not support a breach of contract action, where a party's assent to an agreement is induced by a material omission, a contract may be voidable where the parties' relationship creates legal or equitable obligations to communicate all relevant facts. *DeMarco*, 1993 Mass. App. Div. at *2. Here, as noted, Labaton was serving as Lead Counsel and the ERISA attorneys were not only co-counsel, but had their own clients to whom they owed obligations. In the context of this relationship, ERISA counsel were entitled to rely upon the forthrightness and fair-dealing of its Lead Counsel, Labaton. In not telling ERISA counsel about the Chargois payment, Labaton not only precluded ERISA counsel from fully informing their clients, it prevented them from making fully informed decisions about their own fee allocations in their negotiations with the customer class counsel. Here, context is important. The $4.1 million payment to Chargois -- who performed no work and never appeared in the case -- was considerably more than any ERISA law firm received.

That this omission by Labaton was material is borne out by Lynn Sarko's testimony that had he known of the Chargois payment, (1) he would have had to advise his client representatives, and he believes they would not have agreed to it, Sarko 9/8/17 Dep., p. 75:18-19; and (2) he would not have agreed to the fee allocation agreement limiting the ERISA attorneys to 9% (later 10%) of the total fee. [EX. 37]. Beyond this, Labaton knew that the payment to Chargois would be material to the ERISA attorneys.

Even long after the fee allocation agreement between the customer class and ERISA attorneys was made, Labaton was at pains to make sure the ERISA attorneys still did not know about the Chargois payment. In an email about the claw-back letter in November 2016, Larry Sucharow directed that separate letters be sent to customer class counsel and ERISA counsel, saying "Need two letters with breakdown, ERISA just gets sent to ERISA counsel with 10 percent off the top and then a third each. Class co-counsel get one with ERISA 10 percent off the top, Damon's percentage also off the top, and each of class co-counsel split with the percentages agreed to. *In short, no reason for ERISA to see Damon's split. They only need to see their 10 percent and then split three ways."* TLF-SST-012272 – 2274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller and Belfi). [EX. 160]. This reflects Labaton's own knowledge that the $4.1 million payment to Chargois would be significant to the ERISA attorneys as to their own fees.

Labaton's omission had another important ramification that speaks to its materiality. As noted, Sarko was the ERISA attorney principally liaising with DOL, the governmental agency that had oversight responsibility for ERISA plans. Carl Kravitz was also involved with negotiating with DOL. Defendant State Street was insisting on a fully global settlement with all interested parties, including DOL. By not telling the ERISA attorneys about the Chargois payment, Labaton prevented them from fully informing DOL. Both Sarko and Kravitz testified that had they known about the Chargois payment, they would have had to have told DOL. In Sarko's view, this could have "blown up" the entire settlement. Sarko 9/8/17 Dep., p. 84:5. [EX. 37].

Beyond this, as set out in the Findings of Fact, the Settlement Agreement anticipated a cap of $10.9 million for attorneys' fees out of the $60 million of recovery for the portion of the settlement allocated to ERISA class members. However, the ERISA attorneys received only $7.5 million of this $10.9 million allocation of ERISA recovery related attorneys' fees. The remaining $3.4 million went to the customer class attorneys. Although this is not directly related to the material omissions related to the Chargois payment, it is a measure of what the ERISA attorneys might well have expected and negotiated for had they known of the Chargois payment.

Beyond its dealings with ERISA Counsel, Labaton was not fully forthright and transparent with its Customer Class co-counsel. Bob Lieff, who was the participant from the Lieff firm involved in agreeing to share the Chargois obligation equally among the three customer class firms, testified that he was led to believe that Chargois was performing all of the work and services local counsel routinely do. Lieff 9/11/17 Dep., p. 58:18-24. [EX. 139]. Lieff further testified that he did not know that the Chargois payment grew out of a pre-existing obligation that Labaton had to Chargois that pre-dated the State Street case. *Id.*, pp. 73:14 – 74:3. He further testified that had he known that Chargois did no work and provided no value to the case, he would not have agreed to share the $4.1 million payment. *Id.*, p. 97:13-16. Lieff also testified that if he had known the history of the Chargois payment, he would have encouraged Labaton to inform the Court. *Id.*, p. 97:14-16.

Lieff's testimony is supported by a significant amount of contemporaneous evidence the nature of emails between Labaton, Lieff and Thornton and other

correspondence in which Chargois is consistently referred to as "local counsel" or "the local." *See e.g.,* LBS025771 (4/24/13 "Dublin email" referring to Chargois as "the local counsel who assists Labaton in matter involving Arkansas Teachers Retirement System) [EX. 140]; TLF-SST-040617-0618 (Bradley email to Lieff and Thornton regarding fee discussions with reference to "Arkansas local") [EX. 147]; TLF-SST-053117-3126 (email referencing payments to ERISA Counsel and "local Arkansas counsel"). [EX. 151]. Labaton never corrected this mischaracterization, and given the fact that it was consistently made in the context of persuading Lieff to share in the $4.1 million Chargois obligation, this clearly constitutes a materially misleading misrepresentation of the true and complete story behind the Chargois payment obligation.

In each of these instances of material omission and misrepresentation, contract principles require that the respective agreements be voided and that the parties' rights be adjusted. These contract principles not only stand on their own, but also inform a court's equitable authority, and given the factual underlayment here, a court could be expected to reform a contract to meet the parties' reasonable expectations. Thus, to the extent pure contract law principles may not supply a complete legal remedy, equitable principles do.

In order to achieve a just result, the Special Master recommends a three-fold finding: (1) that in agreeing to the fee allocation, the ERISA attorneys were materially misled by the omission of the Chargois payment (and its history) and that their share of the fee award should be increased; (2) because it has been well established beyond any question in this investigation that the ERISA attorneys bore no responsibility for either the double-counting on the customer class firms' lodestar petitions or the payment to

Chargois -- and, in fact, were intentionally kept in the dark about the payment to Chargois by Labaton -- the ERISA attorneys should receive reimbursement for having been dragged into this investigation through no fault of their own; and (3) in view of all of the history recounted herein, the Special Master recommends that any obligations the ERISA attorneys may have had to Labaton under the claw-back letter be abrogated and that the claw-back letter be declared void as to the ERISA attorneys.

As to Lieff, the appropriate resolution is more complicated. On the one hand, Lieff agreed to share in the Chargois payment and at least knew about Chargois, albeit not the full state of affairs. On the other hand, the Special Master believes that Lieff was misled into agreeing to share in the Chargois payment. Ordinarily, some recompense would be in order for this. However, at oral argument, Lieff's counsel (and the firm's General Counsel), Richard Heimann, when asked what if any relief he was seeking, indicated he was not looking for any repayment. (However, Bob Lieff, who was present at the oral argument, but apparently is no longer a member of the firm, thought there should be a payment back to the Lieff firm.) In view of all of these factors, the Special Master believes that the fairest result for the Lieff firm would be for it to be relieved of its obligations to Labaton under the claw-back letter as to Chargois, but no more. However, as addressed in the section on remedies for the double-counting, Lieff's own emails, and the deposition testimony of its lawyers, indicate that Lieff shares responsibility for the inadvertent mistake, and that part of the remedies will be dealt with separately.

The Thornton firm presents an even closer, more complicated, question. Although the evidence supports Mike Thornton's testimony that he, too, believed that Chargois was

serving as Labaton's local counsel and providing some service, Garrett Bradley's testimony to the same effect simply cannot be credited. As the Special Master has found elsewhere, and for the reasons set forth, Garrett Bradley knew most if not all of the history behind the Chargois payment and knew he performed no work on the case. But Garret Bradley was also serving as Of Counsel to Labaton.

In the end, the responsibility for Chargois must be Labaton's alone. They initiated the relationship with Chargois, benefitted from it over the years, and they made the decision to conceal it from the client, the class, co-counsel and the Court. Accordingly, they must bear the costs of the remedy occasioned by the non-disclosure of the Chargois Arrangement and payment.

The precise remedies for this conduct will be set forth separately.

Recommended Legal Findings for Breach of Duties to the Court

Previous sections of these Recommendations have detailed Labaton's failures in informing its client ATRS, the class, and its co-counsel of the Chargois Arrangement. However, Labaton's failure to disclose the Chargois Arrangement and payment to the Court is perhaps the most serious and far-reaching of all of its breaches of duty. Within the framework of our class action system, Courts have a fiduciary duty to the class members and serve as the final guardians of class members' rights. Particularly at the settlement approval stage, class counsel must assist the Court in performing that obligation to the class by providing it with all of the information necessary to discharge its fiduciary responsibilities.

As Lead Counsel here, Labaton had a legal and ethical duty to provide the Court with all the information it needed to make an informed decision as to the award of attorneys' fees out of the State Street settlement fund. This included disclosure of the identity of all attorneys -- including Damon Chargois -- who would be sharing in the award and what the share of each attorney would be. Labaton had a duty under the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct, as well as under federal case law, to allow the Court to conduct this essential role in protecting class members. In failing to disclose the Chargois Arrangement to the Court, Labaton breached this duty.

The Federal Rules of Civil Procedure mandate full and accurate disclosures to the Court, including Fed. R. Civ. P. 23(e)'s requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement and to a settlement-related fee petition, Fed. R. Civ. P. 23(e)(5) and (h)(2). As with the right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. Unfortunately, by not disclosing to the Court that $4.1 million of the settlement funds would be paid to an attorney who did no work on the State Street case, Labaton deprived the Court of information it needed to discharge its fiduciary obligations to protect the class's interests.

Professor William Rubenstein has opined in this case that Rule 23(h), by its incorporation of the procedures for making a claim for attorneys' fees under Fed. R. Civ. P. 54, places the burden on the Court to order disclosure of a fee agreement such as the

Chargois Arrangement, and, absent such a court order, that disclosure is not required. Professor Rubenstein places the entire blame for the non-disclosure of the Chargois payment in this case upon the Court because it failed to specifically inquire about fee agreements underlying class counsel's claim for an award of fees.

However, separate and apart from Rule 23(h) and its incorporation of Rule 54 procedures for making a claim for attorneys' fees, Fed. R. Civ. P. 23(e)(3) requires that "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money that they may have received elsewhere. *Manual of Complex Litigation*, § 21.631. [EX. 248].

In his treatise, Professor Rubenstein also recognized counsel's independent obligation of disclosure under Rule 23(e)(3). Section 15.12 of *Rubenstein and Newberg on Class Actions*, entitled, "Fee procedures at a class action's conclusion -- Disclosure of fee-related agreements requirement," first speaks to the (obvious) requirement to disclose any agreements as to fees when so ordered by the court. The Section goes on to recognize, however:

> [I]n addition to Rule 54's disclosure requirements, Rule 23(e) governing class action *settlement* -- not *fee* -- approval states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal." (emphasis in original; footnote omitted).

Newberg on Class Actions, § 15.12. [EX. 236].

Although Rule 23(e)(3) references the settlement agreement itself, Professor Rubenstein himself observed that

> given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself -- such as any agreements about fees -- may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests. *There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class…Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.* (emphasis added)
>
> *Id.*

The Special Master recommends that the Court find that this was such a case. With its burden-shifting of Labaton's own pre-existing financial obligation to Chargois to the class and co-counsel, the Chargois Arrangement affected the class's interests in this case as it "allocates money that the class members may have received elsewhere," i.e., to Damon Chargois. There was an undisclosed agreement to pay $4.1 million out of the settlement funds -- funds that could otherwise be allocated to the class members -- to an attorney who did no work on the case whatsoever. As previously noted, the obligation to Chargois was Labaton's and Labaton's alone, and the payment to him, without disclosing it to the Court, significantly and adversely impacted the Court's ability to protect the class from an enormous payment for which the class received no value and of which the class representatives were never informed. This created a potential conflict between Labaton and the class, a conflict the Court could not protect the class against because it was hidden from the Court.

In order to assist the Court in performing its fiduciary function to protect the interests of the class, Labaton was obligated to disclose to the Court its pre-existing agreement to pay Chargois this substantial amount of the settlement fund. The Special Master finds that, given the facts here, Labaton's failure to do so was in derogation of the duties imposed upon it by Fed. R. Civ. P. 23(e)(3).

Beyond Labaton's failure to disclose the Chargois Arrangement to the Court, the Special Master is further troubled by what can only be construed as misleading statements in its declaration seeking a fee award. As part of his Lead Counsel obligation in this case, Lawrence Sucharow of Labaton filed a "Declaration in Support of Plaintiff's Assented-To Motion for Final Approval of the Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for Award of Attorney Fees." *See* Dkt. No 104. [EX. 3]. In that Omnibus Declaration, in two separate places, at footnotes 2 and 6, Sucharow purports to identify all of "Plaintiffs' Counsel." In footnote 2, Sucharow identifies as "Plaintiffs' Counsel," his own firm, Labaton Sucharow, and "the Thornton Law Firm LLP ("TLF"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), McTigue Law LLP ("McTigue Law"), and Zuckerman Spaeder LLP ("Zuckerman Spaeder")", *id*., note 2, p. 1. In footnote 6, Sucharow identifies Labaton Sucharow, Thornton, Lieff Cabraser, Keller Rohrback, McTigue Law, Zuckerman Spaeder, as well as, Beins, Axelrod, P.C. (which partnered with McTigue Law and Zuckerman Spaeder in representing the Henriquez plaintiffs); Richardson, Patrick, Westbrook & Brickman, LLC (former co-counsel for Henriquez plaintiffs); and Feinberg, Campbell & Zack, P.C. (local

counsel for McTigue Law in the Andover action). *Id*., note 6, p. 41. In Keller Rohrback's Declaration, Theodore Hess-Mahan of the Massachusetts firm of Hutchings Barsamian Mendelcorn LLP is identified as Keller Rohrback's local counsel. Within Labaton's lodestar report attached as Exhibit A to Labaton's individual fee declaration at Dkt. # 104-15, Sucharow further identifies fees paid to an "of counsel," P. Scarlato (Paul Scarlato of Goldman Scarlato, a Pennsylvania law firm). [EX. 88].

On the surface, these Declaration statements could lead the Court reasonably to believe that these are all of the lawyers being paid from class funds. However, there is one lawyer who was paid from class funds who is not mentioned anywhere in Sucharow's Omnibus Declaration, in Labaton's individual fee declaration -- which was also signed by Lawrence Sucharow -- or in Labaton's lodestar and reports annexed thereto. That one lawyer is Damon Chargois.

Sucharow has admitted that he knew of the obligation to pay Chargois a portion of the State Street fee award at least as of 2015; the fee petition was filed on September 15, 2016. The Special Master finds that this nondisclosure was considered and deliberate.

In deciding the amount of fee to award class counsel -- and to whom to award it -- the Court, as a fiduciary for the class, including unnamed class members, needed first to know -- and Sucharow and Labaton had a duty to tell it -- who would be participating in any fee the Court in its discretion might award from the class recovery and the basis for the claim. By not disclosing the intended payment of $4.1 million to Chargois, Sucharow and Labaton kept the Court in the dark and denied it the very information it needed in order to decide how much of the settlement funds should go to counsel, and which

counsel, and how much should go to the class. As Professor Gillers observed, "Quite simply, until the Court made that decision, there was no fee to divide." Gillers Supp. Report, p. 97. [EX. 233]. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the recovery to Chargois, who never appeared and who did no work, and made no contribution whatsoever to the success of the State Street litigation, whose Arrangement with Labaton preceded the State Street case by several years, and to direct that the money intended for Chargois should instead go to the class. The Court, however, never had an opportunity to make that decision because of the material omission of Chargois from Sucharow's Declaration.

Given this background, the Special Master considered at length whether to recommend that Labaton's failure to disclose Chargois' role and the agreement to pay him $4.1 million in the fee petition should be sanctioned under Fed. R. Civ. P. 11. While at least one court of appeals has found that Rule 11 applies both to disclosures and omissions, the First Circuit has not, and, having considered other persuasive arguments and factors raised by counsel to Labaton, the Special Master recommends that no violation of Rule 11 in Labaton's non-disclosure of the Chargois Arrangement be found.

However, beyond the imperative for disclosure in the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct required disclosure to the Court. Massachusetts Rule 3.3 imposes upon attorneys practicing in Massachusetts a "duty of candor toward the tribunal." Rule 3.3(a) provides in relevant part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false

> statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

Comment 3 to Rule 3.3 makes clear that an attorney's failure to make a disclosure in an affidavit or in open court can be the equivalent of a misrepresentation within the purview of Rule 3.3(a).

That Sucharow had a duty to disclose the Chargois Arrangement to the Court is made even more clear by Comment 14A to Rule 3.3, which provides:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit . . . the proceeding loses its adversarial character and in some respects takes on the form of an *ex parte* proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in *ex parte* proceedings and should be guided by Rule 3.3(d).
>
> Mass. R. Prof. C. 3.3, cmt. [14A].

Proceeding from Comment 14A takes us to Rule 3.3(d), which provides:

> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse. The standard applied to *ex parte* proceedings is applicable in the context of a joint petition to approve a settlement of a class action. See Cmt. 14A to Mass. R. Prof. C. 3.3.

For all of these reasons, the Special Master recommends the Court find that Sucharow deliberately concealed the Chargois Arrangement from the Court and thereby

denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class. Accordingly, it is recommended the Court find that Sucharow's concealment of this very relevant information violated Massachusetts Rule of Professional Conduct 3.3.

In addition to Rule 3.3 of the Massachusetts Rules of Professional Conduct, there is an overriding general duty of candor owed by attorneys as officers of the court. As noted by Professor Gillers, while "the phrase 'candor to the Court' is not an unbounded source of duty, entirely untethered to rules, custom, or case law. . . the word 'candor' should at least guide a lawyer's understanding of his or her duties as officers of the court." Gillers' Supp. Report, p. 88. [EX. 233].

This broad duty of candor has been recognized by the First Circuit, which, in *Pearson*, 200 F.3d at 38, cited the Fourth Circuit in *Shaffer Equipment Co.,*11 F.3d at 457. In that case the court said, "[T]ruth is the object of the system's process…of dispensing justice…Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process."

It is for all of these reasons that the Special Master recommends that through his failure to disclose the $4.1 million Chargois Arrangement, the Court find that Sucharow violated his duty of candor as an officer of the court, and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class.

As stated in previous recommended findings as to the client, the class and co-counsel, it is recommended that the Court find that Labaton and Sucharow must bear the

sole responsibility for the non-disclosure -- and, in fact, the concealment -- of the Chargois Arrangement from the Court. The remedies for this breach will be set forth separately.

RECOMMENDED REMEDIES AND SANCTIONS

Before detailing the recommendations to provide remedies and redress for the conduct identified in this Report, it is appropriate to provide a preamble as context. One of the most troubling elements of the Chargois aspect of the investigation has been Labaton's response to the discovery of the conduct revealed in the investigation: Quite simply, it is inappropriate and insufficient to the severity and pervasiveness of the conduct. There has been no acceptance of responsibility for the calculating and secretive nature of the conduct and its adverse ramifications. There has been no expression of contrition. There has been no expression of remorse. And, there has been no expression of apology to the client, to the class members, to co-counsel or to the Court.

Rather, Labaton has met the Special Master's inquiry into the Chargois Arrangement and the $4.1 million payment with a phalanx of experts, who together with Labaton, have erected a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court). Although Labaton certainly has a right to present its best case -- and its arguments have been considered and, in some instances, used to inform the Special Master's findings and recommendations to the Court -- some acknowledgement of the potential harm this conduct has caused to class members, co-counsel and the Court would have been not only appropriate, but expected. Instead, Labaton and its experts have taken positions that speak only to its legal defenses, and not to what is in the best

interests of class members and the ability of courts to discharge their fiduciary responsibilities to the class. This approach is as disappointing as it is indicative of the culture of compartmentalization and concealment at Labaton that led to the Chargois Arrangement and its nondisclosure to the other participants in the case in the first place.

The remedies and sanctions recommended here will be delineated as they relate to specific conduct and the law firms associated with that conduct, as well as where the allocated funds will go.

Double-Counting on the Customer Class Firms' Lodestar Petitions ($4,058,000)

As indicated, with the exception of Garrett Bradley's Declaration statements, the Special Master has found that the mistakes made were largely inadvertent and the result of a combination of Labaton's internal compartmentalization (e.g., settlement attorney Nicole Zeiss not knowing anything about the agreement to share costs) and a lack of any formal agreement. Although the contemporary email traffic, the billing practices and deposition testimony all bear out that at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate, other lawyers at the firms were not aware at all of an agreement to allow Thornton to put the staff and contract attorneys on its lodestar, and no one ever attempted to memorialize this, even in an email.

Having said the double-counting was inadvertent does not end the need for a remedy, however. The notion of including the employees of one firm on the lodestar petition of another firm is fraught with the danger of miscounting and misrepresentation

to the court, just as happened here. The same cost-sharing could easily have been achieved by a simple agreement to share costs in some equitable way, rather than by the artifice of putting one firm's employees on another firm's lodestar petition. Further, careful preparation of the fee petition documents by comparing the lodestar petitions of each firm should have caught the mistake.

In the end, all three Customer Class firms must share the blame. The remedy for this is the disgorgement by all three firms in equal amounts of the entire approximately $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.

Garrett Bradley's Sworn Declaration Statements

The Special Master has found that Garrett Bradley's statements in his sworn declaration that accompanied the Thornton fee petition were knowingly false, that they were motivated by a desire to greatly enhance the Thornton lodestar and thereby justify a larger fee award, and that Bradley did not attempt to correct these statements, despite numerous opportunities to do so, until directly called upon by the Court at the March 7, 2017 hearing. The Special Master has found that these sworn declaration statements violated both Rule 11 of the Federal Rules of Civil Procedure and Bradley's duty of candor to the Court under Rule 3.3 of the Massachusetts Rules of Professional Conduct. The Special Master has further found that the sworn statements were material and contributed to the double-counting errors because, had Bradley made fully truthful statements describing the actual relationship of the staff attorneys to Thornton, rather than representing to the Court that they were Thornton employees and that their rates

were Thornton's current rates for them, it is likely that either or both Nicole Zeiss and/or the Court would have been alerted that something was amiss and the double-counting would have been caught.

For the falsity of the sworn declaration statements, the failure to come forward and correct them, and the impact it had on the fee proceedings, the Special Master recommends that significant monetary sanctions, and professional discipline be levied. As to monetary sanctions imposed under Rule 11, they are imposed against the Thornton firm (as provided by Rule 11) in a range of $400,000 to $1 million, approximately ten to twenty-five percent of the cost of the double-counting. As to the sanctions under Rule 3.3 of the Massachusetts Rules of Professional Conduct, these are individual and the Special Master recommends that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings. No additional monetary sanctions beyond those recommended for the violations of Rule 11 are recommended for the violations of Rule 3.3.

It is recommended that the monetary sanctions should be awarded to the class.

Hours and Rates

The Special Master recommends that, with the relatively minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar petitions were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the staff attorneys employed by Labaton and Lieff, who by virtue of their experience, work and level of contribution to

the case, merit the rates that were ascribed to them on the lodestar petitions. Therefore, other than as noted below, the Special Master recommends that no adjustment be made in hours and rates.

Michael Bradley: The first exception to this recommendation is to the rate of Michael Bradley. As noted, although the number of hours Bradley recorded is supported by reasonably reliable contemporaneous records, his submitted rate of $500/hour is not supportable by his experience, the work he did on the case, or the value he contributed to the case, particularly in relation to the other staff attorneys. Rather, he had no experience relevant to the case and the work he performed was simple, straightforward, and unmonitored document review. Further, although he undertook the work with no certainty of payment, he performed the work fully on his free time and when it was convenient for him to do so. Therefore, his rate should be more at the level of a paralegal, supplemented by the fact of his law degree and experience as a lawyer. The Special Master recommends that Bradley's rate be set at half of the submitted rate, or $250/hour. Bradley recorded roughly 406 hours, thus yielding a total lodestar of $101,500. In addition, Thornton received a 1.8 multiplier on the original fee. Thornton should not be entitled to this additional benefit calculated on the higher rate, and, thus, its lodestar, on which claimed Michael Bradley's hours, should be reduced accordingly and the difference between the original fee value ($ 365,760, after multiplier) and the amount reflective of a more appropriate hourly rate of $250 ($182,880, after multiplier) returned to the class. In making this calculation, we give equal weight, and apply the same multiplier, to Michael Bradley's hours as we do any other attorney who worked on the case.

Petition and Adjustment	Timekeeper	Rate	Hours	Lodestar Value	Multiplier	Total Fees
Original Petition	Michael Bradley	$500	406.4	$203,200.00	1.8	$365,760.00
Appropriate Adjustment	Michael Bradley	$250	406.4	$101,600.00	1.8	$182,880.00
						To class: $182, 880
Original Petition	Contract attorneys	$415, $515	2949.5	$1,325,588.00	1.8	$2,386,058.40
Appropriate Adjustment	Contract attorneys	$50	2949.5	$147,475.00	(at cost)	$147,475.00
						To class: $2,238,583.40

Contract Attorneys: The next exception is the rates of the so-called contract attorneys. For all of the reasons set forth in the Report, the Special Master recommends that law firms not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be reimbursed to law firms as an expense, and the firms compensated for that expense dollar-for-dollar. The seven contract attorneys, all retained by Lieff, recorded 2833.5 hours in this role, at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to

their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged and returned to the class. The Customer Class is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the class.

The Chargois Payment ($4.1 million)

As set out in this Report, because the Chargois Arrangement was solely Labaton's obligation and because Labaton has profited handsomely over the years from the ATRS relationship Chargois helped facilitate, and because Labaton is solely responsible for the non-disclosure of this relationship to ATRS, the class, ERISA counsel and the Court, the Special Master recommends that the appropriate remedy for the Chargois payment be disgorgement of entire $4.1 million Chargois amount, and that this disgorgement be solely the responsibility of Labaton.

Because the non-disclosure of the Chargois payment fell disproportionately upon the ERISA attorneys, who were told nothing about Chargois and who were required to negotiate their fee allocation without the knowledge that an attorney who performed no work on the case, bore no risk or client responsibility and never appeared in the case would receive an amount considerably more than any ERISA firm, the Special Master recommends that ERISA counsel should receive the bulk of this award. The Special Master recommends that the appropriate remedy for the non-disclosure of the $4.1 million is $3.4 million, an amount which reflects the difference between the $10.9 million

that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received. This amount is also supportable because it is the amount that went instead to the customer class counsel.

As further support for this $3.4 million reallocation remedy to the ERISA attorneys, the Special Master recognizes that this investigation has resulted in great expenditures of time and expense to the ERISA firms that have been drawn into it through no fault of their own, either as to the double-counting or as to the Chargois Arrangement. Normally, the Special Master would recommend that the ERISA attorneys submit their time and expenses incurred in having to participate in the investigation and recommend that the firms be reimbursed dollar-for-dollar. However, this would be a lengthy, time-consuming, and additionally burdensome process that would likely result in additional expense for these firms. Instead, in fashioning this recommended award, the Special Master has taken into consideration the time and expense incurred by the ERISA attorneys in participating in the investigation and believes that the recommended $3.4 million is sufficient to include the costs and expenses incurred by the ERISA attorneys in the investigation. Finally, the Special Master recommends that the $3.4 million be allocated amongst the ERISA law firms in the same proportion and in the same manner as the original fee award was allocated.

The $3.4 million award to ERISA counsel still leaves a balance from the $4.1 million of $700,000. The Special Master recommends that this amount should be allocated back to the class, which was deprived of its ability to make a determination as to whether to agree to the settlement which included the Chargois payment. In making

this recommendation, the Special Master notes that with the additional reallocations to the class recommended here, the class will receive well more than an additional $5.5 million to $6 million beyond that which it would receive under the original settlement.

One of the most difficult decisions in arriving at recommendations for appropriate redress and remedies for the Chargois conduct has been whether to recommend professional disciplinary sanctions for Labaton. In trying to strike a balance here, the Special Master recognizes that formal professional disciplinary sanctions for a firm like Labaton, which often represents public institutional investors with elevated standards of conduct for their outside counsel, could dramatically and adversely impact the firm's ability to provide legal services in its area of expertise, services which benefit both their class clients and often the broader public. Indeed, formal disciplinary proceedings could spell the end of the firm. Furthermore, as discussed in this Report, although the conduct here was of a serious and sustained nature and worthy of strong redress, the Special Master has noted that a number of the ethical and legal questions related to the conduct, particularly as to the Chargois payment, have been close calls and not always susceptible of easy resolution. Beyond this, the Special Master has noted that Labaton, as Lead Counsel for the class, helped to achieve a very laudable result for the class.

In weighing all of this in the balance, the Special Master believes that the monetary remedies recommended to address the Chargois conduct are proportionate and sufficient, and the more extreme step of recommending professional disciplinary action against Labaton and some of its lawyers is unnecessary to fulfill the objectives of what punishment should be in any case, which is sufficient to provide a measure of punishment

for the conduct, deter future conduct by both Labaton and other law firms, and cure any harm arising from the conduct, but not so extreme as to be disproportionate to the cause. The Special Master believes that a recommendation of professional disciplinary action, with its potential for bringing an end to the firm, would be a step too far. For these reasons, the Special Master recommends that no professional disciplinary action be taken.

Jurisdiction to Resolve Disputes Stemming from the Special Master's Recommendations

As between Labaton and Chargois, the Special Master takes no position as to how Labaton and Chargois should adjust their rights in light of the Special Master's findings and conclusions, and recommends that the Court not intervene. Although the Special Master believes that the underlying agreement between Chargois and the Labaton firm was questionable from its inception and holds the possibility of problems in the future, those issues should be left to be worked out, or adjudicated, among those parties.

The Special Master recommends that any disputes between the law firms or that involve the class that may arise out of the Special Master's Report should be subject to the continuing jurisdiction of this Court. The reasons for this are clear. The conduct that is the subject of this investigation took place in a case before this Court and the investigation and resulting Report and Recommendations of the Special Master was done at this Court's initiative and under this Court's supervision. Beyond this, if any dispute touches on the rights of members of the class, this Court has an ongoing fiduciary duty to the protect the class's interests. Given the lengthy history of this case and these

considerations, this Court is in by far the best position to adjudicate any resulting disputes.

Other Related Remedies and Issues

Costs of the investigation: Other than the allocation to the ERISA attorneys which is intended to include and cover their costs and fees incurred in this investigation, the customer class firms must each bear their own costs and fees for the investigation.

Although the Special Master is recommending that no professional disciplinary action be administered beyond Garrett Bradley, there nonetheless remains concern about future conduct by both Labaton and Thornton. The conduct uncovered in this investigation has not only been serious, it is endemic to the way these two firms have done business with their hyper-focus on business development and fee generation. In the case of Labaton, its almost obsessive secrecy and compartmentalization of responsibility -- with one part of the firm being completely in the dark about what another part of the firm is doing -- is in great measure what brought us to this investigation. Beyond this, its aggressive tactics in effectively hiring people to go out and solicit business, and paying them a finder's fee not only for a single case, but as a floating lien on all future cases, is disturbing in what it may portend for the practice of law. Further, although Labaton seems to have a competent General Counsel in Michael Canty (and, before him, Michael Stocker), they are not expert in the Rules of Professional Conduct. But, even if they were, Labaton attorneys apparently do not routinely consult with their General Counsel on ethics issues.

Thornton does not even have a General Counsel, much less an in-house lawyer well-grounded in the Rules of Professional Conduct. Further, Thornton has no established system or requirements for contemporaneous time-keeping so as to assure contemporaneous, accurate time-keeping. Nor does it have a process in place to evaluate, on a regular basis, and adjust if necessary, the firm's rates, unlike the other firms. As to its business development practices, Thornton lawyers appear to be largely unsupervised and unconstrained by the professional conduct norms. If Thornton is to continue to practice in large scale national class action cases, it needs to adopt policies and practices to ensure that it does not exceed professional conduct boundaries.

Going forward, both of these firms require someone from the outside to consult with them on professional conduct norms and to ensure that they comply with those norms. Whether the Court has the authority to order such a measure beyond this case is uncertain. However, both firms, and their clients, would greatly benefit from the imposition of on-going ethics supervision. The Special Master recommends that the two firms work with the Court to establish a consulting process that will ensure consistent ethical compliance. The Special Master notes that, according to a letter from counsel dated April 30, 2018, Labaton has already taken steps in this direction, and has taken additional steps to address the kinds of conduct that arose in this case. The Special Master recommends that Labaton continue its progress and take additional steps to build on these efforts.

Lessons Learned and Best Practices for the Future

This investigation has been a laborious, protracted, and painful process for all involved. But, beyond the remedies recommended here, it will have been a worthwhile undertaking if several lessons can be learned from the investigation and principles established for best practices in large class action cases. The Special Master sets out a number here, which are not intended to be an exhaustive list.

First, it appears everyone agrees that the practice -- to the extent anyone else did it -- of sharing costs by allocating attorneys to other firms who are not their employers and putting employees from one firm on another firm's lodestar petition is a recipe for confusion and mischief. While the need to share costs and the concomitant risk according to some formula in these large and protracted class actions is apparent, there are myriad ways this can be accomplished, just as there are ways to fairly share fees without allocating another firm's attorneys to a different firm as a means of "jacking up" that firm's lodestar petition.

Next, the practice revealed in this case of retaining a person to open doors to clients and then paying that person a percentage of every future case, whether or not that person does any work on a case or performs any services for the client, is unseemly and a violation of ethical rules -- even if that person happens to have a law degree. As observed elsewhere, it amounts to paying a finder's fee and providing that finder a floating lien on every case. Hopefully, this investigation will make clear the dangers to

the profession in these types of arrangements and these will cease to be an acceptable part of business development in our profession.

The Special Master here is admittedly an outsider to Massachusetts law practice with its own unique history and traditions. However, the practice of "bare referrals" – permitting a lawyer to receive a referral fee for doing no work and having no attachment to the case or the client -- seems to invite abuses such as the ones found here which blur the lines between legitimate referrals that promote the retention of more competent lawyers and those which cross the line to outright solicitation. One step that might be helpful would be if the Massachusetts Board of Bar Overseers and Massachusetts courts were to make clear that Rule 7.2(b) applies to lawyers and that lawyers cannot receive "fees" from other lawyers simply for recommending a lawyer, unless there were a valid agreement under Rule 1.5(e) consented to in writing by the client after being fully informed.

Final Thoughts on Remedies

The Special Master recognizes that not everyone will agree with the remedies and sanctions recommended here. Some may say they were overly harsh, given the result in the underlying case and that the conduct revealed here was largely only about how money was to be divided up among lawyers in a successful case. Further, the Special Master anticipates that the law firms and lawyers most rigorously redressed will likely disagree with at least some of the findings and recommended remedies.

On the other hand, the Special Master also recognizes that others may feel the recommended remedies do not go far enough to address some of the more egregious conduct. These people may criticize the recommendations by pointing out that even after the imposition of the monetary remedies recommended here, the Labaton, Lieff and Thornton law firms will still be left with not only their base lodestar claim, but a substantial multiplier. The Special Master calculates that even after the allocation of all monetary amounts, and the costs of the investigation, the customer class firms will still receive its base lodestar plus a significant multiplier. Beyond this, some will no doubt point out that even with all of the questionable conduct here, the total reduction in fees for the firms is only roughly 12%. To the man on the street, this may seem insufficient redress for the conduct identified. And, no doubt some observers will criticize the recommendations here for not recommending additional professional disciplinary action beyond that which is recommended here. These critics may well say that the Special Master has given a pass to some of the lawyers for some of the conduct by not recommending more extensive disciplinary action.

In response, the Special Master would point out that the intent here has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and the harm. In this context, the Special Master notes that the recommendations here, if followed, would return in a range of approximately $7.4 to $8.1 million to the class. Beyond this, the Special Master would remind critics that, despite the questionable conduct, the result achieved for the class was a very good one and that the lawyers

deserve great credit for that. The fact that the customer class lawyers retain a multiplier on top of their lodestar is an appropriate measure of their work on the case and the result they achieved.

Hon. Gerald E. Rosen (ret.),
Special Master

DATED: May 14, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,

Plaintiff, **No. 11-cv-10230-MLW**
Hon. Mark L. Wolf

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated,

Plaintiffs, **No. 11-cv-12049-MLW**

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on Behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated,

Plaintiffs, **No. 12-cv-11698-MLW**

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

EXECUTIVE SUMMARY

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Introduction

This investigation, conducted in the post-settlement phase of the case, has raised a number of significant issues that are important to the conduct and administration of large class actions generally and this case in particular. Among these issues are the appropriate rules and policies governing attorney fee petitions, the approach plaintiffs' counsel use in their fee petitions -- including appropriate billing rates -- and the obligations of lead counsel to act with candor and transparency toward their clients, the class, the Court, and co-counsel, in general, and as to any financial obligation that will be paid from class funds in particular. After a lengthy investigation, the Special Master finds that in several significant areas, the Court was not provided accurate and reliable information in the fee petitions and at the fairness hearing and, unfortunately, these failings had profound and adverse ramifications throughout the fee approval process. The redress the Special Master recommends at the conclusion of the Report is intended, to the extent possible, to remedy these failings.

At the outset, the Special Master makes two observations. First, the Special Master recognizes the important role class actions and plaintiffs' class action attorneys play in protecting and enforcing the rights of consumers, injured parties and the public in general. To adequately fulfill this role, class action plaintiffs require sophisticated, well-resourced attorneys who should be compensated at rates comparable to those of the large, sophisticated, well-resourced defense firms who will in the vast majority of cases be opposing them. Second, an equally important part of the class action framework is ensuring the integrity of the fee petition process. Because the fee petition process is often

non-adversarial, as it was in this case, for the system to work properly, honesty, reliability and transparency are essential to enable the Court to adequately fulfill its assigned gatekeeping and fiduciary responsibilities to class members. This case and the evidence adduced during the Special Master's investigation fully exemplifies the importance of both of these policy objectives.

The underlying case here was a class action alleging unfair and deceptive practices in conducting complex foreign exchange transactions and required highly skilled and sophisticated counsel. After much work, dedication and exceptional effort in the discovery and mediation process, the parties ultimately reached a $300 million settlement. Given the risks, complexities and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by skilled and dedicated plaintiffs' counsel, was an excellent result for the class. The Court approved the settlement on November 2, 2016. Of the $300 million, plaintiffs' counsel were awarded $74,541,250.00 in attorneys' fees and $1,257,699.94 for expenses. By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved.

Unfortunately, this investigation has shown that all other things were not equal. Almost immediately after approval of the settlement, the laudable result obtained for the class became tainted when questions began to arise as a result of media inquiries concerning the fee award which, in turn, caused the Court to appoint a Special Master to

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investigate and prepare a Report and Recommendations concerning all issues relating to the attorneys' fees, expenses and service awards the Court had approved in the case. The Special Master's investigation has spanned a period of some fourteen months and encompassed written discovery, the production of approximately 200,000 pages of documents, 34 witness interviews and 63 depositions. Beyond this, the law firms that were the subject of the investigation were given extensive opportunities to contribute to the legal and factual record through briefing, providing expert opinions and oral argument, input which was helpful to the Special Master in obtaining a more complete view of the factual, legal and ethical issues raised in the investigation.

The investigation is now complete. The Special Master's Report and Recommendations detail a mixed narrative of good intentions, great talent, and undeniable accomplishment and result, undermined by serious albeit inadvertent mistakes compounded by 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.

Exacerbating matters is the fact that this payment grew out of an obligation that long pre-dated the *State Street* case and was the sole obligation of one law firm -- an obligation that this law firm shifted to the class and to its co-counsel.

In short, this Report chronicles a lamentable and dismaying tale of a great result achieved by fine and highly effective lawyering that became tainted and entangled in a

web of concealment and highly questionable ethical practices by experienced attorneys who should have known better.

Having heard and considered the testimony of the witnesses, many of whom were designated as experts, and the arguments of counsel, and having reviewed and considered the parties' interrogatory responses, the documents they produced, and their supplemental submissions, the Special Master makes his Findings of Fact, Conclusions of Law, and Recommendations to the Court. To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that any Conclusions of Law constitute Findings of Fact, they are so adopted.

Overview of the Procedural Background

The underlying complex class action began as three separately-filed class action complaints against State Street Bank and Trust Company ("State Street") that were subsequently consolidated for pretrial purposes. Each of the actions alleged that State Street, as the custodian to individual institutional investors and pension fund accounts, engaged in unfair and deceptive practices in conducting "indirect" or "standing instruction" foreign currency exchange ("FX") transactions on behalf of its customers, without disclosure to its clients that these trades generated mark-ups that inured to the benefit of State Street. Following extensive discovery, resulting in document review of millions of pages of materials, coordinated with a protracted mediation process, all parties, including the governmental agencies, reached a global settlement of $300 million.

At the preliminary approval hearing on August 8, 2016, the Court certified a class for settlement purposes. The settlement class consisted of both institutional investors

who had accounts with Defendant State Street, the class representative of which was the Arkansas Teachers Retirement System ("ATRS"), (the so-called "customer class"), as well as institutional accounts representing ERISA pension plans whose accounts were held for investment by State Street, the class representatives of which were Andover Trust and four individuals, (the so-called "ERISA" class).[1] The Court had previously consolidated these separate actions for pretrial purposes, including discovery conducted concurrently with mediation (the "Hybrid Mediation"), which contributed greatly to the global settlement. In addition to the class members, the global settlement included several governmental agencies which had become involved with, although never formally intervened in, the *State Street* case, including the Department of Labor ("DOL"), the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"). Labaton, Sucharow LLP ("Labaton") had previously been designated Lead Class Counsel; separate lead counsel was not named for the ERISA portion of the settlement class, although in important ways, three law firms – Keller Rohrback, Zuckerman Spaeder, and McTigue Law -- performed what were essentially lead counsel functions for the ERISA "class."

At the November 2, 2016 fairness hearing, the Court approved the $300 million settlement for class members, as well as an award to all Plaintiffs' counsel of attorneys' fees. The attorneys fee award was based upon a Fee Petition submitted to the Court and

[1] The parties have at times colloquially referred to these two groups as the "Customer Class" and the "ERISA Class," and they had separate counsel representing them. However, they were never formally divided into separate classes or sub-classes, and were combined into a single settlement class for purposes of the fairness hearing and approval of the settlement and attorneys' fees.

supported by separate sworn declarations for all Class Counsel. The lodestar petition submitted by Plaintiffs' counsel claimed a total of 86,113 hours for nine law firms, and set out a lodestar claim of $41.3 million at the fairness hearing. Based upon representations made in the Fee Petition and at the fairness hearing, the Court awarded approximately $74.5 million in attorneys' fees, finding that award to be fair and reasonable using the percentage of fund method and cross-checking it against the lodestar value. The fee represented 24.8% of the total $300 million settlement fund. The total fee reflected a multiplier of 1.8 times lodestar, which the Court specifically found to be reasonable. The Court also awarded expenses of $1.2 million, including service awards to the plaintiff class representatives in an amount totaling $85,000.

By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class' law firms, a view with which the Special Master wholly agrees. Unfortunately, this laudable result for the class became tarnished when reports of irregularities in the attorneys' fee petitions began to surface shortly after approval. Following media inquiries to Plaintiffs' Counsel, on November 10, 2016, the Court received correspondence signed by Attorney David Goldsmith ("Goldsmith") of Labaton on behalf of the plaintiffs firms which revealed that the Fee Petition and accompanying submissions of a number of Customer Class Counsel law firms, contained "certain quantitative inaccuracies," essentially double-counting more than 9,300 hours of "staff attorneys'" ("SA's") time totaling over $4 million in lodestar fees for attorneys involved in the document review process. This occurred because the same hours for the same staff

attorneys were claimed on the lodestar reports of Customer Class firms Thornton Law Firm ("Thornton"), on the one hand, and either Labaton or Lieff Cabraser ("Lieff"), on the other hand. Goldsmith indicated in his letter to the Court that these inaccuracies were discovered "in the course of internal reviews conducted in response to a media inquiry," and that this double-counting was inadvertent.[2] Goldsmith Ltr Nov 10, 2016 to Hon. Mark L. Wolf.

Shortly thereafter, the *Boston Globe* reported on the "double-counting" issue addressed by Goldsmith, but also raised additional questions about the accuracy and reliability of the attorneys' fees, including issues regarding the rates charged for the staff attorneys and the "contract attorneys" (or attorneys booked through private agencies (referred to herein as "agency attorneys") as well as the work in the case by the brother of Thornton managing partner Garrett Bradley, Michael Bradley -- who was not employed by Thornton -- including the $500 per hour rate at which Michael Bradley's work was included in Thornton's lodestar.

On February 6, 2017, the Court responded by issuing an Order indicating it was considering the appointment of a Special Master to inquire into these reports. Following a hearing on March 7, 2017, the Order entered on March 8, 2017 appointing retired

[2] The letter did not attempt to explain how or why the double-counting had occurred -- only that it had occurred and that it was inadvertent.

federal judge Gerald Rosen as Special Master[3] to investigate and prepare a Report and Recommendations as to:

> the accuracy and reliability of counsels' fee petitions; (2) the accuracy and reliability of representations made in David Goldsmith's November 10, 2016 letter to the Court; (3) the accuracy and reliability of representations made by parties requesting service awards; (4) the reasonableness of attorneys' fees, expenses, service awards previously ordered and whether any of them should be reduced; and (5) whether any misconduct occurred in connection with the award of attorneys' fees, and if so, whether such misconduct should be sanctioned. Court's March 8, 2017 Order, pp. 2-3.

The Special Master has conducted his investigation consistent with the March 8th Order and with the Court's mandate firmly in mind. The investigation has consisted of discovery interrogatories, reviewing approximately 200,000 documents relating to the attorney fees petitions, conducting 34 witness interviews and 63 depositions of Class Counsel, class representatives, staff attorneys, expert witnesses and others involved in this matter. Pursuant to the authority of the Court's Order, the Special Master engaged William F. Sinnott of the firm of Barrett & Singal as his counsel, attorney John Toothman as a technical advisor and ethics expert Professor Stephen Gillers.

Unfortunately, the Special Master's investigation revealed additional serious issues beyond the double-counting disclosed to the Court by the Goldsmith letter and those raised by the *Boston Globe*, but which clearly fall within the scope of investigating the reasonableness of the award of attorneys' fees and the accuracy and reliability of the fee petitions, and are therefore included in this Report. The most significant of these

[3] Judge Rosen was appointed without objection by any of the law firms. One firm, the McTigue Law Firm, initially filed an objection to the appointment of Judge Rosen as Special Master, but withdrew the objection at the March 7, 2017 hearing.

issues, as will be discussed later in this summary, arises out of the nondisclosure of a $4.1 million payment made to a lawyer in Texas who never appeared in any way in the *State Street* docket and performed no work whatsoever on the case. The discovery of this concealed financial obligation, several months into the investigation, drove much of the remaining investigation and culminated in expert reports and testimony[4] implicating very serious questions of class action law, ethical obligations owed both among counsel and to the Court, and fundamental concerns about how Courts should be assisted by class counsel in fulfilling their fiduciary obligations to the class.

The overall investigation has revealed that the above-referenced inaccuracies, mis-statements and omissions of material facts were, in varying degrees, the responsibility of particular Customer Class firms and counsel, with some counsel -- particularly the ERISA lawyers -- bearing no responsibility for any of the inaccuracies, misstatements or omissions to the Court. Because each of the three Customer Class law firms bears widely varying degrees of responsibility for these deficiencies, the relative culpability of the Customer Class Counsel is addressed separately below. This summary next provides an overview of the Findings of Facts, Conclusions of Law and the Special Master's Recommendations, all of which are discussed in detail in the body of this Report.

Summary of the Special Master's Findings, Conclusions and Recommendations

As a starting point, the Special Master finds that, unfortunately, the Court was not provided accurate and reliable information in the Fee Petition and at the fairness hearing

[4] Reports and testimony were submitted by one expert retained by counsel for the Special Master and by eight experts retained by counsel for the customer class law firms.

in several key areas with respect to the attorneys' fees. As this was a fully consensual settlement with no objectors and with the defendants playing no adversarial role, the accuracy, reliability and completeness of the information provided to the Court in the fee petitions and at the fairness hearing was absolutely essential in order for the Court to properly and fully exercise its gatekeeper function to protect the class members, to whom the Court owes fiduciary duties under established law. *See Bezdek v Vibram, USA,* 809 F. 3d 78 (1st Cir. 2015). In this context, the Special Master's Findings and Conclusions are made more complicated and nuanced because, in varying degrees, the assorted categories of inaccuracies, misstatements and omissions were the responsibility of different Class Counsel firms.

As noted, some Class Counsel, including the ERISA counsel, bear no responsibility whatsoever for any of the inaccuracies, misstatements or omissions – and, indeed, were themselves the unknowing object of certain omissions -- while other firms bear different levels of responsibility for different aspects of the inaccuracies, misstatements and omissions. For example, Labaton, in its role as Lead Class Counsel, must bear particular responsibility for the misstatements as to the double-counting, although its responsibility on this issue is somewhat mitigated by the fact that the double-counting was unintentional and inadvertent, as Labaton's error was largely limited to failing to catch the duplication of the hours in the lodestar petitions of Labaton, Thornton and Lieff. Having said this, Labaton cannot be absolved of primary responsibility as it was Labaton's responsibility to ensure the accuracy of its Declaration and of the contributing declarations of the other firms in its role as Lead Counsel.

However, and much more troubling, Labaton failed to disclose to its client, to the class, to the Court, to the ERISA clients and counsel, and to the government regulatory agencies, that a significant portion of the attorneys fee award from the settlement fund would be paid to a lawyer in Texas who never appeared in the case, performed no legal services whatsoever, and whose existence was unknown to anyone beyond a few lawyers with the three customer class firms.[5] This payment derived from a contractual obligation Labaton incurred to this lawyer years before the *State Street* litigation commenced, an obligation which had nothing to do with the *State Street* case and which provided no value to the class or co-counsel. This obligation, which the three Customer Class firms later agreed would "come off the top" of the attorneys' fee award, along with the payments to the ERISA law firms and, would be shared equally among them upon settlement of the *State Street* case, resulted in this attorney, Damon Chargois, receiving 5.5 percent of the entire attorneys' fee award, totaling $4.1 million. It also resulted in Labaton being able to deflect its own obligation onto the class and co-counsel.

Before delving deeper into the various inaccuracies, misstatements and omissions and the relative responsibility for them, it bears repeating that together Class Counsel achieved an excellent settlement for the class for the reasons the Court recognized at the fairness hearing, including that the legal theory of the case was novel, the risks were great

[5] It appears that Labaton did not even fully inform the other Customer Class firms of the true nature of the obligation to this Texas lawyer, as several attorneys from Thornton and Lieff testified that they were led to believe that this attorney was serving as "local counsel" and had some active role in the *State Street* case. This, despite the fact that they had agreed to share in the payment to him. One of the attorneys from Lieff testified that, had he known of the true nature of the relationship, he would not have agreed to share in the $4.1 million payment, and would have encouraged Labaton to inform the Court of the obligation.

and counsel had successfully condensed combined document discovery and mediation in a truncated process and negotiated with counsel for State Street and with the government regulators to create a sizeable fund for the class.

Perhaps the most lamentable and dismaying aspect of this investigation is that this laudable result, achieved by fine lawyering, became entangled in a web of concealment, inaccuracies, and questionable ethical practices by experienced attorneys who should have known better. The very positive outcome achieved for the class cannot excuse the failings of the customer class law firms in discharging their duties of full candor and disclosure to the Court, to the class, to other counsel, and even to their own clients.

The Relative Responsibility of the Law Firms for the Double-Counting

As Labaton has conceded, the Fee Petition included double-counting of staff attorneys' hours by several firms; specifically, the same hours for the same lawyers -- largely at higher rates -- for the same work appeared in the Thornton lodestar, on the one hand, and in either the Lieff or Labaton lodestar reports, on the other hand. The explanation for this "oversight" begins with Thornton's inclusion of hours of staff attorneys (and several agency attorneys) who were employees of Labaton and Lieff and "loaned" to Thornton for document review purposes so as to spread the cost burden of the case across the three firms. In fact, the term "loaned" to describe the arrangement is itself a misnomer, as these attorneys were never in any sense working directly for Thornton. Rather, they were at all times supervised and housed at Labaton and Lieff. Thornton was

simply billed for the actual cost of these attorneys at periodic intervals, and paid these invoices.[6]

While there was never an explicit agreement among the three firms that Thornton would claim these hours on its lodestar, there was an apparent understanding among some (but not all) Labaton and Lieff partners to that effect. Each of the three firms bears different degrees of responsibility for the double-counting and, accordingly, the firms' respective roles are addressed *seriatim* here.

Lieff

Lieff, during the deposition of partner Dan Chiplock, has acknowledged that it made a mistake in claiming the hours of the staff attorneys and agency attorneys loaned to Thornton on its lodestar. Contemporaneous evidence also indicates that Lieff anticipated that its staff attorneys would be included on Thornton's petition. Notwithstanding this error, Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting. Lieff had, early in this litigation, agreed to the "loaning" of its staff attorneys and agency attorneys to Thornton as a means of sharing the costs and risks of employing these attorneys and the litigation as a whole. While the agreement to "loan" the staff and agency attorneys to Thornton was, perhaps, an ill-considered judgement since the cost-sharing of this case could have been achieved easily in other ways, it cannot be said that the agreement to

[6] The evidence indicates that Thornton lawyers never supervised or even met these staff attorneys and agency lawyers, as they worked in other cities, largely New York and San Francisco, while Thornton was based in Boston.

share costs through this mechanism was a significant cause of the double-counting. Thus, while Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent. [7]

Thornton

Thornton bears significant responsibility for the double-counting of hours and for the misstatements which contributed to these errors. The Thornton declaration, signed and sworn by attorney Garrett Bradley and filed in support of its fees, contains statements that are palpably false.[8] The assertions in the Bradley Declaration as to the staff attorneys and the agency attorneys are misrepresentations, since the attorneys that are the subject of the double-counting were neither employed by Thornton (unlike Labaton and Lieff) nor were the rates claimed "the same as …my firm's regular rates charged for their services," as represented to the Court in the Fee Petition. Nor were the hourly rates claimed in the lodestar, and the resulting lodestar calculations "based on their current billing rates." Bradley Declaration, ¶ 4. Indeed, they hardly could have been, since the staff and agency

[7] It bears emphasis here that none of the ERISA law firms knew anything about the agreement among the customer class law firms to "loan" the staff attorneys to Thornton, nor did they know of the cost-sharing arrangement, and certainly were not in any position to catch the double-counting of the staff attorneys time. The ERISA firms bear no responsibility for the double-counting.

[8] The Thornton declaration states under oath in paragraphs 3 and 4:

> 3. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation is based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request.
> 4. The hourly rate for attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

attorneys did not work for Thornton and could not have "regular rates" or "current billing rates" with that firm. The same is true of Michael Bradley, who was similarly not employed by Thornton and had no "regular rate" with that firm. Thus, to this extent, there is nothing "inadvertent" about these sworn statements to the Court; they are simply blatant falsehoods.

While Thornton reasonably asserts that Labaton and Lieff, not Thornton, mistakenly claimed the loaned staff attorneys' and agency attorneys' hours in their lodestars, its misleading Declaration contributed to this substantial billing error. It is probable that, had Thornton's petition contained fully truthful and accurate statements describing the actual affiliation and rates of the loaned staff attorneys and agency attorneys, Labaton Settlement Attorney Nicole Zeiss, or the Court, would have been alerted that something was amiss and thereby have detected the double-counted hours.

Notwithstanding the apparent informal agreement among the customer class firms to allow Thornton to claim the subject hours in its lodestar, this arrangement was ripe for confusion, error and abuse, and the three firms must share responsibility for agreeing to it. Indeed, the manner in which Thornton implemented this agreement appears designed from the inception to exaggerate its lodestar. Thornton specifically reimbursed the other two firms for the staff attorneys and agency lawyers "loaned" to them on a straight cost-only basis yet subsequently claimed them on its own lodestar report at rates much higher than Thornton had actually paid the two firms in cost reimbursement, and even higher hourly rates than Labaton and Lieff claimed for most of these same staff attorneys on their own reports. Moreover, discovery and deposition testimony reflects that Thornton

attorneys, particularly Garrett Bradley, were hyper-focused on attempting to increase, or "jack up," the Thornton lodestar in this case as a means of increasing the firm's ultimate claim for attorneys' fees.[9]

Additionally, Thornton bears further, and sole, responsibility for the inclusion of Michael Bradley's substantial time--over 400 hours at a rate of $500 per hour for a total cost of $203,200 in its lodestar petition. Michael Bradley's time is simply not supported by the declaration that his time was "the same as regular rates charged for [his] services." Not only was Michael Bradley not employed by Thornton and had no regular rate with that firm, his work is largely unverifiable as it was done in his free time at his office, not at Lieff or Labaton with all the other staff attorneys, and was done at irregular intervals, such as ten hours a week over several years when he had time to fit the work in. Further, unlike the Labaton and Lieff staff attorneys, Michael Bradley prepared no legal memoranda or deposition preparation files concerning issues in the case. Further, Michael Bradley lacked the relevant experience and expertise in massive document review that the Lieff and Labaton staff attorneys had, and it is not clear that he participated in the extensive case training provided to the staff attorneys from Labaton and Lieff. These facts, taken together, raise serious questions as to the level of any substantive contribution to the case on his part. In addition, although Bradley did perform the work on a contingency basis—and he accepted the risk that he would not be

[9] Other evidence received by the Special Master directly reflects a concern on the part of Bradley and Thornton to inflate their lodestar in this case, a result in part of a belief on Bradley's part that Thornton's lodestar was undervalued in the earlier-settled Bank of New York Mellon case, a similar foreign exchange trading fraud case in which both Thornton and Lieff were involved at the same time this matter was pending, and that he wanted to make up for this in the *State Street* case.

paid if there was no recovery--the fact that most of the matters he had been retained for in his practice were in the $55 to $250/hour range makes his $500/hour rate particularly unwarranted.

Labaton

Finally, as to allocation of responsibility for the double-counting, Labaton must bear ultimate responsibility. The Labaton lawyer with primary responsibility for preparing the fee petition, Nicole Zeiss, knew nothing of the agreement among the three firms to share costs through the invoicing to Thornton of the costs of the staff and agency attorneys because she was never told anything. To this extent, Zeiss had no advance knowledge of the arrangement such that she would have been on alert to scrutinize the petitions of the firms to ensure that there was no double-counting of staff attorneys' or agency attorneys' time on multiple lodestar reports.

Beyond this, as noted, there was never an explicit or written agreement by Labaton and Lieff to allow Thornton to claim the time for these attorneys on its lodestar, much less at the enhanced rates it claimed them. David Goldsmith, one of the lead Labaton lawyers responsible for prosecuting the substantive case and who also worked with Zeiss on the fee petition, testified that although he knew of some general agreement to "sponsor" the staff and agency attorneys to Thornton as a means of sharing the costs of the case, as far as he knew, there was never an agreement to allow Thornton to claim these lawyers on its lodestar report.

Thus, to the extent that the two Labaton lawyers most responsible for preparing the Fee Petition to the Court had no knowledge that Thornton might include the lawyers on its lodestar, the double-counting was "inadvertent" as to Labaton in this sense.

However, this only insulates Labaton from a finding of intentional misrepresentation or misstatement -- it does not ultimately excuse Labaton from responsibility for the double-counting. Labaton was Lead Class Counsel and as such was ultimately responsible for preparing an accurate and reliable fee petition that the Court could rely upon to perform its gatekeeping function and discharge its fiduciary duties to the class. This responsibility would surely encompass catching and rectifying any mistakes or misstatements -- and certainly those of the magnitude of 9300 double-counted hours totaling more than $4 million in lodestar. A careful cross-checking of the lodestar petitions of the firms would have revealed the double-counting. This was Labaton's responsibility as Lead Counsel, and it did not meet this responsibility. Thus, although the double-counting and resultant misstatements to the Court as to the total lodestar were not intentional, and the misrepresentations in the Thornton declaration likely contributed to the administrative confusion, it was, nevertheless, a serious mistake for which Labaton must bear ultimate responsibility.[10]

[10] As noted elsewhere, Labaton's responsibility is enhanced because, in a very real sense, its secrecy and compartmentalized approach to all aspects of its practice contributed greatly to the double-counting errors. As manifested here, the lawyer ultimately responsible for preparing all of the settlement documents, including the fee petition, was walled off from important aspects of the substantive prosecution and administration of the case; in the context of the administration of the case, Nicole Zeiss knew nothing about the arrangement between the three customer class law firms to share the costs of the case through the allocation of the staff attorneys and agency lawyers. This compartmentalization clearly contributed to the double-counting errors, as it did to other problems discussed elsewhere in this report.

Hours and Rates.

The Court has called upon the Special Master to determine the accuracy and reliability of representations made to the Court in connection with the fee petition and the reasonableness of the fees previously ordered.[11] In concluding that the amount of fees requested was reasonable, the Court reviewed in detail the relevant factors to determine reasonableness outlined in *Johnson v. Georgia Hwy. Express*, 488 F.2d 714 (5th Cir. 1974) and *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), highlighting the submission of the number of hours spent, the result achieved for the class, the novel theory pursued, the potential difficulty of achieving class certification, the global settlement reached with the ERISA class, the arduous discovery and mediation processes that proceeded in tandem, and the involvement and agreement of the regulatory bodies involved, namely the DOL, the SEC, and the DOJ.

But beyond these factors, including those used to guide the application of the percentage of fund and lodestar cross-check, any determination of the reasonableness of attorneys' fees depends entirely in the first instance on the accuracy and reliability of rates and hours submitted to the Court in the lodestar reports of the parties. As detailed in the Report, the Special Master conducted a comprehensive review of the billing hours submitted in the *State Street* case and the rates of the attorneys associated with the billings.

[11] The transcript of the November 2, 2016 Hearing bears out that the Court accepted Class Counsel's calculation of fees and expenses, including service awards to the plaintiff representatives, as 25.27% of the gross settlement fund. See 11/2/16 Hearing Tr., pp. 23-24; 35-36. The Court also applied the lodestar cross-check to the fees, and found the fees reasonable. Id. at 35-36.

The Special Master agreed with counsel that for a number of compelling reasons, including the complexity of FX trading claims, the need for counsel experienced in securities class action matters, and the inclusion of ERISA claims, national billing rates should apply to the work performed in the *State Street* case.

In determining whether the appropriate national rate was used in the *State Street* case, the Special Master considered that such national rates must be consistent with the rates typically charged by counsel practicing in the subject matter -- here complex securities/financial fraud litigation -- in those geographic markets where securities and financial fraud litigation are typically brought. Like regional rates, national rates should be commensurate with the legal rates for attorneys of comparable skill, experience, and reputation litigating substantially similar matters. Employing a variety of resources and considering a variety of indicia, the Special Master compared the rates charged in the *State Street* case for partners, associates, staff attorneys and contract attorneys with those charged in similar matters. In reviewing comparable rates and determining appropriate billing rates in this matter, the Special Master examined national surveys focused on the four major cities associated with the firms in this case: New York City, San Francisco, Washington, D.C. and Boston, and also received rate information from WilmerHale, which represented State Street in the litigation.

The Special Master recommends that, for the reasons summarized above and set forth in great detail in the Report, with the minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar reports were submitted to the Court are reasonable and accurate, and consistent with

applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff.

Contrary to the picture painted in the Boston Globe article, with the exception of Michael Bradley, whose work is discussed below, these staff attorneys did much more than "low level" document review. As noted, they all were attorneys with years of experience, and the majority of them had specialized knowledge or skills in FX/securities areas. A number of them had worked on BONY Mellon which raised similar issues to those in the *State Street* case. They all made substantive contributions to the case. They did not simply do first-level document review; they also digested complex information and prepared topical memoranda and witness memoranda for depositions -- the same kind of work done by associates at large firms. Rather than referring to them as staff attorneys, it would be more accurate to refer to them as "non-partnership-track" attorneys.

Adjustments should, however, be made to the following:

Michael Bradley, whose submitted rate of $500/hour is not supportable by his experience, the work he did on the case, or the value he contributed to the case, particularly in relation to the other staff attorneys.

Contract Attorneys: The law firms should not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be

reimbursed to law firms as an expense, and the firms compensated for that expense dollar-for-dollar.

Marking Up of Staff/Agency Attorneys' Lodestar Hours

Finally, no explanation is offered for the different hourly rates at which the staff attorneys and agency attorneys were billed in the respective lodestars, or the discrepancy of those rates with the representations in the various Customer Class Counsel declarations to the Court. For example, the Declaration of Labaton's Larry Sucharow contained representations to the Court that "the lodestar calculations [are] based … on their current billing rates." Sucharow Dec. Par. 176. These same representations are made in the Lieff and Thornton declarations as well. These staff attorneys were paid an average of $55, and included some agency (contract) attorneys, contracted with an outside agency for between $35 and $55 per hour. While strong arguments support marking up staff attorneys who are full-time employees of a law firm and similarly situated in relation to the qualifications of and the work product output of law firm's partnership-track associates -- who, of course, are routinely marked up -- there is not nearly the same justification for marking up outside lawyers who are employed by an agency and "rented" to a law firm for a specific task. As noted above, these agency lawyers are more in the nature of an expense and should be treated as such.[12]

[12] It is true that some courts have approved mark-ups for such agency attorneys, although largely without analysis or detailed discussion. This does not seem to be a sound approach-- particularly when marked up again by a multiplier of almost 2.0, as was done here--and is fully discussed in the Report and Recommendations.

Service Fees

Not everything about the Fee Petition was tainted. The Special Master specifically finds that the service awards to the class representatives were fully justified based on their participation in the preparation of the case, specifically in the discovery and in the mediation sessions and that the class representatives, and particularly ATRS Executive Director George Hopkins, added great value to the case and the eventual excellent result.

A Breakdown in the Role of Lead Class Counsel

Many of the problems in this case stem from the way in which Labaton internally divides and manages its work in cases in which it serves as lead class counsel. In exercising its role as Lead Counsel, Labaton compartmentalized the roles of its lawyers working on this matter, which led to an overall lack of oversight by Lead Counsel for the class -- a repeated pattern of one hand not knowing what the other hand was doing. The example of Nicole Zeiss, who acted as "settlement counsel," having a complete lack of knowledge of the cost-sharing arrangement with Thornton as to the staff attorneys and the agency lawyers has already been noted. That she did not have all the facts she needed in order to have the necessary awareness of the full picture during her review of the various Fee Petition documents to check for the possibility of such double-billing is a serious systemic fault of Labaton.

The case could be made that Zeiss and her team should nevertheless have caught the double-counting errors -- Labaton as lead counsel ultimately bears full responsibility for this error -- but Zeiss' job was made considerably more difficult by not having been told of the "loaning" arrangement in advance of preparing the Class Counsel Fee Petition.

While the problem was potentially exacerbated by the false statements in the Thornton declaration, which did not alert Zeiss (or the Court) that Labaton and Lieff's employees were being included on Thornton's lodestar, such compartmentalization clearly contributed to no Labaton lawyer catching the double-counting problem once another firm claimed those attorneys in its report. This separation of functions resulted in the firm providing little effective oversight as Lead Counsel. Rather, it is clear that at critical times in the litigation, the knowledge of one Labaton partner on a range of significant issues was never conveyed to other Labaton partners representing the class. Certainly, Lead Counsel must exercise greater diligence in their role to eliminate the possibilities for such oversights and to safeguard the class they represent.[13]

The Chargois Arrangement

Beyond the double-counting and lodestar misstatement matters discussed above, a more serious issue was discovered during the Special Master's investigation: Labaton had a pre-existing agreement with a Texas lawyer, Damon Chargois ("Chargois"), who years earlier had facilitated an introduction to ATRS for Labaton. In return, Labaton had promised Chargois 20 percent of all legal fees awarded Labaton for any case in which Labaton was lead, or co-lead, counsel, and ATRS was a lead plaintiff (the "Chargois Arrangement"). In this case, that previously existing agreement resulted in Chargois—who made no appearance, did no work, and did not participate in the case in any way,

[13] Another prominent example of Labaton's compartmentalization and secrecy involved the Chargois Arrangement, which will be discussed in the following section: Labaton lawyers claim to have left the Chargois Arrangement to Eric Belfi and Chris Keller as "relationship counsel." But, other attorneys such as David Goldsmith who were responsible for the substantive work on the case, were told nothing about the Chargois Arrangement.

receiving 5.5% of the total award of attorneys' fees, or $4.1 million, from the class settlement fund. As noted above, this previous agreement was derived from a contractual obligation which Labaton had incurred to this lawyer years before the *State Street* litigation commenced. This obligation had nothing to do with the *State Street* case and provided no value to the class or co-counsel. Rather, Labaton shifted this long-standing obligation onto the State Street class and its State Street co-counsel.

The investigation revealed that Labaton engaged in consistent, conscious, and calculated efforts to conceal Chargois from almost all participants in the *State Street* litigation: its client, the class, ERISA counsel, and most importantly, the Court, who assumed a fiduciary role to protect absent class members. Labaton even failed to fully inform its Customer Class co-counsel, who were sharing equally in the $4.1 million payment to Chargois, of Chargois' actual role (or lack of a role) in the *State Street* case.

The three Customer Class law firms did agree to share this obligation, one-third each, and agreed it would come "off the top" of the total award of attorneys' fees, along with the fees for ERISA counsel, from the common fund. Further, the Customer Class Counsel specifically agreed that the Court need not be told of the allocation of fees, which meant that the Court would not be told of the Chargois Arrangement, notwithstanding that the Court specifically asked about attorneys' fees at the fairness hearing, albeit not specifically the allocation itself.

The Customer Class Counsel further agreed that the ERISA Counsel -- and, therefore, the ERISA party representatives -- should also not be told of the Chargois Arrangement or the payment of class settlement funds to Chargois. This is significant

because ERISA Counsel testified that had they known of the Chargois payment and its history, they would have been obligated to tell their clients and they believe their clients would not have agreed. They also testified that had they known of the Chargois Arrangement and payment, the ERISA Attorneys would not have agreed to the fee allocation that provided them 9% (later 10%) of the total attorneys' fee award, in amounts that meant Chargois would receive considerably more than any ERISA law firm that worked on the case and contributed great value to the class.

Beyond this, because ERISA Counsel Lynn Sarko was the lawyer responsible for dealing with the DOL, the decision not to tell ERISA counsel about Chargois also meant that DOL would not be told of the Chargois payment. This was a particularly critical omission, with far-reaching ramifications. ERISA Counsel, and the DOL, were instrumental in effectuating the global settlement reached in this case. ERISA Counsel have uniformly testified that if they had known that $4.1 million of the settlement funds would be paid to a lawyer who performed no work on this case, not only would they not have settled the matter, they would have told the DOL of the agreement with Chargois, and they believe the DOL would not have agreed to settle. This fact is important because State Street was insisting on a global settlement, including with the ERISA claimants and the government agencies, and State Street would not have been willing to settle without these government agencies', and especially DOL's, agreement to the terms.

While Labaton attempts to justify the payment to Chargois as arising from Chargois' introduction of a Labaton attorney to an ATRS official in 2008, and hence in the nature of a "referral fee," the Chargois payment fits none of the elements of a referral

fee. First, the Chargois obligation was not disclosed to the ATRS client -- nor to the ERISA parties -- and cannot be justified as anything other than what it was: an undisclosed obligation of Labaton in the nature of a continuing "finder's fee" to use class funds to satisfy its own pre-existing obligation. In addition to not disclosing the Chargois Arrangement to George Hopkins, the ATRS Executive Director and class representative of Labatons's client, ATRS, Labaton further failed to disclose that ATRS specifically declined to accept Chargois in a joint-bid made with Labaton to be monitoring counsel for ATRS, making the Chargois Arrangement even more material.

In fact, Labaton has paid fees to Chargois in nine other class action cases in which it served as lead counsel, not disclosing to ATRS the payments in eight of the cases. In only one such matter did Chargois file an appearance; in each of the others, his role was the same as in this case -- he filed no appearance, was unknown to the client, did no work in the case and, even though the settlement fund was used to pay his fee, his payment was not disclosed to the Court.

This Arrangement, and the failure to disclose it and the $4.1 million payment from class funds, to the Court, to the class, to the clients, to the government regulatory agencies and to ERISA counsel, is the most troubling aspect of this investigation and raises serious and profound questions about the accuracy and reliability of the Fee Petition and the individual declarations supporting it, as well as the reliability of Labaton's November 10, 2016, letter to the Court, in which Labaton again did not disclose to the Court the Chargois relationship and payment, despite that the November

10th letter provided a natural opportunity to advise the Court of any additional irregular or unusual aspects to the Fee Petition beyond the inadvertent double-counting of hours.

The Special Master believes that if the Court had been fully apprised of the obligation and all the attendant facts, including the lack of participation of Chargois and the nondisclosure to the client, the class and the ERISA parties, the Court would have raised serious questions about the Chargois payment and would have had deep reservations about approving it. At a minimum, the Special Master believes that the Court would have insisted that the class members be informed and given the opportunity to object.

What follows is a summary overview of the legal and ethical framework that informs the findings set out in this Report that Labaton failed in its duties to inform its client, the class, co-counsel/ERISA counsel, and the Court.

Duty to Inform the Client

We begin with Labaton's duties to its direct client, ATRS. As with any client, Labaton had a fundamental duty to keep ATRS reasonably informed about the status of the *State Street* matter. Mass. R. Prof. C. 1.4(a)(1)(3). In the context of a class action case, a class representative, like ATRS, must be given the information it needs to adequately perform its fiduciary duties to the class. Fed. R. Civ. P. 23(a)(4). This includes who will receive a portion of the final settlement award funding the common fund. Thus, Labaton had a duty to inform ATRS as its client, and even more so as a representative for the class, that Chargois would receive 20% of Labaton's share of the total fee award. Massachusetts Rule 1.5(e), governing attorney conduct as to fees, speaks

directly to this issue and imposes an unequivocal duty to secure client consent before dividing fees with lawyers outside the firm. By failing to fully inform Hopkins or ATRS of the Chargois Arrangement, in detail, Labaton breached its duty to inform its client, ATRS, as set forth in Rule 1.5(e). For reasons detailed fully in the body of this Report, the Special Master rejects Labaton's experts' strained explanation that Labaton satisfied, if only imperfectly, the Rule as written in 2011, through its piecemeal notice to the client in 2007-2008[14]or through the vague and generic language of its February 8, 2011, engagement letter with ATRS.

Nor are we persuaded that George Hopkins' statement to Belfi that he did "not want to know" (or otherwise be involved with the specifics of Labaton's fee agreements) relieved Labaton of its ethical obligation to inform ATRS about Chargois. A client's request not to be informed does not constitute consent under Rule 1.5(e). Even Labaton's experts acknowledged that a client's desire, however explicit, not to know certain facts does not relieve lawyers of their ethical duty to inform that client of fee-sharing. Such burden-shifting is especially inappropriate where the client is serving in a fiduciary role and owes ethical duties of his own to the class he represents. In that sense, a client like Hopkins speaks not only for himself but for the absentee class members, a duty that the record shows Hopkins took very seriously. Labaton, therefore, had a clear obligation to affirmatively inform Hopkins of the critical details of the Chargois Arrangement -- that Chargois would receive considerable payment if Labaton successfully recovered fees,

[14] The Chargois and Heron law firm appeared with Labaton on a joint application to be one of a ATRS' monitoring counsel. Labaton was accepted; Chargois and Heron was not.

though he had no obligation to work on the case -- and secure his written consent. Hopkins' instruction to Belfi did not waive that critical duty, much less rise to the level of informed consent contemplated by Rule 1.5(e).[15]

Although the Special Master believes that Labaton had a professional obligation to tell its client ATRS, a class representative, the salient details of the Chargois Arrangement so that the client could make an informed determination as to whether to give consent and as to how this might impact its obligations as class representative, rather than taking measures to keep the information from the client, the intersection of the law and the facts in this matter does not rise to the level of requiring disciplinary action. The obligations to the client, and the timing of them, were simply too unclear at the time to merit the imposition of professional discipline or any kind of disciplinary sanction.

Closely related to the issues surrounding Rule 1.5(e) are questions of whether Labaton violated Rule 7.2(b), the rule forbidding a lawyer from giving "anything of value to a person for recommending the lawyer's services." The reason Rule 1.5(e) is implicated in this discussion is that subsection (5) of Rule 7.2(b) includes an exception to the prohibition of paid recommendations for valid division-of-fee agreements under Rule 1.5(e). Rule 7.2(b)(5). In other words, if there is a valid division-of-fee award under Rule 1.5(e), it is permissible to pay a lawyer for recommending another lawyer without implicating Rule 7.2(b)'s proscriptions.

[15] A Declaration filed by Hopkins at the end of the investigation reporting that he had told Eric Belfi not to inform him of fee allocations and purporting to ratify on behalf of ATRS the Chargois payment, does not cure the problem and it obviously cannot speak for the class.

As noted, Professor Gillers believes that there was not compliance with Rule 1.5(e) and, therefore, goes on to analyze whether the Chargois Arrangement, and the history of how the Arrangement began, constitute a violation of Rule 7.2 (b). He believes that there was a violation. Contrary to the opinions of two of Labaton's experts (Wendel and Lieberman) -- who believe that Rule 7.2(b) does not apply to lawyers at all because a lawyer is not a "person" for purposes of the Rule -- Professor Gillers opines that payments by a lawyer to another lawyer for recommendations that do not comply with Rule 1.5(e) are within the proscriptions of Rule 7.2(b). In other words, Professor Gillers believes that a lawyer is a "person" under the Rule. Professor Gillers, commonsensically, points out that if the word "person" was intended to exclude lawyers from its ambit, there would be no need for the exception in Rule 7.2(b)(5) for fee agreements that divide fees between lawyers. Beyond this, the Rule or its comment use the word "non-lawyer" five times, and if the drafters of the Rule wished to limit the category of covered persons to non-lawyers, they would have used the word non-lawyer, rather than "person." Thus, the purpose of using the word "person" was to make clear the Rule covered both lawyers and non-lawyers.

Further, Labaton's experts say that the entire history of the Rule was directed toward advertising and solicitation for lawyers by touts, taxi drivers and other non-lawyers, and was not intended to cover recommendations by a lawyer to others for the services of another lawyer. Therefore, as noted, they reason, a lawyer is not a "person" within the meaning of the Rule. Two experts (Joy and Green) opine further that because the Rule covers only the "recommending" of a lawyer's services, and what Chargois did

was to introduce Labaton to ATRS and facilitate a relationship, the Chargois Arrangement is not the product of a "recommendation" and, therefore, not covered under the Rule. Finally, and more persuasively, two of Labaton's experts (Green and Lieberman) pointed out that a lawyer has never been disciplined in Massachusetts under Rule 7.2(b) for paying another lawyer for "recommending" that lawyer and there are no cases in Massachusetts -- or in fact in any jurisdiction in the country -- that have ever been brought against a lawyer for this type of a violation of Rule 7.2(b).

In the Conclusions of Law section, the Special Master finds that Professor Gillers has the stronger argument on this point as a strict matter of law and statutory construction. In reaching this decision, it resonates with the Special Master that the Rule creates a specific exception for valid fee divisions between lawyers and if lawyers were not intended to be covered by the Rule, this exception would be unnecessary. When one of Labaton's experts (Professor Green) was questioned about this, he simply said the language was "surplusage"; another expert (Mr. Lieberman) said it was "redundant" drafting. The Special Master cannot accept these rather facile explanations -- one must presume that drafters of laws mean what they say and do not adorn statutes, regulations and rules with unnecessary language -- and finds that Rule 7.2(b) covers recommendations made by lawyers for the services of other lawyers, unless there is compliance with Rule 1.5(e). Further, after a careful review of the record, the Special Master is persuaded that the entire origin and nature of the Chargois Arrangement fit easily within the ambit of Rule 7.2(b) and, therefore, the payments by Labaton to Chargois for his recommending of Labaton at the inception of the Labaton/ATRS

relationship falls within Rule 7.2(b)'s proscriptions. Therefore, because, as discussed, the fee division agreement did not comply with Rule 1.5(e), the entire Chargois Arrangement violated Rule 7.2(b).

However, this does not end the discussion, as it begs the question of whether professional discipline is merited to address the conduct. The Special Master concludes that it does not, for several reasons. First, as noted, the question of compliance with Rule 1.5(e) is a very close question upon which reasonable experts and lawyers may differ and if there was compliance with that Rule, there was no violation of Rule 7.2(b). Because the violation of Rule 1.5(e) found here does not merit professional discipline, it would be hard to say that the connected violation of Rule 7.2(b) merited discipline. Beyond this, the Special Master is struck by the fact that apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer under Rule 7.2(b) for paying another lawyer for a "recommendation." Although Professor Gillers analysis and opinion makes absolute sense, this goes to the question of notice to the practicing bar. Perhaps going forward, if the Court adopts Professor Gillers' and the Special Master's views on this Rule, the practicing profession will be on notice that bare recommendations that are not made pursuant to a valid division-of-fee agreement under Rule 1.5(e) could subject lawyers to discipline under Rule 7.2(b). But, because this appears to be an issue of first impression and not one of which the profession might have been well- advised in advance, it would not be appropriate to impose professional discipline in these circumstances. Accordingly, no professional discipline or sanctions is warranted here and none is recommended.

Duty to Inform the Class

Labaton was Lead Counsel for the class and therefore owed a fiduciary duty to inform the unnamed customer and ERISA members of the class, whom they represented after the Court certified the class for settlement purposes on August 8, 2016, of the existence of the Chargois Arrangement and its terms, including that an attorney who did no work on the case would receive $4.1 million from the settlement fund. The unnamed members of the certified class were entitled to know about the Chargois Arrangement before they were called upon to decide, with the benefit of legal advice if they desired, whether to opt out or object to the settlement or to the fee request made by Customer Class Counsel. Both decisions would precede the Court's decision on any fee award.

On August 8, 2016, David Goldsmith of Labaton appeared before Judge Wolf for the "plaintiffs and the settlement class." Michael Thornton of Thornton and Daniel Chiplock of Lieff Cabraser appeared for the same clients. "We are here," the Court said, "with regard to the motion for preliminary certification of class action and preliminary approval of the proposed class settlement." The Court concluded that it was "appropriate to certify a class for settlement purposes." It then certified "the proposed class for settlement purposes only."

Previously, in January 2012, the Court had appointed Labaton as "interim lead counsel to act on behalf of all plaintiffs and the proposed class," and had appointed Thornton as "liaison counsel for plaintiff and the proposed class" and Lieff Cabraser to "serve as additional attorney for the plaintiff and the proposed class." When the Court

certified the settlement class on August 8, 2016, the firms continued to hold these positions.

Once the class was certified (if not before), there was an attorney-client relationship between class counsel and the absent class members; at least as of August 8, 2016, Class Counsel Labaton, Lieff, and Thornton had attorney-client relationships with the certified settlement class and its members.

As fiduciaries and lawyers for the unnamed certified class members -- and lawyers are fiduciaries for their clients as a matter of law -- customer class counsel had a duty to give their clients information relevant to decisions that belonged to the client. One of the most significant decisions that belongs to a client is whether or not to settle a case. This is the very decision the Notice of Pendency presented to the recipients -- i.e., whether to settle on the terms in the Notice or to object. Under Fed R. Civ. P. 23(e)(2), the settlement must be "fair, reasonable and adequate," and under Fed. R. Civ. P. 23(e)(5), class members must have the right to object to the settlement. According to Lieff's expert Prof. Rubenstein, "notice must be sufficiently clear and informative to make those opportunities meaningful."[16]

The right of class members to make an informed decision on whether to object to a fee award is not simply a procedural safeguard. Rather, and significantly, it is grounded in counsels' ethical duties under the Rules of Professional Conduct. Mass. R. Prof. C. 1.2(a) provides in part: "A lawyer shall abide by a client's decision whether to accept an

[16] Counsel's independent obligation of disclosure under Rule 23(e)(3) is discussed in this summary *infra* under Duties to Inform the Court.

offer of settlement of a matter." Mass. R. Prof. C. 1.4(a)(1) provides: "A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f) is required by these Rules." Mass. R. Prof. C. 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.0(f) provides: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See also Restatement (Third) of Law Governing Lawyers* (2000), §§ 20(3) and 22(1).

Here, class members were told their "legal rights," which included their right to object to the anticipated fee application, but they were not given material information that could reasonably have prompted an objection.[17] The class members could assume that ATRS was fulfilling its fiduciary duties to the class but ATRS did not know about the Chargois Arrangement. The Notice told them that the Court had appointed Labaton Sucharow for the Settlement Class, of which they were told they were members. They could rightfully assume that Labaton was protecting their interests as its clients. However, Labaton had chosen to withhold important information that might have prompted objections. Labaton's decision to do so placed its own interest in discharging the pre-existing obligation to Chargois ahead of its client's (the class's), and thereby

[17] Supporting the fact that the Chargois payment was material is the testimony of ERISA counsel Lynn Sarko that, had he known of it, he would have had to tell his class representative clients and that he believes they would not have agreed to the payment.

deprived its client the class members of a meaningful opportunity to be informed and potentially to object. In this, Labaton failed in its duty to the class, and shifted its own obligation to Chargois – which contributed no value to the class – onto the class.

Duty to Inform Co-Counsel

Labaton's evasion of is disclosure obligations extended to and materially affected both its fellow customer class counsel and the ERISA counsel -- all of whom relied significantly on Labaton in its role as court-appointed Lead Counsel-- by preventing the Co-Counsel firms from executing their own duties to the Court, to their clients and to the class. Moreover, Labaton's neglect of its duties as Lead Counsel, and its conscious effort to conceal the existence, or true nature, of the Chargois obligation, prevented the Co-Counsel firms from meaningfully assenting to the fee allocation arrangements to which they ultimately consented on the basis of misinformation or outright omission. Labaton's failures in its duties as thus prevented its co-counsel from carrying out their own obligations in the *State Street* litigation, and call into serious question the validity of multiple fee agreements reached between the firms.

Testimony provided during the investigation confirms that that the nondisclosure or incomplete disclosure was also significant to Labaton's co-counsel. Attorney Robert Lieff, for example, testified that he would not have agreed to share in the Chargois' payment had he known that Chargois was providing no legal services and adding no value, in the *State Street* case. Lieff also testified that "it would have been appropriate to convince Larry [Sucharow] or his firm to go to the Court and tell the Court what we have here." As noted, ERISA Counsel testified that they would have proceeded differently in

multiple material respects – including disclosing the Arrangement to their clients and to government agencies had they been aware of it, as well as not agreeing to the 9% (later 10%) allocation of fees to ERISA Counsel.

In response, Labaton has maintained that it had no obligation to disclose the Chargois Arrangement to ERISA Counsel because the agreement had no impact on ERISA Counsel's fee, and that it had no duty to disclose further details to Lieff and Thornton because those firms had a sufficiently detailed understanding of the agreement. Here, Labaton's position is circular and ignores the important duties the firm owed to its co-counsel firms. The only reason Labaton's nondisclosure may not have impacted ERISA Counsel's fees is the fee agreement -- but that agreement was reached in the absence of knowledge of the Chargois payment.

General principles of fairness and professional responsibility toward co-counsel, and toward the Court, suggest that Labaton was required to disclose the Chargois Arrangement to co-counsel, as do contract and equitable principles. Co-counsel in a large class action litigation share responsibility to the clients and to the class. The co-counsel firms here relied heavily on Labaton to effectively carry out their own duties to each of these groups. To the extent that Labaton's nondisclosures affected the ability of other firms to carry out their duties to the class, and, in the case of the ERISA Attorneys, to their clients the ERISA class representatives, Labaton failed in its responsibility as Lead-Counsel to act fairly and in the interests of all parties and their counsel.

Contract and equitable principles may also be applicable to the enforceability, or voidability, of the fee sharing agreement among Customer Class Counsel, and the

agreement between the Customer Class Counsel and ERISA counsel. This may be especially apt in circumstances where, as here, Co-Counsel relied upon Lead Counsel to provide timely and accurate information in negotiating their fee agreement, and the failure to fully inform Co-Counsel of the Chargois Arrangement and payment was a material omission.

Finally, Labaton's calculated concealment of the Chargois Arrangement from ERISA Counsel also put counsel in a risky and untenable situation with respect to DOL and the other two government agencies who participated in this settlement. By its material omissions, Labaton failed in its duty to inform co-counsel of the Chargois Arrangement.

Duty to Inform the Court

Perhaps most importantly, Labaton had a duty under the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct, as well as under federal case law, to fully disclose the Chargois Arrangement to the Court. Labaton's failure to disclose the Chargois Agreement to the Court is perhaps the most serious and far-reaching of all the breaches of duty. Courts serve as the final backstop and gatekeeper in protecting class members and in our class action system; this is a fiduciary duty of the Court to the class members.

Full and accurate disclosure to the Court is the underpinning of Fed. R. Civ. P. 23(e)'s requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement and any attendant fee petition, Fed. R. Civ. P. 23(e)(5) and (h)(2). As with the

right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. Unfortunately, by not disclosing to the Court that $4.1 million of the settlement funds would be paid to an attorney who did no work on the *State Street* case, on account of a pre-existing obligation of the class's lead counsel -- an obligation which provided no value to the class -- Labaton deprived the Court of information it needed to discharge its fiduciary obligations to protect the class's interests.

Professor William Rubenstein has opined in this case that the failure of the class to be informed of the Chargois payment is entirely the Court's responsibility. This is because Rule 23(h), by its incorporation of the procedures for making a claim for attorneys' fees under Fed. R. Civ. P. 54, places the entire burden on the Court to order disclosure of a fee agreement such as the Chargois agreement in this case, and, absent such a court order, disclosure is not required. In other words, it is Professor Rubenstein's position that the Court must order disclosure, or at least ask the attorneys about fee allocations, and if it does not order or ask, class counsel have no duty to disclose such payments. However, separate and apart from Rule 23(h) and its incorporation of Rule 54 procedures for making a claim for attorneys' fees, Fed. R. Civ. P. 23(e)(3) requires that "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money that they may have received elsewhere. *Manual of Complex Litigation* (4th ed.) § 21.631.

In his treatise, Professor Rubenstein also recognized counsel's independent obligation of disclosure under Rule 23(e)(3). Section 15.12 of *Rubenstein and Newberg on Class Actions*, entitled, "Fee procedures at a class action's conclusion -- Disclosure of fee-related agreements requirement," first speaks to the (obvious) requirement to disclose any agreements as to fees when so ordered by the court. The Section goes on to recognize, however:

> [I]n addition to Rule 54's disclosure requirements, Rule 23(e) governing class action settlement -- not fee -- approval states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal."

Rubenstein and Newberg on Class Actions, § 15.12 (5th ed.) (footnote omitted).

Although Rule 23(e)(3) references the settlement agreement itself, Professor Rubenstein then goes on to observe that

> given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself -- such as any agreements about fees -- may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests. There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class. . . . Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.

Id.

This was certainly such a case. With its burden-shifting of a pre-existing obligation of Labaton to the class, the Chargois Arrangement affected the class's interests

in this case as it "allocates money that the class members may have received elsewhere," i.e. to Damon Chargois.

Here, we have an undisclosed agreement to pay $4.1 million out of the settlement funds -- funds that could otherwise be allocated to the class members -- to an attorney who did no work on the case whatsoever. In order to assist the Court in performing its fiduciary function to protect the interests of the class, Labaton was obligated to disclose to the Court its pre-existing agreement to pay Chargois this substantial amount of the settlement fund. Labaton's failure to do so was in derogation of the duties imposed upon it by Fed. R. Civ. P. 23(e)(3).

The Special Master has considered at length whether Labaton's failure to disclose Chargois' role and the agreement to pay him $4.1 million in the fee petition should be sanctionable under Fed. R. Civ. P. 11. While at least one court of appeals has found that Rule 11 applies both to disclosures and material omissions, the First Circuit has not, nor has any district court in the First Circuit, and, together with other arguments and factors raised by counsel to Labaton, the Special Master finds it must stop short of finding a violation of Rule 11 in Labaton's nondisclosure of the Chargois Arrangement.

But this does not end the analysis of whether Labaton breached duties to the Court. As part of his Lead Counsel obligation in this case, Lawrence Sucharow of Labaton filed a "Declaration in Support of Plaintiff's Assented-To Motion for Final Approval of the Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for Award of Attorney Fees." *See* Dkt. No 104. In that Omnibus Declaration, in two separate places, at footnotes 2 and 6,

Sucharow purports to identify all of "Plaintiffs' Counsel." In footnote 2, Sucharow identifies as "Plaintiffs' Counsel," his own firm, Labaton Sucharow, and "the Thornton Law Firm LLP ("TLF"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), McTigue Law LLP ("McTigue Law"), and Zuckerman Spaeder LLP ("Zuckerman Spaeder")", *id*., n. 2, at p. 1. In footnote 6, Sucharow identifies Labaton Sucharow, TLF, Lieff Cabraser, Keller Rohrback, McTigue Law, Zuckerman Spaeder, as well as, Beins, Axelrod, P.C. (which partnered with McTigue Law and Zuckerman Spaeder in representing the Henriquez plaintiffs); Richardson, Patrick, Westbrook & Brickman, LLC (former co-counsel for Henriquez plaintiffs); and Feinberg, Campbell & Zack, P.C. (local counsel for McTigue Law in the Andover action). *Id.*, n. 6, at p. 41. In Keller Rohrback's Declaration, Theodore Hess-Mahan of the Massachusetts firm of Hutchings Barsamian Mendelcorn LLP is identified as Keller Rohrback's local counsel. Within Labaton's lodestar report attached as Exhibit A to Labaton's individual fee declaration at Dkt. No. 104-15, Sucharow further identifies fees paid to an "of counsel," P. Scarlato (Paul Scarlato of Goldman Scarlato, a Pennsylvania law firm).

On the surface, these Declaration statements could lead the Court reasonably to believe that these are all of the lawyers being paid from class funds. However, there is one lawyer who was paid from class funds who is not mentioned anywhere in Sucharow's Omnibus Declaration, in Labaton's individual fee declaration -- which was also signed by Lawrence Sucharow -- or in Labaton's lodestar and reports annexed thereto. That one lawyer is Damon Chargois.

Sucharow has admitted that he knew of the obligation to pay Chargois a portion of the *State Street* fee award at least as of 2015; the Fee Petition was filed on September 15, 2016. The Special Master finds that this nondisclosure was considered and deliberate.

In deciding the amount of fee to award Class Counsel -- and to whom to award it -- the Court, as a fiduciary for the class, including unnamed class members, needed first to know -- and Sucharow and Labaton had a duty to tell it -- who would be participating in any fee the Court in its discretion might award from the class recovery, and the basis for the claim. By not disclosing the intended payment of $4.1 million to Chargois, Sucharow and Labaton kept the Court in the dark and denied it the very information it needed to decide how much of the settlement funds should go to counsel, and which counsel, and how much should go to the class. As Professor Gillers observed, "[q]uite simply, until the Court made that decision, there was no fee to divide." Gillers Report at p. 73. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the class funds to Chargois, who never appeared and who did no work, made no contribution whatsoever to the success of the *State Street* litigation, and whose only connection to the case was through Labaton's own pre-existing obligation, and instead to direct that the money intended for Chargois should instead go to the class. The Court, however, never had an opportunity to make that decision because of the material omission of Chargois from Sucharow's Declaration.

Beyond any obligation for disclosure under the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct required disclosure to the Court. Mass.

R. Prof. C. 3.3 imposes upon attorneys practicing in Massachusetts a "duty of candor toward the tribunal." Rule 3.3(a) provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

Comment [3] to Rule 3.3 makes clear that an attorney's failure to make a disclosure in an affidavit or in open court can be the equivalent of a misrepresentation within the purview of Rule 3.3(a).

That Sucharow had a duty to disclose the Chargois Arrangement to the Court is made even more clear by Comment [14A] to Rule 3.3, which provides:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit . . . the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Mass. R. Prof. C. 3.3, Cmt. [14A]. Proceeding from Comment [14A] takes us to Rule 3.3(d), which provides:

> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

In addition to Rule 3.3 of the Massachusetts Rules of Professional Conduct, there is also an overriding general duty of candor owed by attorneys as officers of the court. As noted by Professor Gillers, while "the phrase 'candor to the Court' is not an unbounded source of duty, entirely untethered to rules, custom, or case law. . . the word 'candor' should at least guide a lawyer's understanding of his or her duties as officers of the court." This broad duty of candor has been recognized by the First Circuit, which, in *Pearson v. First NH Mtg. Corp*., 200 F.3d 30 (1st Cir. 1999) cited the Fourth Circuit in *United States v. Shaffer Equipment Co*.,11 F.3d 450, 457 (4th Cir. 1993), in which the court said, "[T]ruth is the object of the system's process…of dispensing justice…Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process."

It is for all of these reasons that the Special Master concludes that through his failure to disclose the $4.1 million Chargois Arrangement, Sucharow violated his duty of candor as an officer of the Court, and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class.

Special Master's Recommendations

Before detailing the Special Master's recommendations to provide remedies and redress for the conduct identified in this Report, the Report provides a preamble as context. One of the most troubling elements of the Chargois aspect of the investigation has been Labaton's response to the discovery of the conduct revealed in the investigation. Quite simply, the response is inappropriate and insufficient in light of the severity and

pervasiveness of the conduct. There has been no acceptance of responsibility for the calculating and secretive nature of the conduct and its adverse ramifications. There has been no expression of contrition. There has been no expression of remorse. And there has been no expression of apology to the client, to the class members, to co-counsel or to the Court.

Instead, Labaton has met the Special Master's inquiry into the Chargois Arrangement and the $4.1 million payment with a phalanx of experts, who together with Labaton, have erected a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court). Although Labaton certainly has a right to present its best case -- and its arguments have been considered and, in some instances, used to inform the Special Master's findings and recommendations to the Court -- some acknowledgement of the potential harm this conduct has caused to class members, co-counsel and the Court would have been not only appropriate, but expected. Instead, Labaton and its experts have taken positions that speak only to its legal defenses, and not to what is in the best interests of class members. This approach is as disappointing as it is indicative of the culture of compartmentalization and concealment at Labaton that led to the Chargois Arrangement and its nondisclosure to the other participants in the case in the first place.

With this context in mind, the Report provides a comprehensive set of Recommendations informed by the previously-delineated findings of fact and conclusions of law. In important respects, formulating these recommendations was the most difficult and challenging undertaking of the Special Master because it required that the interests of the class, the law firms, individual attorneys, the public and the judicial

process be weighed and in some respects, balanced, in order to recognize the valuable role of class action proceedings while addressing misconduct and questionable practices in an uncompromising fashion. The Special Master believes that his Recommendations achieve that balance and those objectives.

After presenting recommended legal findings with respect to inaccuracies, misstatements and omissions of material facts, to include double-counting and the breaches of duty to the client, class, co-counsel and the Court arising from the Chargois Arrangement, the Special Master recommends remedies and sanctions to address these failings:

1. Double-Counting on the Customer Class Law Firms' Lodestar Petitions ($4,058,000).

   All three customer class firms will share responsibility. The remedy for this is the disgorgement in equal amounts of the entire $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.

2. Garrett Bradley's Sworn Declaration Statements.

   The Special Master recommends that significant monetary and professional sanctions be levied. As to monetary sanctions imposed under Rule 11, they are imposed against the Thornton firm (as provided by Rule 11) in an amount within a range between $400,000 and $1 million, approximately ten to twenty-five percent of the value of the double-counting. As to the sanctions under Rule 3.3 of the Massachusetts Rules of Professional Responsibility, these are individual and the Special Master recommends that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings. The Special Master recommends that these monetary sanctions be awarded to the class.

3. Hours and Rates.

   The Special Master recommends that, for the reasons set forth in great detail in the Report, with the minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar

petitions were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff. Adjustments should, however, be made to the following:

- **Michael Bradley**: Michael Bradley, whose submitted rate of $500/hour is not supportable by his experience, the work he did on the case, or the minimal value he contributed to the case, particularly in relation to the other staff attorneys. Bradley's rate should be set at half of the submitted rate, or $250/hour. Bradley recorded roughly 406 hours, thus yielding a total of $101,500. It is recommended that Thornton, which received a multiplier of roughly 1.8 on his original fees, be disgorged any monetary benefit afforded to it by applying an artificially inflated rate. Thornton's lodestar on which it claimed Michael Bradley's hours should be reduced by $182,180, equal to the difference between the lodestar-generated marked-up hourly rate ($500) and the more appropriate hourly rate of $250. In making this calculation, Special Master gives equal weight, and applies the same multiplier, to Michael Bradley's hours as to any other attorney who worked on the case. The Special Master recommends that this overpayment amount be awarded to the class.

- **Contract Attorneys**: The law firms should not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be reimbursed to law firms as an expense, and the firms compensated for that expense dollar-for-dollar. The seven contract attorneys, all retained by Lieff, recorded 2833.5 hours at rates varying between $415 and $515. The total billings for contract attorneys was $1,298,198, or approximately $1.3 million. In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2,336,756, or approximately $2.3 million for the time of the contract attorneys. It is recommended that this amount be disgorged and be returned to the class. The Customer Class Counsel is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the class.

4. <u>The Chargois Payment ($4.1 million).</u>

Because the Chargois Arrangement was solely Labaton's obligation and because Labaton has profited handsomely over the years from the ATRS relationship Chargois helped facilitate, and because Labaton is solely responsible for the nondisclosure of this relationship to ATRS, the class, ERISA counsel and the Court, the Special Master recommends that the appropriate remedy for the Chargois payment be disgorgement of entire $4.1 million Chargois amount, and that this disgorgement be solely the responsibility of Labaton. The Special Master recommends that ERISA counsel should receive the bulk of this award, or $3.4 million, an amount which reflects the difference between the $10.9 million that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received. This amount is also the amount that went instead to the customer class counsel.

The Special Master, in making this recommendation, has also considered the significant value the ERISA attorneys added to the class recovery. Taking into consideration the considerable time and expense incurred by the ERISA attorneys in participating in the investigation, the Special Master believes that the recommended $3.4 million is sufficient to include the costs and expenses incurred by the ERISA attorneys in this investigation. Finally, the Special Master recommends that the $3.4 million be allocated amongst the ERISA law firms in the same proportion and in the same manner as the original fee award was allocated. The $3.4 million award to ERISA counsel still leaves a balance from the $4.1 million of $700,000. The Special Master recommends that this amount be allocated back to the class, which was deprived of its ability to make a determination as to whether to agree to the settlement which included the Chargois payment.

5. Guidance on Ethics Issues.

The Special Master believes there is a need for a mechanism to provide ethical guidance to Labaton and Thornton on ethical issues in the future, recognizing that formal professional disciplinary sanctions for a firm like Labaton, which often represents public institutional investors with elevated standards of conduct for their outside counsel, could dramatically and adversely impact the firm's ability to provide legal services in its area of expertise, services which benefit both their class clients and often the broader public. Indeed, the Special Master recognizes that professional disciplinary sanctions could be a death-knell to a firm like Labaton, and the Special Master believes that would be a disproportionate penalty here. Nevertheless, Labaton and Thornton require someone from the outside to consult with them on professional conduct norms and to ensure that they comply with those norms. The Special Master recommends that the two firms work with the Court to establish a consulting

process that will ensure consistent ethical compliance. The Special Master notes that, according to its April 30, 2018 letter, Labaton has already taken steps in this direction, and has taken additional steps to address the kinds of conduct that arose in this case. The Special Master recommends that Labaton continue its efforts in this direction and that Thornton adopt policies and comparable practices to ensure that, going forward, it does not exceed professional conduct boundaries.

Lessons Learned and Best Practices Recommendations

During the course of the investigation, the Special Master invited the law firms to reflect upon lessons learned in this case and to offer recommendations as to best practices for their firms and for class action practice in general, a number of which the Special Master, in turn, presents to the Court for its review, including:

1. Ceasing the practice of allocating attorneys to other firms who are not their employers and of putting employees from one firm on another firm's lodestar report. At least one of the firms has reported that it now prohibits the practice of allowing its staff attorneys to be reimbursed by another firm.

2. Putting practices in place to eliminate the communication gaps and compartmentalization (or "silo-ing," as some firm attorneys referred to it) among law firm attorneys that contributed to failures in this case, including double-counting. In addition, lead counsel should begin discussions on preparing lodestar numbers immediately after the Court grants preliminary approval, should compare all lodestar numbers before submission, and should ensure that lodestar reporting protocol is followed.

3. Implementing internal measures to ensure quality control of lodestar submissions (including removal of time spent preparing fee petition). Labaton reports that it has "expanded the checklist" for its settlement attorney in preparing fee petitions; it will also require its accounting office to directly identify staff attorney costs and will assign specific reviewers to track costs throughout the litigation.

4. Implementing external measures to ensure quality control of lodestar submissions among firms in large class action cases, including

   - Circulating draft declarations to co-counsel for close scrutiny;

- Replacing unclear language with new, model language;
- Lead counsel imposing semi-routine lodestar reporting requirements; and;
- Seeking interim data throughout the lifetime of the case.

5. Implementing better communication among firms on cost-sharing, including memorializing such agreements in-writing and including any cost-sharing arrangements in the individual declarations.

The firms offered additional meritorious recommendations for *the courts* to implement, including:

6. Appointing an executive committee comprised of co-counsel;
7. Defining standards at the beginning of litigation detailing what is expected of counsel;
8. Providing necessary guidance as to critical criteria in the fee petition; and
9. Ordering periodic fee monitoring requirements such as those required by Judge David Proctor in the Northern District of Alabama.

In addition to the preceding best practices offered by counsel, the Special Master recommends the following:

10. That firms report all fee allocation agreements among counsel to the Court—without being asked.
11. That lead counsel include sufficient information to a class of fee allocation agreements between counsel such that class members may make informed decisions as to whether to object or opt out of class settlements.
12. That firms no longer retain an individual to obtain introductions to clients and then pay that person a percentage of every future case, whether or not that person does any work on a case or performs any services for the client, even if that person happens to have a law degree.

13. That fee allocation agreements between class counsel be in writing and based upon full disclosure of all material terms, and that Lead Counsel be responsible for ensuring this.

14. That Massachusetts limit the practice of "bare referrals", i.e. permitting a lawyer to receive a referral fee for doing no work and having no attachment to the case or the client, which invites abuses such as those found here and which blurs the lines between legitimate referrals that promote the retention of more competent lawyers and those which cross the line to outright solicitation. One step that might be helpful would be if the Massachusetts Board of Bar Overseers and Massachusetts courts were to make clear that Rule 7.2(b) applies to lawyers and that lawyers cannot receive "fees" from other lawyers simply for recommending a lawyer, unless there were a valid agreement under Rule 1.5(e), consented to in writing by the client after being fully informed in the material terms of the fee-sharing agreement.

The Special Master concludes by stating that in the focus of this investigation has been to identify true professional misconduct, to remedy wrongs and to put the law firms and the class in a position that is proportionate to the conduct and the harm. In this context, the Special Master notes that the recommendations here, if followed, would return between $7.4 and $8.1 million to the class. Beyond this, the Special Master reiterates that, despite the questionable conduct, the result achieved for the class in this settlement was an excellent one and that the firms and their lawyers deserve great credit.

DATED: May 14, 2018

Hon. Gerald E. Rosen (ret.),
Special Master

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this Response and Objections to the Special Master's Report and Recommendations ("Report"), and Executive Summary thereof ("Executive Summary"), dated May 16, 2018.[1]

I. INTRODUCTION

In his Report and Executive Summary, the Special Master Honorable Gerald E. Rosen (Ret.) (the "Special Master"), makes the following findings and conclusions with which Lieff Cabraser concurs:

- The Special Master acknowledges the risks, difficulties and challenges of the State Street Action, the skill and dedication of plaintiffs' counsel, including Lieff Cabraser, and the outstanding accomplishment of the $300 million settlement in the captioned action (the "State Street Action");
- The Special Master finds the roughly 25% fee awarded to plaintiffs' counsel was appropriate based solely on the work performed and the result achieved;
- The Special Master concludes that the hourly rates for, and the number of hours worked by, Lieff Cabraser's attorneys, including its staff attorneys (whose work the Master compared favorably to junior to mid-level associates), were reasonable;[2]
- The Special Master finds the contemporaneous time records of Lieff Cabraser's attorneys, including its 18 staff attorneys, to be sufficiently and reliably detailed;
- The Special Master concludes that Lieff Cabraser's role in the double-counting of any lodestar for staff attorneys was "inadvertent," and as between the three Customer Class Counsel, Lieff Cabraser bears the least responsibility for that error;

[1] All references herein to the Report, or the Executive Summary, are to ECF No. 357 and 357-1.

[2] Lieff Cabraser uses the term "staff attorneys" to refer to those licensed attorneys with relevant experience who work for the firm conducting document review, coding, and analysis, and who write related issue and/or witness memoranda (as necessary), in the many of the firm's large, complex cases. Their specific tasks generally, and in the State Street Action specifically, are described in detail herein. The term "staff attorneys" includes personnel paid directly by the firm and lawyers paid by an outside agency (which in turn bills the firm for those lawyers' services).

- The Special Master finds that Lieff Cabraser was not aware of the origins or details of the relationship between lead counsel, Labaton Sucharow ("Labaton"), and attorney Damon Chargois, and justifiably believed Chargois to be "local counsel" for Labaton and the named plaintiff, and therefore bears no responsibility for Chargois' involvement (or lack thereof) in the State Street Action; and,

- The Special Master concludes that Lieff Cabraser should be "relieved of its obligations to Labaton under the claw-back letter as to Chargois."

Lieff Cabraser objects, however, to the following of the Special Master's findings, conclusions, and recommendations:

- The Special Master recommends that Lieff Cabraser "disgorge" one-third of the aggregate amount of inadvertently double-counted staff attorney lodestar, and that this money be "returned" to the class;

- The Special Master recommends that the time of Lieff Cabraser's seven staff attorneys who were paid, at least in part, by an agency (which in turn billed Lieff Cabraser) be treated as a cost, instead of including that time in the firm's lodestar;

- The Special Master recommends that Lieff Cabraser "disgorge" the difference between: (a) the total of the firm's "agency" attorneys' lodestar, multiplied by 1.8; and, (b) $50 per hour for the agency lawyers' time; and,

- The Special Master concludes that even after the "imposition of the monetary remedies recommended here" Lieff Cabraser "will still be left with not only their base lodestar claim, but a substantial multiplier."

Based on the required *de novo* review of the factual record and controlling case law, for the reasons summarized below, the Court should sustain Lieff Cabraser's objections and grant the relief it seeks.

Lieff Cabraser should not be required to disgorge any portion of the firm's inadvertently double-counted lodestar. The Special Master recommends that Labaton, Thornton Law Firm ("Thornton"), and Lieff Cabraser (together "Customer Class Counsel"), disgorge and "return" to the class the $4,058,000 in double-counted staff attorney time. Lieff Cabraser objects to this recommendation by the Special Master, and urges the Court to reject it, for the following reasons: (1) the double-counting of lodestar (which, in the case of Lieff Cabraser, concerned only

four staff attorneys for two-three months) was found by the Master to be "inadvertent"; (2) the Special Master's recommendation is contrary to controlling law in that it miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (3) the inadvertent double-counting caused no harm to the class; and, (4) Customer Class Counsel, including Lieff Cabraser, have already been penalized for the accidental double-counting. Contrary to the Special Master's recommendation, the proper way to address the double-counting issue is simply to remove the double-counted lodestar from the aggregate lodestar used in the cross-check of the 25% fee award, and then determine whether the resulting aggregate multiplier of 2.0 (and Lieff Cabraser's resulting individual multiplier of 1.69) is appropriate. Lieff Cabraser submits that it is.

In the event the Court requires Lieff Cabraser to disgorge any portion of the firm's double-counted lodestar, that disgorgement should be commensurate with the firm's "relative" role in the double-counting. In the event the Court overrules Lieff Cabraser's objection to the imposition of any "remedy" for the double-counting, the firm objects to the Special Master's recommendation that the appropriate result is "disgorgement by all three firms in equal amounts" of the $4,058,000 in inadvertently double-counted time (i.e., $1,352,667 each). Lieff Cabraser objects to this recommendation because such an outcome is inconsistent with the factual record and the Special Master's own substantive findings. Based on the firm's limited fee interest in the State Street Action (24% among Customer Class Counsel and 20.3% among all plaintiffs' counsel), the actual amount of the lodestar the firm inadvertently double-counted ($868,417), the relatively small percentage of the total double-counted amount that can be attributed to Lieff Cabraser (21%), and given the Special Master's findings that the firm was least responsible for failing to catch and correct the inadvertent double-counting, if the Court requires any

disgorgement (an outcome not supported by the law or the facts), the firm should be obliged to pay significantly less than an "equal share" of the total double-counted lodestar (i.e., not 33 1/3%).

Lieff Cabraser should not retroactively be required to treat the firm's staff attorneys paid by an agency as a "cost" instead of including them as part of the aggregate lodestar for cross-check purposes. The Special Master recommends that the time of Lieff Cabraser's seven staff attorneys who were paid, at least in part, by an agency be treated as a cost, and not as a component of lodestar for cross-check purposes. Lieff Cabraser objects to this recommendation on the following grounds: (1) the controlling and relevant case law, including from within the First Circuit, expressly *rejects* the Special Master's recommendation that the time of the firm's agency lawyers be treated as a cost; and (2) the purported "factual" distinctions the Special Master attempts to draw between the firm's staff attorneys on payroll and those paid by an agency are either insignificant or not supported by a fair reading of the record. No matter what the Special Master's academic views on best practices may be with respect to the treatment of agency (contract) attorneys in the context of class action fee applications, those views should not displace the controlling law or the relevant facts.

Even if the Court agrees that the firm's agency lawyers should be treated differently than the staff attorneys on firm payroll for purposes of the lodestar cross-check, the Special Master's recommended disgorgement remedy should be rejected. The Special Master recommends that Lieff Cabraser "disgorge" and "return" to the class the difference between: (a) the total of the firm's agency attorneys' lodestar, multiplied by 1.8, and (b) $50 per hour for the

agency lawyers' time ($2,241,098.40)[3]. Lieff Cabraser objects to this recommendation by the Special Master for the following reasons: (1) the Special Master's recommendation is contrary to controlling law in that it miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (2) the inclusion of Lieff Cabraser's agency lawyers in the cross-check caused no harm to the class; and (3) penalizing Lieff Cabraser for adhering to controlling legal principles and having committed no violation of law or ethics is blatantly unjust. In the event the Court agrees to treat the time of the firm's agency attorneys as a cost, the proper way to address the matter would be to remove those attorneys' lodestar (along with the double-counted lodestar) from the aggregate lodestar used in the cross-check of the 25% fee award, and then determine whether the resulting aggregate multiplier of 2.07 (and resulting individual multiplier of 1.99 for Lieff Cabraser) is appropriate. Lieff Cabraser submits that it is.

Lieff Cabraser should be reimbursed for the amount of money it has spent responding to the Chargois investigation. The Special Master finds that Lieff Cabraser has no responsibility for Chargois' involvement (or lack thereof) in the State Street Action. The Special Master also concludes that the firm should be relieved of any obligation to contribute to the $4.1 million the Master recommends Labaton disgorge as a "remedy" for the "non-disclosure" of the Chargois payment. When invited by the Special Master near the close of his investigation, the firm declined to seek reimbursement from Labaton and/or Thornton of the approximately $1 million the firm effectively contributed toward Chargois' $4.1 million fee. Lieff Cabraser will abide by that position now. However, the firm does seek reimbursement from Labaton and/or Thornton of the amount Lieff Cabraser has spent responding to the Chargois investigation, an exercise for

[3] For this calculation, the firm is using the correct total hours worked by agency (contract) lawyers, based on Lieff Cabraser's time records, of 2899.2. The Special Master uses different hour totals (i.e., 2949.5 or 2833.5) for these attorneys at various places in his Executive Summary and Report. *See, e.g.,* Executive Summary at 50, Report at 367.

which the firm was not responsible. The firm seeks repayment of the amount it has contributed to the Special Master's fees and expenses that are attributable to the Chargois investigation, as well as the amount of costs and lodestar expended by the firm in addressing the Special Master's Chargois-related inquiries.

Contrary to the Special Master's "calculations," after the imposition of the recommended monetary "remedies" against Lieff Cabraser, along with the costs of the investigation already incurred by the firm, the firm will not receive its "base lodestar" plus a "substantial multiplier." Far from it. Having found that Lieff Cabraser engaged in no intentional or professional misconduct and violated no rule of law or ethics, the Special Master seeks to justify (or rationalize) the "imposition of the monetary remedies recommended here," by incorrectly claiming that "even after the allocation of all monetary amounts, and the cost of the investigation, [Lieff Cabraser] will still receive its base lodestar plus a significant multiplier." To be clear, the Special Master recommends that the firm disgorge $3,593,765 – or roughly 24% of the $15,116,965.50 in fees Lieff Cabraser actually received – *in addition* to (a) the $912,000 the firm has already spent to fund its share of the Special Master's investigation, and (b) the $2.39 million the firm has spent in time and costs since February 6, 2017 responding to the investigation, a combined $3.3 million. Altogether, this would mean a total reduction in Lieff Cabraser's fee of $6,897,590. Contrary to the Special Master's arithmetic, "after the allocation of all monetary amounts, and the cost of the investigation," Lieff Cabraser would receive *less* than its "base lodestar" and, in fact, a *negative* individual multiplier (0.92) for its exemplary service to the class in the State Street Action.

The financial impact on Lieff Cabraser of the Special Master's disgorgement recommendations is unjust and entirely disproportionate to the firm's conduct and the

absence of harm to the class. The Special Master claims that the "intent here has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and the harm." Yet, with respect to Lieff Cabraser, the Special Master does not "identify" *any* "true and unmistakable professional misconduct," concludes that the firm bears the least responsibility for the inadvertent double-counting error, and finds that it contributed to a laudable result for the class with stellar work by the firm's attorneys (including its staff attorneys).

Despite these findings, and without support of any controlling or relevant case law, the Special Master's recommendations would impose the harshest financial penalty on Lieff Cabraser (as a percentage of individual fees paid) of any firm in these proceedings. The financial impact that would be inflicted on Lieff Cabraser by the Special Master's disgorgement recommendations is entirely disproportionate to the firm's role in the events giving rise to this investigation and the absence of harm suffered by the class.

Lieff Cabraser submits that the firm has already been excessively penalized for inadvertently double-counting $868,417 in lodestar for four staff attorneys (for two to three months' work) by paying 24% ($912,000) of the Special Master's $3.8 million investigation (to date), plus $2.39 million in time and costs spent responding to the investigation. This aggregate expense of $3.3 million is wildly disproportionate to the firm's double-counting mistake and the wholly appropriate manner in which it included its agency attorneys in the firm's submission of lodestar for cross-check purposes.

The essential facts concerning Lieff Cabraser's inadvertent double-counting of the lodestar of just four staff attorneys for a limited time-frame, and the propriety of the number of hours and the hourly rates of the firm's attorneys, including its 18 staff attorneys, who worked on

the State Street Action, were communicated to the Special Master within the first month of his appointment. Nevertheless, the firm was obliged to respond to the same inquiries about these topics (and other topics that were mostly irrelevant to the investigation) through the production of thousands of pages of documents, responses to dozens of interrogatories and other written submissions, and in numerous depositions attended by the Special Master and as many as four other members of his team. All of this time and effort was devoted to questions that were simple and uncomplicated, the answers to which did not change from the firm's first engagement with the Special Master in April 2017 through the filing of the Master's Report more than 11 months later in May 2018.

Moreover, the costs incurred by the firm were and continue to be occasioned by dramatic changes in the scope of the Special Master's investigation. As the Special Master finds, Lieff Cabraser has no responsibility for Chargois' involvement (or lack thereof) in the State Street Action. Nevertheless, the firm was required to respond to multiple, duplicative discovery requests, appear for two depositions, and submit expert testimony, all to repeat the same basic facts – that the firm agreed to pay its share (24%) for the services of an attorney the firm believed to be Labaton's local counsel in Arkansas; that the firm was told and understood that this lawyer, Chargois, had performed valuable services for Labaton and its client; that based on the firm's experience, there was nothing unusual in such a local counsel arrangement for a public pension fund in a financial fraud case; and, that the firm knew nothing about the origins or the actual details of the relationship between Labaton and Chargois.

Finally, the Special Master states in his Report that the "intent" of the investigation was, among other things, to "put the law firms and the class roughly in a position that is proportionate to the conduct and the harm." The Master sums up his efforts by touting the possible "return" of

"between $7.4 and $8.1 million to the class." But, there is no factual, legal or policy basis for the firm to be required to "return" approximately one quarter of its well-earned fees to the class. Indeed, it would appear the Special Master does not entirely believe that it was the "intent" of his investigation to "put the law firms and the class roughly in a position that is proportionate to the conduct and the harm," as the Master recommends that $3.4 million of the $4.1 million paid to Chargois should now be redirected to counsel for ERISA plaintiffs and not "returned" to the class. In any event, the firm has now expended additional resources to address the Special Master's recommended "remedies" against Lieff Cabraser. The firm should have to pay no more.

II. STATEMENT OF FACTS

A. Lieff Cabraser's Relevant Business Practices, Including How the Firm Manages Complex Litigation, Uses Staff Attorneys, and Sets Hourly Rates.

1. Lieff Cabraser's Complex Litigation Practice Involves Large Scale Document Review and Analysis.

Lieff Cabraser is a plaintiff-side litigation firm founded in 1972, based in San Francisco, with additional offices in New York, Nashville, and Seattle.[4] More than 100 attorneys, including partners, associates, and staff attorneys currently work for the firm.[5] Lieff Cabraser engages in predominantly contingent fee practice for plaintiff classes, groups and individuals, on behalf of public and private institutional investors, small business, shareholders, consumers and

[4] *See* April 5, 2017 Presentation to the Special Master, LCHB 0000001 - 0067, attached as Exhibit ("Ex.") A to the Declaration of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLLP to the Special Master's Report and Recommendations ("Fineman Declaration"), filed herewith. *See also* Lieff Cabraser resume, LCHB 0049987 – 50109, earlier filed as ECF No. 104-17 (Ex. C). Documents and pleadings produced or provided to the Special Master by Lieff Cabraser in this proceeding that are referenced herein, but are not exhibits to the Master's Report or are not already in the public docket, are attached to the Fineman Declaration. *See also* Fineman Declaration at ¶ 19.

[5] Ex. A to Fineman Declaration at 4; ECF No. 104-17 (Ex. C); Ex. 57 to Report at 2-3; Fineman Declaration at 19.

employees.[6] The firm also occasionally represents plaintiffs on an hourly basis.[7] Lieff Cabraser is "considered by many to be one of the preeminent plaintiffs' class action firms in the nation."[8]

Lieff Cabraser has litigated and resolved hundreds of class action lawsuits and thousands of group and individual cases (many in the context of multi-district litigation ("MDL") proceedings), including in the fields of securities and financial fraud.[9] Most of the firm's cases involve major corporate defendants (e.g., banks and other financial institutions, pharmaceutical and medical device companies, oil and energy companies, technology corporations, and consumer product manufacturers).[10] These kinds of defendants are represented by the largest and most sophisticated law firms in the world.[11] Most of the firm's large, complex cases involve production by defendants of enormous numbers of pages of documents (frequently in the millions).[12]

Lieff Cabraser staffs its complex cases to maximize effectiveness and efficiency in light of the defendants' typically significant advantage in economic and personnel resources.[13] The firm's complex cases are normally supervised by a senior partner, and staffed with an additional senior partner and one or more junior partners, and the appropriate number of associates, staff attorneys and litigation support personnel (e.g., paralegals, financial analysts, investigators, and

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[6] *Id.*

[7] *Id.*; Ex. 175 to Report at 8.

[8] Report at 16.

[9] Ex. A to Fineman Declaration at 5; ECF No. 104-17 (Ex. C); Fineman Declaration at ¶ 20; Ex. 57 to Report at 2-3.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Ex. A to Fineman Declaration at 6-7; Fineman Declaration at ¶ 21.

the like).[14] Investigations, pleadings, briefs, written discovery, depositions, court appearances, trial and settlement are handled by partners and associates depending on the level of experience required.[15] Document review, analysis, issue memoranda and witness kits (for deposition and trial) are conducted or prepared by a combination of junior partners, associates, and staff attorneys.[16]

2. Lieff Cabraser's General Use of Staff Attorneys.

As stated above, Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast number of documents produced in these cases.[17] In addition, Lieff Cabraser staff attorneys support all aspects of the firm's complex cases by identifying documents and frequently drafting issue, witness, and liability memoranda.[18] The work product generated by the firm's staff attorneys is used, for example, in support of class certification, in preparation for the conduct of fact and expert depositions, in opposition to motions for summary judgment, for settlement negotiations, and in other pre-trial and trial proceedings.[19]

As described more fully below with respect to the staff attorneys who worked on the State Street Action, the firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and in document review and analysis in complex cases, and have made the lifestyle and career choice to work a more limited number of hours

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Fineman Declaration at ¶ 22.

than do traditional law firm partners and associates.[20] Many of the firm's staff attorneys are paid directly by the firm and receive benefits provided by the firm.[21] Other firm staff attorneys work at the firm's direction, but are paid directly by agencies that bill the firm for those lawyers' services.[22]

During and since the State Street Action, Lieff Cabraser has employed as many as 30 staff attorneys at one time who are paid directly by the firm.[23] Given the number of large complex cases the firm handles at one time, Lieff Cabraser sometimes has need for attorney document review and analysis support beyond the firm's available staffing (for example, the firm may just need additional attorneys, or may require lawyers with specific subject experience or language expertise).[24] When such a need arises, the firm seeks and receives resumes from "preferred" agencies: preferred because those agencies have long-standing relationships with the firm and understand the lawyer qualifications and experience the firm requires.[25] Frequently, as was the case for four of the staff attorneys who worked on the State Street Action, staff attorneys who start working for the firm while paid by an agency transition to direct employment by the firm.[26]

Whether on Lieff Cabraser's payroll or paid via an agency, all firm staff attorneys have comparable educational backgrounds and work experiences, and all perform substantially the same document review and analysis functions.[27] And, all utilize, to varying degrees, the firm's

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[20] *Id.* at ¶ 23; Appendices A and B.
[21] *Id.*
[22] *Id.*
[23] Fineman Declaration at ¶ 24.
[24] *Id.*; Ex. 18 to Report at 31-32.
[25] Fineman Declaration at ¶ 24.
[26] *Id.*; Appendices A and B.
[27] *Id.*; Ex. 10 to Report at 113-116.

infrastructure and resources, including physical office space (for the majority working in firm offices instead of remotely); information technology support (both in the office and remotely); administrative support (e.g., human resources, accounting, and word processing); assistance from the firm's litigation support department; supervision from firm partners and senior associates; and the cost to the firm for the staff attorneys' services.[28]

3. Lieff Cabraser's Hourly Rates, Including for Staff Attorneys, Are Market Driven and Routinely Approved.

Although the firm is compensated predominantly on a contingent fee basis, Lieff Cabraser's attorneys and litigation staff maintain contemporaneous time records that identify specific tasks performed and the amount of time devoted to those tasks.[29] The firm's contemporaneously recorded time, when multiplied by applicable hourly rates, generates what is known as "lodestar."[30] In certain class actions handled by the firm, aggregate lodestar is used as a "cross-check" to assure that the firm's fee in a "percentage-of-the-recovery" context is appropriate (i.e., that the multiplier on the lodestar is not excessive).[31] In other class actions the firm is compensated based on its lodestar plus an appropriate multiplier.[32] The firm also uses its lodestar figures in cases for hourly rate paying clients.[33]

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[28] Fineman Declaration at ¶ 25; Ex. 18 to Report at 49.

[29] Fineman Declaration at ¶ 27; Exs. 206 and 247 to Report.

[30] Fineman Declaration at ¶ 27; Ex. A to Fineman Declaration at 60; Ex. 175 to Report at 8-9.

[31] *Id*

[32] *Id.*

[33] Both prior to and in the early stages of the Special Master's investigation, there was a question about whether Customer Class Counsel have bill-paying clients (in addition to contingent fee clients) who pay the firms' hourly rates. Lieff Cabraser has consistently and correctly reported to the Court and the Special Master that it periodically has bill-paying clients who pay the firm's hourly rates. *See* Fineman Declaration at ¶ 27; Ex. A to Fineman Declaration at 55-59; Ex. B to Fineman Declaration at 20-21; Ex. 89 to Report, ECF No. 104-17, at 3; Ex. 175 to Report at 7-10 and 16; ECF No. 176 at 92-93.

All Lieff Cabraser hourly rates, including those for staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for a lawyer's services, primarily in the San Francisco and New York market places.[34] The firm's management evaluates and adjusts hourly rates on an annual basis, based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys. Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys (whether on the firm's payroll or employed through an agency), based on what the firm pays them (or for them).[35] Again, firm hourly rates are based on what is reasonable in the applicable market places for our services.[36]

For a number of years prior to 2016, hourly rates of the firm's staff attorneys were set to be consistent with the rates of "on-track" firm attorneys with the same or comparable levels of experience. However, as the firm's staff attorneys (payroll and agency) became increasingly experienced and senior, that approach began to result in rates the firm believed were too high.[37] Therefore, beginning in 2016, with limited exceptions, all firm staff attorneys were assigned an hourly rate of $415 per hour (then the equivalent of a fourth year "on-track" associate).[38] This rate was determined based on the firm's understanding of the market for staff attorneys performing document review, coding and analysis, and the preparation of issue and witness

[34] Fineman Declaration at ¶ 28; Ex. A to Fineman Declaration at 8-9; Ex. 175 to Report at 5-9; Ex. 18 to Report at 57-62.

[35] *Id.*

[36] *Id.*

[37] Fineman Declaration at ¶ 29; Ex. A to Fineman Declaration at 8-9; Ex. 176 to Report at 5-9.

[38] *Id.*; *see also* Appendices A and B.

memoranda in the kind of large complex cases handled by Lieff Cabraser. The firm determined this to be a fair and appropriate rate, even though Lieff Cabraser's staff attorneys, by and large, have many more than four years of relevant experience.[39]

The vast majority of fee awards in the firm's class action cases over the years have been awarded on a percentage of the recovery basis.[40] In recent years, however, courts have increasingly conducted a lodestar cross-check to determine that the percentage of the recovery award is not excessive.[41] And, in rare cases, courts have determined our class action fees on a lodestar basis.[42] In both the lodestar cross-check and lodestar fee award context, Lieff Cabraser's hourly rates, including the firm's staff attorney rates, have routinely been approved.[43] In addition, in those infrequent instances when Lieff Cabraser has represented plaintiffs on an hourly basis, the firm has been paid the applicable hourly rates for its attorneys, including its staff attorneys.[44]

B. The Background of Lieff Cabraser's Involvement in the State Street Action.

1. Lieff Cabraser's Role in the California *Qui Tam* Action.

Lieff Cabraser began investigating and pursuing claims of alleged deceptive practices and overcharges by State Street related to foreign currency exchange ("FX") products and services in 2008.[45] Along with Thornton, Lieff Cabraser was co-counsel of record in a *qui tam* FX lawsuit filed against State Street under seal in California on April 14, 2008 (the "California Action").[46]

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[39] *Id.*
[40] Ex. A to Fineman Declaration at 60; Ex. 175 to Report at 8.
[41] *Id.*
[42] *Id.*
[43] Ex. A to Fineman Declaration 61-67; Ex. 175 to Report at 9, 16-18; Ex. 18 to Report at 62.
[44] *See* note 33, *supra*.
[45] Ex. A to Fineman Declaration at 10; Ex. 57 to Report at 3-4.
[46] *Id.*

The California Attorney General intervened in the California Action in October 2009, making the FX scheme public.[47] The attendant publicity caused a number of custodial clients to question whether they had been overcharged on FX trades in a similar manner. The questions were not restricted to State Street; BNY Mellon faced similar allegations in *qui tam* lawsuits that were unsealed in early 2011.[48]

2. Lieff Cabraser's Role in the BNY Mellon Action.

In July 2011, Lieff Cabraser filed, with co-counsel (including Thornton), a class action suit against BNY Mellon in the United States District Court for the Northern District of California on behalf of custodial customers of BNY Mellon who were wrongly overcharged on FX trades (the "BNY Mellon Action"). That complaint was subsequently amended and BNY Mellon's motion to dismiss was denied in February 2012. The case was put on an aggressive schedule by Judge William Alsup, resulting in the plaintiff filing its opening brief on class certification in April 2012.[49]

Shortly after the plaintiff filed its class certification motion, however, in April 2012, the case was transferred to Judge Lewis A. Kaplan of the Southern District of New York and consolidated with several other customer, ERISA, and securities fraud cases all alleging the same underlying facts about BNY Mellon's custodial FX practices. These cases (now part of an MDL) were in turn coordinated for discovery purposes with a later-filed civil suits brought by the United States Department of Justice ("DOJ") and the New York State Attorney General ("NYAG").[50]

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[47] Ex. A to Fineman Declaration at 10; Ex. 57 to Report at 4.
[48] Ex. 57 to Report at 4.
[49] *Id*.
[50] Ex. 57 to Report at 4-5; Ex. 10 to Report at 24-26.

Once before Judge Kaplan, Lieff Cabraser was appointed co-lead counsel for the proposed class of custodial customers affected by the BNY Mellon FX scheme. In addition, the firm was appointed to the three-member executive committee overseeing all plaintiffs in the MDL.[51] Between 2012 and early 2015, BNY Mellon aggressively defended the actions, taking 57 depositions of the plaintiffs, absent class members, or third parties, and filing counterclaims against the named customer plaintiffs and absent class members.[52] The plaintiffs in the MDL and the DOJ took more than 50 depositions of BNY Mellon.[53] BNY Mellon produced more than 29 million pages of documents.[54]

Lieff Cabraser, working closely with its co-counsel and the DOJ, reviewed and analyzed these documents with the aid of 13 Lieff Cabraser staff attorneys (including six "agency" lawyers), most of whom later went on to work on the State Street Action.[55] In addition to reviewing, analyzing and coding documents, Lieff Cabraser's staff attorneys, who individually averaged nearly 2,200 hours on the BNY Mellon Action, prepared highly detailed witness kits and issue memoranda to assist the lead attorneys in preparing for depositions.[56]

In January 2015, fact discovery closed in the BNY Mellon action and settlement discussions began, which resulted in a global resolution in March 2015. The settlement, approved by Judge Kaplan in September 2015, provided $504 million for the benefit of BNY Mellon customers, with $335 million attributed to resolution of the customer class case co-lead

[51] *Id.*
[52] Ex. 57 to Report at 5.
[53] *Id.*
[54] *Id.*
[55] Ex. A to Fineman Declaration at 18-20; Ex. 57 to Report at 15; Appendices A and B.
[56] *Id.*

by Lieff Cabraser (the settlement also resolved claims by the DOJ and NYAG, and the United States Department of Labor).[57]

3. Lieff Cabraser's Inclusion in the State Street Action.

During its involvement in the California Action and throughout its early work on the BNY Mellon Action, Lieff Cabraser investigated possible claims to be brought on a class basis for the benefit of custodial customers of State Street.[58] In that regard, the firm discussed with several institutional investors the possibility that they would serve as class representatives in a customer class action against State Street. The firm however, was not retained by any State Street client for that purpose.[59]

As noted above, Lieff Cabraser worked with Thornton on the California and the BNY Mellon Actions. Based on Lieff Cabraser's prior working relationship with Thornton and the firm's expertise and institutional knowledge concerning custodial FX pricing practices, the firm was invited to participate in the State Street Action by Thornton and Labaton, after Labaton's client, the Arkansas Teacher Retirement System ("ATRS"), decided to proceed with the filing of a class action against State Street in the District of Massachusetts.[60]

Throughout the State Street Action, Labaton served as lead counsel for ATRS and the putative and settlement class; Thornton served as liaison counsel for ATRS and the putative and settlement class; and, Lieff Cabraser served as "additional counsel" for ATRS and the putative and settlement class.[61] Lieff Cabraser had no formal attorney client relationship with ATRS during the State Street Action, and has not represented ATRS before or after the State Street

[57] Ex. A to Fineman Declaration at 12-13; Ex. B to Fineman Declaration at 7-8.
[58] Ex. 18 to Report at 9-10, 13; Ex. 19 to Report at 12-13.
[59] *Id.*
[60] Ex. A to Fineman Declaration at 11; Ex. 57 to Report at 7.
[61] ECF No. 28; Ex. 113 to Report, ECF No. 110, at ¶ 4.

Action. [62] Prior to and during the pendency of the State Street Action, Lieff Cabraser had no direct substantive communication with ATRS.[63]

During the course of the State Street Action, Labaton, Thornton and Lieff Cabraser asserted claims on behalf of all eligible custody clients of State Street (including plans eligible under the Employee Retirement Income Security Act of 1974 ("ERISA")), and were known, and are collectively referred to herein, as "Customer Class Counsel." Other attorneys ("ERISA Counsel") filed cases asserting strictly ERISA-based claims solely for the benefit of ERISA plan custody clients of State Street.[64] Customer Class Counsel and ERISA Counsel are collectively referred to herein as "Plaintiffs' Counsel."

C. The State Street Action

1. Plaintiffs' Underlying Allegations and Claims against State Street.

Lieff Cabraser assumes the Court's familiarity with State Street's allegedly unfair and deceptive practice of charging its custody and trust customers excessive rates and spreads in connection with certain FX transactions, in alleged violation of State Street's statutory, common law, contractual and fiduciary obligations.[65] Therefore, the firm does not restate here those allegations and claims. It does bear noting, however, that both this Court and the Special Master have acknowledged the complexity, difficulty and challenges of the State Street Action.[66]

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[62] Ex. 10 to Report at 45-47.

[63] Ex. 57 to Report at 7.

[64] Those attorneys include Keller Rohrback, LLP ("Keller Rohrback"), McTigue Law, LLP ("McTigue Law"), and Zuckerman Spaeder, LLP ("Zuckerman Spaeder") (collectively, "ERISA Counsel"). *See* Exs. 23, 24, and 29 to Report.

[65] Ex. 7 to Report, ECF No. 10.

[66] Ex. 78 to Report, ECF No. 114, at 19-20, 36, 38; Ex. 113 to Report, ECF No. 110, at 5; ECF No. 110 at 4; Executive Summary at 3; Report at 6, 29-33, 152-156. *See also* Ex. 57 to Report at 12-13 (risk factors identified by Lieff Cabraser at the outset of the State Street Action).

2. Procedural Litigation and Mediation History of the Litigation.

Lieff Cabraser assumes the Courts' knowledge of the procedural, litigation and mediation history of the State Street Action from its inception in February 2011 to the execution and filing of the final settlement agreement in July 2016. For the Court's reference, a detailed history of the litigation can be found in the Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, etc., filed September 15, 2016 ("Omnibus Declaration").[67]

3. Lieff Cabraser's Specific Tasks in the State Street Action.

Lieff Cabraser worked closely from the outset of the State Street Action with Labaton and Thornton on, among other things: (a) researching potential causes of action against State Street for overcharging custodial customers on FX trades; (b) drafting both the complaint and amended complaint; (c) briefing plaintiff's opposition to defendants' motion to dismiss (with particular responsibility for (i) countering defendants' statutes of limitations arguments and (ii) supporting plaintiff's claims under M.G.L. ch. 93A); (d) researching and drafting memoranda on the viability of class certification (particularly as applied to M.G.L. ch. 93A); and, (e) drafting plaintiffs' final settlement approval memorandum.[68]

Lieff Cabraser was principally responsible for developing the M.G.L. ch. 93A theory of liability, which was particularly valuable since it allowed for double or treble damages (plus prejudgment interest), and (as directed against a Massachusetts-based company and conduct) provided a potentially more readily-certifiable class claim for State Street custodial customers

[67] Ex. 3 to Report, ECF No. 104, at ¶¶ 39-106. The Report refers to Sucharow's September 15, 2016 Declaration as the "Omnibus Declaration," and Lieff Cabraser therefore adopts that same definition here. Report at 54-55.

[68] Ex. A to Fineman Declaration at 11; Ex. 57 to Report at 8-9.

from across the country.[69] During the parties' numerous mediation sessions, Lieff Cabraser took the lead in researching and presenting on the viability of class certification under M.G.L. ch. 93A in particular, as well as the availability of double or treble damages and the elements and standards of proof necessary to achieve those results.[70] Lieff Cabraser attorneys attended and participated in every mediation session and in all related plaintiff-side meetings.[71]

In addition, Lieff Cabraser participated in the review and analysis of more than nine million pages of documents produced by State Street.[72] State Street's productions largely took place between December 2012 and November/December 2013.[73] The initial production (in December 2012) of more than 300 CDs and a hard drive consisted principally of materials gathered and produced by State Street in the California Action, and totaled more than 260,000 documents.[74] The latter productions (bringing the total number of documents to be reviewed in the database to more than 750,000 [including 84,000 native Excel files], and more than nine million pages or 500 gigabytes) included documents produced by State Street in *Hill v. State Street Corporation*, No. 09-cv-12146-GAO (D. Mass.) (a securities fraud lawsuit filed in the wake of the disclosure of the California Action which contained overlapping allegations of unfair or deceptive custodial FX pricing practices by State Street).[75]

The State Street productions contained, among other things, internal and external email correspondence, custodial contracts and fee schedules, marketing materials, internal compliance and training manuals, investment manager guides, internal and external presentations, analyst

[69] Ex. 10 to Report at 15-19, 55-58, 68, 70-74.
[70] Ex. A to Fineman Declaration at 11; Ex. 10 to Report at 15-19, 55-58, 68, 70-74.
[71] *Id.*
[72] Ex. A to Fineman Declaration at 11; Ex. 57 to Report at 13-14.
[73] Ex. 57 to Report at 13-14.
[74] *Id.*
[75] *Id.*

reports, customer surveys, codes of conduct, competitive analyses, and FX revenue/profit and loss reports.[76] All of these documents and materials were uploaded to a Catalyst e-discovery database hosted and chiefly administered by Lieff Cabraser in the firm's San Francisco office.[77] As explained below, most of the review, reading and analysis of the documents produced by State Street were performed by staff attorneys working for Customer Class Counsel, including Lieff Cabraser.

D. The Role Of Lieff Cabraser's Staff Attorneys In The State Street Action.

1. The Training of and Work Performed By Lieff Cabraser's Staff Attorneys.

As explained above, State Street produced more than nine million pages of documents potentially relevant to the issues and claims in the State Street Action. Consistent with Lieff Cabraser's practice in complex litigation document review (*see* discussion, *supra*, at 11, the firm's staff attorneys, along with staff attorneys from Labaton and staff attorneys paid for by Thornton, reviewed, issue-coded, analyzed, and completed issue memoranda concerning State Street's documents. The scope of that effort is described below.

All staff attorneys had access to the Catalyst document database hosted by Lieff Cabraser.[78] Online technical training on how to the use the database was provided by Lieff Cabraser's litigation support department Manager, Kirti Dugar, in conjunction with the staff at Catalyst.[79] The documents maintained in the Catalyst database consisted of all those documents produced by the parties in the State Street Action.[80]

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[76] *Id.*
[77] *Id.* at 16-17.
[78] *Id.* at 16; Ex. B to Fineman Declaration at 17-18.
[79] *Id.*
[80] *Id.*

Before the staff attorneys began their review and analysis of the documents, they were instructed to review relevant pleadings in the State Street Action, including the operative class action complaint and plaintiffs' memorandum in opposition to State Street's motion to dismiss.[81] In addition, each staff attorney was provided with and expected to read and understand the State Street Document Review Protocol, including the Document Review Coding Fields Quick Reference Guide, in which issue codes were listed, followed by descriptions of their relevance to the case.[82] In addition to these materials, emails from supervising attorneys communicating assignments on proposed topics for the factual, legal and/or discursive memoranda to be prepared by staff attorneys (discussed further below) contained descriptions, context and/or explanations for the topics assigned.[83]

The staff attorneys' job responsibilities and tasks included reviewing and coding of all documents produced by State Street for relevance and/or strength or weakness in support of plaintiffs' theory of the case.[84] In addition, the staff attorneys identified specific issues and topics addressed by each of the documents so they could be sorted and searched by subject matter or issue at a later date.[85] Staff attorneys also had the ability to enter attorney notes to explain or clarify the decision behind their coding determinations.[86] There were more than 30 different issue or document type codes available for assignment by staff attorneys to the

[81] *Id.* at 18.
[82] Ex. A to Fineman Declaration at 43-47; Ex. 57 to Report at 18.
[83] Ex. 57 to Report at 18.
[84] Ex. A to Fineman Declaration at 41; Ex. 57 to Report at 15-16.
[85] Ex. 57 to Report at 21.
[86] *Id.*

documents they reviewed.[87] The staff attorneys received appropriate supervision from Lieff Cabraser partners and senior staff to assure the quality of their work.[88]

The review and coding of State Street's documents was largely completed by the end of April 2015, after which the staff attorneys were tasked with preparing detailed memoranda on approximately 18 selected themes, issues or witnesses to be further developed in depositions and follow-up discovery.[89] Each memorandum prepared by the staff attorneys contained hyperlinks to supporting documents from State Street's productions, with some of the memoranda exceeding 100 pages.[90] The memoranda were circulated to the supervising attorneys on a rolling basis as they were completed.[91] Had the mediation ended without resolution of the State Street Action, the memoranda and included documents would have formed the principal repository of knowledge for the supervising attorneys as they prepared for depositions and pretrial litigation.[92]

2. Lieff Cabraser's Staff Attorneys Were/Are Well-Educated, Professionally Experienced and Skilled Lawyers.

Attached as Appendix A is narrative biographical information about each of Lieff Cabraser's 18 staff attorneys (with citations to the factual record), who worked on the State Street Action. Attached as Appendix B is a chart summarizing key information about each of these firm staff attorneys (with citations to the factual record).[93] The 18 Lieff Cabraser staff

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[87] Ex. A to Fineman Declaration at 41; Ex. 57 to Report at 21.

[88] *Id*. These memoranda were all produced to the Special Master at.

[89] Ex. A to Fineman Declaration at 41-42; Ex. 57 to Report at 21-22.

[90] *Id.*

[91] Ex. 57 to Report at 22-23.

[92] *Id.*

[93] All of the specific information about Lieff Cabraser's staff attorneys presented herein can be found in Ex. A to the Fineman Declaration at 18-40, and in Lieff Cabraser's Responses to Special Master Hon. Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017, dated July 10, 2017, particularly in the firm's responses to Interrogatory Nos. 24 and 25. This

attorneys who worked on the State Street Action were, in alphabetical order (with the number of hours each worked for Lieff Cabraser on the Action noted parenthetically): Tanya Ashur (843.50); Joshua Bloomfield (2,033.20); Elizabeth Brehm (1,682.90); Jade Butman (24.00); James Gilyard (882.00); Kelly Gralewski (1,475.90); Christopher Jordan (539.90); Jason Kim (904.00); James Leggett (893.00); Coleen Liebmann (24.00); Andrew McClelland (58.00); Scott Miloro (658.80); Leah Nutting (1,940.10); Marissa Oh (800.30); Peter Roos (780.00); Ryan Sturtevant (796.00); Virginia Weiss (473.50); and Jonathan Zaul (495.20).

The Lieff Cabraser staff attorneys who worked on the State Street Action each attended good to excellent colleges and law schools.[94] They each had years of experience in civil litigation and in document review and analysis in complex cases for major American law firms.[95] For example, as of 2016, five of the staff attorneys who worked on the State Street Action had more than 15 years of experience, six had between 10 and 15 years of experience, and six had between five and 10 years of experience.[96]

Lieff Cabraser's staff attorneys who worked on the State Street Action were selected in large part from the pool of staff attorneys who had worked previously or simultaneously on the BNY Mellon Action, and who had acquired substantial relevant experience concerning custodial FX trading, pricing, and marketing.[97] The thirteen Lieff Cabraser staff attorneys who worked on the BNY Mellon Action before and/or during the State Street Action were (with the number of hours each worked on that Action noted parenthetically): Ashur (2,414.50); Bloomfield (2,183); Gilyard (2,614.50); Gralewski (301.50); Jordan (1,572.90); Kim (2,659); Leggett (2,476.20);

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set of discovery Responses is not included as an exhibit to the Special Master's Report. The Responses are therefore attached as Ex. B to the Fineman Declaration.

[94] Appendices A and B.

[95] *Id*.

[96] *Id*.

[97] Ex. A to Fineman Declaration at 18; Ex. 57 to Report at 16.

McClelland (1,799); Miloro (3,146.80); Nutting (3,128.40); Oh (2,576.70); Weiss (1,445.80); and Zaul (2,197.90).[98]

Five other Lieff Cabraser staff attorneys who were assigned to the State Street Action did not work on the BNY Mellon Action. Of these, attorneys Brehm, Roos and Sturtevant brought significant relevant litigation experience to their contributions to the State Street Action, including: a background in document review analysis in financial fraud cases for plaintiff-side litigation firms (Brehm); extensive experience in financial and corporate transactions and documentation during an 18 year career with Baker & MacKenzie (Roos); and, significant experience in securities and financial fraud class actions while working for numerous major American law firms (Sturtevant).[99] Staff attorneys Butman and Liebmann also had meaningful prior experience in document review and analysis, but devoted only 24 hours each to the State Street Action.[100]

Of the 18 Lieff Cabraser staff attorneys who worked on the State Street Action, the following 11 were compensated directly by the firm during the time they worked on the Action: Ashur, Brehm, Gilyard, Gralewski, Jordan, Kim, Liebmann, Miloro, Oh, Roos, and Zaul.[101] The following four Lieff Cabraser staff attorneys were compensated initially by an agency (which billed the firm directly for their services), but became payroll employees of the firm in January 2015, during the pendency of the State Street Action: Bloomfield, Leggett, Nutting, and Sturtevant.[102] The following three Lieff Cabraser staff attorneys were compensated by an

[98] Appendices A and B.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

agency throughout their work for the firm on the State Street Action: Butman, McClelland, and Weiss.[103]

The following Lieff Cabraser staff attorneys physically worked on the State Street Action in the firm's San Francisco offices: Ashur, Butman, Gilyard, Kim, Leggett, Liebmann, McClelland, Oh, Roos, and Sturtevant. Miloro worked in Lieff Cabraser's New York office.[104] The following Lieff Cabraser staff attorneys worked remotely on the State Street Action (with their remote work locations noted parenthetically): Bloomfield (San Francisco, California); Brehm (Shoreham, New York); Gralewski (San Diego, California); Jordon (Houston, Texas and Atlanta, Georgia); Nutting (San Francisco, California); Weiss (Rochester, Minnesota and Sacramento, California); and Zaul (San Francisco, California).[105]

The following 13 Lieff Cabraser staff attorneys who worked on the State Street Action are still employed by or are working on behalf of the firm (with the total number of years worked for Lieff Cabraser, as of June 2018, noted parenthetically): Ashur (5 years), Gralewski (9 years), Jordan (6 years), Kim (7 years), Leggett (5 years), Liebmann (4 years), Miloro (7 years), Nutting (6 years), Oh (5 years), Roos (6 years), Sturtevant (6 years), and Zaul (6 years).[106] Five of the Lieff Cabraser staff attorneys who worked on the State Street Action are no longer with the firm: Bloomfield, Brehm, Butman, Gilyard and McClelland.[107]

Consistent with the firm's rate setting policies (*see* discussion *supra* at 13-15), with the exceptions noted below, all of the Lieff Cabraser staff attorneys who worked on the State Street

[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

Action (payroll and agency) were billed at an hourly rate of $415.[108] That hourly rate was consistent with the rate of a fourth year associate at the firm in 2016. *See* discussion *supra* at 14. Staff attorneys Bloomfield (class of 2000) and Butman (class of 1997) had an hourly rate of $515 per hour, which was equivalent to the hourly rate of a firm attorney in the class 2008.[109] The hourly rates used for these two attorneys were their rates in 2015, the year in which they left the firm and the year before the firm set all staff attorney rates at $415 per hour.[110] Staff Attorney Oh also had a billing rate of $515 per hour (equivalent to a Lieff Cabraser attorney in the class of 2008).[111] This rate was deemed appropriate by firm management in light of Oh's educational background (Stanford Law School), her graduation year (2004) and her extensive experience as a partner-track attorney at major law firms.[112]

3. Lieff Cabraser Shared and Hosted Staff Attorneys Paid For By Thornton.

By January 2015, more than half of the documents produced by State Street remained to be analyzed and coded.[113] The global settlement in the BNY Mellon Action and that settlement's attendant publicity created a pivotal moment in the State Street Action mediation. The parties needed to be prepared to proceed quickly to class certification, depositions and trial preparation should resolution not be achieved. Therefore, the parties agreed that the mediation should/would not extend past mid-2015.[114] Customer Class Counsel, including Lieff Cabraser,

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[108] *Id.*

[109] *Id.*

[110] *See* Appendices A and B; Ex. A to Fineman Declaration at 48.; Ex. 89 to Report, ECF No. 104-17, at 4.

[111] *Id.*

[112] Appendices A and B; Ex. A to Fineman Declaration at 48.

[113] Ex. A to Fineman Declaration at 49; Ex. B to Fineman Declaration at 7-8.

[114] Ex. A to Fineman Declaration at 13 and 49; Ex. B to Fineman Declaration at 7-8.

ramped up their document review accordingly in order to prepare the detailed issue, witness and liability memoranda described above.[115]

In early 2015, Lieff Cabraser agreed to share and/or host approximately five staff attorneys that would be partially or fully paid for by Thornton.[116] Labaton similarly agreed to share and/or host a number of staff attorneys that would be compensated, in whole or in part, by Thornton.[117] This arrangement was used due to Thornton's limited physical facilities and so that Thornton could bear an appropriate share of the cost of the document review and analysis.[118] It was also understood by Lieff Cabraser that Thornton would include the lodestar of the staff attorneys it paid for in any later fee request.[119]

Two of the staff attorneys Lieff Cabraser "shared" with Thornton were Jordan and Zaul.[120] As noted above, Jordon and Zaul both worked extensively for Lieff Cabraser on the BNY Mellon Action, both were on Lieff Cabraser's payroll, and both continue to work for Lieff Cabraser to this day.[121] For roughly a nine-week period between February and April 2015, Lieff Cabraser invoiced Thornton, and Thornton paid Lieff Cabraser, for the work performed by Jordan and Zaul.[122] For all other time periods during the State Street Action, Lieff Cabraser compensated Jordan and Zaul directly for any work they performed, without reimbursement from Thornton.[123]

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[115] Ex. A to Fineman Declaration at 49; Ex. B to Fineman Declaration at 7-8.
[116] Ex. A to Fineman Declaration at 50; Ex. 57 to Report at 23.
[117] Ex. 57 to Report at 23; Ex. 178 to Report, ECF No. 116.
[118] Ex. A to Fineman Declaration at 50; Ex. 57 to Report at 24; Ex. 175 to Report at 3.
[119] Ex. 57 to Report at 24; Ex. B to Fineman Declaration at 19; Ex. 10 to Report at 136-37.
[120] Appendices A and B; Ex. B to Fineman Declaration at 12, 18.
[121] Appendices A and B.
[122] Ex. 57 to Report at 25; Ex. B to Fineman Declaration at 18; Ex. 10 to Report at 156, 172.
[123] Appendices A and B; Ex. B to Fineman Declaration at 18; Ex. 10 to Report at 172.

Two other of these staff attorneys, McClelland and Weiss, had also worked extensively on the BNY Mellon Action for Lieff Cabraser. [124] Throughout their time with Lieff Cabraser, both of these attorneys were paid by an agency. [125] McClelland, who worked in Lieff Cabraser's San Francisco office, spent only 58 hours for Lieff Cabraser on the State Street Action (the bulk of his remaining hours were correctly allocated to Thornton, without duplication). [126] Weiss, who worked remotely, put in 473.50 hours on behalf of Lieff Cabraser in the State Street Action (with some additional hours also being correctly allocated to Thornton, without duplication). [127] Ms. Weiss continues to perform work for Lieff Cabraser today. [128] From February to mid-April, 2015, Thornton paid an agency directly for the legal services of McClelland and Weiss. [129]

Two additional staff attorneys – Ann Ten Eyck and Rachel Wintterle – were hired through and paid by an agency, which in turn was paid directly by Thornton. [130] These two staff attorneys worked physically in Lieff Cabraser's San Francisco office between February and June, 2015. [131] Neither Ten Eyck nor Wintterle had a prior or subsequent relationship with Lieff Cabraser. [132]

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[124] Appendices A and B.
[125] *Id.*
[126] Ex. 10 to Report at 151-152, 154; Ex. 41 to Report at 61.
[127] *Id.*; Appendices A and B.
[128] Appendices A and B.
[129] *Id.*; Ex. 57 to Report at 27; Ex. 10 to Report at 151-152, 154.
[130] Ex. A to Fineman Declaration at 50; Ex. B to Fineman Declaration at 11 and 18.
[131] *Id.*
[132] *Id.*

E. The Settlement And Attorneys' Fees Approval Process.

1. The Resolution of the State Street Action.

The parties in the State Street Action reached an agreement in principle to resolve the Action for $300 million on June 30, 2015.[133] The settlement term sheet, however, was not executed until September 2015, during which time the parties continued to negotiate a plan of allocation.[134] Almost nine months passed after the term sheet was executed, while State Street negotiated separate settlements with the DOJ and the Securities and Exchange Commission.[135] At a status conference on June 23, 2016, the parties notified the Court of the pending settlement and plans to submit it for preliminary approval.[136] At that hearing, the Court opined both on the likely fairness of the settlement, as well as the seeming reasonableness of Plaintiffs' Counsel's anticipated 25% attorneys' fee request.[137]

On July 26, 2016, Plaintiffs' Counsel filed a fully executed settlement agreement, along with a motion for preliminary approval of the settlement which included proposed forms of class notice.[138] Following a hearing held on August 8, 2016, on August 11, 2016, the Court issued a preliminary approval order which, among other things: preliminarily found the settlement to be fair, reasonable and adequate; preliminarily certified the settlement class; appointed Labaton as lead counsel, Thornton as liaison counsel, and Lieff Cabraser as additional counsel for the settlement class; approved the forms, substance and method of dissemination of the class notice; set deadlines and procedures for the serving and filing of objections to the settlement and/or

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[133] Ex. A to Fineman Declaration at 15; Ex. 3 to Report, ECF No. 104, at 20-24.
[134] *Id.*
[135] Ex. A to Fineman Declaration at 16; Ex. 3 to Report, ECF No. 104, at 20-24.
[136] *Id.*; ECF No. 85.
[137] *Id.*
[138] Ex. 75 to Report, ECF No. 89; ECF Nos. 90-92.

attorneys' fee request; set deadlines and procedures for requesting exclusion from the settlement class; and set a final approval hearing for November 2, 2016.[139]

2. Notice to the Class.

On August 22, 2016, notice of the settlement was provided to the class via direct mail and publication.[140] The notice advised class members of the factual background of the State Street Action; summarized the class settlement, the benefits available to class members, the plan of allocation of settlement proceeds, and Plaintiffs' Counsel's request for attorneys' fees and reimbursement of expenses; described the method and timing for opting out or objecting to the settlement; and provided the date for final settlement approval.[141]

With respect to attorneys' fees, the notice advised class members: "Lead counsel, on behalf of ERISA and Customer Counsel, will apply to the Court awarding attorneys' fees in an amount not to exceed $74,541,250.00 [approximately 25% of the settlement fund] and payment of Litigation Expenses in an amount not to exceed $1,750,000.00, plus interest earned on these amounts."[142]

3. The Final Settlement Approval Papers and Request for Payment of Attorneys' Fees.

On September 15, 2016, all plaintiffs (ATRS and the ERISA plaintiffs) filed their motion and legal memorandum in support of final settlement approval.[143] Also on September 15, 2016, Labaton, as lead counsel acting on behalf of all Plaintiffs' Counsel, filed a motion and

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[139] Exs. 111 and 112 to Report, ECF Nos. 93 and 97.

[140] Ex. 81 to Report.

[141] *Id*.

[142] *Id*. at 4. The notice further advised class members that they could obtain copies of the settlement agreement, as well as other litigation and settlement-related documents at www.statestreetindirectfxclasssettlement.com, or by contacting Labaton (as lead counsel) or the claims administrator. *Id*. at 15.

[143] ECF No. 101-1.

memorandum for an award of attorneys' fees, payment of expenses, and payment of service awards, along with the Omnibus Declaration and exhibits.[144] Among the exhibits attached to the Omnibus Declaration were individual firm declarations and lodestar reports from Plaintiffs' Counsel (showing those firms' timekeepers and their individual and aggregate hours worked and hourly rates).[145] Labaton, as lead counsel, took primary responsibility for the preparation of the attorneys' fee and expenses request, drafting the memorandum and the Omnibus Declaration.[146] Lieff Cabraser provided Labaton with editorial comments on both of those documents.[147] Lieff Cabraser did not, however, see the individual lodestar reports of Labaton, Thornton or ERISA Counsel before they were filed with the Court as exhibits to the Omnibus Declaration.[148]

Lieff Cabraser partner Daniel P. Chiplock prepared a declaration on behalf of the firm in support of the motion for award of attorneys' fees and expenses (the "Chiplock Declaration"), which was filed as an exhibit to the Omnibus Declaration.[149] The Chiplock Declaration summarized the history of the firm's involvement in the California Action, the specific tasks performed by the firm in the State Street Action, and attached a "Lodestar Report"

> indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based on the billing rates for each such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court.[150]

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[144] Exs. 3 and 110 to Report, ECF Nos. 103-1 and 104.
[145] Ex. 3, 66, 88-95 and 100 to Report.
[146] Ex. A to Fineman Declaration at 17; Ex. 175 to Report at 9-13.
[147] *Id.*
[148] *Id.*
[149] Ex. 89 to Report, ECF No. 104-17 at 1-3 and Exhibit "A"; Ex. 175 to Report at 9-10.
[150] *Id.* at 2-3.

Among other things, the Lieff Cabraser Lodestar Report specified which firm timekeepers were partners, associates and staff attorneys.[151] In total, Lieff Cabraser reported 20,458.5 hours worked for a total lodestar of $9,800,487.50.[152]

Labaton, on behalf of all Plaintiffs' Counsel, requested a percentage-of-the-recovery fee award of roughly 25% of the total settlement fund of $300 million based on the factors commonly considered by courts within the First Circuit and in typical contingent fee percentages awarded in complex class cases such as the State Street Action.[153] The reasonableness of the fee request was bolstered by the Court's comments during the June 23, 2016 status conference during which the Court stated that a 25% fee percentage was "great" and was the level at which the Court "start[ed] ordinarily."[154] The lodestar of each of the Plaintiffs' Counsel firms, including Lieff Cabraser, was submitted to the Court solely for "cross-check" purposes in order to assist the Court in determining whether a 25% fee was appropriate in light of the work performed and risks undertaken.[155]

4. The Court's Approval of the Settlement and the Attorneys' Fees Request.

The final fairness hearing of the settlement of the State Street Action occurred on November 2, 2016.[156] During that hearing, the Court announced that it did not believe "either the question of class certification or the question of whether the settlement is fair, reasonable and adequate is a close question. I think the answer to both is yes."[157] Observing that the class

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[151] *Id.*, Ex. A.
[152] *Id.*
[153] Ex. 110 to Report, ECF No. 103-1 at 3-24; Ex. B to Fineman Declaration at 25-26.
[154] ECF No. 85; Ex. A to Fineman Declaration at 16; Ex. B to Fineman Declaration at 25-26.
[155] Exs. 3, 66, 88-95 and 110 to Report.
[156] Ex. 78 to Report, ECF No. 114.
[157] *Id.* at 18.

members were sophisticated institutional investors, the Court found that the "settlement of $300 million is fair, reasonable and adequate, again essentially for the reasons stated on August 8, 2016 [at the preliminary approval hearing] and the additional facts that no class member has objected, no class member has opted out."[158]

In considering the attorneys' fee request, the Court found Plaintiffs' Counsel's request for $74,541,250 in fees and $1,257,699.94 in expenses was reasonable.[159] The Court stated that it is "appropriate in this case to use the percentage of the common fund approach in determining the amount of attorneys' fees that should be awarded."[160] The Court went on to state:

> I have used the percentage of common fund method. I have used the reasonable lodestar to check on that I've also considered the awards in comparable cases. The $74,500,000 plus is about – well, is 24.48 percent of the settlement fund. Adding in litigation expenses brings it to 25.27 percent of the settlement fund. Adding the service awards makes it a little higher. This is in the 20 to 30 percent range usually awarded by me in class action common fund cases and in many cases with settlements in the First Circuit and in many cases where the settlements are [in] a $250 million to $500 million range.[161]

The Court also used the "reasonable lodestar" of $41.3 million to determine that the approximately 25% percentage-of-the-recovery fee request was appropriate: "The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain."[162]

On the same day as the final fairness hearing, November 2, 2016, the Court entered orders finally approving the settlement and the plan of allocation, as well the award of attorneys'

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[158] *Id*. at 18-19.
[159] *Id*. at 35.
[160] *Id*. at 22-23.
[161] *Id*. at 35.
[162] *Id*. at 36.

fees "in the amount of $74,541,250.00, plus any accrued interest, which was approximately 25% of the Class Settlement Fund, along with payment of expenses in the amount of $1,257,697.94,…"[163] The Court specifically found that the "amount of attorneys' fees awarded is fair and reasonable and consistent with fee awards approved in cases within the First Circuit and other Circuits with similar recoveries."[164]

F. The Inadvertent Double-Counting Of Certain Staff Attorney Time.

1. Lieff Cabraser's Discovery and Response to the Inadvertent Double-Counting of Some of Their Staff Attorneys' Hours.

On November 8, 2016, David J. Goldsmith of Labaton informed Chiplock of Lieff Cabraser that a reporter from the Boston Globe had inquired about the appearance of certain attorneys on more than one of Customer Class Counsel's lodestar reports.[165] Upon learning of that inquiry, Lieff Cabraser, through Chiplock, promptly identified time and lodestar included in the firm's Lodestar Report that was also included as part of the Thornton fee submission (the latter of which had not been shared with Lieff Cabraser before it had been filed with the Court).[166] Chiplock identified these duplicative time entries: (a) by reviewing prior email correspondence between and among Lieff Cabraser and the other Customer Class Counsel during the early to mid-2015 timeframe; (b) through confirmatory emails by and between personnel at Lieff Cabraser and Thornton; (c) by reviewing the detailed time reports for the staff attorneys Lieff Cabraser shared with or hosted for Thornton; and, (d) by reviewing Thornton's fee submission (which, again, the firm had not seen prior to its filing with the Court).[167]

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[163] ECF Nos. 110, 111 at ¶4, and 112.

[164] ECF No. 111 at ¶6(a).

[165] Ex. 175 to Report at 19.

[166] Ex. A to Fineman Declaration at 51-53; Ex. 175 to Report at 20; Ex. B to Fineman Declaration at 27-28.

[167] *Id.*

Lieff Cabraser's internal review showed that two of the staff attorneys who split time performing work for both Lieff Cabraser and Thornton – McClelland and Weiss (*see* discussion *supra* at 30) – showed no duplicative time in Lieff Cabraser's or Thornton's reports. In other words, the reported hours for McClelland and Weiss were correctly allocated between Lieff Cabraser and Thornton, and there was no error to report for them.[168]

Two other staff attorneys who split time between Lieff Cabraser and Thornton, however – Jordan and Zaul (*see* discussion *supra* at 29) – did have time that was inadvertently duplicated in Lieff Cabraser's Lodestar Report.[169] As explained above, Jordan and Zaul worked for Lieff Cabraser and were paid directly by the firm before, during, and after their brief stints for Thornton, and were therefore accustomed to submitting their contemporaneous time records to the firm on a daily basis.[170] The inadvertent duplication of their time in Lieff Cabraser's Lodestar Report occurred because the time these two attorneys spent reviewing documents assigned to Thornton between February 9, 2015 and April 14, 2015 was mistakenly not removed from Lieff Cabraser's timekeeping records after the firm's accounting department invoiced and received payment for those hours from Thornton.[171] This was an inadvertent bookkeeping error.[172]

The two other staff attorneys whose time was incorrectly included in Lieff Cabraser's Lodestar Report – Ten Eyck and Wintterle – were hired through an agency that was paid directly by Thornton. *See* discussion *supra* at 30.[173] Those attorneys should not have entered any time

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] Ex. 175 to Report at 20; Ex. B to Fineman Declaration at 27-28; Ex. 10 to Report at 152-157.
[173] *Id.*

summaries into the Lieff Cabraser timekeeping system.[174] However, they did so throughout the three to four months they worked in Lieff Cabraser's San Francisco office (March – June 2015), by emailing their time summaries directly to the firm's word processing department (consistent with typical staff attorney practice) while also reporting their time to both their employing agency and to Thornton, unbeknownst to the attorneys and staff overseeing the case.[175] This was an inadvertent oversight in their training in San Francisco.[176]

After these errors were discovered on November 9, 2016, Chiplock instructed Lieff Cabraser's accounting department to remove all of the erroneously recorded hours that in fact had been Thornton's financial responsibility from Lieff Cabraser's timekeeping records.[177] This resulted in Lieff Cabraser correcting its lodestar as follows: [178]

Originally Reported Hours and Lodestar	
Hours	Lodestar
20,458.50	$9,800,487.50
Corrected Hours and Lodestar	
Hours	Lodestar
18,696.70	$8,932,070.50
Difference	
Hours	Lodestar
1,761.80 (8.6%)	$868,417.00 (8.8%)

Lieff Cabraser provided its "corrected lodestar" figures to Labaton and assisted in the drafting of the November 10, 2016 corrective letter from Goldsmith to the Court.[179]

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[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] Ex. 57 to Report at 26.
[178] Ex. A to Fineman Declaration at 53.
[179] Ex. 175 to Report at 21; Ex. 10 to Report at 184-189.

2. The November 10, 2016 Goldsmith Letter.

On November 10, 2016, Goldsmith, writing on behalf of Customer Class Counsel, informed the Court of the inadvertent double counting of certain staff attorneys shared with or hosted by Labaton and Lieff Cabraser on behalf of Thornton (the "Goldsmith Letter").[180] Goldsmith explained that because of these "inadvertent errors, Plaintiffs' Counsel's reported combined lodestar of $41,323,895.75, and reported combined time of 86,113.70 hours were overstated."[181] Goldsmith explained that deducting the "duplicative time from the $41.32 million reported combined lodestar results in a reduced combined lodestar of $37,265,241.25, and reduced combined time of 76,790.80 hours."[182]

Goldsmith went on to point out that "[c]ross-checking the $37.27 million in reduced combined lodestar against the $74,541,250 percentage-based fee awarded by the Court yields a lodestar multiplier of 2.00. [Footnote omitted.] This is higher than the 1.8 multiplier we proffered in our submissions and during the hearing."[183] Goldsmith, on behalf of Plaintiffs' Counsel, then respectfully submitted that a "2.00 multiplier remains reasonable and well-within the range of multipliers found reasonable for cross-check purposes in common fund cases within the First Circuit…," and requested that the Court "adhere" to its prior ruling on attorneys' fees notwithstanding the reduced lodestar."[184]

Goldsmith concluded the letter by apologizing to the Court for the "inadvertent errors in our written submissions and presentation during the hearing," and advised the Court that counsel

[180] Ex. 178 to Report, ECF No. 116.
[181] *Id*. at 2.
[182] *Id*. at 3.
[183] *Id*.
[184] *Id*.

was "available to respond to any questions or concerns the Court may have."[185] The Court did not hold a hearing or otherwise communicate with Plaintiffs' Counsel about this matter until almost three months later.[186]

G. The "Clawback" Agreement and Distribution of Attorneys' Fees.

In a letter to Plaintiffs' Counsel dated November 21, 2016, Sucharow of Labaton noted that the settlement of the State Street Action would become effective on December 7, 2016, and that because there were no objections to the settlement or requested fees, no class member had standing to appeal.[187] Sucharow observed that the Court had not yet responded to the Goldsmith Letter, and stated that if the "Court remains silent as of close of business on December 7, 2016, we [Labaton, as lead counsel] will begin the process of withdrawing the approved fees, expenses and service awards from the Lead Counsel Escrow Account for prompt distribution to your respective firms pursuant to our agreements."[188]

Sucharow continued by acknowledging that it remained "possible, however, that the Court, on or after December 8, 2016, will respond adversely to the [Goldsmith Letter] and ultimately reduce the fee award… after the fees, expenses and service awards have been distributed to your respective firms (and to the other ERISA counsel)."[189] Accordingly, Labaton required that before fees and expenses be distributed, "we will require an undertaking, evidenced by your signature below, confirming your agreement to refund to us within five (5) business days, for redeposit into the Lead Counsel Escrow Account, your *pro rata* share of any Court-

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[185] *Id.*
[186] Ex. 180 to Report, ECF No. 117.
[187] Ex. 179 to Report, ECF No. 116.
[188] *Id.*
[189] *Id.*

ordered reduction of fees, expenses, and/or service awards."[190] Plaintiffs' Counsel, including Lieff Cabraser, consented to this "clawback" agreement.[191]

Pursuant to a written agreement entered into on August 30, 2016, Lieff Cabraser was entitled to 24% of the attorneys' fees allocated to Customer Class Counsel, which received 84.5% of the total fee award, with 10% of the balance going to ERISA Counsel and 5.5% of the total going to "Labaton Sucharow's local counsel."[192] This meant that Lieff Cabraser was entitled to 20.3% of the total attorneys' fee award, along with reimbursement of the firm's expenses.[193] On December 7, 2016, Labaton distributed to Lieff Cabraser its share of the awarded attorneys' fee, $15,116,965.50, along with $271,944.53 in expenses.[194] Using Lieff Cabraser's corrected lodestar total of $8,932,070.50, the corrected and actual lodestar multiplier for Lieff Cabraser was at that time 1.69, below the aggregate corrected lodestar multiplier of 2.0 (and, indeed, below the original uncorrected aggregate reported lodestar multiplier of 1.8).[195]

H. The Attorneys' Fees Investigation By The Special Master.

1. Order Appointing the Special Master.

On December 17, 2016, the Boston Globe published an article, "Critics hit law firms' bills after class-action lawsuits."[196] That article addressed, among other things, the double-counting of certain staff attorney time, the position asserted in the Goldsmith Letter that the Court's fee award remained appropriate after deducting the incorrectly included lodestar, and

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[190] *Id.*
[191] *Id.*
[192] Ex. I to Fineman Declaration at 3-4; Report at 86-88.
[193] *Id.*
[194] *Id.*
[195] Ex. A to Fineman Declaration at 54; Ex. B to Fineman Declaration at 26.
[196] ECF No. 117.

new questions about whether the hourly rates attributed to the staff attorneys who worked on the State Street Action were justified.[197]

Referring to the Goldsmith Letter and the Boston Globe article, in a Memorandum and Order dated February 6, 2017, the Court proposed to appoint former United States District Judge Gerald E. Rosen as a special master to investigate issues that "have arisen with regard to the accuracy and reliability of information submitted by plaintiffs' counsel on which the court relied, among other things, in deciding that it was reasonable to award them almost $75,000,000 in attorneys' fees and more than $1,250,000 in expenses."[198]

Following written responses from Plaintiffs' Counsel, including Lieff Cabraser, and after a March 7, 2017 hearing, in a Memorandum and Order dated March 8, 2017, the Court appointed Judge Rosen as Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure ("Federal Rules"), and directed that Judge Rosen investigate and prepare a report and recommendation concerning, among other issues:

> (a) the accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses, including but not limited to whether counsel employed the correct legal standards and had a proper factual basis for what was represented to be the lodestar for each firm; (b) the accuracy and reliability of the representations made in the November 10, 2016 Letter from David Goldsmith, Esq. of Labaton Sucharow, LLP to the Court (Docket No. 116); (c) the accuracy and reliability of the representations made by the parties requesting service awards; (d) the reasonableness of the amounts of attorneys' fees, expenses, and service awards previously ordered, and whether any or all of them should be reduced; (e) whether any misconduct occurred in connection with such awards; and, if so, (f) whether it should be sanctioned, *see e.g.*,

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[197] *Id.* Although mentioned briefly in the Boston Globe article, Lieff Cabraser was not contacted for comment nor given the opportunity to respond to the class action "critics" cited liberally in the piece.

[198] Ex. 180 to Report, ECF No. 117, at 1-2.

Fed.R.Civ.P. 11(b)(3) & (c); Massachusetts Supreme Judicial Court Rule of Professional Conduct 3.3(a)(1) & (3).[199]

The Court's March 8, 2017 Order further directed Customer Class Counsel to pay $2 million into a fund to be used by the Special Master for purposes of his investigation.[200] The Court ordered that that fund would be used to "pay the reasonable fees and the expenses of the Master and any firm, organization, or individual he may retain to assist him."[201] In subsequent orders dated October 24, 2017 and April 23, 2018, the Court further instructed Customer Class Counsel to pay an additional $1.8 million toward the Special Master's fees and expenses.[202] To date, Customer Class Counsel has collectively paid $3.8 million for the fees and expenses of the Special Master and his team. The economic impact on Lieff Cabraser from funding its share of the Special Master's investigation, and all other aspects of the investigation, is described below. *See* discussion *infra* at 64-66.

2. The "Informal" Phase of the Investigation.

The Special Master's investigation began with an "informal" phase. After providing the Special Master with all settlement approval and fee request documentation, the Master invited each of the Plaintiffs' Counsel firms to meet with him in non-sworn, informal fact-gathering sessions. Lieff Cabraser, through the firm's general counsel and senior partner, Richard M. Heimann, the firm's managing partner, Steven E. Fineman, and Chiplock, met with the Special

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[199] Ex. 163 to Report, ECF No. 173, at 2-3.

[200] *Id*. at 6.

[201] *Id.* In total, the Special Master's team included William Sinnott, Elizabeth McEvoy and Brian Mulcahy, of Barrett & Singal, P.C. (collectively referred to herein as "counsel" for the Special Master); Linda Hylenski, a former law clerk for Judge Rosen and currently a research attorney with JAMS; the Hon. Mary Beth Kelly, a former justice of the Michigan Supreme Court, currently a JAMS mediator and arbitrator; John Toothman, an attorney and purported authority on legal fees; and, Professor Stephen Gillers, a proffered expert on ethical and professional conduct issues. Report at 137.

[202] ECF Nos. 208 and 217.

Master, his assistant, Hylenski, his counsel, Sinnott and McEvoy, and the Special Master's attorneys' fee consultant, Toothman, on April 5, 2017 at the New York offices of JAMS.[203]

During Lieff Cabraser's April 5, 2017 meeting with the Special Master and his team, the firm provided the Master with a 67 page written presentation which framed and guided much of that multi-hour interview ("Presentation").[204] That Presentation addressed the following topics:

- About Lieff Cabraser
- How Lieff Cabraser staffs large complex cases
- How Lieff Cabraser sets hourly rates, including for staff attorneys
- Involvement in the *State Street* case
- Involvement in the *BNYM FX* case
- Resolution of the *BNYM* and *State Street* cases
- Fee application process in *State Street*
- Background of Lieff Cabraser staff attorneys who worked on *State Street*
- Role of Lieff Cabraser staff attorneys in *State Street*
- *State Street* Document Review Protocol
- Hourly rates applied to Lieff Cabraser staff attorneys in *State Street*
- Coordination of staff attorneys with Labaton and Thornton firms
- Lieff Cabraser's hourly duplication mistake explained
- Lieff Cabraser's fee and corrected lodestar in *State Street*
- Hourly rates of Lieff Cabraser staff attorneys paid by clients
- Lieff Cabraser staff attorneys are routinely included in and approved in class action fee awards[205]

The essential facts as they relate to Lieff Cabraser, including the firm's inadvertent double counting of time of four staff attorneys, and the propriety of the hourly rates applied to Lieff Cabraser's attorneys (including its staff attorneys), were included in the firm's April 5, 2017 Presentation, discussed during that meeting with the Special Master, and were later

[203] Throughout the Special Master's investigation, Lieff Cabraser has represented itself through Messrs. Heimann, Fineman and Chiplock.

[204] Ex. A to Fineman Declaration.

[205] *Id.*

reiterated through formal written and deposition discovery.[206]

3. The "Formal" Phase of the Investigation.

On May 18, 2017, the Special Master, through his counsel, propounded on Lieff Cabraser 53 document requests and 77 interrogatories.[207] Similar discovery was served on Labaton and Thornton. On May 23, 2017 the Special Master, through his counsel, propounded annotated and revised written discovery on Lieff Cabraser (and Labaton and Thornton), reducing the number of document requests and interrogatories that would require responses from the firm to 35 and 64, respectively, and modified the schedule for responding to the discovery to three dates (June 1, June 9, and July 10, 2017).[208] Lieff Cabraser responded to the Special Master's written discovery as follows:

- May 26, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents (written responses to 35 document requests).[209]
- June 1, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017 (responses and objections to 20 interrogatories).[210]
- June 1, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due June 1, 2017 via link to LCHB's file-share system.
- June 2, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due June 1, 2017 via link to LCHB's file-share system.

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[206] In addition to providing the Presentation to the Special Master and his counsel at the time of the informal meeting, it was later produced to the Special Master during the formal phase of the investigation. *See* note 4, *supra*. The Presentation is not included among the exhibits to the Special Master's Report

[207] Ex. C to Fineman Declaration.

[208] Ex. D to Fineman Declaration.

[209] Ex. E to Fineman Declaration.

[210] Ex. 57 to Report.

- June 9, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories due on June 9, 2017 (written responses and objections to 22 interrogatories).[211]

- June 9, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due June 9, 2017 via link to LCHB's file-share system.

- July 10, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017 (written responses and objections to 22 interrogatories).[212]

- July 10, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due July 10, 2017 via link to LCHB's file-share system.

Between June 5, 2017 and July 17, 2017, the Special Master took 39 depositions of personnel from the Plaintiffs' Counsel firms.[213] Attached as Appendix C is a chart identifying each deponent, the date of deposition, the number of pages of testimony, the total deposition time, and the Special Master's personnel in attendance at the deposition.

The Special Master, and his counsel, took depositions of nine representatives from Lieff Cabraser, including firm partners Heimann, Fineman, and Chiplock; staff attorneys Ashur, Gralewski, Jordan, Oh, and Zaul; and, the firm's litigation support manager, Dugar.[214] The deposition testimony of Lieff Cabraser's attorneys and staff reiterated the information provided

[211] Ex. 175 to Report.

[212] Ex. B to Fineman Declaration.

[213] The firm uses the phrase the "Special Master and as counsel" because typically both the Master and his counsel, Sinnott, alternated asking questions of the witnesses, frequently covering the same ground, and in the case of the Special Master, periodically offering his views on the topic being covered.

[214] Exs. 10, 18, 19, 55, 59, 61, 101, 104 and 106 to Report.

by the firm in the November 10, 2016 Goldsmith Letter, the April 5, 2017 Presentation, and its responses to the Special Master's written discovery, and is further reflected in this Response and Objections.[215]

On July 5, 2017, the Special Master made a request for a supplemental submission from Customer Class Counsel, inviting Counsel to "provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his final Report and Recommendation."[216] In particular, the Special Master asked Customer Class Counsel to address the issues relating to the "areas of concern" identified in the Court's March 8, 2017 Memorandum and Order, and to provide input on additional "topics which have arisen during the course of the Special Master's investigation and are related to his mandate from Judge Wolf."[217]

On August 1, 2017, Customer Class Counsel submitted a Consolidated Response to the Special Master's July 5, 2017 request. In its Response, Customer Class Counsel specifically addressed the areas of concern raised by the Court and the specific topics identified by the Special Master, all with citations to the written discovery responses and deposition testimony to date. The Response was augmented by an accompanying July 31, 2017 Expert Declaration of William B. Rubenstein, the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular ("Rubenstein Declaration I").[218]

In their Consolidated Response, Customer Class Counsel stated:

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[215] *Id.*

[216] Ex. F to Fineman Declaration.

[217] *Id.*

[218] Neither the Consolidated Response nor Rubenstein Declaration I are exhibits to the Special Master's Report, and therefore are attached as Exs. G and H to the Fineman Declaration.

- Counsel employed the correct legal standards in their request for an award of attorneys' fees and expenses;
- Except for the inadvertent double-counting of certain staff attorneys' time, as reported in the November 20, 2016 Goldsmith Letter, the representations made by counsel in their request for awards of attorneys' fees and expenses were accurate and reliable.
- The attorneys' fees and expenses awarded to Plaintiffs' Counsel were reasonable when made, and should not be reduced beyond the $2 million already contributed to the cost of the Special Master's investigation; and
- The billing rates for staff attorneys who worked on the State Street Action were based on the firms' understanding of appropriate market rates for the legal services rendered, and that based on the work performed by those staff attorneys, the hourly rates submitted as part of the lodestar cross-check against the percentage of the fee recovery were appropriate.[219]

In the Consolidated Response, Lieff Cabraser specifically addressed questions raised by the Special Master about whether it was appropriate to assign the same hourly rates to staff attorneys paid directly by the firm and those paid by an agency, and whether such agency attorneys should be treated as a cost instead accounting for their time as part of the firm's lodestar.[220] With reference to the factual record and the Rubenstein Declaration I, Lieff Cabraser made the following points on this topic:

- Some staff attorneys began their work on the litigation as agency attorneys before being hired directly by the firm;
- By the time the staff attorneys were working on the detailed issue memoranda only one Lieff Cabraser staff attorney was still being paid through an agency (Weiss);
- Staff attorneys and agency attorneys were given the same type of assignments, supervised in the same manner, and were expected to produce the same quality of work (Weiss, for example, authored detailed issue memoranda just like the others);

[219] Ex. G to Fineman Declaration at 2-5.
[220] *Id.* at 4-5.

- Ten Eyck and Wintterle, agency lawyers paid by Thornton but working in Lieff Cabraser's offices, also prepared issue memoranda just like the others;

- Billing rates for all firm staff lawyers, including those from an agency, were set based on the firm's understanding of the appropriate market rates for similar legal services; and,

- The amount paid by the firm to an agency for an agency attorney's work on an hourly basis was comparable to the hourly pay for staff attorneys paid directly by the firm.[221]

With the submission of the August 1, 2017 Consolidated Response, Lieff Cabraser assumed the Special Master's investigation was complete and that the Master would proceed to prepare a final report and recommendation. As explained below, however, the Special Master's investigation took, what was for Lieff Cabraser at least, an unexpected turn.

4. The "Chargois" Investigation.

During the course of its investigation, the Special Master learned that 5.5% (or $4.1 million) of the attorneys' fee awarded by the Court in the State Street Action was allocated to attorney Damon Chargois, at all times understood by Lieff Cabraser to be Labaton's "local counsel" in Arkansas.[222] According to the Special Master, because Chargois had not appeared on any of the pleadings in the State Street Action and had not been identified to the Court as a prospective recipient of attorneys' fees, the Master commenced an investigation into the relationship between Chargois and Customer Class Counsel and the basis upon which Chargois was compensated.[223]

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[221] *Id.* In his June 6, 2017 deposition testimony, Lieff Cabraser managing partner Fineman made many of these same points, and emphasized to the Special Master that the firm incurs "overhead" expenses in connection with all of its staff attorneys, including those paid directly by an agency. Ex. 18 to Report at 47-55.

[222] Report at 87.

[223] *Id.*

a. August 11, 2017 Written Discovery Responses.

The Chargois investigation commenced with written discovery propounded on Lieff Cabraser (and on the other Plaintiffs' Counsel) on August 7, 2017. Lieff Cabraser responded as follows:

- August 11, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Interrogatories Due on August 11, 2017 (responses and objections responding to one multi-part interrogatory);[224] and,
- Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Request for the Production of Documents (responses and objections to one request for all documents in the firm's possession concerning Chargois).[225]

In Lieff Cabraser's August 11, 2017 interrogatory responses, the firm informed the Special Master of its limited knowledge of and complete lack of contact with Chargois. In particular, Lieff Cabraser advised the Special Master that the firm had no contact with Chargois in the State Street Action other than several emails on which Lieff Cabraser attorneys were copied, and that no Lieff Cabraser attorney had ever met or spoken with Chargois.[226] Lieff Cabraser explained to the Special Master that the firm was informed and understood at all times that Chargois was "local counsel" in Arkansas (the location of the lead plaintiff ATRS); that Labaton owed Chargois 20% of its share of any fee award in the State Street Action; and, that at the request of Labaton and Thornton, the firm agreed that 5.5% of the aggregate fee award in the Action (an amount estimated to equal Labaton's 20% obligation) would be paid to Chargois for his services.[227]

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[224] Ex. I to Fineman Declaration.

[225] Ex. J to Fineman Declaration.

[226] Ex. I to Fineman Declaration.

[227] *Id.* In their August 11, 2017 interrogatory responses, Lieff Cabraser also responded to the Special Master's inquiry why the firm had not previously produced the fee allocation

b. September/October 2017 Depositions.

Between September 1, 2017 and October 25, 2017, the Special Master, through his counsel, conducted 15 depositions concerning the Chargois investigation.[228] Only two of those deponents – Chiplock and Robert L. Lieff – were from Lieff Cabraser. *Id*.[229] During their depositions, Chiplock and Lieff confirmed that Chargois was repeatedly described and represented to the firm as "local counsel" for Labaton and/or ATRS; that they were informed that Chargois had played an "important" role in the litigation and had provided legal services that were of value to the client and therefore to the class; that they were familiar with the role of local counsel in large financial fraud cases (particularly those led by public pension fund clients); that they appreciated that Chargois' role was similar to that of the local counsel for the firm's public pension fund client in the BNY Mellon Action; and, that based on their past experience, they did not believe that fees of approximately 5% to local counsel were unreasonable in view of what they understood about Chargois' role in the case.[230]

Further, it was not until certain deposition testimony in September and October 2017, that Lieff Cabraser first learned that Labaton had an agreement in place to pay Chargois (or his law firm) up to 20% of attorneys' fees received by Labaton in any litigation involving an institutional

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agreement or related emails showing that 5.5% of any aggregate fee award would be paid to "Labaton Sucharow's local counsel." *Id*. Lieff Cabraser explained to the Special Master that the firm "simply in good faith did not understand [the fee allocation agreement or related emails] to be responsive to the Master's prior discovery requests," pointing out that the originally propounded document request seeking such information had been specifically withdrawn by the Master's counsel and that no interrogatory sought the specific fee allocation by and among Plaintiffs' Counsel. *Id*. When the Special Master asked for the fee allocation agreement and related email correspondence, Lieff Cabraser promptly and thoroughly complied. *See* LCHB-0053483 – LCHB-0053569. In his Report, the Special Master notes that he "does not conclude that the non-disclosure constitutes discovery misconduct." Report at 119, n. 98.

[228] *See* Appendix C.

[229] *Id.*; Exs. 41 and 139 to Report.

[230] Ex. 41 to Report at 100-105, 109-111, 115-118, 150-152; Ex. 139 to Report at 57-68, 72-97.

investor for whom Chargois had facilitated the introduction, including ATRS, or that this arrangement dated back to approximately 2007.[231] Moreover, it was not until conduct of the depositions in September and October 2017 that Lieff Cabraser first learned that Chargois had not served as local counsel for Labaton and/or ATRS in the State Street Action, had performed no work in the Action, and was not known to the client representative for ATRS.[232] Lieff himself testified that had he known of the true nature of the Chargois arrangement he would not have agreed that the firm share in the payment of fees to Chargois.[233]

c. November 3, 2017 Submission.

On September 7, 2017 the Special Master propounded on Lieff Cabraser a request for a supplemental submission concerning "the circumstances of the monies paid to attorney Damon Chargois in the State Street case for his role as a referring attorney and the implications of that payment and circumstances in addressing the charge of Judge Wolf in paragraph 2 of his March 8, 2017 Order."[234] The date for responding to this request was extended to November 3, 2017 to accommodate the completion of the deposition schedule.

In its November 3, 2017 Response, Lieff Cabraser again, with reference to the firm's interrogatory responses, internal documents, and deposition testimony, advised the Special Master that the firm understood Chargois to be local Arkansas counsel who played an important role in the State Street Action, a role with which the firm was generally familiar from prior experience, including in the BNY Mellon Action (on which Lieff Cabraser was lead counsel).[235] Lieff Cabraser also reminded the Special Master that it did not learn that Chargois had not served

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[231] *Id.*
[232] *Id.*
[233] Ex. 139 to Report at 95-97.
[234] Ex. K to Fineman Declaration.
[235] Ex. L to Fineman Declaration.

as local counsel, had performed no work in the State Street Action, and was not known to the client representative for ATRS until those facts came out during the depositions in September and October 2017.[236] Finally, the firm stated that at no time did Lieff Cabraser agree to "conceal" the existence of Chargois from anyone, including the Court, class members, or ERISA Counsel, either before or after the November 2016 final approval hearing.[237]

d. Expert Testimony.

On February 23, 2018 Lieff Cabraser, along with the other Plaintiffs' Counsel, received an Ethical Report for Special Master Gerald E. Rosen, prepared by Professor Gillers ("Gillers Report I").[238] In his Report I, Gillers concluded that the "Chargois Arrangement," defined by Gillers (and the Special Master) as Labaton's agreement to pay Chargois up to 20% of any attorneys' fees received by Labaton in any litigation involving an institutional investor for whom Chargois had facilitated the introduction, including ATRS, without regard to substantive work performed in a particular case, was "unethical payment for the recommendation of a client, not a valid division of [a] fee agreement."[239] Gillers went on to opine that even if the "Chargois Arrangement" could be deemed a valid division of a fee agreement, and not an improper payment for recommending a client, Labaton, Thornton and Lieff Cabraser were ethically

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[236] *Id.*

[237] *Id.*; *see also* Ex. 41 to Report at 104-105, 115-117, 119-120, 140-141. In his Executive Summary, the Special Master states, without citation to the record, that, "the Customer Class Counsel specifically agreed that the Court not be told of the allocation of fees, which meant that the Court would not be told of the Chargois arrangement,…." Executive Summary at 26. To be sure, there is no agreement, email, or any other document or testimony, in which Lieff Cabraser "specifically agreed that the Court need not be told of the allocation of fees," or that Chargois would be receiving a fee.

[238] Ex. 232 to Report.

[239] *Id.* at 33 and 58.

obligated to disclose the Arrangement to the Court and to the class under Massachusetts ethical rules.[240]

However, when confronted at his March 20 and 21, 2018 deposition with the fact that Lieff Cabraser did not know of the Chargois Arrangement until recently (*see* discussion *supra* at 49-53), Gillers recanted his opinion that Lieff Cabraser had violated any ethical rules.[241] Indeed, in his Supplemental Ethical Report for Special Master Gerald E. Rosen, dated March 8, 2018 ("Gillers Report II"), Gillers eliminated all reference to Lieff Cabraser having violated any ethical rules as to any matter under consideration by the Special Master, including concerning Chargois or the Chargois Arrangement.[242]

In response to Gillers Report I, on March 26, 2018, Lieff Cabraser offered expert reports from Professor Rubenstein and an experienced Boston, Massachusetts based attorney, Timothy Dacey, in support of the firm's position that it violated no legal or ethical rules in connection with the Chargois payment or the Chargois Arrangement.[243] In the Expert Report of William B. Rubenstein ("Rubenstein Report"), Rubenstein expressed three primary opinions: (1) Rules 23 and 54 of the Federal Rules do not require disclosure of fee allocation agreements absence judicial order, courts rarely order disclosure or involve themselves in fee allocation, and the Court in this case issued no such order; (2) Professor Gillers's attempts to advocate around the text of Rules 23 and 54 are not supported by the law; and (3) Rule 23 does not require disclosure of fee allocation agreements in the class notice.[244]

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[240] *Id.* at 66, et seq.

[241] Ex. 253 to Report at 219-222, 239-240, and 248-254.

[242] Ex. 233 to Report.

[243] Exs. 234 and 254 to Report.

[244] Ex. 234 to Report. Professor Rubenstein's extensive experience and qualifications as one of the nation's leading experts in complex class action practice are set forth in Ex. H to the

Lieff Cabraser's other expert, Dacey, is a longtime Boston trial lawyer and expert on Massachusetts ethical rules.[245] In the Expert Report of Timothy Dacey ("Dacey Report"), Dacey concluded that, based on the factual record described above, "Lieff Cabraser attorneys did not violate the Massachusetts Rules of Professional Conduct."[246] According to Dacey, to violate the duties of candor imposed by the Massachusetts ethical rules, "a lawyer must have actual knowledge that his or her statements are false or misleading. Based on the facts as I understand them, the lawyers at Lieff Cabraser lacked the requisite state of mind to establish a violation of these Rules."[247]

Between March 20 and April 20, 2018, nine expert witnesses proffered by the parties, including Gillers, Rubenstein and Dacey, were deposed.[248] Rubenstein and Dacey were deposed on April 9, 2018.[249] Their testimony was in all material respects consistent with their expert reports.[250]

e. April 5, 2018 Submission.

On March 25, 2018, the Special Master requested from Lieff Cabraser "any evidence… identif[ied] in the record, or evidence… not currently in the record" relating to Lieff Cabraser's "state of mind" as to the issue of [Chargois's] role in the State Street litigation prior to

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Fineman Declaration at 3-7, and A1-A18. Rubenstein is the author of the definitive text on class action practice, *Newberg on Class Actions* (5th ed.)(2015).

[245] Dacey, who has practiced for 48 years at the Boston firms of Hill & Barlow, LLP and Goulston & Storrs, P.C., has been a member of the Committee on Professional Ethics of the Massachusetts Bar Association since 1984 and Vice-Chair of the Committee since 1991. In addition, since 2012, Dacey has been a member of the Massachusetts Advisory Committee on the Rules of Professional Conduct, and a lecturer at Harvard Law School where he teaches a course that focuses on the rules of professional conduct. Ex. 244 to Report.

[246] *Id.* at 18.

[247] *Id.* at 1.

[248] *See* Appendix C.

[249] Exs. 235 and 237 to Report.

[250] Exs. 234, 235, 237 and 244 to Report.

September 7, 2017.[251] Even though the record was already full of evidence of the firm's "state of mind" regarding Chargois, on April 5, 2018, Lieff Cabraser submitted a Response to the Special Master's March 25 request.[252] That Response included specific references to the deposition testimony of Lieff and Chiplock concerning their understanding that Chargois was local Arkansas counsel for Labaton and ATRS; that Chargois had played an important role in the litigation; that they assumed his role as local counsel was comparable to the role played by local counsel in the BNY Mellon Action; and, that there was nothing unreasonable or unusual about local counsel receiving approximately 5% of an aggregate fee in a large financial fraud case.[253] Along with the Response were original declarations from Chiplock and Lieff again confirming their, and the firm's, understanding of Chargois' role in the State Street Action.[254]

5. The Final Hearing Before the Special Master.

On April 13, 2018, at the JAMS office in Boston, the Special Master conducted a full-day hearing and oral argument concerning his investigation ("Final Hearing").[255] Lieff Cabraser's presentation at the final hearing was consistent with the facts set forth in this Response and Objections.[256]

During the hearing, the Special Master inquired of Lieff Cabraser's Heimann whether the firm wished for the Master to recommend "remedial action" in the nature of payment (or repayment) from Labaton and/or Thornton to Lieff Cabraser because the firm was not fully and

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[251] Ex. M to Fineman Declaration.
[252] Ex. N to Fineman Declaration.
[253] *Id.*
[254] *Id.*
[255] Ex. 162 to Report.
[256] *Id.* at 219-307.

accurately apprised of the Chargois Arrangement by its colleagues.[257] Heimann responded that although the firm was "not happy that we weren't fully informed in real-time about the Chargois [Arrangement] and that we ended up paying a very large sum of money to him that we probably would have had some serious questions about had we been fully informed," in light of the firms' longstanding "good relationship" with Labaton and Thornton, and because Lieff Cabraser did not agree with the apparent position of the Special Master regarding Labaton's failure to disclose the payment to Chargois to the Court or the class, the firm declined to request such payment (or repayment).[258]

I. The Special Master's Report And Findings Relevant and Specific To Lieff Cabraser.

On May 14, 2018, the Special Master filed under seal and served on Plaintiffs' Counsel, including Lieff Cabraser, a 54 page Executive Summary, and a 377 page Report. After hearing from the parties on proposed redactions to the Report, the Court put the Executive Summary and Report in the public docket on June 28, 2018.[259]

The Special Master's key findings in the Report relevant or specific to Lieff Cabraser are as follows:

- *The Special Master acknowledges the risks, difficulties and challenges of the State Street Action, the skill and dedication of Plaintiffs' Counsel, and the outstanding accomplishment of the settlement:*

> After much work, dedication and exceptional effort in the discovery and mediation process, the parties ultimately reached a $300 million settlement. Given the risks, complexities and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by

[257] *Id.* at 271-272.
[258] *Id*. at 272-274.
[259] ECF No. 357 and 357-1.

> skilled and dedicated plaintiffs' counsel, was an excellent result for the class.[260]
>
> * * *
>
> By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class'[s] law firms, a view with which the Special Master fully agrees.[261]

- *The Special Master finds the fee awarded to Plaintiffs' Counsel was appropriate based on the work performed and the result achieved:*

> The Court approved the settlement on November 2, 2016. Of the $300 million, plaintiffs' counsel were awarded $74,541,250.00 in attorneys' fees and $1,257,699.94 for expenses. By itself, this attorney fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved.[262]

- *The Special Master concludes that the hourly rates for, and the number of hours worked by, Lieff Cabraser's attorneys, including its staff attorneys, were reasonable and accurate:*

> The lodestar reports of Plaintiffs' Counsel charged partners at hourly rates ranging from $535 to $1000, and associates at hourly rates of $325 to $725 [footnote omitted]. As discussed below, we conclude that these rates are commensurate with partner and associate rates charged and approved in similarly complex class actions, and therefore are reasonable.[263]
>
> * * *
>
> The Special Master recommends that, for the reasons summarized above and set forth in great detail in the Report, with the minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar reports were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work. This

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[260] Executive Summary at 3, Report at 6.

[261] Executive Summary at 7, Report at 125; *see also*, Report at 151-156 (discussing the complexity and challenges plaintiffs' counsel faced and the experience required to successfully assert the FX trading claims alleged in the State Street Action).

[262] Executive Summary at 3, Report at 6.

[263] Report at 164 and 176.

includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff.[264]

* * *

The fact that they were designated as "staff attorneys" or that they were tasked with "document review" should not indicate the work they did was routine or "paralegal" in nature. Both the work they performed and their professional qualifications and experience established them as more akin to lower-level and mid-level associates.[265]

* * *

The staff attorneys at the Labaton and Lieff firms did much more than "low-level" document review. The staff attorneys not only did first-level document review; they also digested complex information and prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore in depositions once witnesses were identified and also on areas that would require follow-up discovery and document discovery if the mediation were to end without a resolution.[266]

* * *

Contrary to the picture painted in the *Boston Globe* article, with the exception of Michael Bradley, whose work is discussed below, these staff attorneys did much more than "low level" document review. As noted, they all were attorneys with years of experience, and the majority of them had specialized knowledge or skills in FX/securities areas. A number of them had worked on BONY Mellon which raised similar issues to those in the *State Street* case. They all made substantive contributions to the case. They did not simply do first-level document review; they also digested complex information and prepared topical memoranda and witness memoranda for depositions – the same kind of work done by associates at large firms. Rather than referring to them as staff attorneys, it would be more accurate to refer to them as "non-partnership-track" attorneys.[267]

The *Boston Globe* article also took issue with the staff attorneys' billing rates as compared to what the staff attorneys were actually *paid*. The article reported that these attorneys were paid only $25 to $40 an hour. In fact, the vast majority of the staff attorneys were paid in the range of $40-$60 an hour, plus benefits. More importantly, there is nothing impermissible about marking up an attorney's billing rate above "cost" so

[264] Executive Summary at 21-22 and 49-50, Report at 365-366.

[265] Report at 70-71.

[266] Report at 72.

[267] Executive Summary at 22, Report at 176-177.

> long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed.[268]
>
> * * *
>
> The Special Master concludes the staff attorney billing rates in the lodestar fee petition are generally reasonable given that the staff attorneys were responsible for some 70% of the work billed on the case. These rates are particularly reasonable when compared to the relatively low number of hours billed by associates for the three Customer Class law firms (less than 2% of the total time billed). This can be attributed to the fact that the staff attorneys effectively did the work of lower- to mid-level associates. Thus, for purposes of the analysis here, the Special Master views the staff attorney work as associate-level work.[269]

- *The Special Master finds contemporaneous time records of Lieff Cabraser's attorneys, including its staff attorneys, to be sufficiently and reliably detailed:*

> Lieff used a comparable electronic time keeping system to maintain accurate and contemporaneous time records for its attorneys.[270]
>
> * * *
>
> As described below, based on our review of the individual as well as firm-wide time entries recorded in this case, the time records produced by the firms participating in the *State Street* case sufficiently and reliably detail the firms' substantive, legal contributions to that case.[271]
>
> * * *
>
> Aside from the reasonableness of the aggregate tally, we conclude that the hours presented on the Fee Petition are reasonable for three additional reasons. First, the firms appropriately staffed the case, assigning lawyers to specific tasks commensurate with their experience and capabilities with a sensitivity to the costs ultimately passed on to the client, the class, through the common fund. Thus, the hours expended by each individual attorney accurately reflect the nature of the work assigned to him or her. Second, the narratives in the time records themselves capture the precise nature of these substantive contributions in detailed – and in some

[268] Report at 177.
[269] Report at 180.
[270] Report at 203.
[271] Report at 209.

> instances highly detailed – descriptions of the legal work performed within the individual records.[272]
>
> * * *
>
> Billing entries of Lieff attorneys, moreover, sufficiently conveyed the nature of the work – whether emails, meetings, drafting or reviewing – along with the salient details, such as with whom and the basic substance of each task.[273]
>
> * * *
>
> While we recognize the danger that Lieff, as Co-Lead Counsel in the *BONY Mellon* case, could include hours in the *State Street* lodestar expended in litigating the *BONY Mellon* case or other FX matters, we conclude that Lieff did not do so here. All the hours submitted by Lieff in its *State Street* hours bear, directly or indirectly, on the legal issues presented in the *State Street* case.[274]

- *The Special Master finds Plaintiffs' Counsel's aggregate lodestar multiplier of 1.8 to be "certainly within the reasonable range" for purposes of a lodestar cross-check:*

> In performing a lodestar cross-check on a proposed percentage-of-fund fee award, a lodestar multiplier is used. A lodestar multiplier is determined by dividing the proposed percentage-of-fund award by the total lodestar [citation omitted]. In the instant matter, plaintiffs' counsel's combined lodestar was $41,323,895.75. Dividing the proposed fee of 25% of the total fund, $300,000,000.00, by the lodestar yields a multiplier of 1.8.
>
> A 1.8 multiplier is certainly within the reasonable range [citing cases that supported multipliers of 2.02, 3.0, 1.987, 2.7, 3.5 and up to 4.0].[275]

- *The Special Master concludes that Lieff Cabraser's double-counting was "inadvertent," and that Lieff Cabraser's conduct was a lesser part of the cause of the investigation:*

> Each of the three firms bears different degrees of responsibility for the double-counting and, accordingly, the firms' respective roles are addressed *seriatim* here.
>
> Lieff… has acknowledged that it made a mistake in claiming the hours of the staff attorneys and agency attorneys loaned to Thornton on its lodestar.

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[272] Report at 210.

[273] Report at 211.

[274] Report at 212.

[275] Report at 245-246.

> Contemporaneous evidence also indicates that Lieff anticipated that [certain of] its staff attorneys would be included on Thornton's petition. Notwithstanding this error, Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting. Lieff had, early in this litigation, agreed to the "loaning" of [certain of] its staff attorneys and agency attorneys to Thornton as a means of sharing the costs and risks of employing these attorneys and the litigation as a whole. While the agreement to "loan" the staff and agency attorneys to Thornton was, perhaps, an ill-considered judgment since the cost-sharing of this case could have been achieved in other ways, it cannot be said that the agreement to share costs through this mechanism was a significant cause of the double-counting. Thus, while Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent.[276]

- *The Special Master recommends that Lieff Cabraser "disgorge" one-third of the total double-counted staff attorney lodestar and that the money be "returned" to the class:*

> All three customer class firms will share responsibility. The remedy for this is the disgorgement in equal amounts of the entire $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.[277]

- *The Special Master recommends that the time of Lieff Cabraser's staff attorneys paid by an agency be treated as a cost item, instead of including that time in the firm's aggregate lodestar:*

> The law firms should not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be reimbursed to the law firms as an expense, and the firms compensated for that expense dollar-for-dollar.[278]

- *The Special Master recommends that Lieff Cabraser "disgorge" the difference between (a) the total of the firm's "agency" attorneys' lodestar, times 1.8, and (b) $50 per hour for the agency lawyers' time:*

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[276] Executive Summary at 14-15; Report at 363.

[277] Executive Summary at 49, Report at 364. Lieff Cabraser's objection to this recommendation by the Special Master is presented *infra* at 67-77.

[278] Executive Summary at 22-23 and 50, Report at 367; *see also*, Report at 181-189. Lieff Cabraser's objection to this recommendation by the Special Master is presented *infra* at 77-90.

> The seven contract attorneys, all retained by Lieff, recorded 2,833.5[279] hours in this role at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged and returned to the class. The Customer Class Counsel is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable more rate of $50/hour. The Special Master recommends the difference between these two figures also be awarded to the class.[280]

- *The Special Master finds that Lieff Cabraser was not aware of the Chargois Arrangement, and justifiably believed Chargois to be Labaton's local counsel, and therefore bears no responsibility for the Chargois episode and recommends the firm be relieved from any further responsibility relating to Chargois under of the claw-back agreement:*

> Labaton even failed to fully inform its Customer Class co-counsel [including Lieff Cabraser], who were sharing equally in the $4.1 million payment to Chargois, of Chargois' actual role (or lack of a role) in the *State Street* case.[281]
>
> * * *
>
> Lieff and Thornton were not privy to the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which ATRS was a co-lead counsel.[282]
>
> * * *
>
> Beyond this, when [Labaton] sought to have Lieff and Thornton share in the obligation to Chargois by splitting equally the $4.1 million payment to him, they told them only a portion of the story, leading them to believe that Chargois was local counsel and performing work of value in the case.[283]

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[279] As noted above, this correct number would appear to be 2899.2.

[280] Report at 367-368. A similar recommendation is contained in the Special Master's Executive Summary, but certain of the dollar figures cited there are different than those cited in the Report and are incorrect. Executive Summary at 50. Lieff Cabraser's objection to this recommendation by the Special Master is presented *infra* at 90-96.

[281] Executive Summary at 26.

[282] Report at 106, 287-289, 301-302.

[283] Report at 331; *see also* Report at 350-351; Report at 109-113 (summarizing Lieff Cabraser's lack of knowledge of the Chargois Arrangement, and its justifiable belief that Chargois was serving at local Arkansas counsel for Labaton on behalf of ATRS).

* * *

> On the one hand, Lieff agreed to share in the Chargois payment and at least knew about Chargois, albeit not the full state of affairs. On the other hand, the Special Master believes that Lieff was misled into agreeing to share in the Chargois payment. Ordinarily, some recompense would be in order for this. However, at oral argument, Lieff's counsel (and the firms' General Counsel), Richard Heimann, when asked what if any relief he was seeking, indicated he was not looking for any repayment…. In view of all these factors, the Special Master believes that the fairest result for the Lieff firm would be for it to be relieved of its obligations to Labaton under the claw-back letter as to Chargois, but no more.[284]

- *The Special Master concludes that even after his recommended monetary "remedies" are imposed on Lieff Cabraser, the firm will still have received as a fee its base lodestar plus a significant multiplier*:

> [E]ven after the imposition of the monetary remedies recommended here… Lieff… will still be left with not only their base lodestar claim, but a substantial multiplier. The Special Master calculates that even after the allocation all monetary amounts, and the cost of the investigation, the Customer Class Firms will still receive its [sic] base lodestar plus a significant multiplier.[285]

J. <u>The Actual and Potential Costs To Lieff Cabraser Of The Special Master's Investigation.</u>

Consistent with the firm's fee interest in the State Street Action relative to the other Customer Class Counsel, Lieff Cabraser has borne 24% of the direct costs of the Special Master's investigation. *See* discussion *supra* at 41. In other words, Customer Class Counsel have paid a total of $3,800,000 to fund the Special Master's investigation ($500,000 of which has been paid for future work, if any, by the Special Master and his counsel and/or advisors), and Lieff Cabraser's 24% share of that total paid is $912,000.

In addition to the amount of money it has paid to finance the Special Master's investigation, Lieff Cabraser has also incurred an additional $428,715 in costs to represent and

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[284] Report at 352. Lieff Cabraser's response to this recommendation by the Special Master is presented *infra* at 96-98.

[285] Report at 376. Lieff Cabraser's objection to this finding by the Special Master is presented *supra* at 6, *infra* at 64-66, and 99.

defend itself during the investigation. This figure includes the costs of three expert reports from Rubenstein; one expert report from Dacey; frequent air travel from San Francisco to New York and Boston for Heimann, and his attendant accommodation expenses; travel from New York to Boston and related accommodation expenses for Chiplock; travel from San Francisco to New York of five Lieff Cabraser staff attorneys (for their depositions), along with related hotel expenses; and miscellaneous other related litigation costs.[286]

Lieff Cabraser's representation of itself during the Special Master's investigation has involved a substantial amount of time from firm partners Heimann, Fineman and Chiplock, along with additional time from Lieff Cabraser support staff. The aggregate lodestar devoted to the Special Master's investigation, from February 6, 2017 through the date of this Response and Objections, is $1,963,110 (calculated at 2018 hourly rates).[287] Therefore, the total cost to the firm resulting from the Master's investigation (to date) is $3.30 million.

In addition to that extraordinary figure, the Special Master now recommends that Lieff Cabraser "disgorge" from its fee award an additional $3,593,765, reflecting (i) an equal share of Customer Class Counsel's aggregate inadvertently double-counted lodestar ($1,352,667), plus (ii) the difference between (a) the lodestar attributed (for cross-check purposes) to Lieff Cabraser's "agency" staff attorneys, plus a 1.8 multiplier on that lodestar, and (b) $50 per hour for each hour[288] worked by those "agency" attorneys, or $2,241,098.40.

As noted above, the firm received $15,116,965.50 in attorneys' fees (reflecting its 24% interest in fees allocated to Customer Class Counsel and 20.3% of the total fee awarded to Plaintiffs' Counsel). *See* discussion *supra* at 41. Based on its corrected lodestar figures (i.e.,

[286] *See* Exhibit O to Fineman Declaration.

[287] *See* Fineman Declaration at ¶ 18.

[288] Again, as noted above, the firm uses the correct contract attorney hourly total of 2899.2 for this calculation.

subtracting $868,417.00 in inadvertently double-counted staff attorney lodestar, resulting in a total lodestar of $8,932,070.50), Lieff Cabraser's *corrected* effective multiplier on its individual fee was 1.69 – substantially less than the aggregate multiplier averaged across all counsel, and indeed less than the 1.8 aggregate lodestar multiplier that the Court *originally found to be reasonable*. *See* discussion *supra* at 35.

When subtracting from the firm's fee award the $912,000.00 it has paid to date toward the Special Master's investigation, the firm's award is reduced to $14,204,965.50, resulting in a lowered effective multiplier of just 1.59 on the firm's corrected lodestar. And after deducting from the firm's fee award the additional costs and lodestar the firm has spent on the investigation, Lieff Cabraser's effective fee award is reduced to $11,813,140.50, for a reduced multiplier of just 1.32. If, after all of that, the Special Master's recommendations for the "disgorgement" of $3,593,765 of Lieff Cabraser's fees is also implemented, the firm's fee award would be further reduced to $8,219,375.50, for an end multiplier of *0.92* – i.e., a *negative multiplier*, meaning that Lieff Cabraser would not even be recovering what it has put into the litigation.[289]

As argued below, the financial impact on Lieff Cabraser of the Special Master's recommendations is entirely unjust in light of the factual record, the Special Master's actual substantive findings, and the application of controlling legal principles.

[289] According to the firm's calculations, Lieff Cabraser would be alone, among all of the firms involved in the litigation, in obtaining a negative effective multiplier if the Special Master's recommendations were fully adopted. On the other end of the spectrum, one of the ERISA Counsel (Zuckerman Spaeder) would obtain an effective individual multiplier of more than 3.0 if the Special Master's recommendations were fully adopted.

III. ARGUMENT IN SUPPORT OF LIEFF CABRASER'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT.

A. The Court Must Review Objections To The Special Master's Findings, Conclusions, And Recommendations *De Novo*.

The Special Master was appointed pursuant to Rule 53 of the Federal Rules. Under Rule 53(f)(3) and (4), a court must decide *de novo* all objections to findings of fact and/or conclusions of law made or recommended by a master. Accordingly, this Court will review objections to the Special Master's findings, conclusions and recommendations *de novo*.[290] Based on an independent review of the factual record and controlling case law, the Court should sustain Lieff Cabraser's following objections to the Special Master's findings, conclusions, and recommendations.

B. Lieff Cabraser Should Not Be Required To Disgorge Any Portion Of The Firm's Inadvertently Double-Counted Lodestar.

The Special Master recommends that Customer Class Counsel, including Lieff Cabraser, disgorge and "return" to the class in equal amounts the $4,058,000 in double-counted staff attorney time.[291] Lieff Cabraser objects to this recommendation by the Special Master, and urges the Court to reject it, for the following reasons: (1) the double-counting of certain staff attorney time was inadvertent; (2) the Special Master's recommendation miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (3) the inadvertent double-counting caused no harm to the class; and, (4) Customer Class Counsel, including Lieff Cabraser, has already been penalized for the double-counting.

[290] Ex. 163 to Report, ECF No. 173, at 12 (this Court stating that it will review *de novo* any recommended findings of facts and conclusions of law as to which Plaintiffs' Counsel object).

[291] Executive Summary at 49, Report at 364.

1. The Double-Counting of Certain Staff Attorney Time Was Inadvertent.

As the Special Master notes, the "hot button issue" that triggered the Special Master's investigation was the discovery of the double-counting of certain staff attorney lodestar.[292] Indeed, a substantial portion of the pre-Chargois investigation by the Special Master addressed the double-counting issue. *See* discussion *supra* at 43-49. After they explained the accidental nature of the double-counting in numerous interrogatory responses, through thousands of pages of produced internal documents, and in informal interviews and sworn depositions, the Special Master agreed with Customer Class Counsel, including Lieff Cabraser, that the double-counting was "inadvertent."[293]

2. The Special Master's Recommendation Miscomprehends or Ignores the Limited "Cross-Check" Purpose of the Submission and Use of Lodestar in this Action.

Despite the inadvertence of the double-counting, the Special Master recommends that Customer Class Counsel "return the $4,058,000 in double-counted time to the class."[294] As explained below, there is no "time" or lodestar to "return" to the class. Plaintiffs' Counsel, including Lieff Cabraser, were not paid by the class on an hourly basis, and did not somehow charge for work that was not performed. Rather, Plaintiffs' Counsel were compensated on a percentage-of-the-fund basis with Counsel's lodestar submitted solely for cross-check purposes. The Special Master's proposed "remedy" belies either a miscomprehension or a disregard of the purpose of the use of lodestar in the State Street Action.

As the Court ruled, and as the Special Master acknowledges, Plaintiffs' Counsel's fees in the Action were awarded on a percentage-of-the-fund basis, with a lodestar cross-check. *See*

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[292] Report at 219.
[293] Executive Summary at 14-15, Report at 363.
[294] Executive Summary at 49, Report at 364.

discussion *supra* at 34-36, 57-61. The Court ruled that a percentage-of-the-fund fee of approximately 25% was consistent with First Circuit authority and the Court's own practices in large complex cases. *See* discussion *supra* at 34-36. The Special Master acknowledges the propriety of a 25% contingent fee, subject to a lodestar cross-check, and acknowledges the reasonableness of the aggregate fee award to Plaintiffs' Counsel. *See* discussion *supra* at 57-61.

Plaintiffs' Counsel did not seek, and the Court did not award Counsel's fees, based on the very different lodestar-multiplier method. *See* Declaration of William B. Rubenstein in Support of Lieff Cabraser Heimann & Bernstein, LLP's Responses and Objections to the Special Master's Report and Recommendations, dated June 20, 2018 and filed herewith ("Rubenstein Declaration II"), at 18 ("The Special Master's Report errs in recommending these remedies as it confused the nature of a lodestar cross-check, applied in this case, with a lodestar-based fee, not at issue here."); *see also* Rubenstein Declaration I at 7-12[295] and Rubenstein Declaration II at 19-20 (describing the difference between the percentage method and the lodestar method of awarding attorney's fees in class actions).

The purpose of a lodestar cross-check against a percentage-of-the-fund fee request is clear – a lodestar cross-check is performed solely for the purpose of determining that a percentage-of-the-fee award is reasonable and not excessive. *See e.g.*, *In re Tyco Intern. Ltd. Multidistrict Litigation*, 535 F.Supp.2d 249, 270 (D.N.H. 2007) (lodestar cross-check used to determine whether the percentage of the fund fee award is "reasonable," and whether the "fee award appropriately reflects the degree of time and effort expended by the attorneys"); *In re Citigroup, Inc. Securities Litigation*, 965 F.Supp.2d 369, 388 (S.D.N.Y. 2013) ("Part of the reasonableness inquiry is a comparison of the lodestar to the fees awarded pursuant to the

[295] Ex. H to Fineman Declaration.

percentage of the fund method [as a cross-check]"); *see also* Rubenstein Declaration I at 10 ("[U]sing a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall")[296]; Rubenstein Declaration II at 19 ("Since the early 1990s, most courts have used the percentage method in large common fund cases like this one, although about half the courts that do so ensure that the percentage that is awarded is not too great by 'cross-checking' it against counsel's lodestar").

Unlike the level of detail required to support a lodestar-based fee, however, a lodestar cross-check is more summary in nature. *See e.g., Tyco*, 535 F.Supp.2d at 273 ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306 (3rd Cir. 2005), as amended (Feb. 25, 2005))); *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, No. 05-CIV-11148 (PBS), 2009 WL 3418628, at *1 (D.Mass. October 20, 2009) (determining that lodestar is enough of a cross-check on the percentage method; a full audit of all attorneys' fees and costs is too "cumbersome, time-consuming and resource intensive"); William B. Rubenstein, Newberg on Class Actions (5th ed.) (2015) at §15:86 (collecting cases, including from the First Circuit, for the summary nature of the lodestar cross-check).

In the State Street Action, Plaintiffs' Counsel submitted lodestar reports for the purpose of allowing the Court to conduct a lodestar cross-check against a percentage-of-the-fee award. *See* discussion *supra* at 32-34. The combined lodestar submitted by Plaintiffs' Counsel in connection with their fee application was $41,323,895.75 based on 86,113.70 hours worked. *See Id*. In cross-checking Plaintiffs' Counsel's aggregate lodestar against an approximately 25% contingent fee of $74,541,250.00, the Court found, and the Special Master later agreed, that the

[296] Ex. H to Fineman Declaration.

aggregate multiplier of 1.8 was well within the range of what is reasonable under applicable legal authority. *See* discussion *supra* at 34-36, 57-61.

In the November 10, 2016 Goldsmith Letter, Customer Class Counsel acknowledged the inadvertent double-counting error and advised the Court that approximately $4.06 million of lodestar should be removed from the aggregate lodestar the Court used to perform a cross-check against the 25% percentage-of-the-fund fee award. *See* discussion *supra* at 39. The aggregate corrected lodestar figure was accurately reported in the Goldsmith Letter, and is the number that has been adopted by the Special Master in his Report. *See* discussion *supra* at 39, 48. In the Goldsmith Letter and throughout the investigation, Customer Class Counsel has pointed out to the Special Master that: removing the double-counted lodestar from the aggregate lodestar of $41,323,895.75, results in a corrected aggregate lodestar of $37,265,241.25; that applying the corrected lodestar as a cross-check against the aggregate fee awarded ($74,541,250) results in a 2.0 multiplier; and, that such a multiplier, used for lodestar cross-check purposes, is reasonable under controlling legal authority. *See* discussion *supra* at 41-49, 64-66.

In his Report, the Special Master found the aggregate lodestar multiplier of 1.8 (the lodestar multiplier based on the original fee submissions) to be "certainly within the reasonable range," and cited as support for that statement cases that applied multipliers of 2.02, 3.0, 1.987, 2.7, 3.5 and up to 4.0. *See* discussion *supra* at 61. The Special Master does not attempt to explain why a 1.8 multiplier is clearly reasonable, but a 2.0 multiplier is not. That is because he cannot.

Controlling case law clearly supports multipliers of 2.0 or more as well within the range of reasonableness for lodestar cross-check purposes. *See* Ex. 110 to Report, ECF No. 103-1, at 24-25 (collecting and reporting to the Court First Circuit "megafund" settlements in which

lodestar multipliers in a range of 2.7 to 8.3 were approved for cross-check purposes); Rubenstein Declaration I at 30 ("Quantitatively, a 2 multiplier is consistent with multipliers that courts have previously approved in similar circumstances"), and 33 ("Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion [that a 2.0 multiplier is appropriate], as the change in the proposed multiplier is simply from 1.8 to 2.")[297]; Rubenstein Declaration II at 19-20 ("[C]orrecting the double-counting issue by reducing counsels' lodestar adjusted their multiplier from 1.8 to 2.01, which in the context of this case was insignificant.").

The Special Master cites no case law, or any other legal principle, to support his proposed remedy that Customer Class Counsel, including Lieff Cabraser, "return" the amount of the inadvertently double-counted lodestar to the class. That is because none exists. Indeed, as Professor Rubenstein observes: "In a case where a court employs the percentage method to determine class counsels' fee, and used the lodestar only for cross-check purposes, the reduction of an hour of time recalibrates the lodestar multiplier and requires further analysis of whether that lower amount can continue to sustain the requested percentage award. But it does not require the 'repayment' of that hour of time since counsel was never 'paid' for that hour of time; counsel were paid a percentage of the recovery." *See* Rubenstein Declaration II at 20-21 (also citing "[numerous] legal decisions [that] have understood this distinction, after adjusting the lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remained reasonable).

Given the purpose of the consideration of lodestar for cross-check purposes, and in light of the inadvertent nature of Customer Class Counsel's double-counting of certain staff attorney time, the proper way to address the double-counting issue is simply to remove the double-

[297] Ex. H to Fineman Declaration.

counted lodestar from the aggregate amount of lodestar used in the cross-check of the 25% percentage-of-the-recovery fee. The Court can then determine whether or not the resulting aggregate multiplier is appropriate. Lieff Cabraser submits that it is, particularly in view of the fact that its *individual* corrected multiplier – 1.69 – is lower even than the original, uncorrected 1.8 aggregate multiplier that both the Court and the Special Master found to be reasonable (and, as explained *supra* at 64-66, the firm's post-investigation multiplier is substantially lower still).

3. In Recommending "Return" of the Double-Counted Lodestar to the Class, the Special Master Identifies No Harm to the Class that Justifies Such a "Remedy".

Both the Court and the Special Master have found that the $300 million settlement Plaintiffs' Counsel achieved on behalf of the class was an "excellent result," particularly in light of the uniquely difficult risks and challenges presented by the novel legal theories advanced by Plaintiffs' Counsel, and given the skill and resources of State Street's attorneys. *See* discussion *supra* at 34-36, 57-61. The class therefore received exactly what it was notified it would receive, and what it unanimously agreed to. The Special Master recognizes that the class received significant economic benefits as a consequence of the "highly dedicated and professionally skilled work of the class' law firms." *See* discussion *supra* at 57-61. Prior to final approval, class members were informed of the financial benefits they would receive from the settlement, and were told that class counsel would seek a fee up to approximately 25% of the amount recovered. *See* discussion *supra* at 32. Not a single member of the highly sophisticated class of institutional investors opted out of the certified settlement class or objected to the settlement or to the proposed fee award. *See* discussion *supra* at 34-36.

Based on Plaintiffs' Counsel's accomplishment for the benefit of the class, and applying applicable First Circuit authority, the Court awarded approximately 25% of the recovery as fees.

See discussion *supra* at 34-36. Having nothing whatsoever to do with the quality of Plaintiffs' Counsel's lawyering or the results achieved for the class, Customer Class Counsel accidentally, inadvertently, without intention, double-counted a small portion (9.8%) of the aggregate lodestar submitted to the Court as part of the lodestar cross-check exercise. The prompt correction of that error resulted in the lodestar multiplier increasing from 1.8 to 2.0 – well within the range of reasonableness measured against the 25% percentage-of-the-recovery fee awarded to Counsel.

Under these facts – and these are *the* facts – the class has suffered *no* harm as a consequence of the inadvertent double-counting, and has received substantial benefits as a result of the risks taken and the legal skills applied by their attorneys. The Special Master identifies no harm suffered by the class as a consequence of the double-counting that justifies his unnecessary recommended "remedy."

4. Customer Class Counsel, Including Lieff Cabraser, Has Already Suffered Financially as a Consequence of the Inadvertent Double-Counting.

The Special Master states that "Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation,…"[298] Indeed, Customer Class Counsel, including Lieff Cabraser, has already suffered a meaningful financial burden as a consequence of their inadvertent double-counting of certain staff attorney lodestar by paying for the "attendant cost of the Special Master's investigation." *See* discussion *supra*, at 64-66. It would be entirely unjust for the Court to require Customer Class Counsel, including Lieff Cabraser, to pay more than they already have for the inadvertently double-counted lodestar.

[298] *See* Executive Summary at 15.

C. In The Event The Court Requires Lieff Cabraser To Disgorge Any Portion Of The Firm's Inadvertently Double-Counted Lodestar, That Disgorgement Should Be Commensurate With The Firm's "Relative" Role In The Double-Counting.

As stated above, Lieff Cabraser objects to the Special Master's recommendation that Lieff Cabraser disgorge any portion of its inadvertently double-counted lodestar. Such an outcome is not supported by the law or the facts. However, in the event the Court overrules Lieff Cabraser's objection, the firm further objects to the Special Master's recommendation that the appropriate remedy is "disgorgement by all three firms in equal amounts" of the $4,058,000 in double-counted time. Lieff Cabraser objects to the recommendation that it should pay one-third of that amount, $1,352,667, because such an outcome is inconsistent with the factual record and the Special Master's own substantive findings.

To the extent the Court entertains the Special Master's recommendation that Lieff Cabraser should disgorge some portion of that lodestar, the following facts must be recognized:

- Lieff Cabraser received 24% of the fee award allocated to Customer Class Counsel and has paid 24% of the court-ordered costs for the Special Master's investigation ($912,000 of $3.8 million). *See* discussion *supra* at 64-66;
- the portion of the double-counted lodestar actually attributable to Lieff Cabraser was $868,417, or just 21% of the total double-counted lodestar (*see* discussion *supra* at 3, 38, 64-66); and,
- the portion of the double-counted lodestar attributable to Lieff Cabraser ($868,417), is only 2% of the total aggregate lodestar originally submitted to the Court (*see* discussion *supra* at 64-66).

Based just on these basic facts, Lieff Cabraser should not be obliged to disgorge 33-1/3% of the inadvertently double-counted time. Rather, given the relatively modest amount of its double-counted lodestar, it should have to pay substantially less than that, subject to further reduction based on the Special Master's factual findings, described below.

The Special Master's recommendation that Lieff Cabraser disgorge an equal amount of the double-counted lodestar is inconsistent with the relevant findings in his Report. The Special Master describes the "relative responsibility" of Lieff Cabraser, Thornton and Labaton for the double-counting, pointing out that "each of the three Customer Class law firms bears widely varying degrees of responsibility," and "[e]ach of the three firms bears different degrees of responsibility for the double-counting."[299] The Special Master finds that "Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting."[300] The Special Master also acknowledges that "it cannot be said that the agreement to share costs" through the sharing of certain staff attorneys with Thornton was a "significant cause of the double-counting."[301] The Special Master concludes that "while Lieff bears *some* responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent." (Emphasis added.)[302]

The Special Master goes on to compare Lieff Cabraser's relatively minor (i.e., "some") share of responsibility for the double-counting with Thornton's "significant responsibility for the double-counting"[303] and Labaton's "ultimate responsibility" for the same.[304] Despite weighing the relative roles of the firms in the inadvertent double-counting and finding Lieff Cabraser the least responsible, the Special Master nevertheless, and inconsistently, recommends

[299] Executive Summary at 10, 13 and 14.
[300] Executive Summary 14.
[301] Executive Summary at 14-15.
[302] Executive Summary at 15 (emphasis added).
[303] Executive Summary at 15-18.
[304] Executive Summary at 18-19.

"disgorgement in equal amounts" of the double-counted lodestar.[305] The Special Master's recommendation that Lieff Cabraser disgorge an equal amount of the double-counted lodestar is fundamentally at odds with the Master's own findings and should be rejected.[306]

Based on the firm's limited financial stake in the State Street Action (24% among Customer Class Counsel and 20.3% among all Plaintiffs' Counsel), the modest dollar amount of Lieff Cabraser's inadvertent double-counting ($868,417), and given the Special Master's findings as to Lieff Cabraser's modest role in the double-counting, the firm submits that if the Court requires any disgorgement, it should be obliged to pay significantly less than an "equal share" of the total double-counted lodestar.

* * *

For the reasons stated above, Lieff Cabraser objects to the Special Master's recommendation that Lieff Cabraser disgorge any portion of the double-counted lodestar. Such an outcome is inconsistent with the purposes of the lodestar cross-check in a percentage-of-the-fee recovery context, the class has suffered no harm as a result of the accidental double-counting, and the firm has already spent substantial sums to fund the investigation.

D. Lieff Cabraser Should Not Retroactively Be Required To Treat the Firm's Staff Attorneys Compensated By An Agency As A "Cost" Instead Of Including Them In Its Lodestar As Part Of The Aggregate Lodestar Cross-Check.

After his exhaustive investigation, the Special Master finds that the staff attorneys who worked on the State Street Action were highly qualified and skilled attorneys who made meaningful and valuable contributions to the success of the State Street Action by providing

[305] Executive Summary at 59.

[306] The Special Master's description in the Report of the double-counting issues makes clear that Lieff Cabraser's responsibility for the double-counting was less significant than that of its colleagues. Report at 364.

quality legal services in the nature of complex document review and analysis, and the preparation of sophisticated memoranda. *See* discussion *supra* at 57-60. Finding that the staff attorneys performed at a level comparable to a junior to mid-level associate, the Special Master concludes that their hourly rates (mostly $415 per hour for Lieff Cabraser's staff attorneys) and hours worked were reasonable and appropriate. *See* discussion *supra* at 57-60.

Despite these entirely accurate findings, the Special Master carves out for separate treatment seven of Lieff Cabraser's staff attorneys who at one time or another during the State Street Action were paid by an agency, as opposed to the firm directly. Referring in the Report to the agency attorneys as "contract attorneys," the Special Master "recommends that law firms not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract [agency] attorneys should be reimbursed to law firms as an expense, and firms compensated for that expense dollar-for-dollar."[307]

Lieff Cabraser objects to this recommendation on the following grounds: (1) the case law does not support, and indeed flatly contradicts, the Special Master's recommendation that the time of the firm's contract/agency lawyers be treated as a cost; and (2) the "factual" distinctions the Special Master attempts to draw between the firm's staff attorneys on payroll and those paid by an agency do not support the Master's recommendation, and are at odds with a fair reading of the record. No matter what the Special Master's academic views are with respect to the treatment of contract/agency attorneys in the context of class action fee applications, those views should not displace the controlling law or the relevant facts.

[307] Executive Summary at 50, Report at 367.

1. The Case Law Does Not Support, and Indeed Contradicts, the Special Master's Recommendation The Time of the Firm's "Agency" Lawyers Be Treated as a Cost.

The Special Master states that "[w]hile legal and ethical rulings have not provided definitive guidance on this interesting issue, the better, more common-sensical view is that the costs of contract attorneys should be passed along as a reimbursable expense rather than as a marked-up profit center."[308] This statement is not accurate, and is contradicted by the very cases upon which the Special Master relies.

As Professor Rubenstein observes:

> Courts *have* provided definitive guidance: they are unanimously opposed to the Special Master's Report's approach. Numerous courts have explicitly rejected the argument that contract attorneys must be billed as a cost [footnote omitted] and many other courts – far too numerous to enumerate – have approved fee petitions that include contract attorneys in counsels' lodestar or lodestar cross-check submission. [Footnote omitted] By contrast, I am not aware of a single court in the United States that has ever held that contract attorneys must be billed to the client as a cost rather than included in the lodestar at an attorney rate. [Footnote omitted]

Rubenstein Declaration II at 12. *See also* Rubenstein, *Newberg on Class Actions* at §15:41 n.5 (listing cases rejecting the argument that contracts attorneys must be billed as a cost).

It is well-settled in the First Circuit that when calculating lodestar, the determination of reasonable rates "will vary depending on the nature of the work, the locality in which it is performed, the qualifications of the lawyers and other criteria." *Hutchinson ex rel. v. Patrick*, 636 F.3d 1, 16 (1st Cir. 2011). Most important in determining the reasonableness of hourly rates for lodestar purposes is the "market value of counsel's services." *U.S. v. One Star Class Sloop*, 546 F.3d 26, 40 (1st Cir. 2008); *see also*, *Hutchinson*, 636 F.3d at 16 ("[D]ata evidencing the prevailing market rate for counsel of comparable skill and experience provides helpful

[308] Report at 187.

guidance"); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950-951, 955 (1st Cir. 1984) (reasonable fees are calculated according to the prevailing market rates in the relevant community for similar services by lawyers of comparable skill and experience). When setting forth these criteria, the First Circuit has never distinguished between different categories of lawyers, e.g., partners, associates, or staff or contract (agency) lawyers.

Although the First Circuit has not expressly addressed the issue, one district court case in the First Circuit has specifically rejected the argument that "contract" lawyers be treated as an expense instead of being included as part of lodestar. *Tyco*, 535 F.Supp.2d 249, involved a securities class action settlement in which the court used the percentage-of-the-fund method with a lodestar cross-check to evaluate the fee request. Objectors argued that contract attorneys should be treated as an expense rather than be included in the lodestar. *Id*. at 271-273. The court rejected that argument as meritless:

> The objection lacks merit. The lodestar calculation is intended not to reflect the costs incurred by the firm, but to approximate how much the firm would bill a paying client. An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney. It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar.

Id. at 272. [309] This decision from a different court in the First Circuit is directly contrary to the Special Master's recommendation.

A number of district courts from other circuits have expressly cited *Tyco* in rejecting the notion of treating contract attorneys as an expense. *See e.g., Carlson v. Xerox Corp.*, 596 F.Supp.2d 400, 409 (D. Conn. 2009) (citing *Tyco* in concluding the "objection unpersuasive",

[309] In fact, Lieff Cabraser has had individual bill-paying clients that have paid the hourly rates of firm staff attorneys who were paid by an agency. *See* Ex. A to Fineman Declaration at 56-59.

aff'd, 355 Fed.App. 523 (2d Cir.); *Charlebois v. Angels Baseball, LP*, 993 F.Supp.2d. 1109, 1124 (C.D.Cal. 2012) (citing *Tyco* in finding that the hours of contract attorneys "merit inclusion in the lodestar hours"); *In re Enron* Corp. Securities, Derivative and ERISA Litigation, 586 F.Supp.2d 732, 784-785 (S.D. Tex. 2008) (citing *Tyco* in concluding that "prevailing counsel can recover fees for [contract attorneys] services at market rates rather than at their cost to the firm"). *See also* Rubenstein Declaration II at 12, n. 52 (citing additional cases rejecting the argument that contract attorneys must be billed as a cost).

Moreover, and importantly, some decisions rejecting the argument that contract attorneys may only be billed as a cost expressly refer to the fact that class counsel retained the contract attorneys at issue from an agency. *See e.g.*, *Citigroup*, 965 F.Supp.2d at 394 (adjusting the hourly rates, but rejecting treating as a cost, "attorneys who are not permanent employees of the law firm, are hired largely from outside staffing agencies, are not listed on counsel's law firm website or resume, are paid by the hour, and are hired on a temporary basis to complete specific projects related to a particular action."); *In re AOL Time Warner Shareholder Derivative Litig.*, No. 02-CIV-6302 (CM), 2010 WL 363113 at *25 (S.D.N.Y. Feb. 1 , 2010) (rejecting an objector's argument that contract attorneys should be treated as an expense because the "firms seek a huge markup on the differential between their payment to the businesses referring the contract attorneys and the hourly rates sought" finding that the "contract attorneys here were not mere clerks, but exercised judgment typically reserved for lawyers, under the supervision of the firms' regular attorneys."). *See also* Rubenstein Declaration II at 12, n. 52 ("In other words, counsel's retention of contact attorneys from an outside agency does not distinguish this case from this vast body of pertinent authority.").

Despite the unequivocal holding of these cases – including the leading case from within the First Circuit – that the time of contract (agency) attorneys may be properly included in counsel's lodestar – the Special Master determines that "those decisions that find contract attorneys indistinguishable from off-track associates are not acceptable for purposes of this Report."[310] It is extraordinary that the Special Master would seek to impose a significant economic penalty on Lieff Cabraser by disregarding governing law and replacing it with his own personal views. Equally problematic is that the two cases relied upon by the Special Master for his novel position do not in fact support his approach. *See* Rubenstein Declaration II at 12-13 ("The Special Master's Report cites only two cases in support of its approach – *Dial* and *Meredith* [footnote omitted] – but when probed, neither actually supports that approach.").

In *Dial Corporation v. News Corporation*, 317 F.R.D. 426 (S.D.N.Y. 2016), lawyers for the plaintiffs *voluntarily* sought repayment for contract attorney time as a cost; the court did not require that they do so. *Id*. at 438. In *dicta,* the court in *Dial* expressed its appreciation for counsel's decision to treat the time of the contract lawyers in that case as an expense because it "save[d] the Court from having to 'determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary.'" *Id*. at 138 (quoting *Citigroup*, 965 F.Supp.2d at 394 (in which the court rejected the argument that contract attorneys should be treated as a cost)). The court in *Dial* thus acknowledged the prevailing law that contract attorney time may be included as part of lodestar. "What this means is that absent the lawyers' voluntary decision, the *Dial* Court would have treated these attorneys as lawyers, not as an expense." Rubenstein Declaration II at 13.

[310] Report at 184.

The other case relied upon by the Special Master is *Meredith Corp. v. SESAC, LLC*, 87 F.Supp.3d 650 (S.D.N.Y. 2015). In *Meredith*, a large corporate defense firm represented a plaintiff class in an antitrust action. The decision does not expressly address the lodestar/expense issue, but rather simply identifies contract attorney time as among the expenses for which plaintiff's counsel sought reimbursement. *Id.* at 671. "It [the law firm] too voluntarily sought reimbursement for contract attorneys as cost, [footnote omitted] but in doing so, it was careful to explain to the Court that this was a deviation from the firm's usual practice. [Footnote omitted.] What this means is that absent the lawyer's voluntary decision, the large corporate firm in *Meredith* would have treated these attorneys as lawyers, not as an expenses." Rubenstein Declaration II at 13-14, and n. 58. Neither *Dial* nor *Meredith* support the Special Master's recommendation that Lieff Cabraser's agency attorneys must be treated as a cost.

Although cases that have considered the issue have rejected the argument that contract attorneys (whether on a firm's payroll or hired through an agency) must be treated as a cost, some courts have determined that the market rates for contract attorneys should be lower than comparable full-time associates. For example, in *Citigroup*, 965 F.Supp.2d at 393-399, the court rejected the argument that contract attorneys hired from outside staffing agencies should be treated as a cost, but based on the facts before it, reduced the hourly rates used by class counsel for those attorneys for purposes of a lodestar cross-check. The court found class counsel's proposed blended hourly rate of $466 for the contract/agency attorneys in that case too high when compared with a $402 per hour rate for associates, given that the contract/agency attorneys provided their document review services *after* the settlement of the case was reached, and therefore reduced the contract/agency attorneys' rate to $200 per hour. *Id.*; *see also City of Potomac General Employees' Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276,

280 (S.D.N.Y. 2013) (acknowledging that "it is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm," but questioning the reasonableness of the hourly rates assigned to the contract attorneys in the case); *In re Petrobras Securities Litigation*, No. 14-CIV-9662 (JSR) (S.D.N.Y. June 25, 2018) at 32-35 (reducing the hourly rates of "staff and contract attorneys" of between $325 and $625 per hour by 20% in light of the "considerable time spent by these attorneys on low level document review").[311] *See also* Rubenstein Declaration II at 16 (noting that "some courts have treated the questions as one of degree not type, adjusting the pertinent hourly rate but rejecting the argument that the contract attorneys be passed through as a cost") and n. 69 (citing cases in which courts reduced contract attorney billing rates for lodestar cross-check purposes).

Finally, those courts that have considered the issue have rejected the argument made by the Special Master here that the lodestar of contract attorneys (in this case agency attorneys) should not be multiplied as part of a lodestar cross-check analysis. *See e.g., In re Citigroup*, 965 F.Supp.2d at 394-395 (rejecting the argument that a lodestar multiplier cannot be applied to contract attorneys' time); *AOL TimeWarner*, 2010 WL 363113 at * 26 (rejecting an objection to allowing a multiplier on contract attorney time, concluding: "It is with respect to risk, in particular, that the objection loses its allure. Counsel not only paid for the services of the contract lawyers, but also dedicated the time of their regular personnel to supervision. Because the risk is ultimately financial, counsel's recoupment risk in employing contract attorneys is no less uncertain than relating to the salaries paid to their regular employees"); *Carlson*, 596 F.Supp.2d at 409 (rejecting the argument that contract attorneys' time should not be subject to a multiplier); *In re Petrobras Securities Litigation* at 35-38 (including staff attorney and contract

[311] Ex. P to Fineman Declaration.

lawyer lodestar in awarding class counsel a multiplier).[312] *See also* Rubenstein Declaration II at 17 ("[C]ourts have explicitly rejected the argument that contract attorney time cannot be multiplied") and n. 71.

In disregarding the case law that allows multipliers on contract attorney time, the Special Master offers as a "final caution against allowing a market-rate mark up of contract attorneys," that when a multiplier is applied to market rates, "the actual realized rate on these contract attorneys can be twenty times as much as the firm actually paid the agency, or more."[313] The Special Master goes on to state, as an example, that "if a firm pays an agency $40/hour for a contract attorney but claims $400/hour for that contract attorney on its lodestar, and then obtains a 2.0 multiplier, the actual recovery rate for this contract attorney is $800/hour – or twenty times what the firm paid for the attorney."[314] With this arithmetic, the Special Master again misconceives or ignores the purpose of a lodestar cross-check.

The Court awarded Plaintiffs' Counsel 25% of the common fund. Plaintiffs' Counsel submitted their lodestar solely for cross-check, or verification, purposes. *See* discussion *supra* at 32-36. The aggregate lodestar submission showed that the 25% award was about twice Counsel's lodestar. *See Id.* This enabled the Court to decide whether that multiplier was appropriate under the circumstances. *See Id.* "The Court's conclusion that the 1.8 multiplier was justified did not mean that class counsel received $800/hour for contract attorneys. It meant that the 25% fee was justified." Rubenstein Declaration II at 17. Indeed, the class did not pay Plaintiffs' Counsel $400 per hour or $800 per hour for staff attorney time.

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[312] *Id*.
[313] Report at 188.
[314] *Id*.

2. The "Factual" Distinctions the Special Master Attempts to Draw Between the Firm's Staff Attorneys on Payroll and Those Paid By an Agency Do Not Support the Master's Recommendation.

The Special Master purports to distinguish between staff attorneys paid directly by the firm and those paid by an agency because: "the contract attorneys utilized in this case did not enjoy uninterrupted affiliation with the firm"; the firm did not offer "health insurance or provide other employment benefits" to agency attorneys; "the contract attorneys do not receive W-2s from the firm"; the firm's agency attorneys "did not bring with them the full panoply of federal and state employment law obligations that relate to employees of a business"; "Lieff did not face the same long-term financial obligations in securing contract attorneys as it did with its non-partnership-track staff attorneys"; and, "Lieff does not offer contract attorneys paid through an agency any additional monetary benefits".[315]

These distinctions between Lieff Cabraser's staff attorneys on payroll and those paid by an agency do not support the Special Master's recommendation that the time of the agency attorneys be treated as a cost for two reasons. First, there is no case law, and the Master cites none, for the proposition that these "distinguishing" facts, or facts like them, support treating a contract/agency attorney as a cost. *See* discussion *supra* at 79-85.

Second, a fair reading of the factual record concerning Lieff Cabraser's staff attorneys who worked on the State Street Action while paid by an agency highlights how insignificant, if not irrelevant, the Special Master's proposed factual distinctions actually are, and how they fail to justify his recommendation that the firm's agency lawyers be treated as a cost. These facts can be summarized as follows:

- The 18 Lieff Cabraser staff attorneys who worked on the State Street Action, including the seven who were at one time or for all times

[315] Report at 182-188.

employed by an agency, are described *supra* at 24-28, in Appendices A and B, and in Exhibit A to the Fineman Declaration.

- Throughout his Report, the Special Master recognizes the staff attorneys' stellar educational and professional backgrounds, and repeatedly praises the quality and value of their work in the State Street Action, without regard to which, if any of those staff attorneys, were paid by an agency. *See* discussion *supra* at 57-61.

- The Special Master concludes that the hourly rates for Lieff Cabraser's staff attorneys, mostly $415 per hour, were based on the nature and quality and the quality of their work, which the Master equates to that of a junior to mid-level associate, were therefore reasonable and appropriate. *See* discussion *supra* at 57-61.

- The Special Master concedes that there is no distinction between staff attorneys and agency attorneys as to the actual work performed for the benefit of the class – "[T]here is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary."[316]

- Four of Lieff Cabraser's staff attorneys – Bloomfield, Leggett, Nutting and Sturtevant – were compensated initially by an agency (which billed the firm directly for their services), but became payroll employees of the firm in January 2015, during the pendency of the State Street Action. Three of these attorneys – Bloomfield, Leggett and Nutting – put in substantial hours in both the BNY Mellon Action and the State Street Action. Leggett and Sturtevant performed their tasks on the State Street Action while working in Lieff Cabraser's San Francisco offices; Bloomfield and Nutting worked remotely in San Francisco. Leggett, Nutting and Sturtevent remain with the firm as full-time staff attorneys. *See* discussion *supra* at 24-28.

- Three of Lieff Cabraser's staff attorneys who worked on the State Street Action – Butman, McClelland, and Weiss – were compensated by an agency throughout their work on the Action. McClelland and Weiss both devoted substantial amount of time to the BNY Mellon Action. Weiss, working remotely, also recorded hundreds of hours in the State Street Action (including producing sophisticated issue memoranda) and continues to work for the firm on an agency basis. Butman and McClelland both worked in Lieff Cabraser's San Francisco office, but contributed only in modest hours to the State Street Action for the firm, 24 and 58, respectively (the bulk of McClelland's hours in the State Street Action were billed directly to Thornton and included in Thornton's lodestar). *See* discussion *supra* at 24-28.

[316] Report at 183.

- The firm incurs overhead expenses with respect to all of its staff attorneys, including its agency attorneys, including: the use of physical office space by Leggett, Sturtevant, Butman and McClelland; the use of information technology support for all seven, both in San Francisco and remotely; the use of firm administrative support (e.g., human resources on employment matters or dealing with an agency, accounting services, for payroll or interaction with an agency, and word processing for the submission of time records and the production of memoranda); assistance for all from the firm's litigation support department for training on Catalyst and as needed while performing their tasks; and, supervision of all by firm partners, senior associates and senior staff. *See* discussion *supra* at 12-13, 24-28.

- All attorneys that work for Lieff Cabraser, including those staff attorneys compensated by an agency, are covered by the firm's legal malpractice insurance policy. Of course, in the world of risk assessment, insurance companies focus on the nature of the work being performed and who it is being performed for, not on whether an attorney is receiving a W-2 or is temporary.

As these facts highlight, Lieff Cabraser's agency attorneys are "less distinct from full-time employees than the Report suggests." Rubenstein Declaration II at 14. Contrary to the Master's overbroad assumptions that the agency attorneys did not "enjoy uninterrupted affiliation with firm" and that the firm "did not face the same long-term financial obligations in securing contract attorneys as it did with its non-partnership-track staff attorneys," four of the firm's seven agency lawyers – Leggett, Nutting, Sturtevant and Weiss – began working for the firm between 2012 and 2014, and each remain with the firm today. *See* discussion *supra* at 24-28. And while it is true that the firm does not offer health insurance or certain other employment or monetary benefits to attorneys who are compensated by an agency, the firm offers a host of benefits and opportunities to agency attorneys, including, most obviously, actual employment and the resources to support that employment, and the chance to join Lieff Cabraser as payroll employees, as was the case with Bloomfield, Leggett, Nutting and Sturtevant. *See* discussion *supra* at 12-13, 24-28.

It is also true that not all federal and state employment laws that apply to the relationship between Lieff Cabraser and its employees apply to agency attorneys working under the firm's direction. Nevertheless, the firm expects its agency lawyers to abide by the firm's rules and practices, and agency attorneys are protected by state laws prohibiting harassment and discrimination in the workplace. The firm, through its human resources department, provides all personnel, whether employees of the firm, agency attorneys, or other contractors, with policies for behavioral conduct and on how to report misconduct of others.[317]

Finally, the Special Master's view that the differences he identifies between staff attorneys on the firm's payroll and those paid by an agency have any significance suggests an outdated view of the way the marketplace for legal services works today. As Rubenstein observes:

> [I]n today's current legal practice, firms have entered into far more flexible arrangements with associates and staff attorneys: for instance, many partnership-track attorneys work reduced hours (perhaps thereby removing themselves from certain benefits or legal requirements) and/or off-site or without permanent office space. To the best of my knowledge, private firms nonetheless continue to bill these attorneys at market rates, not as costs. Firms similarly bill summer law students – for whom they generally do not pay healthcare and retirement benefits – to their clients at market rates. These factual questions are complex and involve the court in inquiries irrelevant to the key concern – whether or not legal services are being provided to the client.

Rubenstein Declaration II at 15.

What matters here is not whether these seven attorneys performed their services while on the firm's payroll or being paid by an agency. What matters is the sophisticated nature and high quality of the services they rendered on behalf of the class. Nothing about their participation in the State Street Action warrants treating their time as a mere cost. *See Tyco*, 535 F.Supp.2d at

[317] Fineman Declaration at 26.

272 ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney [and] [i]t is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar.").

E. Even If The Court Agrees That The Firm's Agency Lawyers Should Be Treated Differently Than The Staff Attorneys On Firm Payroll For Purposes Of The Lodestar Cross-Check, The Special Master's Recommended Disgorgement Remedy Should Be Rejected.

There is no legal or factual basis for treating any of Lieff Cabraser's agency (contract) attorneys as a cost. *See* discussion *supra* at 77-90. If, however, the Court overrules that objection, Lieff Cabraser further objects to the Special Master's proposed "remedy" that:

> The seven contract attorneys, all retained by Lieff, recorded 2,833.5 hours in this role, at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged in return to the Class. The Customer Class is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the Class.[318]

Although made confusing by the last sentence, the firm understands the Special Master's recommendation to be that the firm should "disgorge" and "return" to the Class the difference between: a) the total of the firm's agency attorneys' lodestar, multiplied by 1.8; and b) $50 per hour for the agency lawyers' time. Assuming that is a correct reading of the recommendation, it would require that the firm pay $2,241,098.40 as a "remedy" for treating its agency attorneys as a cost ($1,325,5588 x 1.8 = $2,386,058, minus $144,960 (2899.2 hours x $50 per hour)).

[318] Report at 367-368. As noted above, the dollar figures and hours noted by the Special Master are misstated in the Executive Summary. Executive Summary at 50. And the hours are also misstated in the Report. We use the correct hourly total (2899.2) as the basis of the proposed cost reimbursement here.

Lieff Cabraser objects to this recommendation by the Special Master, and urges the Court to reject it, for the following reasons: (1) the Special Master's recommendation again miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (2) the inclusion of Lieff Cabraser's agency lawyers in the cross-check causes no harm to the class; and (3) penalizing Lieff Cabraser in a proposed amount of $2,241,098.40 for adhering to controlling legal principles and having committed no violation of law or ethics is blatantly unjust.

1. The Special Master's Recommendation Again Miscomprehends or Ignores the "Cross-Check" Purpose for Which Lodestar Was Submitted and Used in the State Street Action.

As in the manner in which the Special Master addressed the inadvertent double accounting, the Master has again erred in recommending a disgorgement remedy by miscomprehending or ignoring the "cross-check" purpose for which the firm's lodestar was submitted in the State Street Action. *See* discussion *supra* at 34-36, 57-61, 68-72. "The Special Master's Report errs in recommending these remedies as it confuses the nature of a lodestar cross-check, applied in this case with a lodestar-based fee, not at issue here." Rubenstein Declaration II at 18. Indeed, the Special Master's reference to the "total billings" for Lieff Cabraser's agency attorneys suggests confusion between lodestar being used for cross-check purposes and constituting an actual bill or charge to the Class. Similarly, a "multiplier of 1.8" was *not* added to the firm's agency attorneys' "hours and rates," as though Lieff Cabraser had separately charged the class a multiplier on their time. Rather, the Court compared the 25% fee award ($74,541,250) with the *aggregate* lodestar submitted by *all* Plaintiffs' Counsel ($41,323,895.75), and determined that the resulting 1.8 multiplier on that aggregate lodestar was reasonable. *See* discussion *supra* at 34-36.

Accounting for Lieff Cabraser's agency attorneys' lodestar in the context of a cross-check (the only context that matters here) means that even if the Court agrees with the Special Master that the agency attorneys' time should be treated as a cost, then the only plausible outcome is the removal of the agency lawyers' lodestar ($1,325,588) from the aggregate total lodestar, merely resulting in a higher lodestar multiplier. Rubenstein summarizes the circumstance as follows:

> Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, any error in their lodestar calculation does not mean that the fee awarded was necessarily an error: the lodestar is a means not an end. The critical question is the effect that the lodestar error had on the cross-check. Specifically, reducing class counsel's lodestar (by, for example, fixing the counting and/or removing the contract attorneys' time) will mean that the 25% fee award embodies a higher lodestar multiplier, which the Court will have to ensure is still reasonable.

Rubenstein Declaration II at 19.

This is the approach taken by those courts that have reduced the hourly rates of contract attorneys submitted for lodestar cross-check purposes. Courts do not order disgorgement of the delta between the submitted and the approved lodestar; rather, they simply remove the unapproved lodestar resulting in an adjustment to the multiplier used for cross-check purposes. *See*, *e.g.*, *CitiGroup*, 965 F.Supp.2d at 401 (concluding that a 3.9 multiplier, "the multiplier based on the reduced lodestars calculated by the Court," was "above the norm in securities class action settlements of similar size," settling on a percentage fee that yielded a 2.8 multiplier); *Carlson*, 596 F.Supp.2d at 409 ("[If] the charges for the contract attorneys' time were decreased, the multiplier in this case would still be a reasonable multiplier"); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, No. 07-CIV-5947 (JST), 2016 WL 4126533, at *8-9 (N.D.Cal. August 3, 2016) ("[E]ven if the Court were to reduce the plaintiffs' lodestar to reflect the contract attorneys' lower billing rates, the multiplier that would result would still be well within an

acceptable range… A lodestar reduction is unnecessary when the effect on the multiplier is not material.").

Here, if both the double counted and the agency attorney hours are removed from Plaintiffs' Counsel's aggregate lodestar, the 1.8 multiplier the Court approved becomes a 2.07 multiplier.[319] As explained above, and as acknowledged by the Special Master, a 2.07 multiplier would be well within a reasonable range for cases like the State Street Action. *See* discussion *supra* at 57-61. As Rubenstein explains it, "utilizing empirical evidence of court-approved multipliers—this difference in the context of this case is not significant." [footnote omitted]). "Put differently, given the remarkable success Class Counsel achieved for the Class—an accomplishment that the Special Master recognizes [footnote omitted]—a 25% fee award embodying a 2.07 multiplier is fully reasonable, indeed modest." Rubenstein Declaration II at 19-20.

Given the purpose of the submission of lodestar for cross-check purposes, if the Court follows the Special Master's recommendation to treat Lieff Cabraser's agency attorneys as a cost, the proper way to address the matter is to remove those attorneys' lodestar from the aggregate lodestar used in the cross-check of the 25% fee. *See* discussion *supra* at 68-74. The Court can then determine whether or not the resulting aggregate multiplier is appropriate. For the reasons stated above, Lieff Cabraser submits that it would be.

[319] The corrected aggregate lodestar, after deducting the inadvertently double accounted hours, is $37,265,241.25. If the Lieff Cabraser agency attorneys' lodestar ($1,325,588) is also removed, the total lodestar becomes $35,939,653.25, and the $74,541,250 percentage award translates into a multiplier of 2.07. *See* Rubenstein Declaration II at 19.

2. The Inclusion of Lieff Cabraser's Agency Lawyers in the Cross-Check Causes No Harm to the Class.

In attempting to justify his recommended "remedy" for the inclusion of Lieff Cabraser's agency attorneys' time in the aggregate lodestar for cross-check purposes, the Special Master asserts that in "class actions, this is charged against class funds. Quite simply, this is far too steep a price for class members to pay for what amounts to rented workers."[320] This position is, quite simply, baseless. As explained above, there is no case law support for this proposition, and Lieff Cabraser's staff attorneys who were paid one time or at all times by an agency were far more than "rented workers." *See* discussion *supra* at 24-28, 57-61. Moreover, the class has not in any way been harmed by the inclusion of the firm's agency attorneys in the lodestar for cross-check purposes.

As discussed above, both the Court and the Special Master found that the $300 million settlement in the State Street Action was an "excellent result," providing significant economic benefits for the class. *See* discussion *supra* at 34-36, 57-61. Class members were informed of those benefits in the class notice, and were advised that Plaintiffs' Counsel would seek a fee up to approximately 25% of the amount recovered. *See* discussion *supra* at 32. Not a single class member – sophisticated institutional investors – opted out or objected to the settlement. *See* discussion *supra* at 34-36.

Based on Plaintiffs' Counsel's impressive achievement for the class, and applying controlling legal principles, the Court awarded the requested fees (and reimbursement of the requested expenses). *See* discussion *supra* at 34-36. Lieff Cabraser did not bill or charge the class and the class did not pay the firm for the hours worked by agency attorneys on the State Street Action. And the firm certainly did not bill or charge the class and the class did not pay

[320] Report 188.

Lieff Cabraser an additional lodestar multiplier. As Rubenstein puts it, the "reduction of an hour or time recalibrates the lodestar multiplier," but it "does not require the 'repayment' of that hour of time since counsel was never 'paid' for that hour of time; counsel were paid a percentage of the recovery." Rubenstein Declaration II at 20.

In these circumstances, the Class has suffered *no* harm as a result of the inclusion of the lodestar of Lieff Cabraser attorneys who were paid by an agency. The aggregate lodestar used for cross-check purposes verified the reasonableness of the same percentage-based fee amount the class was informed of and did not object to, and was later approved by the Court. *See* discussion *supra* at 34-36. The Special Master identifies no harm suffered by the Class that justifies such an unnecessary "remedy."

3. Penalizing Lieff Cabraser for Adhering to Controlling Legal Principles and Having Committed No Violation of Law or Ethics is Unjust.

The Special Master proposes penalizing Lieff Cabraser $2,241,098 (separate from and in addition to any double-counting penalty) because Lieff Cabraser included the lodestar of its staff attorneys who are paid by an agency as part of Plaintiffs' Counsel's aggregate lodestar submitted to the Court for cross-check purposes. *See* discussion *supra* at 62-66, 90-92. The Special Master asks the Court to impose this "remedy" on the firm even though the firm acted in compliance with all controlling and relevant case law in accounting for the agency lawyers as it did, and even though the firm violated no legal or ethical rules, and even though the Special Master finds no difference in the academic or professional backgrounds of, or the quality or nature of the work performed, by those lawyers. *See* discussion *supra* at 57-61. Rather, the Special Master recommends that this Court assess the firm $2,241,098 because the Special Master does not like the state of the law and has a different view of how agency and contract lawyers should be treated in the context of class action fee applications. *See* discussion *supra* at 82. This is a

blatantly unfair and unjust basis upon which to extract such an extraordinary sum of money from the firm. The Special Master's recommendation should be rejected.[321]

F. Lieff Cabraser Should Be Reimbursed For The Amount Of Money It Has Spent Responding To The Chargois Investigation.

The Special Master finds that Lieff Cabraser was not aware of the Chargois Arrangement, and justifiably believed Chargois to be Labaton's local counsel, and therefore bears no responsibility for the non-disclosure of the Chargois Arrangement or Chargois' involvement (or lack thereof) in the State Street Action. *See* discussion *supra* at 63-64. That conclusion is in all respects consistent with the factual record. *See* discussion *supra* at 49-56. The firm therefore respectfully requests that the Court adopt the Special Master's exclusion of Lieff Cabraser from any responsibility relating to Chargois.[322]

Based on his findings that the firm "was misled into agreeing to share in the Chargois payment" (24% of 5.5% of the total fee award ($4,099,768.75)), the Special Master states that "[o]rdinarily some recompense would be in order for this."[323] The Special Master goes on to note, however, that when asked at the April 13, 2018 Final Hearing, "what if any relief" the firm was seeking for being misled, Lieff Cabraser's general counsel, Heimann, "indicated he was not looking for any repayment."[324] The Special Master concluded therefore that the "fairest result for the Lieff firm would be for it to be relieved of its obligations to Labaton under the claw-back

[321] Of course, Lieff Cabraser's total lodestar, including that of its agency attorneys, benefited all Plaintiffs' Counsel, including ERISA Counsel, in that the Court's lodestar cross-check in support of the 25% fee award took into account all of the lodestar submitted. Therefore, any reduction in the fee award as a result of the removal of agency attorney lodestar (or double-counted lodestar) must apply to all Plaintiffs' Counsel.

[322] Although it is unnecessary to address in this Response and Objections, in the course of the investigation Lieff Cabraser has challenged the views of the Special Master and Gillers on the applicable "disclosure" rules. *See e.g.*, Ex. 234 to Report, Rubenstein Report; Ex. 244 to Report, Dacey Report; and, Rubenstein Declaration II at 2-9.

[323] Report at 352.

[324] *Id*.

letter as to Chargois, but no more."[325] Lieff Cabraser respectfully requests that the Court adopt the Special Master's recommendation that it be relieved of any further obligations to Labaton under the claw-back agreement as to any prior or future financial obligations relating to Chargois.

Although during the Final Hearing, Heimann, speaking for the firm, declined to seek reimbursement from Labaton and/or Thornton of the approximately $1 million the firm effectively contributed to Chargois' $4.1 million fee, and although Lieff Cabraser abides by that position now, the firm *does* seek reimbursement from Labaton and/or Thornton of the costs the firm has incurred in responding to the Chargois investigation, an exercise for which Lieff Cabraser is in no way responsible. The firm seeks repayment of the amount it has contributed to the Special Master's fees and expenses that are attributable to the Chargois investigation, as well as the amount of costs and lodestar expended by the firm in addressing the Special Master's Chargois-related inquiries.

The Chargois investigation has resulted in significant expenditures of time and expense by Lieff Cabraser. The firm was drawn into the Chargois phase of the investigation through no fault of its own. *See* discussion *supra* at 49-56, 63-64.[326] Under such circumstances, reimbursement to Lieff Cabraser is appropriate under Rule 53 and the discretion of the Court. *See* Rule 53(g)(3) of the Federal Rules ("The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master"); *Chevron*

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[325] *Id*.

[326] The Special Master recommends directing $3.4 million of the $4.1 million Chargois "remedy" to ERISA Counsel because "this investigation has resulted in great expenditures of time and expense to the ERISA firms that have been drawn into it through no fault of their own,…." Report at 369.

Corporation v. Donziger, 11-CIV-0691 (LAK), 2017 WL 6729360, *6 (S.D.N.Y. Dec. 8, 2017) (under Rule 53(g)(3) an "interim allocation may be amended to reflect a decision on the merits").

Because the firm does not at this time know how much of the $912,000 the firm has thus far contributed to the Special Master's fees and expenses is attributable to the Chargois investigation, Lieff Cabraser proposes that if the Court agrees that the firm should be reimbursed for the amount of money it has spent responding to the Chargois investigation, it also direct the Special Master to advise the firm of the total cost (either in aggregate dollars or on a percentage of the $3.8 million) has been spent on the Chargois investigation. The firm would then submit to the Court that information, along with details supporting the firm's out-of-pocket costs and lawyer time devoted to responding to the Chargois investigation as part of a specific request for reimbursement.

IV. CONCLUSION – The Financial Impact Of The Special Master's Disgorgement Recommendations On Lieff Cabraser Are Unjust And Entirely Disproportionate To The Firm's True Conduct And The Absence Of Harm It Has Caused To The Class.

The Special Master's Final Thoughts on Remedies in the conclusion of his Report underscores how unjust and entirely disproportionate the Special Master's recommended punitive monetary remedies are as to Lieff Cabraser. The Special Master claims that the "intent here has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and the harm."[327] Yet, the Special Master finds that Lieff Cabraser did not engage in *any* professional misconduct, let alone any "true and unmistakable" conduct. Further the Master concludes that the firm bears the least amount of responsibility for the accidental, inadvertent double-counting of the lodestar of four staff attorneys (an unintentional overstatement of

[327] Report at 376.

$868,417). For that honest mistake, which caused no harm to the class, the Special Master recommends that Lieff Cabraser "return" to the class $1,352,667. There is nothing proportionate about the Master's punitive recommendation in this regard.

Similarly, Lieff Cabraser has committed no "wrongs" that justify the Special Master's recommendation that Lieff Cabraser "return" $2,241,098 (the actual lodestar of $1,325,588 plus a punitive multiplier) to the class because the Master disagrees with the unequivocal and abundant case law that supports Lieff Cabraser including the lodestar of seven of its staff attorneys who were paid by an agency in the lodestar submitted for cross-check purposes. There is nothing proportionate about imposing a $2,241,098 penalty on Lieff Cabraser for the firm faithfully following the law and having caused no harm to the class by doing so.

Having found Lieff Cabraser engaged in no intentional or professional misconduct and violated no rule of law or ethics, the Special Master seeks to justify the imposition of millions of dollars of monetary forfeiture by claiming that "even after the allocation of all monetary amounts, and the cost of the investigation, [Lieff Cabraser] will still receive its base lodestar plus a significant multiplier."[328] Nothing could be further from the truth. In fact, if the Court accepts the Special Master's recommendation that the firm disgorge $3,593,765 – or approximately 24% of the $15,116,965.50 in fees the firm received – in addition to (a) the $912,000 the firm has already paid to fund its share of the Special Master's investigation, and, (b) the $2.39 million the firm has spent in time and costs responding to the investigation, the firm will receive *less* than its "base lodestar" and, in fact, a *negative* multiplier (0.92%) for its exemplary service to the class in

[328] Report at 376.

the State Street Action. There is nothing "proportionate" about the Master's recommendations concerning Lieff Cabraser's conduct in this case.

Dated: June 29, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

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United States Court of Appeals

for the

First Circuit

Case No. 21-1069

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN; ARNOLD HENRIQUEZ; MICHAEL T. COHN; WILLIAM R. TAYLOR; RICHARD A. SUTHERLAND,

Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC; DOES 1-20,

Defendants,

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Interested Party-Appellant,

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER ROHRBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP

Interested Parties-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS IN CASE NOS. 1:11-CV-10230-MLW; 1:11-CV-12049-MLW; AND 1:12-CV-11698-MLW
HON. MARK L. WOLF, U.S. DISTRICT JUDGE

INTERESTED PARTY-APPELLANT'S APPENDIX
Volume 3 of 3 (Pages A897 to A1493)

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DECLARATION OF WILLIAM B. RUBENSTEIN IN SUPPORT OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S RESPONSE AND OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant	No. 11-cv-10230 MLW
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EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. The law firm Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") has retained me to provide my expert opinion on several aspects of the fee petition that Counsel[1] submitted in this matter in September 2016, as corrected for the subsequently-found accounting errors. After setting forth my qualifications to serve as an expert and disclosing my prior relationship to this case and these firms (Part I, *infra*),[2] I provide the Special Master with empirical data and policy analysis to support the following four opinions relevant to analysis of the reasonableness of Counsel's 2016 fee request:

- ***Counsel's fee approach is the most widely used.*** (Part II, *infra*). Counsel's fee petition employed a percentage approach, provided the Court with information about their lodestar for cross-check purposes, and addressed a series of factors that courts have deemed relevant to the reasonableness inquiry. The percentage approach with a lodestar cross-check is the approach that courts most frequently use to assess the reasonableness of fee requests in common fund class action cases. It improves on the percentage approach standing alone (which could lead to a windfall for counsel) by making a rough comparison of the fee sought to

[1] Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow") filed the fee petition for all the firms in the case. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 102) at 2. In the accompanying brief, Lead Counsel specifies that, in addition to its firm, the term "Plaintiffs' Counsel" encompassed five other firms. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) at 8 n.2. The total lodestar in the case, however, encompasses work from three additional firms, or nine in all. *See* Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, Ex. 24 (ECF No. 104-24) at 2 (Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards). This Declaration uses the term "Counsel" as a short-hand reference to all of these firms.

[2] I typically provide a short synopsis of the litigation in my expert reports, but given the post-hoc nature of this report, I have not done so here.

counsel's time in the case. Simultaneously, it improves on the lodestar approach standing alone (which could bog the court down in review of counsel's time records) by enabling a check on the percentage approach without requiring an extensive audit of counsel's hours and rates.

- ***Counsel's billing rates were reasonable.*** (Part III, *infra*). Counsel's fee petition supplied the Court with billing rates for all professional time-keepers. Three sets of comparison data support the conclusion that the rates employed were reasonable: *first*, the rates are consistent with rates that courts in this community have awarded in approving class action fee petitions in recent years; *second*, Counsel's rates fall far below the court-approved rates charged by large corporate firms in bankruptcy cases in this market; and *third,* the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in this community and in $100-$500 million cases throughout the country.

- ***Counsel appropriately billed non-partnership-track attorneys at market rates and the billing rates employed were reasonable.*** (Part IV, *infra*). Counsel employed non-partnership track attorneys to perform work such as document review and analysis. An empirical analysis of 12 recent cases in which courts have approved fee petitions containing rates for "contract" or "staff" attorneys shows that Counsel's rates for these non-partnership track attorneys are unexceptional: Counsel's blended rate is within pennies of the comparison set's average rate. Public policy also supports Counsel's billing of these non-partnership track attorneys at market rates, not cost, as empirical evidence shows that these attorneys were well-qualified for the legal work that they undertook and as billing at market rates is consistent with how law firms in the private market bill such attorneys, complies with the ABA's suggested ethical approach, and provides the right incentives for plaintiff firms.

- ***Counsel's fee was reasonable, as evidenced by the modest size of the lodestar multiplier***. (Part V, *infra*). The Court-awarded fee embodied a lodestar multiplier (based on Counsel's corrected lodestar) of 2.01. Three sets of data support the reasonableness of a fee that is roughly 2 times greater than Counsel's lodestar: it is below the mean for settlements of this size reported in the leading empirical analyses of class action fee awards, it is below the mean of a comparison group of $100-$500 million settlements, and it is fully consistent with the Court's characterization of the risks Counsel shouldered and the results that they achieved for the class herein.

I am aware of the fact that the fee petition in this case initially contained errors with regard to the lodestar cross-check information submitted to the Court. While those accounting errors were of

course unfortunate, their impact on the lodestar cross-check submission was relatively negligible and did not undermine the reasonableness of the fee Counsel proposed.

I.
BACKGROUND AND QUALIFICATIONS[3]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*, and as of this summer, I have re-written from scratch the entire 10-volume treatise. In 2015, I wrote and published a 600-page volume (volume 5) of the Treatise on attorney's fees, costs, and incentive awards; this volume has already been cited in

[3] My full c.v. is attached as Exhibit A.

numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For this and the past seven years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the

2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 70 cases and as an expert consultant in about another 25 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal. *See In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom. Berman DeValerio v. Olinsky*, 673 F. App'x 87 (2d Cir. 2016).

8. My past work encompasses prior *expert witness* work for and against a number of firms involved in this matter and current and past *legal work* on behalf of the Thornton Law Firm LLP (the "Thornton Fim"), including on an issue at the inception of this case. Specifically, in 2011, the Thornton Firm retained me to advise it on the representation of the class in this matter and the separate representation of the *qui tam* relators in actions against State Street and I worked with the firm in that capacity between February 24, 2011 and June 6, 2011. I am also currently assisting the Thornton Firm in a different complex litigation context, again on issues arising out of the representation of multiple parties that are un-related to the billing issues before the Special Master. Until Lieff Cabraser contacted me in March 2017 about the present retention, I had no other involvement in (or even knowledge of the progress of) this fee-related matter. The Thornton Firm has informed me that it has no objection to my appearing as an expert witness on the fee-related issues presently before the Special Master. I similarly believe that my duties to the Thornton Firm arising out of the unrelated 2011work on this case and my present work on an unrelated collateral matter do not interfere with my ability to provide my own independent expert opinions on the present fee-related matter, but I make this disclosure so that the Special Master has full information. Finally, as is more readily evident from the cases listed on my resume, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback LLP ("Keller Rohrback") have each previously retained me as an expert witness in class action cases. I have also been retained as an expert witness by parties adverse to the Lieff Cabraser firm, or to Plaintiffs' Steering Committees on which it served, or to its clients in about five cases and I worked as court-appointed counsel against a group of plaintiffs' firms, including Lieff Cabraser, arguing for affirmance of a reduced fee award in the Second Circuit, as referenced in the prior paragraph.

9. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

11. Additionally, my research assistants, under my direction, have compiled four sets of data relevant to my analysis and ultimate opinions:

- a data set of 20 cases reflecting billing rates that judges in the District of Massachusetts – and in Massachusetts state courts – have approved in ruling on class action fee requests in the past dozen years (Exhibit C);
- a data set of six fee petitions containing 169 rates utilized by corporate firms in bankruptcy cases that Massachusetts bankruptcy courts have approved in recent years (Exhibit D);
- a data set of 20 class action settlements with aggregate settlement values of $100-$500 million (Exhibit E);
- a data set of 12 class action cases in which courts throughout the country have approved fee petitions that contain billing rates for "contract lawyers" or "staff attorneys" in recent years (Exhibit F).

II.
COUNSEL'S FEE APPROACH IS THE MOST WIDELY USED APPROACH TO FEES IN COMMON FUND CLASS ACITONS

12. Counsel sought a fee of approximately $74.5 million (ECF No. 102 at 2) and they demonstrated the reasonableness of that request according to a percentage approach (with

multiple factors) and a lodestar cross-check. (ECF No. 103-1). Empirical evidence shows that this is the most common approach courts take to fees.[4]

13. Specifically, the most fine-grained data of fee awards demonstrates that courts use a pure lodestar approach in 9.6% of cases, a pure percentage approach in 37.8% of cases, and a mix of the two (typically, a percentage approach with a lodestar cross-check) in 42.8% of cases, with another 9.8% of cases employing some other method or not specifying which method.[5]

14. I explain in the *Newberg* treatise how these current practices developed.[6] After adoption of the current class action rule in 1966, courts tended to employ a percentage approach to fees, but a 1973 decision of the Third Circuit endorsed an hourly approach, labeling it the

[4] It is also consistent with the law in the First Circuit. In reporting on First Circuit law in the *Newberg* treatise, I wrote:

1. *Percentage or lodestar fee method.* The First Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.
2. *Reasonableness review criteria.* The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis. District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits and at other times have employed the Seventh Circuit's market mimicking approach.
3. *Lodestar cross-check.* The First Circuit has held that a lodestar cross-check is entirely discretionary.

5 William B. Rubenstein, Newberg on Class Actions § 15:96 (5th ed.) (2015) (footnotes omitted) (hereafter *Newberg on Class Actions*).

[5] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010) (hereafter "Eisenberg and Miller II")).

[6] 5 *Newberg on Class Actions, supra* note 4, at § 15:64.

"lodestar" method,[7] and many courts began to utilize that method. In response to concerns engendered by the lodestar method, the Third Circuit convened a Task Force consisting of a cross-section of lawyers, judges, and scholars, all with expertise in the area of class action attorney's fees, to develop – in a neutral, non-investigatory setting – a set of best practices.[8] The Task Force concluded that a (negotiated) percentage method was the preferable approach for fee awards in common fund cases and many courts subsequently moved toward a percentage approach to awarding fees in common fund cases. By 2004, the *Manual for Complex Litigation* stated that "[a]fter a period of experimentation with the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."[9] Yet, since the *Manual* made that statement, empirical evidence demonstrates that courts have moved to something of a hybrid: a percentage approach with a lodestar cross-check. Thus, in cases from 1993–2002, 56.4% of courts used the pure percentage, while in cases from 2003–2008 cases, only 37.8% did.[10] This is about a one-third decrease in the use of the pure percentage approach. The big gain was in courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% of cases to 42.8% of cases.

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[7] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168-69 (3d Cir. 1973).

[8] For a description of the Task Force's membership and methodology, see Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 253-54 (1985).

[9] Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 14.121 (2004) (citations omitted).

[10] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Eisenberg and Miller II, supra note 5, and Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 52 (2004) (hereafter "Eisenberg and Miller I")).

15. This approach is favored because it improves on either approach standing alone.[11] The percentage approach without a lodestar cross-check could lead to counsel securing a windfall. A lodestar approach standing alone could engross the court in an unnecessary audit of counsel's hours and rates, as the entire fee turns on the specific time billed. By contrast, using a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall.[12] A review of counsel's lodestar is appropriate, but over-emphasis on it – especially in a case of this magnitude, involving so many lawyers throughout the country – could bog the court down in unnecessary detail.

16. In a recent case in the California Supreme Court, I submitted my own *amicus* brief advocating for the Court to encourage the use of a lodestar cross-check. The Court embraced my brief, writing the following:

> The utility of a lodestar cross-check has been questioned on the ground it tends to reintroduce the drawbacks the 1985 Task Force Report identified in primary use of the lodestar method, especially the undue consumption of judicial resources and the creation of an incentive to prolong the litigation. We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases.
>
> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree

[11] For a defense of the lodestar cross-check method, and a discussion of the points in this paragraph, see 5 *Newberg on Class Actions, supra* note 4, at § 15:86.

[12] Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See id.* at n.13 (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005))).

> of time and effort expended by the attorneys." 5 Newberg on Class Actions, supra, § 15:86, p. 331. . . The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation.
>
> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply. (5 Newberg on Class Actions, supra, § 15:86, pp. 332–333. . .). A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.[13]

17. In sum, the percentage approach with a lodestar cross-check is, empirically speaking, the fee method courts utilize most often in common fund cases, and they do so for sound policy reasons. The approach Counsel took in its fee petition in this case was therefore fully consistent with normal practice in common fund class actions.

18. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, the error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar was a means not an end. The critical question is the effect that the lodestar error had on the cross-check. As Counsel reported in correcting it, the lodestar error meant that their multiplier in the case was approximately 2 rather than 1.8 (ECF No. 116 at 3). As I discuss below, utilizing empirical

[13] *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 687-88 (Cal. 2016) (some citations omitted).

evidence of multipliers, this difference in the context of this case was not significant (Part V, *infra*). This is not, of course, to excuse the mistake. It is, rather, to place the mistake in its proper context.

III.
COUNSEL'S BILLING RATES WERE REASONABLE

19. To investigate the reasonableness of Counsel's billing rates, I utilize empirical evidence to generate three independent comparison sets:

- I compare the hourly rates for each timekeeper in this case to hourly rates that courts in this District (and in Massachusetts state court) have awarded in approving class action fee petitions in recent years.
- I compare the hourly rates for each timekeeper in this case to the hourly rates that defense firms charge for similar work in this market, as evidenced by rates Massachusetts bankruptcy courts have approved in recent years.
- I compare the blended billing rate for this case to the blended billing rate of other class action cases in this District and to other class action cases involving $100-$500 million settlement funds.

20. I have chosen to compare Counsel's billing rates to rates other class action (and bankruptcy) courts have approved because it is my expert opinion that such court-sanctioned rates provide the best comparison group. The primary reason they are the best comparable evidence is that class action attorneys make a living getting paid by their clients through court-approved fee petitions;[14] thus the "market" rates for their services are generally the rates that

[14] Given this fact, I found unambiguous the statements in this case's fee declarations that the "hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." *E.g.*, Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15 at ¶ 7 (Sept. 15, 2016). I read "regular rates charged" as meaning that these were rates submitted in class action fee petitions, a reading confirmed by the succeeding clause's statement that the rates had been "accepted [by courts] in other complex class actions."

courts approve for their services.[15] Other ways of assessing the reasonableness of the hourly rates in cross-check submissions include the following:

- Occasionally, lawyers will submit, and courts rely on, affidavits from other lawyers in the community about prevailing rates.[16] Such affidavits have the benefit of being sworn to under penalty of perjury, and therefore likely provide accurate reporting on the rates included in them, but they may not represent a fair cross-section of evidence given the manner in which they are produced.[17]

- Occasionally lawyers will present evidence collected from surveys such as the *National Law Journal* survey. A few courts have deemed survey evidence sufficient for lodestar cross-check purposes because the cross-check "does not involve bean counting or mathematical precision."[18] Nonetheless, survey evidence is notoriously unreliable for multiple reasons: (a) the survey drafters can skew answers – even inadvertently – simply in the way questions are drafted; (b) results are often reported by attorney type (junior associate, senior partner, etc.) and with bands of rates so that tailored comparisons are impossible; (c) survey respondents, unlike lawyers filing fee petitions, do not sign survey responses under the penalty of perjury; and (d) most problematically, surveys embody a selection bias in that they may neither be sent to nor responded to by an appropriate comparison group; this is particularly a problem in that (e) the nature, legitimacy, and transparency of the organization undertaking the survey – and the context in which the survey is taken – will have a significant effect

[15] For this reason, the Second and Ninth Circuit have criticized the Seventh Circuit's belief that there is some other market approach to class action attorney's fees. *See* 5 *Newberg on Class Actions*, *supra* note 4, at § 15:79 ("'[T]o the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.'") (quoting *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049–50 (9th Cir. 2002)).

[16] *See, e.g., Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) ("[E]vidence of prevailing market rates may include affidavits from other area attorneys.").

[17] *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012) (finding declarations from other attorneys unhelpful for being too general); *Wilhelm v. TLC Lawn Care, Inc*., No. CIV. A. 07-2465-KHV, 2009 WL 57133, at *5 (D. Kan. Jan. 8, 2009) (agreeing with defendant's contention that "the affidavits of other plaintiffs' attorneys should be disregarded because they are self-serving" and "contradict plaintiffs' other evidence").

[18] *In re Schering-Plough Corp*., No. CV 08-397 (DMC)(JAD), 2013 WL 12174570, at *28 n. 27 (D.N.J. Aug. 28, 2013), report and recommendation adopted sub nom. *In re Schering-Plough Corp. Enhance Sec. Litig*., No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013).

on who responds to the survey and how. Accordingly, courts are often quite skeptical of such evidence.[19]

- Occasionally courts rely on something called the *Laffey* Matrix[20] – particularly in fee-shifting cases in the District of Columbia – but this is a disfavored approach and one that I am quite critical of for a host of reasons.[21]

In short, as the goal of this endeavor is to ascertain proper billing rates for lawyers pursuing class action lawsuits, I agree with the many courts that have found that the best comparable evidence are rates that other courts have approved for class action work.[22]

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[19] *See In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06 C 7023, 2016 WL 4765679, at *14 (N.D. Ill. Sept. 13, 2016) (noting "skepticism" amongst courts about applying survey rates that fail to differentiate large and small firms); *Forkum v. Co-Operative Adjustment Bureau, Inc.*, No. C 13-0811 SBA, 2014 WL 3101784, at *4 (N.D. Cal. July 3, 2014) (finding a fee survey "largely unhelpful in determining the reasonable hourly rates for the attorneys that worked on this case" because it is "not [a] reliable measure[] of rates in [the court's District] because [it] provide[s] no data on the prevailing hourly rates charged in this District"); *Lorik v. Accounts Recovery Bureau, Inc.*, No. 1:13-CV-00314-SEB, 2014 WL 1256013, at *2–3 (S.D. Ind. Mar. 26, 2014) (criticizing the "fairly obvious facial weaknesses" in a fee survey, such as insufficient sample size, lack of detailed geographical differentiation, and response bias, and finding "[t]he customary and judicially preferred standard by which the reasonableness of hourly rates is measured ordinarily comes from [evidence of rates charges by] . . . other lawyers who regularly practice in a particular geographical area and who provide similar or comparable legal services"); *California Durham v. Cont'l Cent. Credit*, No. 07CV1763 BTM WMC, 2011 WL 6783193, at *2 n.1 (S.D. Cal. Dec. 27, 2011) (finding a fee survey "is of limited usefulness because [it] does not beak down the hourly rates by region within California").

[20] The matrix originated in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983).

[21] *See* 5 *Newberg on Class Actions*, supra note 4, at § 15:43.

[22] *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498–99 (6th Cir. 2011) (noting that courts should determine reasonable hourly rates by looking to, *inter alia*, the rates used in analogous cases); *Plyler v. Evatt*, 902 F.2d 273, 277 & n.2 (4th Cir. 1990) (noting courts should weigh a fee applicant's hourly rates against the prevailing market rates in the relevant community, which looks to, *inter alia*, "attorneys' fee awards in similar cases"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 262 (N.D. Cal. 2015) (noting evidence of prevailing market rates includes affidavits from area attorneys and "examples of rates awarded to counsel in previous cases"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (noting Fifth Circuit courts determine whether an hourly rate is reasonable by looking to affidavits from other attorneys in the community and "rates actually

Court-approved rates in Massachusetts class action cases

21. For purposes of this Declaration, I utilized a database of 481 fee rates contained in 20 class action fee petitions approved by federal and state courts in Massachusetts in recent years.[23] A list of these cases is attached as Exhibit C. For each timekeeper, my research assistants identified the timekeeper's initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. As the fee petition herein was submitted in 2016, we adjusted all hourly rates in prior cases to 2016 dollars using the U.S. Bureau of Labor CPI Inflation Calculator.[24] Once each timekeeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-

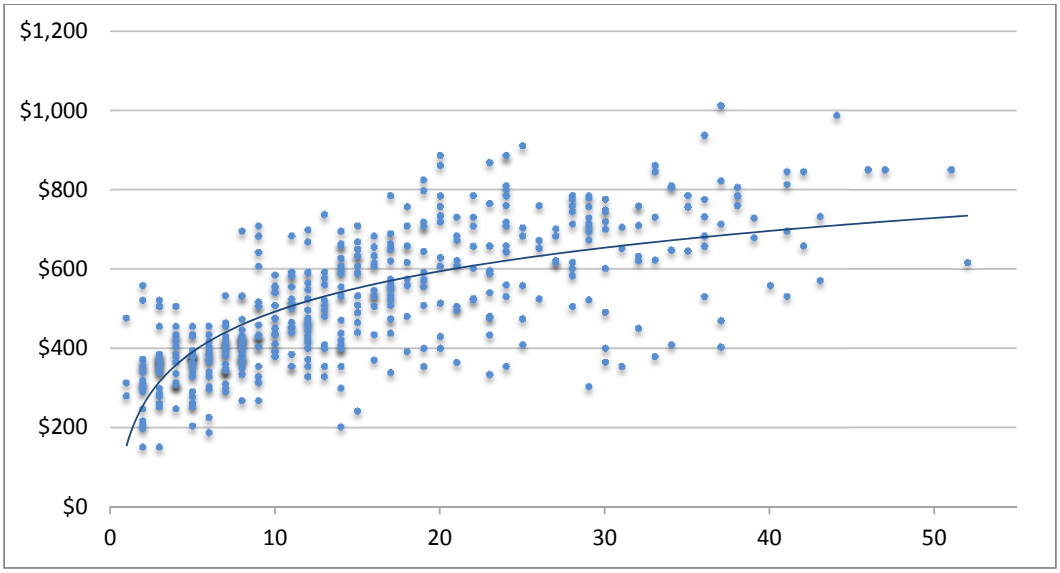
billed and paid in similar lawsuits"); *Faircloth v. Certified Fin. Inc*., No. CIV. A. 99-3097, 2001 WL 527489, at *10 (E.D. La. May 16, 2001) (looking to "decisions of other courts in this jurisdiction" to determine a proposed hourly rate was reasonable).

[23] I originally compiled this dataset for my 2016 work as an expert witness on attorney's fees in a case entitled, *Geanacopoulos v. Philip Morris USA Inc*., No. 98-6002-BLS1 (Mass. Super.). To do so, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study. In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, I coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, I utilized the lower rate in the data set. For purposes of this Declaration, my research assistants updated that dataset in two ways: we added the rates employed in that prior case as the court approved that fee petition and we searched for newer cases using the same criteria and identified one such case to add to the database.

[24] This calculator can be found at this hyperlink: http://data.bls.gov/cgi-bin/cpicalc.pl. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000.00 in January of 2015 was equivalent to $1,013.73 in January of 2016. Accordingly, we multiplied all 2015 rates by 1.01373 to adjust them to 2016 values.

axis representing the years since the timekeeper's admission to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



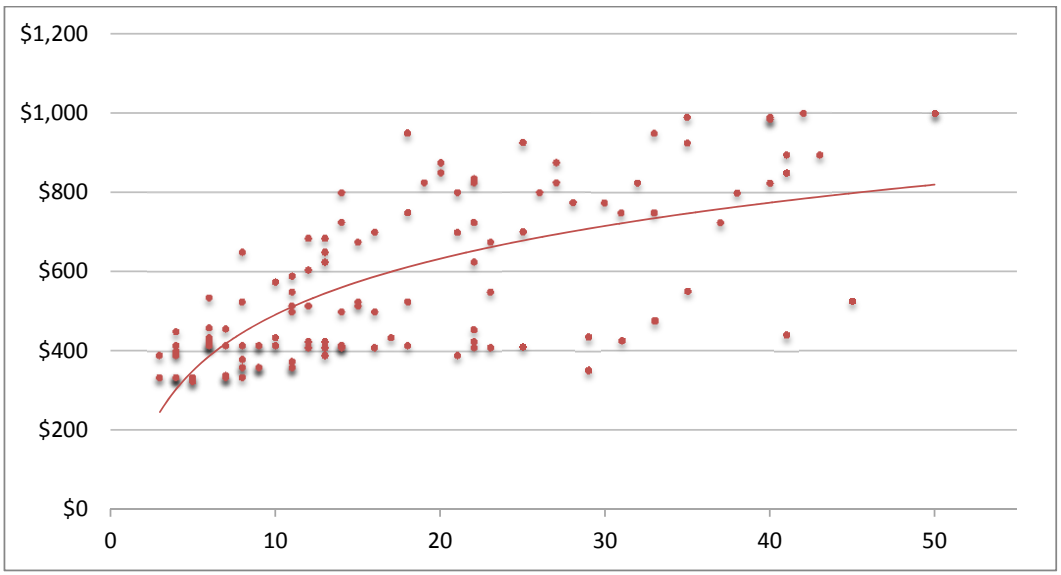
22. My research assistant next plotted the rates utilized by Counsel in this matter. Counsel supplied us with corrected lodestar data for three firms,[25] containing billing rates[26] for 103 lawyers. For the remaining six firms, we used the submissions they made at the time of the

[25] These are: Labaton Sucharow; Lieff Cabraser; and the Thornton Firm.

[26] Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Counsel, who had not been paid in the nearly six years that this case was pending, to use current hourly rates as an adjustment for the delay in payment.

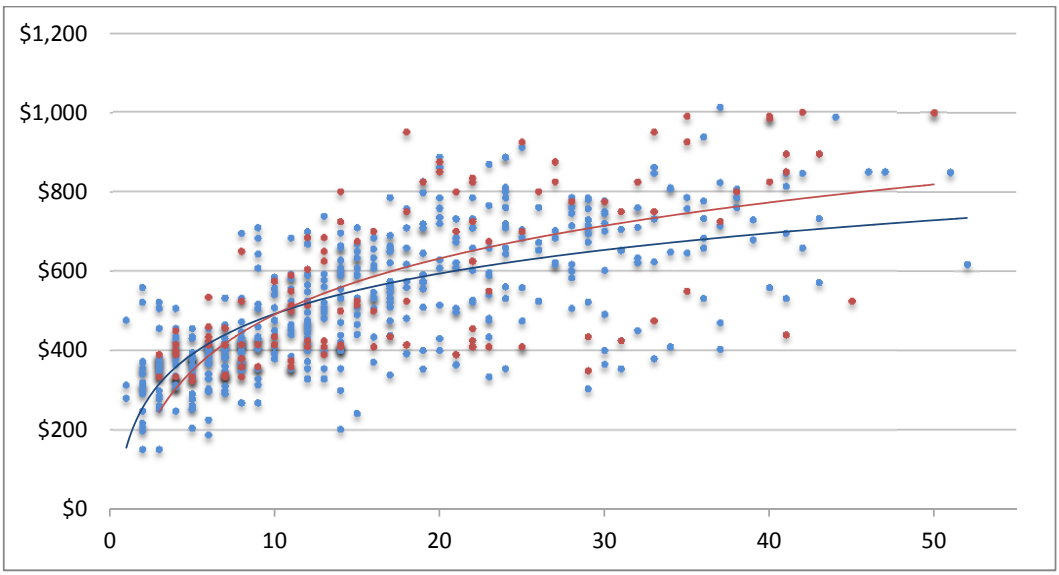
fee petition, which contained rates for 38 lawyers, bringing the total number in this data set to 141. After identifying the year of admission to the bar for each such timekeeper, we plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Counsel's billing rates, with the red logarithmic trend line sketching the trend of Counsel's rates across experience levels.

GRAPH 2
COUNSEL'S HOURLY RATES



23. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
COUNSEL'S HOURLY RATES COMPARED TO
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS
IN MASSACHUSETTS CLASS ACTIONS



24. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with fewer than about 11 years of experience, Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 76 of Counsel's 141 lawyers (53.9%) are below the Massachusetts trend line. When the differences between the trend lines are compared at all 141 points, Counsel's trend line is, on average, 1.01% above the trend line for rates in approved Massachusetts class action fee petitions. This means that Counsel's proposed rates are, across the board, virtually identical to the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

25. The portion of Counsel's trend line that is above the comparison trend line exceeds the comparison by an average of 6.32%. That Counsel's trend line across their senior lawyers in this case is roughly 6% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback are three of the leading class action firms in the United States, and the Thornton Firm is a premier firm in this market with a similar high profile throughout the country. The lawyers at these firms possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. As the comparison set picks up a range of approved class action cases in this community, it encompasses lawyers with far less expertise undertaking far more mundane matters. Indeed, *second*, one would expect higher than average billing rates in a case of this magnitude – a $300 million class action against one of the largest banks in the United States[27] and defended by one of the largest law firms in the United States.[28] Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 6% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

26. In comparing Counsel's rates to Boston rates, I have not adjusted the rates from the non-Boston firms in this case to Boston levels. I have not done so because this is a level of detail generally beyond what is undertaken for lodestar cross-check purposes.[29] In lodestar cross-check cases, courts occasionally cite the standard, borrowed from fee-shifting

[27] State Street Bank is #271 on the Fortune 500 in 2017. This data point is available at hyperlink: http://fortune.com/fortune500/state-street-corp/.

[28] Wilmer Hale is the 26th largest large firm by revenue in the United States. This data point is available at hyperlink: https://en.wikipedia.org/wiki/List_of_largest_law_firms_by_revenue.

[29] *See* note 12, *supra.*

jurisprudence, that rates should be "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[30] I am not aware of any appellate decisions mandating this approach for lodestar cross-check purposes in common fund cases, and it is a step rarely undertaken.[31] Nonetheless, if I were to do so, the rates for most timekeepers would decrease: application of a judicially-endorsed approach to adjusting lawyer rates by geographic market[32] would require decreasing the San Francisco rates (Lieff Cabraser) by 8.3%, the New York rates (Labaton Sucharow) by 3.4%, and the Washington, D.C. rates (McTigue Law LLP, Zuckerman Spaeder LLP, Beins Axelrod PC) by 0.3%, while increasing the

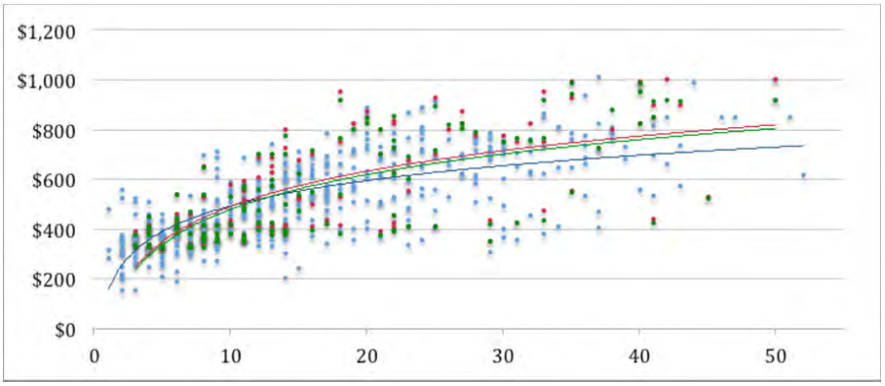
[30] *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) ("Part of the fees calculation is the selection of an appropriate hourly rate for each attorney. Rates should be 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984))).

[31] A search for the term "lodestar cross-check" in all federal cases returns 732 cases, while adding the phrase "and prevailing in the community for similar services" to the search returns a total of 51 cases. Of those 51 cases, only 11 involve a court holding that counsel should use local rates for purposes of a lodestar cross-check; nine of these 11 cases involve courts in the Eastern District of California insisting that lawyers from Los Angeles or San Francisco utilize Fresno rates. This means that outside of Fresno, a total of three of 732 reported cases (or .27%) in this search string insist upon geographic adjustment in the lodestar cross-check context (1.5% if Fresno is included). Even that miniscule percentage is likely exaggerated because there are thousands of lodestar cross-check decisions not reported on Westlaw and the reported cases likely select for aberrations of this type.

[32] I utilize the federal government's judicial differential methodology to adjust rates between different geographic markets, as set forth in *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). The federal government rates can be found at this hyperlink: http://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates. The federal government increases the base rate by 26.73% for the Boston market, by 31.22% for the New York market, by 38.17% for the San Francisco market, by 27.10% for the D.C. market, by 24.24% for the Seattle market, and by 15.65% for the North/South Carolina market. This means that a base hourly rate of, say, $350/hour would be worth $443.56 in Boston ($350 x 1.2673) and $459.27 in New York ($350 x 1.3122). Therefore, one would have to multiply New York billing rates by 0.96579 ($459.27 x 0.96579=$443.56) to bring them down to Boston levels. The same conclusion can be achieved by the formula: <1-(1.2673/1.3122)>. I apply this approach for each market.

Seattle (Keller Rohrback) and South Carolina (Richardson Patrick Westbrook & Brickman LLC) rates by 2.0% and 9.6%, respectively. In Graph 4, below, these new geographically-adjusted rates are added to the prior graph: the Massachusetts-approved rates remain in blue, Counsel's unadjusted rates remain in red, and Counsel's rates adjusted to the Boston market appear in Celtic green. There is also a new green trend line for the geographically adjusted rates, but overall the rates drop so slightly that it is difficult to see the deviation of the green line's adjusted rates from the red line's unadjusted rates.

GRAPH 4
COUNSEL'S HOURLY RATES ADJUSTED TO BOSTON MARKET COMPARED TO COUNSEL'S UNADJUSTED HOURLY RATES AND HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



Put most simply, adjusting for geography, Counsel's overall lodestar decreases by a total of 3.18%. While this means that Counsel's lodestar multiplier simultaneously increases, the increase is so small – from 2.01 to 2.07 – that the multiplier remains well within the range of reasonableness, as discussed below.[33] The small and immaterial effect of all this (geographic-

[33] *See* Part V, *infra.*

correction) work is precisely the reason that courts do not demand that it be undertaken in the cross-check setting.

27. In sum, the prior paragraphs demonstrate empirically that the rates that Counsel utilized in their lodestar cross-check submission in September 2016 were fully consistent with rates courts in Boston had explicitly or implicitly approved in awarding fees in class action cases.

Defense Firm Rates

28. Another relevant set of data concerning rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,"[34] is the set of rates charged by large corporate defense firms. It is these large corporate firms – like Wilmer Hale in this case – that defend significant class action cases like this one; these firms therefore provide the services most comparable to the services that the plaintiffs' lawyers provide in these cases, utilizing reasonably comparable skills and calling on reasonably comparable experience.[35] Since corporate firms typically have private fee arrangements with their clients, the most public – and reliable – evidence of the rates that these firms charge appears in fee petitions submitted by them in bankruptcy cases.[36] For purposes of this Declaration, I

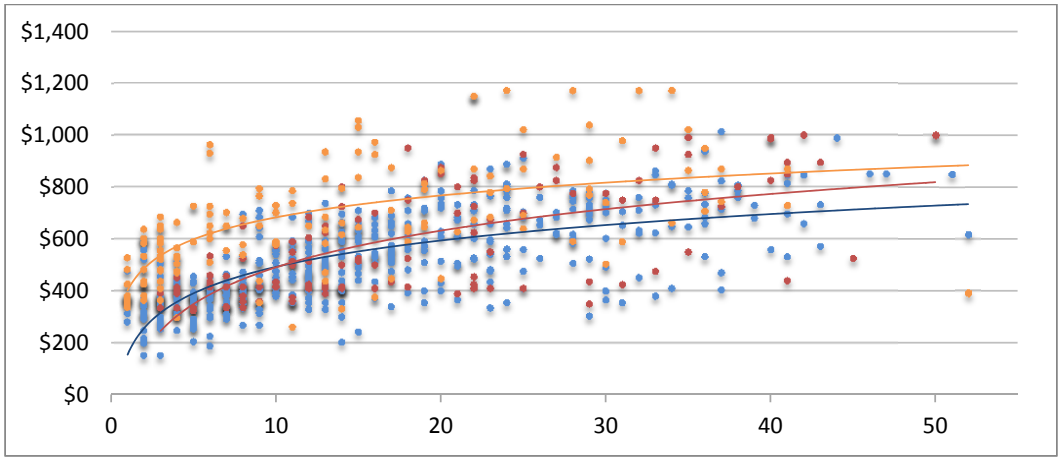
[34] *Martinez-Velez*, 506 F.3d at 47.

[35] There are of course some differences between plaintiff firms running large complex class actions and defendant firms defending such cases, but what is not different is that the two sets of firms are litigating the same cases against one another.

[36] I find these rates the most reliably comparable for four independent reasons. *First*, unlike rates reported in publications like the *National Law Journal*, these rates are provided lawyer-by-lawyer, not in ranges based on job types (like junior associates, or senior associates). *Second*, counsel seeking court approval for these rates swear to their accuracy. *Third*, in the bankruptcy context, the petitioning lawyers specifically represent that the rates they are using are the same rates that they use outside of the bankruptcy context. *See* 11 U.S.C. § 330(a)(3) (directing bankruptcy courts awarding attorneys' fees to take into account "all relevant factors, including . . . whether compensation is reasonable based on the customary compensation charged by

utilized a database of 169 fee rates contained in six fee petitions approved by bankruptcy courts in Massachusetts in five cases in recent years.[37] A list of those cases is attached as Exhibit D. Using orange dots and an orange logarithmic trend line, we plotted these rates (adjusted to 2016 dollars) onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Counsel's rates (in red). The results are reflected in Graph 5, below.

GRAPH 5
CORPORATE FIRM RATES COMPARED TO BOTH HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO COUNSEL'S HOURLY RATES



comparably skilled practitioners in cases other than cases under this title"). *Fourth*, the type of work – providing legal services to a group of absent creditors in a piece of complex litigation – is generally analogous to what class action attorneys do.

[37] My research assistants consulted Chambers and Partners rankings to create a list of leading corporate firms. They then searched for these firms by name on Westlaw, filtering for cases in Bankruptcy Courts in the District of Massachusetts after 2009. When one of the firms on the Chambers list was named as counsel for one of the parties in a Westlaw case, my research assistants searched PACER for a fee petition filed by that firm. Four cases yielded five usable fee petitions; a fifth case, the Houghton Mifflin Harcourt bankruptcy, was found by searching for large bankruptcies in Massachusetts. My research assistants utilized every petition they found meeting these criteria.

As is visually evident, judicially-approved defense firm rates are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than Counsel's rates herein. Indeed, when the differences between the trend lines are compared at all 141 points in Counsel's fee petition, the defense firm rates are, on average, 37.53% above the trend line for Counsel's rates.

Blended Rate

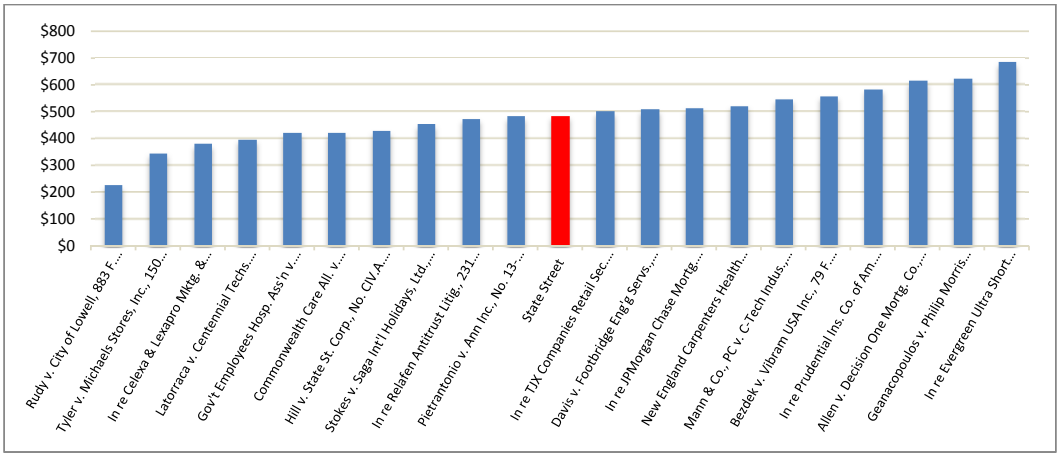
29. Counsel's blended billing rate[38] for the entire case – utilizing the corrected lodestars of the Labaton, Lieff Cabraser, and Thornton firms – is $484.70.[39] A quantitative analysis of this blended billing rate confirms its reasonableness.

30. To assess the reasonableness of the blended billing rate, I directed my research assistants to extract the blended billing rate from the 20 Massachusetts federal and state class action fee approvals that we had collected for this rate study. The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $227.51/hour to a high of $683.24/hour. The mean rate for these 20 cases is $484.05. The complete range of blended billing rates is reflected in Graph 6, below, with the blended billing rate in this case highlighted in red. As the Court can see, the blended billing rate in this case ($484.70) is just at the median of the graph and 65 cents, or 0.13%, above the mean, demonstrating its normalcy.

[38] A blended billing rate is captured by simply dividing the total lodestar by the total number of hours worked, thus providing the average hourly billing rate for the case across all timekeepers ranging from high-end partners to paralegals.

[39] If the rates are adjusted for geographic markets, *see supra* ¶ 26, the blended rate for this case falls to $469.29.

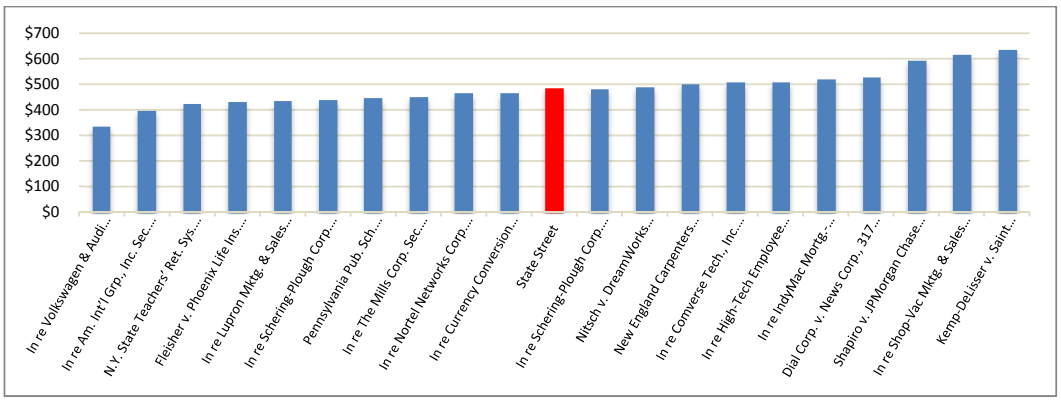
GRAPH 6
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN RECENT MASSACHUSETTS CLASS ACTION FEE APPROVALS



31. Because the blended billing rates in the Massachusetts cases tend to have emerged from smaller settlements (this is one of the largest settlements in Massachusetts history), I also compared the blended billing rate in this $300 million settlement to blended billing rates in 20 other settlements of comparable size ($100-$500 million). A list of those cases is attached as Exhibit E.[40] The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $338.07/hour to a high of $637.67/hour. The mean rate for these 20 cases is $484.67. The complete range of blended billing rates is reflected in Graph 7, below, with the blended billing rate in this case highlighted in red.

[40] My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar. Thus, they used search terms like "megafund" or "hundred million" to capture fund size and search terms like "lodestar" or "hours" to capture decisions that contained rate information. If the case had a fund of the right size, but the reported decision did not contain enough information about the fee petition, they tracked that down on PACER. No cases of the relevant size enabling reference to counsel's lodestar information were rejected.

GRAPH 7
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN $100-$500 MILLION CLASS ACTION SETTLEMENTS



As is visually evident, the blended billing rate in this case ($484.70) is in the middle of the pack – right at the median in the graph – and but three cents above the mean, demonstrating its normalcy.

32. The reasonableness of Counsel's blended billing rate supports several further conclusions. The blended billing rate reflects the distribution of time between partners, associates, and paralegals. If only partners did this work, the blended billing rate would be very high, whereas if only paralegals billed, the blended billing rate would be very low. The fact that the blended billing rate in this case is at or below average across two comparison sets means that Lead Counsel distributed work among partners, associates, non-partnership track attorneys, and paralegals in an appropriate fashion. Given the slightly above-average rates of the most senior attorneys in this case noted above, it is a sign of good leadership that Lead Counsel was able to bring the blended rate in at this mean.

33. In sum, three separate empirical analyses (one with two sub-parts) support the conclusion that Counsel's rates are entirely normal: they are consistent with the mean for rates approved by courts in awarding fees in class actions in this community; they are below the rates charged by the defendant's firm to its paying clients for similar work; and the blended rate is consistent with rates in this community and for comparably-sized settlements.

IV.
COUNSEL APPROPRIATELY BILLED NON-PARTNER TRACK ATTORNEYS AT MARKET RATES AND THE RATES EMPLOYED WERE REASONABLE

34. Counsel employed non-partnership track attorneys to undertake some aspects of the class's legal work, particularly the review of documents. I have reviewed the rates at which these non-partnership track attorneys are included in the lodestar for cross-check purposes and make three factual observations about those rates, two empirical, one policy-oriented.

35. *First,* these are skilled attorneys. They are referred to as "contract" or "staff" attorneys solely by virtue of the fact that they are not on a partnership track at the relevant law firms, but are hired on more of an ad hoc basis.[41] The fact that these lawyers are not on a partnership track, standing alone, says nothing about their qualifications or about the type of work that they undertook. For purposes of this report, I reviewed Lieff Cabraser's slide presentation to the Special Master, which, as the Court knows, reflects the backgrounds and experiences of many of the non-partnership track attorneys who worked on this case. It appeared clear to me that these attorneys were very well qualified: they typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often

[41] While different firms call these attorneys different names – e.g., "contract attorneys" or "staff attorneys" – the defining characteristic of them is that they are not on a partnership track. Commentators often make the incorrect assumption that these attorneys are necessarily "temps." Many are salaried employees of the firms and work at these firms over many years.

work on a non-partnership track as a personal choice about how they wish their careers to proceed, not because they are unqualified for partnership track jobs. Moreover, the firms have convincingly attested that these attorneys did meaningful work.

36. *Second*, the rates at which counsel included non-partnership track attorneys in their lodestar for cross-check purposes are consistent with 57 rates that courts have explicitly or implicitly affirmed in approving fee petitions in 12 class action cases decided since 2013.[42] A list of those cases is attached as Exhibit F. The rates in those cases ranged from $250.00 to $550.00, with a mean (in 2016 dollars) of $379.53.[43] The blended rate for non-partnership attorneys in this case was $379.31. Thus the rate in this case is 22 cents, or 0.06%, below the mean of the comparison group.[44] Put simply, the billing rate for non-partnership track attorneys in this case is entirely normal.

[42] My research assistants compiled this list by searching for recent fee decisions involving staff or contract attorney rates, using a neutral search string in Westlaw. The search returned 29 cases. I read through all 29 cases. We then used the rates from any case with court-approved billing rates for contract or staff attorneys, accounting for experience, except for one case in which the contract attorneys simply staffed a calling center. This yielded 12 usable cases with 57 data points.

[43] Using a different data set, I recently reported a very similar numerical result in the Volkswagen "Clean Diesel" MDL. There, a set of 13 cases with 138 data points yielded an average contract attorney rate of $386.75 in 2017 dollars. *See* Declaration of William B. Rubenstein in Support of Plaintiffs' Motion for 3.0-Liter Attorneys' Fees and Costs at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case 3:15-md-02672-CRB (N.D. Cal.) (ECF No. 3396-2, Ex. B, filed June 30, 2017). Here, my 12 case data set's norm of $379.53 in 2016 dollars is the equivalent of $389.02 in 2017 dollars, which is virtually equivalent to the $386.75 I reported in VW (0.59% higher). Hence the two data sets reinforce one another.

[44] I removed Michael Bradley from this portion of my rate study since his hourly rate was set on a contingent basis, unlike the other non-partnership track attorneys. If he is included, the total for this case rises from $379.31 to $382.94, which is 0.90% above the mean of the comparison group.

37. *Third,*[45] the policy question of how to bill non-partnership track attorneys has arisen regularly in class suits as class counsel will often hire such lawyers to perform discrete functions in a particular case. Class counsel typically pay these attorneys at a lower hourly rate than the hourly rate they assign to them in the lodestar analysis in their fee petitions. To put numbers on this idea: the firms herein hired non-partnership track attorneys at rates ranging from $30 to $60/hour, then assigned these attorneys rates ranging from $335 to $440/hour[46] for purposes of the lodestar cross-check calculation based, for example, on the attorneys' number of years out of law school, their experience, and the type of work they performed. It is my expert opinion that several policy arguments support this approach:

- This is precisely the way in which firms bill legal services – including those of partners, associates, paralegals, and contract attorneys – to clients in the private market. For instance, a firm may pay a first-year associate a $150,000 annual salary and expect 2,000 hours of billable time in return. That means that the associate's salary breaks down to $75/hour. The associate likely costs the firm more than $75/hour because the firm has spent time recruiting and training the associate and because it pays for overhead, perhaps benefits, and other expenses associated with her work. Consequently, the associate who is receiving a $75/hour salary may actually cost the firm, say, $100/hour. But the firm then bills its clients, maybe, $375/hour for that associate's time, realizing a $275/hour, or 275%, profit for the associate's work. Regardless of the precise numbers that attach to the practice, the point is that law firms are in the business of making their partners a profit by having the partners bill the work done by their associates and paralegals to their clients at higher rates than they pay them. So long as a contract attorney is providing legal services to a client, a firm is entitled to bill her time to the client in the same manner.

- The ABA reached this conclusion nearly two decades ago, *see* ABA Formal Opinion 00-420, and I note as a matter of policy that courts have often cited to the ABA's guidance in concluding that class action firms "may charge a markup to cover overhead *and profit* if the contract attorney charges are billed as fees for legal services.[47] It makes sense that courts have so held because a contingent fee class action firm's lodestar operates in the same way as a private law firm's bill to its

[45] The language and citations in this and the following paragraphs are taken from 5 *Newberg on Class Actions*, supra note 4, at § 15:41.

[46] These ranges do not encompass Michael Bradley, as noted above. *See* note 44, *supra.*

[47] *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302(CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (emphasis added).

client: it embodies this basic profit for its partners and, in doing so, brings the lodestar in line with market rates.[48]

- Permitting class counsel to bill non-partnership track attorneys at market rates is cost-efficient: it encourages the firms to delegate work to attorneys who are likely billed at lower costs than are associates or partners. If class action firms could only bill non-partnership track attorneys at cost, they would likely transfer the work required to associates.

38. In sum, quantitative analysis of the rates paid non-partnership track attorneys shows that these rates are indistinguishable from the rates regularly approved by courts for such work and public policy strongly supports the manner in which Counsel billed non-partnership track attorneys.

V.
COUNSEL'S FEE WAS REASONABLE

39. Under the lodestar cross-check method, the measuring stick of the reasonableness of counsel's fee is the level of multiplier that it represents over the time they invested in the case. Counsel's fee embodied a lodestar multiplier of 2.01, or approximately 2.[49] Quantitatively, a 2

[48] The lodestar *multiplier* is meant to reward the class action firm over and above the market rate for undertaking a case on a contingency fee basis. Without such a multiplier, no firm would undertake contingent cases, as it would be far safer to simply reap the normal profit embodied in the lodestar but reflected, in a non-contingent case, in the bill to the client. *See, e.g.*, *Ketchum v. Moses* 17 P.3d 735, 742 (Cal. 2001) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (internal quotation marks and citations omitted)).

[49] This is the multiplier for the full fee award to all counsel in the case divided by the hours of all counsel in the case. As noted above, *see supra* ¶ 26, if all hourly rates are adjusted to Boston rates, the multiplier rises to 2.07.

multiplier is consistent with multipliers that courts have previously approved in similar circumstances.

40. Three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.42,[50] 1.65, [51] and 1.81,[52] while an older study found the mean multiplier to be 4.97.[53]

41. These studies also show that multipliers are higher in cases with larger returns, with the mean multipliers rising to 2.39 (in cases with recoveries over $44.6 million) in one study;[54] to 3.18 (in cases with recoveries over $175.5 million) in another study;[55] and to 4.5 (in cases with recoveries over $100 million) in a third study.[56]

42. In the set of 20 $100-$500 million settlements my research assistants assembled for purposes of this Declaration, the approved multipliers ranged from 0.92 to 8.3, with the average being 2.28. The 2.01 multiplier in this case is therefore 12% below the mean for

[50] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[51] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010).

[52] Eisenberg & Miller II, *supra* note 5, at 272.

[53] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 169 (2003) (hereafter "Logan").

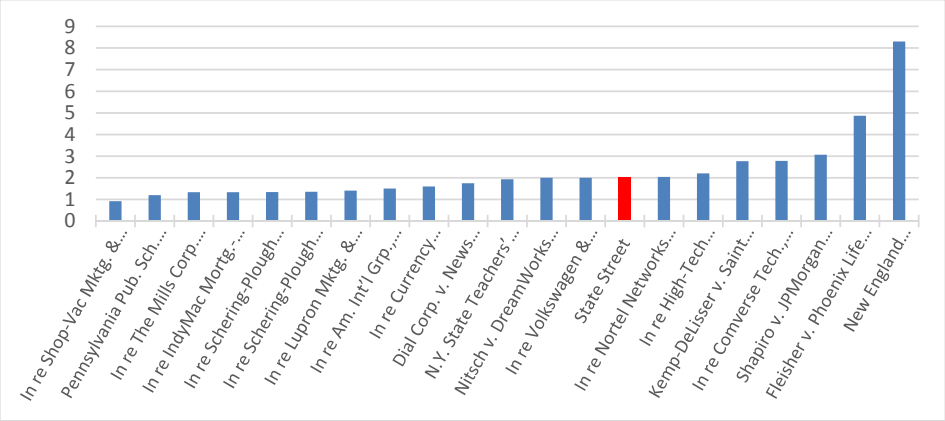
[54] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[55] Eisenberg & Miller II, *supra* note 5, at 274.

[56] Logan, *supra* note 53, at 167.

settlements of comparable size;[57] it appears a few cases higher than the median in Graph 8, below, but the only cases between this case and the median case have multiplier values of 2.0 rather than 2.01.

GRAPH 8
COURT-APPROVED MULTIPLIERS IN
$100-$500 MILLION-DOLLAR CASES



43. Beyond these bare statistics, case reports demonstrate that, in appropriate circumstances, courts have often approved percentage awards embodying lodestar multipliers far above the multiplier of 2 at issue here. In the leading Ninth Circuit opinion on point, for example, the Court established 25% as the benchmark percentage fee and approved a multiplier of 3.65, writing that this number "was within the range of multipliers applied in common fund cases"[58] and appending a list of such cases to its decision. Similarly, in Exhibit G, I provide a

[57] If Counsel's rates are adjusted to the Boston market and a 2.07 multiplier is employed, *see* ¶ 26, *supra,* that multiplier is 9.3% below the mean of the comparison set.

[58] *Vizcaino*, 290 F.3d at 1051; *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) ("A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–4.0. Given the complexity and duration of this litigation, the results obtained for the class, and the risk counsel faced in bringing the litigation, the Court finds the 2.83 multiplier appropriate." (citation omitted)).

list of 54 cases with multipliers over 3.5, 48 of which have multipliers of 4.00 or higher, and 31 of which have multipliers of 5.00 or higher. This list is not meant to be either exhaustive or representative of all multipliers. Rather, it demonstrates that courts approve percentage awards that embody multipliers well above the multiplier sought here in appropriate circumstances.

44. That such circumstances exist in this case is evident from this Court's conclusions at the fairness hearing:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.[59]

The Court's finding regarding the risks that Counsel took and the results that they achieved are precisely the factors that support a multiplied fee award.[60] Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion, as the change in the proposed multiplier is simply from 1.8 to 2.

45. In sum, the requested multiplier is therefore above the mean for *all* cases but below the mean for *large* cases, it falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past, and such circumstances existed in this case. As the purpose of the lodestar cross-check is to generate a multiplier enabling an assessment of

[59] Hearing Transcript, Nov. 2, 2016 (ECF No. 114) at 36.

[60] 5 *Newberg on Class Actions, supra* note 4, at § 15:87.

the reasonableness of the percentage award, a multiplier at this level fully supports the reasonableness of the fee the Court awarded Counsel in this matter.

* * *

46. I have testified that:

- Counsel's ***approach*** to its fee – presenting the Court with a requested percentage, providing information to enable a lodestar cross-check, and addressing a series of relevant factors – is the most common fee method and one normally used in large common fund cases like this one.

- Counsel's hourly ***billing rates*** are consistent with rates in class action cases in this community; lower than the rates charged by corporate firms in this market for similar work; and within pennies of the average blended hourly billing rates approved in other class action settlements in this community and in comparably-sized settlements.

- Counsel's approach to ***billing non-partnership track attorneys*** is consistent with prevailing law, policy, and ethical norms and the rates at which they bill these attorneys are fully consistent with the rates at which courts have approved contract and staff attorney work in other class action settlements.

- Counsel's ***multiplier*** of approximately 2 is below the mean for settlements of $100-$500 million and entirely reasonable given the unique risks that it shouldered and the superb results that it achieved for the class.

Executed this 31st day of July, 2017, in Los Angeles, California.

William B. Rubenstein

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF STEVEN E. FINEMAN IN SUPPORT OF THE RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Steven E. Fineman declares and says:

1. I am the Managing Partner of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this Declaration on behalf of Lieff Cabraser in support of the Response and Objections of Lieff Cabraser Heiman & Bernstein, LLP to the Special Master's Report and Recommendations ("Report").

A. Documents Cited in Lieff Cabraser's Response and Objections

2. Attached as Exhibit A is a copy of the April 5, 2017 Presentation made by Lieff Cabraser to the Special Master (LCHB 0000001-0067).

3. Attached as Exhibit B is a copy of Lieff Cabraser's Responses to Special Master Hon. Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017, dated July 10, 2017.

4. Attached hereto as Exhibit C is a copy of Special Master Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Lieff Cabraser Heimann & Bernstein, LLP, and Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Lieff Cabraser Heimann & Bernstein, LLP, dated May 18, 2017.

5. Attached as Exhibit D is a copy of Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Lieff Cabraser Heimann & Bernstein, LLP and Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Lieff Cabraser Heimann & Bernstein, LLP, as revised and annotated, dated May 23, 2017.

6. Attached as Exhibit E is a copy of Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents, dated May 21, 2017.

7. Attached as Exhibit F is a copy of the Special Master's July 5, 2017 Request for Supplemental Submission from Labaton Sucharow, LLP, Lieff Cabraser Heimann & Bernstein, LLP and Thornton Law Firm, LLP.

8. Attached as Exhibit G is a copy of the Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thornton Law Firm LLP to the Special Master's July 5, 2017 Request for Supplemental Submission, dated August 1, 2017.

9. Attached as Exhibit H is a copy of the Expert Declaration of William B. Rubenstein, dated July 31, 2017.

10. Attached as Exhibit I is a copy of Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Interrogatories Due on August 11, 2017, dated August 11, 2017.

11. Attached as Exhibit J is a copy of Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Request for the Production of Documents dated August 11, 2017.

12. Attached as Exhibit K is a copy of the Special Master's Request for Additional Supplemental Submission from Labaton Sucharow, LLP, Lieff Cabraser Heimann & Bernstein, LLP and Thornton Law Firm, LLP, dated September 7, 2017.

13. Attached as Exhibit L is a copy of the Response by Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's September 7, 2017 Request for Supplemental Submission, dated November 3, 2017.

14. Attached as Exhibit M is a copy of a March 25, 2018 email from William F. Sinnott to Richard M. Heimann concerning evidence of Lieff Cabraser's "state of mind" concerning Chargois.

15. Attached as Exhibit N is a copy of the Response by Lieff Cabraser Heimann & Bernstein, LLP to the March 25, 2018 request by the Special Master.

16. Attached as Exhibit P is Opinion and Order, dated June 25, 2018, in *In Re Petrobras Securities Litigation*, No. 14-CV-9662 (JSR).

B. The Firm's Expenses and Lodestar Incurred in Responding to the Special Master's Investigation.

17. The firm has spent $1,340,715.11 in out-of-pocket expenses in responding to the Special Master's investigation and Report to date, including its share of the Special Master's fees and expenses and the firm's expert witness and travel costs. Attached hereto as Exhibit O is a summary of those expenses.

18. As of June 26, 2018, Lieff Cabraser has spent $1,963,110 in lodestar (at the firm's 2018 rates) in responding to the Special Master's investigation and Report. I do not here attach a lodestar summary or the relevant time reports for those attorneys and staff who have represented the firm in this matter, but will do so upon request from the Court.

C. Relevant Facts About Lieff Cabraser's Practice

1. Lieff Cabraser's Complex Litigation Practice Involves Large Scale Document Review and Analysis.

19. Lieff Cabraser is a plaintiff-side litigation firm founded in 1972, based in San Francisco, California, with additional offices in New York, New York, Nashville, Tennessee, and Seattle, Washington. More than 100 attorneys, including partners, associates, and staff attorneys currently work for the firm. Lieff Cabraser engages in predominantly contingent fee practice for plaintiff classes, groups and individuals, on behalf of public and private institutional investors, small business, shareholders, consumers and employees. The firm also occasionally represents plaintiffs on an hourly basis.

20. Lieff Cabraser has litigated and resolved hundreds of class action lawsuits and

thousands of group and individual cases (many in the context of multi-district litigation ("MDL") proceedings), including in the fields of securities and financial fraud. Most of the firm's cases involve major corporate defendants (e.g., banks and other financial institutions, pharmaceutical and medical device companies, oil and energy companies, technology corporations, and consumer product manufacturers). These kinds of defendants are represented by the largest and most sophisticated law firms in the world. Most of the firm's large, complex cases involve production by defendants or enormous numbers of pages of documents (frequently in the millions).

21. Lieff Cabraser staffs its complex cases to maximize effectiveness and efficiency in light of the defendants' significant advantage in economic and personnel resources. The firm's complex cases are typically supervised by a senior partner, and staffed with an additional senior partner and one or more junior partners, and the appropriate number of associates, staff attorneys and litigation support personnel (e.g., paralegals, financial analysts, investigators, and the like). Investigations, pleadings, briefs, written discovery, depositions, court appearances, trial and settlement are handled by partners and associates depending on the level of experience required. Document review, analysis, issue memoranda and witness kits (for deposition and trial) are conducted and prepared by a combination of partners, associates, and staff attorneys.

2. Lieff Cabraser's General Use of Staff Attorneys.

22. Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast number of documents produced in the cases. Lieff Cabraser staff attorneys support all aspects of the firm's complex cases by identifying documents and frequently drafting issue, witness and liability memoranda. The work product generated by the firm's staff attorneys is used, for example, in support of class certification, in preparation for the conduct of fact and

expert depositions, in opposition to motions for summary judgment, settlement negotiations, and in other pre-trial and trial proceedings.

23. The firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and in document review and analysis in complex cases. Many of the firm's staff attorneys are paid directly by the firm and receive benefits provided by the firm. Other firm staff attorneys work at the firm's direction, but are paid directly by agencies that bill the firm for those lawyers' services.

24. During and since the State Street Action, Lieff Cabraser has employed as many as 30 staff attorneys at one time who are paid directly by the firm. Given the number of large complex cases the firm handles at one time, Lieff Cabraser sometimes has need for attorney document review and analysis support beyond the firm's available staffing (for example, the firm may just need additional attorneys, or may require lawyers with specific subject experience or language expertise). When such a need arises, the firm seeks and receives resumes from "preferred" agencies; preferred because those agencies have long-standing relationships with the firm and understand the lawyer qualifications and experience the firm requires. Frequently, attorneys who start working for the firm while paid by an agency transition to direct employment by the firm.

25. Whether on Lieff Cabraser's payroll or paid via an agency, all firm staff attorneys have comparable educational backgrounds and work experiences, and all perform substantially the same document review and analysis functions. And, all utilize, to varying degrees, the firm's infrastructure and resources, including physical office space (for the majority working in firm offices instead of remotely); information technology support (both in the office and remotely); administrative support (e.g., human resources for employment matters and coordination with

agencies, accounting for payroll and interactions with agencies, and word processing for the submission of time records and the production of memoranda); assistance from the firm's litigation support department for training and database assistance; supervision from firm partners and senior associates; and, the cost to the firm for the staff attorneys' services. The firm's staff attorneys, both those on the firm's payroll and paid by an agency, are covered by the firm's legal malpractice insurance policies.

26. Not all federal and state employment laws that apply to the relationship between Lieff Cabraser and its employees apply to agency attorneys working under the firm's direction. Nevertheless, the firm expects its agency lawyers to abide by the firm's rules and practices, and agency attorneys are protected by state laws prohibiting harassment and discrimination in the workplace. The firm, through its human resources department, provides all personnel, whether employees of the firm, agency attorneys, or other contractors, with policies for behavioral conduct and on how to report misconduct of others.

3. Lieff Cabraser's Hourly Rates, Including for Staff Attorneys, Are Market Driven and Routinely Approved.

27. Although the firm is compensated predominantly on a contingent fee basis, Lieff Cabraser's attorneys and litigation staff maintain contemporaneous time records that identify specific tasks performed and the amount of time devoted to those tasks. The firm's contemporaneously recorded time, when multiplied by applicable hourly rates, generates what is known as "lodestar." In certain class actions handled by the firm, aggregate lodestar is used as a "cross-check" to assure that the firm's fee in a "percentage-of-the-recovery" context is appropriate (i.e., that the multiplier on the lodestar is not excessive). In other class actions the firm is compensated based on its lodestar plus an appropriate multiplier. The firm also uses its lodestar figures in cases for hourly rate paying clients. Lieff Cabraser periodically has bill-

paying clients who pay the firm's hourly rates.

28. All Lieff Cabraser hourly rates, including those for staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for a lawyer's services, primarily in the San Francisco and New York market places. The firm's management evaluates and adjusts hourly rates on an annual basis, based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys. Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys (whether on the firm's payroll or employed through an agency), based on what the firm pays them (or for them).

29. For a number of years prior to 2016, hourly rates of the firm's staff attorneys were set to be consistent with the rates of "on-track" firm attorneys with the same or comparable levels of experience. However, as the firm's staff attorneys (payroll and agency) became increasingly experienced and senior, that approach began to result in rates the firm felt were too high. Therefore, beginning in 2016, with limited exceptions, all firm staff attorneys were assigned an hourly rate of $415 per hour (then the equivalent of a fourth year "on-track" associate). This rate was determined based on the firm's understanding of the market for staff attorneys performing document review, coding and analysis, and the preparation of issue and witness memoranda in the kind of large complex cases handled by Lieff Cabraser. The firm determined this to be a fair and appropriate rate, even though Lieff Cabraser's staff attorneys, by and large, have many more than four years of relevant experience.

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

Executed on this 29th day of June, 2018.

/s Steven E. Fineman
Steven E. Fineman
Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, New York 10018
Tel: (212) 355-9500
Fax: (212) 355-9592

EXHIBIT A
(REDACTED)

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

Arkansas Teacher Retirement System

v

State Street Bank and Trust Company

United States District Court
District of Massachusetts
No. 11-cv-10230 MLW

Richard M. Heimann
Steven E. Fineman
Daniel P. Chiplock

PRESENTATION TO SPECIAL MASTER JUDGE ROSEN

Confidential – Attorney Work Product, Subject to Protective Order

INTRODUCTION

- Richard M. Heimann – Lieff Cabraser's General Counsel and Chair of the firm's Securities and Financial Fraud Practice Group.
- Steven E. Fineman – Lieff Cabraser's Managing Partner and senior member of the firm's Securities and Financial Fraud Practice Group.
- Daniel P. Chiplock – Senior member of the firm's Securities and Financial Fraud Practice Group and day-to-day lead counsel on the *State Street* case.

Overview of Presentation

About Lieff Cabraser

- Plaintiffs-side litigation firm founded in 1972 and based in San Francisco, California.
- Predominantly contingency fee practice for plaintiff classes, groups and individuals (e.g., public and private institutional investors, small businesses, shareholders, consumers and employees).
- The firm occasionally represents plaintiffs on an hourly basis.
- More than 100 attorneys, including partners, associates and staff attorneys currently work for the firm, primarily in the San Francisco and New York marketplaces.

About Lieff Cabraser (cont'd)

- The firm has litigated and resolved hundreds of class action lawsuits and thousands of group and individual cases.
- These kinds of cases involve major corporate defendants (e.g., banks and other financial institutions; pharmaceutical and medical device companies; oil and energy companies; technology corporations; and consumer product manufacturers).
- These kinds of defendants are represented by the largest and most sophisticated law firms in the world.

5

How Lieff Cabraser Staffs Large Complex Cases

- Large complex cases are staffed to maximize effectiveness and efficiency in light of the defendants' advantages and resources.
- Complex cases are typically supervised by a senior partner, and staffed with an additional senior partner and one or more junior partners, the necessary number of associates, staff attorneys and litigation support personnel (e.g., paralegals, financial analysts, investigators, and the like).
- Investigations, pleadings, briefs, written discovery, depositions, court appearances, trial and settlement, are handled by partners and associates depending on the level of experience required.

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How Lieff Cabraser Staffs Large Complex Cases (cont'd)

- Document review, analysis, issue memoranda and witness kits (for deposition and trial) are conducted and prepared by a combination of junior partners, associates, and staff attorneys.

How Lieff Cabraser Sets Hourly Rates, Including for Staff Attorneys

- All Lieff Cabraser hourly rates, including those for staff attorneys, are set based on the firm's understanding of the appropriate market rates for our lawyer's services, primarily in the San Francisco and New York marketplaces.
- The firm's managing partner, in consultation with the firm's executive committee, evaluates and adjusts hourly rates on an annual basis, based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys.

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How Lieff Cabraser Sets Hourly Rates, Including for Staff Attorneys (cont'd)

- Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys, based upon what the firm pays them. Again, rates are based on what are reasonable in the applicable marketplaces for our services.

State Street Case

- Lieff Cabraser has been involved since 2008 in investigating and pursuing claims of alleged deceptive practices and overcharges by custodial banks related to foreign currency exchange ("FX") products and services.
- We were co-counsel of record in qui tam lawsuits originally filed under seal in California (the "California Action"), as well as other states, against State Street.
- The California Action was unsealed in October 2009 by the intervention of the Attorney General for the State of California.
- Before that point and afterwards, Lieff Cabraser investigated possible claims to be brought on a class basis for the benefit of custodial customers who would not otherwise benefit from any unsealed qui tam lawsuits.

State Street Case (cont'd)

- Based on its institutional knowledge, Lieff Cabraser was associated in to the customer class lawsuit being investigated by Labaton Sucharow LLP ("Labaton") on behalf of ARTRS.
- Lieff Cabraser helped research and file the first class complaint (in early 2011) in this action, with particular responsibility for claims under M.G.L. ch. 93A.
- We also attended every mediation session with defendants and additional meetings with co-counsel throughout the life of the case, and helped review and analyze more than nine million pages of documents produced by State Street.

BNYM FX Case

- Lieff Cabraser simultaneously served as co-lead counsel in the BNYM FX customer class litigation, and was one of three firms that led the entire MDL.
- The first BNYM class cases were filed in 2011, were MDL'd in 2012, and then intensively litigated until the close of fact discovery in January 2015.
- More than 120 total depositions were taken and defended, and over 29 million pages reviewed.
- Global settlement resulted in $504 million for benefit of BNYM customers, with $335 million attributed to resolution of the customer class cases.

Resolution of *BNYM/State Street* Cases

- The Jan. 2015 close of fact discovery in BNYM FX led to intensive settlement discussions, leading to global agreement to settle that case by March 2015.
- The end of fact discovery in BNYM freed up time of more than a dozen Lieff Cabraser staff attorneys who had developed expertise in custodial FX issues to assist with completing the review and analysis of State Street documents.
- Settlement of BNYM case heightened pressure either for State Street case to be resolved or for the parties to proceed with class cert discovery and depositions.

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Resolution of *State Street* Case

- The parties agreed to extend the State Street mediation deadline from December 2014 to April 2015.
- The parties continued to mediate, understanding that further extensions likely would not be sought.
- As late as May 2015, State Street still had not presented a settlement number to Plaintiffs, who remained hard at work analyzing the documents produced in preparation for potential termination of the mediation without resolution.

Resolution of *State Street* Case

- The parties in *State Street* reached agreement in principle to settle class case for $300 million on **June 30, 2015**.
- Document reviewers closed out assignments and memoranda they were in the middle of drafting, with such work concluded by early July 2015.
- The settlement term sheet was not executed until September 2015, during which time parties continued to negotiate potential plan of allocation (discussed with the Dept. of Labor ("DoL")).
- The settlement remained contingent on resolution of other government inquiries and satisfaction of DoL concerns regarding allocation.

Resolution of *State Street* Case

- Almost nine months passed after the Term Sheet was executed in September 2015, while State Street negotiated resolutions with the Department of Justice and the SEC.
- The parties next appeared before Judge Wolf at a status conference in June 2016, at which they notified the Court of the pending class settlement and plans to submit it for preliminary approval.
- At that hearing, Judge Wolf opined both on the likely fairness of the settlement as well as the reasonableness of a 25% fee as a "starting point."

Fee Application Process in *State Street*

- Labaton, as lead counsel, was responsible for gathering and reviewing all fee declarations and lodestar reports from co-counsel.
- Lieff Cabraser gathered its lodestar and expense reports in early September 2016, and sent its draft fee declaration to Labaton, who sent suggested edits to Lieff Cabraser. Among those edits were the suggestion to remove any timekeepers who billed less than 5 hours (which we did).

Background of Lieff Cabraser Staff Attorneys Who Worked on *State Street*

- The Lieff Cabraser staff attorneys who worked on *State Street* had extensive document review and analysis experience at the time of their assignment to the case: Five had more than 15 years of experience; six had between 10 and 15 years of experience; and six more had between 5 and 10 years of experience.
- All of the Lieff Cabraser staff attorneys who worked on *State Street* had prior document review experience for Lieff Cabraser.
- Of the 18 Lieff Cabraser staff attorneys who worked on State Street, 13 also worked on the BNYM FX litigation (averaging nearly 2,200 hours each prior to Jan. 2015), where they developed expertise in FX pricing, trading timing and processes, the request for proposals ("RFP") process, and the manner in which custodial banks were alleged to have overcharged their customers on FX.

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Background of Lieff Cabraser Staff Attorneys Who Worked on *State Street (cont'd)*

- "Much of the necessary work involved in prosecuting the Customer Class Cases involved the review, analysis, and application of millions of pages of documents, from both Defendants and third parties. This was neither make-work, nor routine. Rather, it was important work that had to be performed under tight time constraints. It was entrusted primarily to attorneys experienced in document analysis in complex cases, who had proven themselves to Lead Class Counsel in other cases. These attorneys communicated daily with those responsible for briefing, depositions, and related deposition preparation, and this interaction made it possible to mine mountains of raw data, sifting the wheat from the chaff and identifying the critical facts within the tight deadlines set by this Court."
- *In re Bank of New York Mellon Corp. Forex Transactions Litigation*, No. 12-MD-2335 (LAK), S.D.N.Y., Declaration of John C. Coffee, Jr. in Support of Motion for Final Approval of Settlement and an Award of Attorneys' Fees and Service Awards, and Reimbursement of Litigation Expenses filed 8/17/15.

Background of Lieff Cabraser Staff Attorneys Who Worked on *State Street (cont'd)*

- Of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, none were "temporary" employees. Each had a history with the firm working on multiple Lieff Cabraser cases. Indeed, of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, 13 continue to this day to work on document review and analysis projects for the firm.
- Set forth on the pages that follow is biographical information about each of the Lieff Cabraser staff attorneys who worked on *State Street*.

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Arkansas Teacher Retirement System
v.
State Street Bank and Trust Company
District of Massachusetts
No. 11-cv-10230 MLW

Name	Undergrad	Law School	Grad. Year	Years in Practice (following first bar admission)	Billing Rate	Rate Equivalency	Worked on BONY Mellon
Tanya Ashur	University of Illinois	Chicago-Kent College of Law	2000	17+	$415	4th year associate	Yes
Joshua Bloomfield	University Pennsylvania	UCLA School of Law	2000	16+	$515	Class of 2008	Yes
Elizabeth Brehm	Boston University	Hofstra University School of Law	2008	9+	$415	4th year associate	No
Jade Butman	Dartmouth College	University of Pittsburgh School of Law	1997	20+	$515	Class of 2008	No
James Gilyrad	San Francisco State University	University of San Francisco School of Law	2002	15+	$415	4th year associate	Yes
Kelly Gralewski	California State University, Chico	California Western School of Law	1997	19+	$415	4th year associate	Yes
Christopher Jordan	University of North Carolina	Stanford Law School	2004	6+	$415	4th year associate	Yes
Jason Kim	University of California, Davis	Thomas Jefferson School of Law	2009	8+	$415	4th year associate	Yes
James Leggett	University of California, Davis	Santa Clara University School of Law	2012	5+	$415	4th year associate	Yes

Arkansas Teacher Retirement System
v.
State Street Bank and Trust Company
District of Massachusetts
No. 11-cv-10230 MLW

Name	Undergrad	Law School	Grad. Year	Years in Practice (following first bar admission)	Billing Rate	Rate Equivalency	Worked on BONY Mellon
Coleen Liebmann	University of the Pacific	University of San Francisco School of Law	2003	11+	$415	4th year associate	No
Andrew McClelland	University of California, Davis	McGeorge School of Law	2008	9+	$415	4th year associate	Yes
Scott Miloro	Cornell University	Cardozo School of Law	2006	11+	$415	4th year associate	Yes
Leah Nutting	University of California, Berkeley	Harvard Law School	2002	15+	$415	4th year associate	Yes
Marissa Oh	Rice University	Stanford Law School	2004	17+	$515	Class of 2008	Yes
Peter Roos		University of Limburg J.D. University of San Francisco School of Law L.L.M.	1989 2002	27+ (15+ in the U.S.)	$415	4th year associate	No
Ryan Sturtevant	University of California, Santa Barbara	University of California, Hastings College of the Law	2005	11+	$415	4th year associate	No
Virginia Weiss	University of Northern Iowa	University of Kansas School of Law	2007	10+	$415	4th year associate	Yes
Jonathan Zaul	University of California, Berkeley	University of San Francisco School of Law	2009	8+	$415	4th year associate	Yes

Arkansas Teacher Retirement System
v.
State Street Bank and Trust Company
District of Massachusetts
No. 11-cv-10230 MLW

TANYA ASHUR

EDUCATION – University of Illinois, Urbana, Illinois, B.A. 1997; Chicago-Kent College of Law, Chicago, Illinois, J.D. 2000.

ADMITTED TO PRACTICE – Illinois Bar, 2000; California Bar, 2002.

WORK EXPERIENCE SUMMARY – Ms. Ashur worked as an associate for Deloitte & Touche, Adams Nye, and Gordon & Rees, all in San Francisco, California. Prior to working for Lieff Cabraser, Ms. Ashur had extensive document review and analysis experience in complex litigation matters for Lathman Watkins, Orrick, Google, Fujitsu, and Gibson Dunn.

LIEFF CABRASER WORK HISTORY – Ms. Ashur began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Ms. Ashur worked extensively on the BONY Mellon Forex Litigation. In 2015, Ms. Ashur devoted 843.5 hours to document review and analysis in the State Street Forex Litigation. Ms. Ashur is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Ashur's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Ashur is an experienced attorney, with more than 17 years in practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JOSHUA BLOOMFIELD

EDUCATION – University of Pennsylvania, Pennsylvania, Philadelphia, PA, B.A. 1996; UCLA School of Law, Los Angeles, CA, J.D. 2000.

ADMITTED TO PRACTICE - California Bar, 2001.

WORK EXPERIENCE SUMMARY – Mr. Bloomfield worked as an associate for Jeffer Mangels in Los Angeles, California and Holland & Knight in San Francisco, California, before starting his own civil and criminal litigation firm. Prior to working for Lieff Cabraser, Mr. Bloomfield had extensive document review and analysis experience in complex litigation matters for King & Spalding, Paul Hastings, Morrison Foerster, Gibson Dunn, Wilmer Hale, Orrick, Sidley Austin, Jones Day, DLA Piper, and Skadden.

LIEFF CABRASER WORK HISTORY – Mr. Bloomfield began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. Bloomfield worked extensively on the BONY Mellon Forex Litigation. In 2013 and 2015, Mr. Bloomfield devoted 2,033.20 hours to document review and analysis in the State Street Forex Litigation. Mr. Bloomfield left the firm in 2015.

Mr. Bloomfield's time in the State Street Forex Litigation was calculated at $515 per hour. That was the hourly rate of the class of 2008 in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Bloomfield is an experienced attorney, with more than 16 years of practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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ELIZABETH BREHM

EDUCATION – Boston University, Boston, Mass, B.S. 2001; Hofstra University School of Law, Hempstead, NY, J.D., magna cum laude, 2008.

ADMITTED TO PRACTICE – New York Bar, 2008.

WORK EXPERIENCE SUMMARY – Ms. Brehm worked as an associate for Winston & Strawn and Kirby McInerney, both in New York, New York. During her time at Kirby – a leading plaintiff-side litigation firm – Ms. Brehm focused on antitrust, securities and financial fraud cases, and gained experience with numerous document review projects.

LIEFF CABRASER WORK HISTORY – Ms. Brehm began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into early 2015, Ms. Brehm devoted 1,682.90 hours to document review and analysis in the State Street Forex Litigation. Ms. Brehm left the firm in 2015.

Ms. Brehm's time in the State Street Forex Litigation was calculated at $415 per hour. That was comparable to the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Brehm is an experienced attorney, with more than nine years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. Her work was particularly valuable in State Street as she had developed expertise in evaluating documents in financial fraud cases at the Kirby firm.

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JADE BUTMAN

EDUCATION – Dartmouth College, Hanover, NH, B.A. 1992; University of Pittsburgh School of Law, Pittsburgh, PA, J.D. 1997.

ADMITTED TO PRACTICE – New Hampshire, 1997; New York, 1998; California, 2005.

WORK EXPERIENCE SUMMARY – Ms. Butman worked as an associate for Constantine Cannon (antitrust) and Kaplan Landau (commercial litigation) in New York, New York, and for Keller Grover (consumer class cases) in San Francisco, California. At each firm, Ms. Butman was involved in document review and analysis. Prior to joining Lieff Cabraser, Ms. Butman had additional extensive document review in complex litigation matters for Viacom in New York, and Robbins Geller and Berman DeValerio (plaintiff-side class action firms) in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Ms. Butman worked for Lieff Cabraser in 2014 and 2015 as a document review attorney. In 2015, Ms. Butman devoted 24.00 hours to document review and analysis in the State Street Forex Litigation. Ms. Butman left the firm at the end of 2015.

Ms. Butman's time in the State Street Forex Litigation was calculated at $515 per hour. That was the hourly rate of the class of 2008 in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Butman is an experienced attorney, with more than 20 years of practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. Her work was particularly valuable in State Street as she had developed expertise in evaluating documents in complex cases or as associate at several plaintiff-side firms.

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JAMES GILYARD

EDUCATION – San Francisco State University, San Francisco, California, B.A. 1999; University of San Francisco School of Law, San Francisco, California, J.D. 2002.

ADMITTED TO PRACTICE – California Bar, 2002.

WORK EXPERIENCE SUMMARY – Mr. Gilyard worked as an associate for Robbins Geller (plaintiff-side class action firm), in San Francisco, California, where, among other things, he gained extensive experience in document review and analysis. Prior to working for Lieff Cabraser, Mr. Gilyard had additional extensive document review and analysis experience in complex litigation matters for Bingham McCutchen, Morrison & Foerster, and Wilson Sonsini, among others.

LIEFF CABRASER WORK HISTORY – Mr. Gilyard began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. Gilyard worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Gilyard devoted 882 hours to document review and analysis in the State Street Forex Litigation. Mr. Gilyard left Lieff Cabraser in late 2016.

Mr. Gilyard's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Gilyard is an experienced attorney, with more than 15 years of practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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KELLY GRALEWSKI

EDUCATION – California State University, Chico, San Diego, California, B.S. and B.A. 1992; California Western School of Law, San Diego, California, J.D. 1997.

ADMITTED TO PRACTICE – California Bar, 1998

WORK EXPERIENCE SUMMARY – Ms. Gralewski worked as an associate for Peterson & Price, a real estate, business law and dispute resolution firm in San Diego, California. While there, Ms. Gralewski gained experience in the review and analysis of corporate documents

LIEFF CABRASER WORK HISTORY – Ms. Gralewski began working for Lieff Cabraser in 2009 as a document review attorney. Since then, and continuing to today, Ms. Gralewski worked on a number of financial fraud cases at Lieff Cabraser. In 2012 and 2015, Ms. Gralewski worked on the BONY Mellon Forex Litigation. In 2013 and 2015, Ms. Gralewski devoted 1,478.90 hours to document review and analysis in the State Street Forex Litigation.

Ms. Gralewski's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Gralewski has been a California lawyer since 1998, with more than nine years of experience in reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases at Lieff Cabraser. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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CHRISTOPHER JORDAN

EDUCATION – University of North Carolina, Chapel Hill, North Carolina, B.A. 2000; Stanford Law School, Stanford, California, J.D. 2004.

ADMITTED TO PRACTICE – California Bar, 2011; Texas Bar, 2012.

WORK EXPERIENCE SUMMARY – Mr. Jordan worked extensively in the management, supervision of, and execution of large scale document review and analysis projects in complex litigation matters for Debevoise & Plimpton in New York, Dynegye and Synergy in Houston, Texas, and Troutman Sanders in Atlanta, Georgia.

LIEFF CABRASER WORK HISTORY – Mr. Jordan began working for Lieff Cabraser in 2012 as a document review attorney. In 2014 and 2015, Mr. Jordan worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Jordan devoted 539.90 hours to document review and analysis in the State Street Forex Litigation attributable to Lieff Cabraser. Mr. Jordan is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Jordan's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Jordan has more than six years of experience reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JASON KIM

EDUCATION – University of California at Davis, Davis, California, B.A. 2002; Thomas Jefferson School of Law, San Diego, California, J.D. 2009.

ADMITTED TO PRACTICE – California Bar, 2009.

WORK EXPERIENCE SUMMARY – Mr. Kim worked as an associate for the full service litigation firm, Renchner Law Group in San Francisco, California, before starting his own civil litigation law firm in Santa Clara, California. Prior to working for Lieff Cabraser, Mr. Kim had extensive document review and analysis experience in complex litigation matters for McDermott Will & Emory, Quinn Emmanuel, and Crowell Moring.

LIEFF CABRASER WORK HISTORY – Mr. Kim began working for Lieff Cabraser in 2011 as a document review attorney. From 2013 into 2015, Mr. Kim worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Kim devoted 904 hours to document review and analysis in the State Street Forex Litigation. Mr. Kim is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Kim's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Kim is an experienced attorney, with more than eight years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JAMES LEGGETT

EDUCATION – University of California, Davis, Davis, California, B.A. 2004; Santa Clara University School of Law, Santa Clara, California, J.D., cum laude, Order of the Coif, 2012.

ADMITTED TO PRACTICE – California Bar, 2012.

WORK EXPERIENCE SUMMARY – Prior to law school, Mr. Leggett worked as a private banker at UMB Bank in Denver, Colorado for almost four years. Immediately after law school, Mr. Leggett performed document review and analysis in financial fraud and employment cases at the plaintiff-side litigation firm Schneider Wallace in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Mr. Leggett began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. Leggett worked on the BONY Mellon Forex Litigation. In 2015, Mr. Leggett devoted 893 hours to document review and analysis in the State Street Forex Litigation. In 2016, Mr. Leggett is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Leggett's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Leggett has spent more than four years at Lieff Cabraser reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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COLEEN LIEBMANN

EDUCATION – University of the Pacific, B.A. 1992; University of San Francisco School of Law, San Francisco, California, J.D. 2003.

ADMITTED TO PRACTICE – California Bar, 2006.

WORK EXPERIENCE SUMMARY – Ms. Liebmann has more than 11 years of experience in document and privilege review and analysis in complex litigation matters for a number of the country's most prestigious law firms, including Williams & Connolly, Latham & Watkins, DLA Piper, Quinn Emmanuel, Morrison Foerster, Perkins Coie, Wilmer Hale, O'Melveny & Myers, Jones Day, and Farella Braun & Martel, among others.

LIEFF CABRASER WORK HISTORY – Ms. Liebmann began working for Lieff Cabraser in 2014 as a document review attorney. In 2015, Ms. Liebmann devoted 24 hours to document review and analysis in the State Street Forex Litigation. Ms. Liebmann is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Liebmann's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Liebmann is an experienced document review attorney, with more than 11 years reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms.

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ANDREW McCLELLAND

EDUCATION – University of California, Davis, Davis, California, B.A. 2002; University of the Pacific, McGeorge School of Law, Sacramento, CA, J.D., Order of the Coif, 2008.

ADMITTED TO PRACTICE – California Bar, 2008.

WORK EXPERIENCE SUMMARY – Mr. McClelland worked as an associate for the construction defect litigation firm, Boornazian, Jensen & Garthe in Oakland, California, and as an associate for a similar firm, Lorber Greenfield & Polito, in San Francisco, California. At both firms, Mr. McClelland had extensive document review and analysis experience. In addition, Mr. McClelland has conducted document review and analysis in complex litigation matters for Bingham and Smith Lillis Pitha, in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Mr. McClelland began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. McClelland worked extensively on the BONY Mellon Forex Litigation. In early 2015, Mr. McClelland devoted 58 hours to document review and analysis in the State Street Forex Litigation. In February and March 2015, Mr. McClelland devoted additional time to the State Street matter, while housed in LCHB's offices, but was paid for that time by the Thornton firm. Mr. McClelland left Lieff Cabraser in early 2015 to pursue a different legal job.

Mr. McClelland's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. McClelland is an experienced attorney, with more than nine years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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SCOTT MILORO

EDUCATION – Cornell University, Ithaca, New York, B.S. 1994; State University of New York at Buffalo, Buffalo, New York, M.S. 1996; Cardozo School of Law, New York, New York, J.D. 2006.

ADMITTED TO PRACTICE – New York Bar, 2006; United States Patent and Trademark Office, 2006.

WORK EXPERIENCE SUMMARY – After law school, Mr. Miloro spent more than three years as an associate at the intellectual property firm of Ohlandt, Greely, Ruggiero & Perle in Stamford, Connecticut. In that capacity, Mr. Miloro gained extensive experience in reviewing and analyzing complex technical documents.

LIEFF CABRASER WORK HISTORY – Mr. Miloro began working for Lieff Cabraser in 2011 as a document review attorney. From 2012 into 2015, Mr. Miloro worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Miloro devoted 658.80 hours to document review and analysis in the State Street Forex Litigation. Mr. Miloro is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Miloro's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Miloro is an experienced attorney, with more than 11 years of experience, including more than five years at Lieff Cabraser, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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LEAH NUTTING

EDUCATION – University of California Berkeley, Berkeley, California, B.A. 1999; Harvard Law School, Cambridge, Massachusetts, J.D. 2002.

ADMITTED TO PRACTICE – California Bar, 2002.

WORK EXPERIENCE SUMMARY – Ms. Nutting was an associate in the securities litigation group at Clifford Chance, and then in the general litigation group at Orrick, both in San Francisco, California. During her four years at those two firms, Ms. Nutting had extensive experience in investigating complex financial fraud matters, including experience in document review and analysis. Ms. Nutting also has engaged in extensive document review in complex litigation matters for Kilpatrick Townsend, Bloomberg, and Morrison Foerster.

LIEFF CABRASER WORK HISTORY – Ms. Nutting began working for Lieff Cabraser in 2012 as a document review attorney. From 2012 into 2015, Ms. Nutting worked extensively on the BONY Mellon Forex Litigation. In 2013 and 2015, Ms. Nutting devoted 1,940.10 hours to document review and analysis in the State Street Forex Litigation. Ms. Nutting is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Nutting's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rates of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Nutting is an experienced attorney, with more than 15 years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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MARISSA OH

EDUCATION – Rice University, Houston, Texas, B.A. 1999; Stanford Law School, Stanford, California, J.D. 2004.

ADMITTED TO PRACTICE – California Bar, 2004.

WORK EXPERIENCE SUMMARY – Ms. Oh (formerly Marissa Lackey) was an associate at Orrick in San Francisco, California, where she gained extensive experience in financial fraud litigation and where her responsibilities included coordination and supervision of document reviews. Ms. Oh also has extensive document review and analysis experience in complex litigation matters at various top tier law firms, including Keker & Van Nest and Morrison Foerster in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Ms. Oh began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Ms. Oh worked extensively on the BONY Mellon Forex Litigation. In 2015, Ms. Oh devoted 800.30 hours to document review and analysis in the State Street Forex Litigation. Ms. Oh is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Oh's time in the State Street Forex Litigation was calculated at $515 per hour. That was the hourly rates of the class of 2008 working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Oh is an experienced attorney, with more than 17 years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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PETER ROOS

EDUCATION – University of Limburg, Maastricht, The Netherlands, J.D. 1989; University of San Francisco School of Law, L.L.M. 2001.

ADMITTED TO PRACTICE – The Netherlands, 1989; California Bar, 2002.

WORK EXPERIENCE SUMMARY – For more than 18 years, Mr. Roos was an associate and then a partner at Baker & McKenzie in Amsterdam, The Netherlands, and in Palo Alto, California. During those years, Mr. Roos gained extensive experience in financial and corporate transactions and documentation. In more recent years, Mr. Roos has engaged in extensive document review and analysis in complex litigation matters for such major American law firms as Jeffer Mangels, Gibson Dunn, Morrison Foerster, Paul Hastings, and Hopkins & Carley, among others.

LIEFF CABRASER WORK HISTORY – Mr. Roos began working for Lieff Cabraser in 2013 as a document review attorney. In 2015, Mr. Roos devoted 780 hours to document review and analysis in the State Street Forex Litigation. Mr. Roos is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Roos's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rates of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Roos is an experienced attorney, with more than 27 years of experience as a corporate partner in an international law firm and then reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms.

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RYAN STURTEVANT

EDUCATION – University of California, Santa Barbara, Santa Barbara, California, B.A. 2001; University of California, Santa Barbara, Santa Barbara, California, M.A. 2003; University of California, Hastings College of the Law, San Francisco, California, J.D. 2005.

ADMITTED TO PRACTICE – California Bar, 2006.

WORK EXPERIENCE SUMMARY – Mr. Sturtevant has gained extensive experience in document review and analysis in complex litigation matters for a number of major American law firms, including Bingham, Cooley, Morrison Foerster, Wilson Sonsini, O'Melveny & Myers, and Jones Day. In particular, Mr. Sturtevant gained experience in securities and financial fraud class actions.

LIEFF CABRASER WORK HISTORY – Mr. Sturtevant began working for Lieff Cabraser in 2013 as a document review attorney. In 2015, Mr. Sturtevant devoted 796 hours to document review and analysis in the State Street Forex Litigation. Mr. Sturtevant is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Sturtevant's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Sturtevant is an experienced attorney, with more than 11 years of experience reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms.

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VIRGINIA WEISS

EDUCATION – University of Northern Iowa, B.A. 2004; University of Kansas School of Law, J.D. 2007.

ADMITTED TO PRACTICE – Minnesota Bar, 2007; California Bar, 2010.

WORK EXPERIENCE SUMMARY – Ms. Weiss has dedicated more than 15 years to document review and analysis in complex litigation matters for numerous law firms and organizations, including Epstein Becker and Crowell and Moring, in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Ms. Weiss began working for Lieff Cabraser in 2014 as a document review attorney in complex financial fraud matters. In 2014 and into 2015, Ms. Weiss worked extensively on the BONY Mellon Forex Litigation. In 2015, Ms. Weiss devoted 473.50 hours to document review and analysis in the State Street Forex Litigation for Lieff Cabraser. She spent additional time on the case in 2015 which was paid by the Thornton firm. Ms. Weiss continues to work on document review and analysis projects for Lieff Cabraser.

Ms. Weiss's time in the State Street Forex Litigation was calculated at $415 per hour That was the hourly rates of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Weiss is an experienced attorney, with more than 10 years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JONATHAN ZAUL

EDUCATION – University of California, Berkeley, Berkeley, California, B.A. 2004; University of San Francisco School of Law, San Francisco, California, J.D. 2009.

ADMITTED TO PRACTICE – California Bar, 2009.

WORK EXPERIENCE SUMMARY – Following law school and a judicial clerkship, Mr. Zaul opened his own transactional and civil litigation law firm where he served as the principal.

LIEFF CABRASER WORK HISTORY – Mr. Zaul began working for Lieff Cabraser in 2012 as a document review attorney. From 2013 into 2015, Mr. Zaul worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Zaul devoted 495.20 hours to document review and analysis in the State Street Forex Litigation attributable to Lieff Cabraser. Mr. Zaul is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Zaul's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Zaul is an experienced attorney, with more than eight years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for Lieff Cabraser. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

Role of Lieff Cabraser Staff Attorneys in *State Street*

- Shared issue coding and secondary review and analysis of over 9 million pages of documents.
- Initial document production was made in January 2013.
- Second production (more than doubling the total volume) was made in December 2013.
- Reviewers tagged documents using more than 30 different issue/doc type codes and six levels of usefulness/relevance.
- Initial coding of documents largely completed by mid-April 2015, after which LCHB reviewers were tasked with preparing detailed memoranda on 18 (out of more than 50) selected themes, issues or witnesses to be further developed in depositions and follow-up discovery. Each memo contained hyperlinks to supporting documents from State Street's production, with some memos accordingly exceeding 100 pages.

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Role of Lieff Cabraser Staff Attorneys in *State Street*

- Roughly 37% of Lieff Cabraser's total Staff Attorney lodestar and hours can be attributed to researching and creating issue-specific memoranda (with hyperlinks to supportive documents from State Street's production) created between April and July 2015.

State Street Document Review Protocol

Field Name/Sub-Type	Issues
CheckBox or Radio Button	Preferential FX Pricing
CheckBox or Radio Button	Best Execution
CheckBox or Radio Button	Custodial fees
CheckBox or Radio Button	Bonus
CheckBox or Radio Button	Disclosure of FX Practice
CheckBox or Radio Button	ERISA Obligations
CheckBox or Radio Button	FX Policies
CheckBox or Radio Button	ERISA Customers
CheckBox or Radio Button	FX Profits/Revenues
CheckBox or Radio Button	Govt Invest
CheckBox or Radio Button	Mkting of Cust/FX Serv
CheckBox or Radio Button	Negotiated FX Pricing
CheckBox or Radio Button	Netting
CheckBox or Radio Button	SI Costs
CheckBox or Radio Button	SI FX Pricing
CheckBox or Radio Button	Spreads – Neg – SI
CheckBox or Radio Button	Welcome Pkge
CheckBox or Radio Button	Public Pension Funds
CheckBox or Radio Button	Non-Pension Customers
CheckBox or Radio Button	Damages
Field Name/Sub-Type	**Document Types**
CheckBox or Radio Button	Articles/FX Comments
CheckBox or Radio Button	Cust Agr
CheckBox or Radio Button	Cust FX Inquiries
CheckBox or Radio Button	IM Guides
CheckBox or Radio Button	Org Chart
CheckBox or Radio Button	RFP/RFI Response
CheckBox or Radio Button	Data Files
CheckBox or Radio Button	Presentations

State Street Document Review Protocol (cont'd)

Field Name/Sub-Type	Issues
Field Name/Sub-Type	**Rating**
CheckBox or Radio Button	Hot
CheckBox or Radio Button	Highly Relevant
CheckBox or Radio Button	Relevant
CheckBox or Radio Button	Irrelevant
CheckBox or Radio Button	Dupe
CheckBox or Radio Button	Contra
Field Name/Sub-Type	**Document Problems**
CheckBox or Radio Button	Redacted
CheckBox or Radio Button	Other Viewing Problem
CheckBox or Radio Button	Foreign Language
CheckBox or Radio Button	Follow-Up
CheckBox or Radio Button	Incomplete
CheckBox or Radio Button	Get Native
Field Name/Sub-Type	**Key Witnesses**
Text Box	
Field Name/Sub-Type	**Attorney Notes**
Text Box	

State Street Document Review Protocol

Document Review Coding Fields Quick Reference Guide

Issue Code	Description
Articles/FX Comments	Please use this issue code to identify articles or industry reports or commentary, both internal and external to State Street, regarding FX transactions generally and State Street's FX services specifically.
Preferential FX Pricing	Certain State Street custodial clients may have been preferred customers and thus able to negotiate more favorable FX trading terms not offered to State Street's general custodial public. Please use this issue code to identify documents that evidence, even in general terms, any such preferential arrangement and indicate in attorney notes the name of the preferred client..
Best Execution	State Street promised their customers "best execution" which was understood to mean that State Street would obtain the best possible FX price in any FX transaction for their customers. State Street now contends that such an understanding is not consistent with their internal understanding of the term "best execution." This issue code is therefore important and should be used to identify documents where "best execution" is mentioned and especially any client communications where State Street promises to obtain "best execution" as well as documents where the term is generally discussed, described or in any way defined.
Custodial fees	Please use this issue code to identify documents addressing annual "flat" fees for custodial services or fees for "ancillary" services.
Bonus	Please use this issue code to identify documents that address, discuss or otherwise concern the fact that State Street employee bonuses are tied to profits obtained through the provision of FX services.
Cust Agr	Please use this issue code to identify custodial agreements between State Street and its customers. Please also identify the customer in the Attorney Notes section of documents tagged with this issue code.
Customer FX Inquiries	Please use this issue code to identify documents, particularly correspondence, between State Street and its customers regarding inquiries into State Street's FX services. In other words, documents that address, discuss or otherwise concern customer inquiries related to State Street's FX services. Please also identify the name of the customer either making or related to the inquiry at issue in the Attorney Notes section of documents tagged with this issue code.

State Street Document Review Protocol

Document Review Coding Fields Quick Reference Guide (cont'd)

Issue Code	Description
Disclosure of FX Practice	Please use this issue code to identify documents that disclose or appear to purport to disclose to customers how State Street processes or will process FX trades.
FX Policies	Please use this issue code to identify internal State Street FX policy documents or descriptions as well as documents that address or in any way concern State Street's internal FX policies.
ERISA Customers	Please use this issue code to flag documents relating specifically to ERISA fund customers
FX Profits/Revenues	Please use this issue code to describe State Street FX profit/revenue charts or spreadsheets as well as documents that address or in any way concern profits/revenues earned by State Street from FX services.
Govt Invest	Please use this issue code to identify documents that concern government investigation into State Street, particularly investigation related to its FX services.
IM Guides	Investment Manager Guides that were distributed to IM's for various custodial clients typically included representations about State Street's FX services along the lines of FX trades being "based on market rates at the time of execution," etc. Please use this issue code to identify all such IM Guides.
Mkting of Cust/FX Serv	Please use this issue code to identify State Street marketing materials or similar documents that discuss or otherwise concern State Street's marketing of its FX services.
Negotiated FX Pricing	Please use this issue code to identify documents that discuss or in any way concern pricing offered by State Street for its negotiated or direct FX transactions.
Netting	Refers to a process State Street claims to have followed whereby buys and sells for all of their custodial clients were "netted" each day in order to obtain "best pricing" for their clients. Evidence appears to indicate they didn't really do this, at least not in the manner they claim.
Org Chart	Please use this issue code to identify internal State Street organizational charts or documents that discuss or otherwise concern the internal organizational structure of State Street, particularly as it relates to FX services.
RFP/RFI Response	State Street would often make representations about its FX services in RFP/RFI responses. Please use this issue code to identify responses or references to responses by State Street to any Requests for Proposal or Requests for Information submitted by any current or potential custodial clients. Please also identify the client that submitted the RFP/RFI in the Attorney Notes section of any documents tagged with this issue code.

State Street Document Review Protocol

Document Review Coding Fields Quick Reference Guide (cont'd)

Issue Code	Description
SI Costs	Certain State Street custodial clients utilized standing instructions for FX trades. Please use this issue code to identify documents that evidence costs incurred by customers using standing instructions and/or costs incurred by State Street for standing instruction services.
SI FX Pricing	Please use this issue code to identify any documents that discuss or in any way concern pricing offered by State Street for its SI (standing instruction) or indirect FX transactions.
Spreads – Neg – SI	Spreads for those FX trades governed by standing instructions (indirect trades) were typically higher than spreads for negotiated FX trades (direct trades). Please use this issue code to identify documents that concern, even generally, the difference in the amount of profit State Street earned on FX trades subject to standing instructions vs. negotiated FX trades.
Welcome Pkge	Please use this issue code to identify State Street documents, either internal or for distribution to its current or potential clients, that provides a description of its FX services, i.e., this is who we are and what we do.
Public Pension Funds	Please use this issue code to flag documents relating specifically to Public Pension fund customers
Non-Pension Customers	Please use this issue code to flag documents relating specifically to any non-pension customers, such as investment banks.

We'll also want boxes people can check indicating problems with the documents, such as "Redacted," "Other Viewing Problem," "Foreign Language" or "Follow-Up."[v]

Hourly Rates Applied to Lieff Cabraser Staff Attorneys in *State Street*

- The hourly rates applied to Lieff Cabraser staff attorneys in *State Street*, as reported to the Court with the firm's fee application, were the current billing rates applicable at the time of the fee application in 2016, except for personnel no longer employed by the firm, in which case the hourly rate of that person in his or her final year of employment was applied.
- Of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, the 2016 rate for 15 of them was $415 per hour. That was the billable rate of Lieff Cabraser's fourth year associates.
- Of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, the 2016 rate for 3 of them was $515 per hour. That was the same rate applicable to attorneys in our class of 2008.

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Coordination of Staff Attorneys With Labaton and Thornton Firms

- By January 2015, more than half of the documents produced by State Street remained to be coded.
- Global settlement in BNYM FX for $714 million and the attendant publicity it created made for an inflection point in the State Street mediation, wherein the parties needed to push forward and prepare to proceed quickly to class certification discovery and depositions should resolution not be achieved. The parties agreed that mediation should/would not extend past mid-2015.
- Class counsel ramped up their document review accordingly in order to prepare detailed liability memos and to receive new documents.

Coordination of Staff Attorneys With Labaton and Thornton Firms (cont'd)

- Lieff Cabraser agreed to share or host up to 6 staff attorneys that were partially or fully paid for by Thornton between February and June 2015. This arrangement was made due to Thornton's limited physical facilities, so that Thornton could bear a roughly equal share of the cost of document review.
- Four of these staff attorneys (Andrew McClelland, Virginia Weiss, Christopher Jordan, and Jonathan Zaul) worked for both Lieff Cabraser and Thornton in 2015. All four of these attorneys had worked extensively for Lieff Cabraser before, including in BNYM, and three of them are still working with us.
- Two of these staff attorneys (Ann Ten Eyck and Rachel Wintterle) were hired by Lieff Cabraser through an agency, which was paid directly by Thornton, and did not have a prior relationship with Lieff Cabraser.

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Lieff Cabraser's Hourly Duplication Mistake Explained

- Of the four staff attorneys who split time between Lieff Cabraser and Thornton, two of them (McClelland and Weiss) did not show duplicative time in class counsel's reports. In other words, their reported hours—for both Lieff Cabraser and Thornton—were correct.
- Two others (Jordan and Zaul) did have time that was inadvertently duplicated in Lieff Cabraser's and Thornton's reports. This was because the time they spent reviewing documents assigned to Thornton folders from 2/9/15 – 4/14/15 was mistakenly not removed from Lieff Cabraser's timekeeping records after our Accounting Department invoiced and received payment for those hours from Thornton.
- This was an inadvertent bookkeeping error.

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Lieff Cabraser's Hourly Duplication Mistake Explained (cont'd)

- The two other staff attorneys (Ten Eyck and Wintterle) whose time was incorrectly included in Lieff Cabraser's lodestar report were hired by an agency that was paid directly by Thornton. Accordingly, they should not have been entering any work/time summaries into our system.
- However, they did so throughout the three to four months they worked at Lieff Cabraser (March – June 2015), by emailing their time summaries directly to our Word Processing department (consistent with typical staff attorney practice), unbeknownst to the attorneys and staff overseeing the case. This was an inadvertent oversight in their training in San Francisco.

Lieff Cabraser's Hourly Duplication Mistake Explained (cont'd)

- To review, there were no hourly duplication errors for 16 staff attorneys listed in Lieff Cabraser's initial lodestar declaration with the Court. The inadvertent duplication errors were limited to 4 staff attorneys, as described above.
- The corrections to Lieff Cabraser's lodestar reports result in 1,761.8 fewer attorney hours than initially reported, for a new attorney/staff total of 18,696.70 hours for Lieff Cabraser (not including timekeepers who worked less than 5 hours).
- This equates to an 8.6% inadvertent initial overstatement of hours for Lieff Cabraser.

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Lieff Cabraser's Fee and Corrected Lodestar

- Lieff Cabraser's share of the awarded attorney's fee was $15,116,965.50.
- Using Lieff Cabraser's corrected lodestar total of $8,932,070.50 (applying 2016 rates), the corrected lodestar multiplier for Lieff Cabraser is ***1.69***.
- This is ***less*** than the 1.8 multiplier the Court initially approved on November 2, 2016, and is at the low end of lodestar multipliers typically approved in the context of a lodestar cross-check, particularly in the First Circuit.

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Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients

- Although Lieff Cabraser is normally compensated for legal services on a contingent fee basis, the firm does occasionally represent plaintiffs on an hourly basis. In the following examples, the firm was paid staff attorney applicable hourly rates.

Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients

- In [redacted], paid the firm monthly, including nearly 5,000 hours of staff attorney-document review time, at hourly rates ranging from $375 to $435 per hour, in 2015, for a total of over $1.8 million (or, 52% of the total fees paid in the case, $3,437,310).

Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients (cont'd)

- In [redacted] paid us monthly, including for three staff attorneys who conducted document review and analysis. Between February and July 2012, those three LCHB staff attorneys were billed out and paid at rates between $375 and $460 per hour.

Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients (cont'd)

- In [redacted]. That assignment in 2014 and 2015 was undertaken on an hourly basis and we were paid $400 per hour for the time of two staff attorneys who performed document review and analysis for the client (and who also worked extensively on *State Street*).

Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients (cont'd)

- In [redacted] two Merrill Lynch mutual funds, paid the firm on an hourly basis, including the hourly rates of two staff attorneys for document review and analysis at rates between $275 and $315 per hour in 2003.

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards

- Most fee awards in the firm's class action cases have been awarded on a percentage of the recovery basis. However, in recent years some courts have conducted a "lodestar cross-check" to determine that the percentage of the recovery award is not excessive. And, in rare cases, courts have determined our class action fees on a lodestar basis. In both the lodestar cross-check and lodestar fee award contexts, Lieff Cabraser staff attorneys' hourly rates are routinely included and approved in class action fee awards. Below are some recent examples:

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *In re New York Mellon Corp. Forex Transactions Litigation*, 12-md-2335 LAK (S.D.N.Y.) – Over 28,000 hours of staff attorney time at roughly the same hourly rates applied in *State Street* were included as part of the lodestar cross-check conducted by Judge Kaplan in approving class counsel's requested attorneys' fees. At the final fairness and attorney fee hearing, Judge Kaplan of the Southern District of New York said, in part:

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

"This was an outrageous wrong committed by the Bank of New York Mellon, and plaintiffs' counsel deserve a world of credit for taking it on, for running the risk, for financing it and doing a great job. I accept the lodestar. I accept as fair, reasonable and accurate everything that went into it."

In re Bank of New York Mellon Corp. Forex Transactions Litigation, No. 12-MD-2335 (LAK), S.D.N.Y.

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- Staff Attorney lodestar constituted approximately 45% of the total lodestar recorded in the BNYM litigation, across all firms.
- By comparison, Staff Attorney lodestar constituted just over 50% of the total lodestar recorded in the State Street litigation.

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *Allagas, et al. v. BP Solar International, Inc., et al.*, 3:14-cv-00560-SI (N.D. Ca.) – In 2016, Judge Illston of the Northern District of California approved a percentage of the recovery fee for Lieff Cabraser and co-class counsel but also conducted a lodestar cross-check. Judge Illston concluded that the firm's "hourly rates, used to calculate the lodestar here, are in line with prevailing rates in this District and have recently been approved by federal and state courts." In *BP Solar*, specifically, Judge Illston's lodestar cross-check included two Lieff Cabraser staff attorneys billed at $415 per hour, the same as most of the staff attorneys in *State Street*.

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *In re High Tech Employee Antitrust Litigation*, No. 11-cv-02509-LHK (N.D. Ca.) – In this complex antitrust class action in 2015, Judge Koh of the Northern District of California ordered Lieff Cabraser and their co-lead counsel attorneys' fees based on the lodestar methodology. Judge Koh found:

> Having reviewed the billing rates for the attorneys, paralegals, litigation support staff at each of the firms representing Plaintiffs in this case [including co-lead counsel Lieff Cabraser], the Court finds these rates are reasonable in light of prevailing market rates in this district and that counsel for Plaintiffs have submitted adequate documentation justifying those rates.

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- Judge Koh further found in *High Tech* that the "billing rates submitted vary appropriately based on experience," and found that the "billing rates for non-partner attorneys, including senior counsel, counsel, senior associates, associates and staff attorneys, range from about $310 to $800, with most under $500." (Emphasis added.)
- In this case, Lieff Cabraser's lodestar submission included a number of staff attorneys whose hourly rates are consistent with the rates submitted in *State Street* a year later.

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL 3:07-md-1827 SI (N.D. Ca.) – In 2011, Judge Illston approved a percentage of the fee recovery for Lieff Cabraser and their co-lead counsel "and confirmed" the fee by a lodestar cross-check. Included in Lieff Cabraser's lodestar submission was the time of several staff attorneys whose rates ranged from $385 to $475 per hour in 2011 when the fee submission was made.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO MARCH 25, 2018 REQUEST BY SPECIAL MASTER

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully provides this response to the Special Master's request dated March 25, 2018, for "any evidence . . . identif[ied] in the record, or evidence . . . not currently in the record" relating to Lieff Cabraser's "state of mind" as to the issue of Damon Chargois's ("Chargois") role in the State Street litigation prior to September 2017, when details concerning his arrangement with Labaton Sucharow LLP ("Labaton") first came to light. This response is accompanied by sworn declarations by both Robert L. Lieff and Daniel P. Chiplock (the latter of which attaches pertinent emails and documents, including Lieff Cabraser's prior Supplemental Submission, dated November 3, 2017, discussing many of the same issues).

Both Mr. Lieff and Mr. Chiplock were questioned at their depositions about Chargois and what they understood regarding his involvement in the State Street case prior to September 2017. Both testified that they understood that Chargois was local counsel for the Arkansas Fund and for Labaton as lead counsel. Although neither directly communicated with Chargois, they were informed that he had played an important role in the litigation and they assumed he had provided legal services that were of value to the client and therefore to the class. They were familiar with the role of local counsel in cases like State Street, and understood that Chargois's role was similar to that of the Ohio funds' local counsel in the BNY Mellon litigation. Neither thought, or had reason to believe, that fees of 4 to 5.5 percent to local counsel were unreasonable in view of what they had been told and what they understood about Chargois's role in the case. The testimony at deposition included the following:

	Robert Lieff	**pages**
Q	And did he (Chargois) fit the description of what you think of as a "local counsel" based on what you knew about him?	58-59

A 2013-15? It was so represented, yes, by Garrett Bradley that he was local counsel, and it sounded like he was taking care of the situation in Arkansas as typically a local counsel would do. So that was my understanding.

Q Did you have any concerns about—beyond the financial aspect which appears to you to be non-problematic—that there might be other issues, ethical issues or client issues or class issues that the ERISA attorneys might suffer? 60-61

A Again, it's hard to answer this without reference to the timeframe. Back in the early days when I first heard about it, as I now know it was April 2013 I believe, and then again 2015, I didn't think too much about it because we had a very similar situation in the companion—I call it the companion but in the Bank of New York we had local counsel in Ohio dealing with the fund. I thought this was local counsel in Arkansas dealing with the fund.

Q Special Master: And the Labaton folks at no time told you anything more about the larger context of the relationship with Mr. Chargois? 66

A No.

Q Special Master: What was your understanding of what the relationship was between Mr. Chargois and Labaton? 67

A I thought he was local counsel for Labaton in this particular case. I assumed dealing with the Arkansas Fund because that's what local counsel will do. That was my understanding.

Q Special Master: We don't know how to characterize this, and we are asking all the witnesses in their experience if they know how to characterize it. Mr. Sucharow did characterize it as a forwarding fee arrangement. 78-80

A I saw that. I would say, first of all, we have to be talking about class actions only.

Q Special Master: Yes.

A That's what we are talking about. And in the context of class actions there is no such thing as a referral lawyer. You cannot refer a class action and be compensated. It just—it's not the way it works . . . Likewise, forwarding fee. I don't know what that means. But if it is a referral fee, there is no such thing in class actions.

Local counsel there definitely is, and there is no question about the use of local counsel, but you choose local counsel in each of your cases. Now that does not mean that if it is not the same counsel—I know, for example, we have represented funds in Ohio, and we have a law firm in Columbus, Ohio chosen by the attorney general, Mike DeWine, of Ohio, and he wants them to be our local counsel, and they work, and they get paid, and we get time records.

Q Special Master: But what was the basis of your firm's agreement to share in the payment then? 92-93

A Lead counsel said to the other two class firms that we have a local counsel in Arkansas helping us in Arkansas—later saying I think they were doing a good job or something—and that we have to compensate them for what they have done.
Q Special Master: And based on that—
A —I agreed
Q Special Master: —you agreed.
A Very common to do this, yeah.

Q Special Master: Did 5.5 percent seem to be a large number for a local counsel of 75 million dollars? 93-94
A I would have to look up, for example, what our local counsel in the Bank of New York case got, what percentage. I do not remember. But it does not seem on the face of it to be unusual. I think perhaps our local counsel got something similar to that, but I would have too look it up.
Q Special Master: Would it depend on how much work the local counsel did? Among other factors.
A Yes. In the Bank of New York case it was easy because we had their time records. And **we were lead counsel**. **When I am lead counsel, I look at this differently than when I am not lead counsel.** [Emphasis supplied].

Daniel Chiplock

Q Did you recall any conversation aside from the name Damon Chargois that referenced a referring attorney? 101-103
A No. And with respect to Mr. Chargois, he was never characterized to me as a referring attorney.
Q Special Master: How was he characterized to you?
A Local counsel. He was always described to me as—when I say "always" I mean there were maybe 5 or 6 emails during the life of this case on this issue that I can recall. He was always described as local counsel.
Q And what does that mean to you that someone is local counsel?
A Well, it can mean a few things. I can tell you what I thought it must have meant here. What I assumed when I was told local counsel—and I think there was another email from Garrett that said he played an important role in the case. So it was—it is not at all atypical in cases like this for an institutional plaintiff, especially a pension fund, to want there to be like a hometown lawyer or a local counsel who is close to them, who is involved in the case somehow. I can give you an example. In the BNY Mellon case we represented Ohio pension plans. The Ohio AG selected an Ohio counsel to work with us, we had no—we had no input into that. And that was their choice. They wanted to have what they called a local counsel, even though the case was pending in New York, to interface with them, to give them comfort, to respond to questions and maybe do, you know, one—run some things down on the local side on the client-facing side, you know, while we as national counsel are involved in the main part of the litigation. So we had local counsel in the BNY Mellon case who actually did a fair amount of interaction with the Ohio AG's office.

Q	Do you recall what the payment terms were for Mr. Chargois?	106
A	Ultimately?	
Q	Both historically and ultimately in State Street?	
A	Well, I think initially how it was characterized to us was that he was local counsel and that he was entitled to twenty percent of Labaton's fee, and the proposal by Garrett was that it instead be taken off the top of whatever the total fee turns out to be. So those were the terms as they were described in 2013 and then in 2015 and then again in 2016 I think. And then ultimately he was paid five and a half percent of the total fee.	
Q	Special Master: At 2015 when you became cognizant that there was going to be a fee—a payment to Mr. Chargois—were you advised by anyone at Labaton of the history with Mr. Chargois—Labaton's history with Mr. Chargois?	109-110
A	No. What was always represented to us—at least the communications that I am copied on and that I took part in—were that he was a local counsel, and sometimes he is described as local counsel for Arkansas or Arkansas local counsel. And sometimes he is described as local counsel for Labaton.	
Q	Special Master: And what did you take that to mean?	
A	As I said earlier, I assumed—you know, between those representations and between this representation here (indicating) that he performed some kind of an important role, that he was some type of local counsel of the type that I described a little while ago.	
Q	But, in any event, you do recall being informed as to the arrangement, even though it was not solid or completely defined, between Labaton and consequently by the customer class firms and Mr. Chargois.	115-116
A	I recall his—the description of him that was offered in that email which was I think the—the words they used were that he assisted Labaton in matters pertaining to Arkansas.	
Q	And did you interpret that description of he assisted as meaning he took an actual active role in those cases?	
A	I actually assumed that, yes. That it was some kind of a role, some kind of an assistance offered by a local counsel. And for that assumption I based it on my own experience, my own recent experience in the BNY Mellon case.	

Dated: April 5, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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 ROBERT L. LIEFF

Robert L. Lieff, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am Of Counsel to the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration to further elaborate on my prior testimony concerning my understanding and belief as to the role of "local counsel" in the State Street litigation and the attorney's fees allocated to local counsel.

2. During my deposition I was asked about the size of the fee for Mr. Chargois, local counsel to Labaton and to the Arkansas Fund.

> Q. Special Master: did 5.5% seem to be a large number for a local counsel of seventy-five million dollars?
>
> A. I would have to look up, for example, what our local counsel in the Bank of New York case got, what percentage. I do not remember. But it does not seem on the face of it to be unusual. I think perhaps our local counsel got something similar to that, but I would have to look it up.
>
> Q. Special Master: Would it depend on how much work the local counsel did? Among other factors.
>
> A. Yes. In the Bank of New York case it was easy because we had their time records. And we were lead counsel. When I am lead counsel I look at this differently than when I am not lead counsel. (93:14-94:9)

3. I have now confirmed that my recollection regarding the magnitude of the fee to our local counsel in the BNY Mellon case was correct. The court in the BNY Mellon case awarded fees to our local counsel of $3,154,291, or just slightly less than 4% of the total attorney fees awarded in the case.

4. I would have been aware of the fee request in the BNY Mellon case and the amount we were requesting for local counsel by no later than mid-2015 and of the actual award by the court as of September 2015. So I would clearly have had that in mind contemporaneously with the discussions in 2015 and again in 2016 regarding the fee allocation for local counsel in the State Street case.

5. In my answer to the Special Master's question, I remarked that I look at these types of matters, fee allocations among class counsel, differently when I am lead counsel. When Lieff Cabraser is lead counsel in class litigation we assume responsibility for assessing the contributions of subordinate counsel in connection with allocation of fees among counsel and with respect to fee requests. As lead counsel we do our best to make sure that fees are fairly allocated according to the value of the contributions to the class and that no fee allocation or fee request is unreasonable, either because it is too large or too small. Invariably we also share the information regarding fee allocation or fee requests with the court-appointed class representative(s) to obtain their approval of the allocation or request.

6. The Labaton firm has extensive experience in class litigation, particularly in the securities field. They have served as lead or co-lead counsel in scores of class action cases. I had every reason to believe, and did believe, that they had engaged in the process of reviewing the work done by local counsel and the contributions of local counsel, and that they and their client, the Arkansas Fund, were of the view that the fee allocation to Chargois was fair and reasonable and fully supported by his contribution to the case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2018.

Robert L. Lieff

1533142.1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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DECLARATION OF DANIEL P. CHIPLOCK

Daniel P. Chiplock, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am a partner with the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration to further elaborate on my prior testimony concerning my understanding and belief, at all times prior to September 2017, as to Chargois & Herron LLP's role as reputed "local counsel" in the State Street litigation, and the basis for that understanding and belief.

2. For my declaration, to avoid repetition, I specifically refer to and incorporate the Response by Lieff Cabraser Heimann & Bernstein LLP to [the] Special Master's September 7, 2017 Request for Supplemental Submission, dated November 3, 2017 ("the Supplemental Submission")[1], and the citations to the record therein.[2]

3. As detailed in the Supplemental Submission and my prior deposition testimony dated September 8, 2017 ("Sept. 8 Deposition"), in the few communications where Lieff Cabraser attorneys were copied or participated that concerned Damon Chargois, he was consistently referred to by attorneys outside of Lieff Cabraser as "local counsel" for Labaton Sucharow LLP ("Labaton") and/or the client, the Arkansas Teacher Retirement System ("ATRS").[3] *See* Exhibits A and B.

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[1] The Supplemental Submission is attached hereto as Exhibit A, for ease of reference.

[2] All emails referenced in the Supplemental Submission, in addition to several others relevant to the issue of Lieff Cabraser's mindset, are attached collectively as Exhibit B.

[3] The Ethical Report for Special Master Gerald E. Rosen by Prof. Stephen Gillers ("Ethical Report"), dated February 23, 2018, refers to an "original cost-sharing agreement" mentioning Mr. Chargois that purportedly was "circulated—but never executed—among Customer Class Counsel in 2011," but Lieff Cabraser has no record of its attorneys ever having received this document. *See* Ethical Report, p. 42 and n. 47. Indeed, the testimony cited in n. 47 of the Ethical Report appears to confirm that this document was not "circulated . . . among Customer Class Counsel" but instead was a draft that was circulated solely between Christopher Keller (of Labaton) and Garrett Bradley (of Thornton Law Firm). The first mention that Lieff Cabraser can find of Mr. Chargois in any communication involving Lieff Cabraser is the April 2013 email string described in paragraph 2 of the Supplemental Submission.

4. Lieff Cabraser's attorneys referred to Mr. Chargois in kind as "local counsel" in the handful of communications they exchanged with co-counsel about Mr. Chargois and in internal Lieff Cabraser communications. Co-counsel never corrected Lieff Cabraser's attorneys, nor suggested to Lieff Cabraser's attorneys that Mr. Chargois was anything other than "local counsel." *See* Exhibit B.

5. Lieff Cabraser was not lead counsel in the State Street litigation, and had no direct client relationship with ATRS. Indeed, the Lieff Cabraser attorneys did not interact with George Hopkins (the chief representative for ATRS in the litigation) at all during the State Street litigation, outside of the mediation sessions that Mr. Hopkins personally attended. Lieff Cabraser's attorneys also never spoke with Mr. Chargois to my knowledge, and had no interactions with him outside of a few group emails. For its understanding of Mr. Chargois' role and function in the State Street litigation, Lieff Cabraser accordingly relied on the representations by Labaton, who was lead counsel, and Mr. Garrett Bradley, who prior to the conclusion of the State Street litigation was Of Counsel to Labaton, and on Mr. Chargois' confirmations by email (copied to both Bob Lieff and myself) of his role as local counsel and his important role in the case. (For the latter, *see* Chargois' emails of April 25, 2013 [LBS025771] *and* July 8, 2016 [LCHB-0053544-45], contained in Exhibit B).

6. During the life of the State Street litigation, Lieff Cabraser had no visibility into any work being performed by Mr. Chargois. But this was not unusual for a local counsel working in tandem with a lead counsel, in my recent experience. In the BNY Mellon litigation (where Lieff Cabraser did serve as lead counsel), Lieff Cabraser worked with an Ohio-based local counsel for its Ohio-based public pension fund clients. That local counsel (who was selected by the Ohio Attorney General) communicated directly and virtually exclusively with Lieff Cabraser insofar as his work assignments were concerned. His work was focused primarily

on assisting Lieff Cabraser in guiding the Ohio pension fund clients through their responses to defendants' discovery requests, as well as helping to defend their depositions. This was but one distinct part of a very large and complex litigation effort (which involved taking more than 100 depositions overall, including scores of depositions of defendants and third parties all over the globe), which involved many law firms. Throughout this, the Ohio local counsel's principal focus remained serving the Ohio public pension funds' individual discovery and litigation needs (with some document review assignments as well). As such, he and his firm had very little (if any) contact with Lieff Cabraser's co-lead counsel in that case (Kessler Topaz Meltzer & Check LLP), and virtually none with the other law firms who were not serving in a co-lead capacity (which would have been analogous to Lieff Cabraser's position in the State Street litigation).

7. The total attorneys' fees awarded in the BNY Mellon litigation were $83,750,000, which equated to 25% of the $335 million settlement fund in that case. Ohio local counsel was ultimately awarded approximately 4% of the total fees by the court in that case, which was certainly within the range of fees commonly paid or awarded (in Lieff Cabraser's experience) to local counsel who have performed services for the class representatives or lead counsel and thus to the class as a whole.

8. The $335 million settlement in the BNY Mellon litigation was reached in principle by March 2015, and preliminarily approved in late April 2015. Notice to the class was sent shortly thereafter, and by then it was understood and communicated to class members that counsel would apply for approximately a 25% attorneys' fee. By the time the final settlement approval and fee petitions were filed in August 2015, the level of fee we would be requesting for Ohio local counsel in the BNY Mellon case was established – approximately 4%.

9. Accordingly, at about the same time that I was being apprised by co-counsel of Mr. Chargois' role as "local counsel" in the State Street litigation, and the contours of his fee

interest were being discussed, I was in the process of finalizing and requesting a proposed fee allocation in the BNY Mellon litigation that included a fee percentage for local counsel that was not substantially different from what was being discussed for Mr. Chargois. That proposed fee percentage did not strike me as outside of the norm for a local counsel such as Mr. Chargois had been described to me. Nor did I view it as unusual that I was not privy to the specific work Mr. Chargois had performed as local counsel; as stated above, the various non-lead counsel in BNY Mellon, to my knowledge, had little or no substantive direct contact with Ohio local counsel in that case.

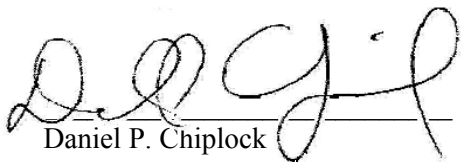
10. Based on lead counsel's descriptions, I understood during the State Street litigation that ATRS was gathering and producing a fairly substantial number of documents in response to defendant's requests. All told, according to lead counsel, ATRS produced more than 73,000 pages of documents,[4] an undertaking in which Lieff Cabraser was not directly involved. I also understood that prior to Lieff Cabraser being engaged as additional counsel for the proposed class, ATRS had spent substantial time investigating, with the assistance of its counsel, the underlying allegations against State Street (which were first made public by the October 2009 unsealing of a whistleblower lawsuit in California) before finally filing a lawsuit in 2011, and that this time period included one or more meetings with State Street representatives (none of which included my firm). It was my belief, informed both by (i) co-counsel's descriptions of Mr. Chargois as "local counsel" who was "assisting" Labaton in matters pertaining to ATRS and had performed "an important role" in the litigation, and (ii) my firm's recent experience in BNY Mellon, that Mr. Chargois had actually assisted and played an important role in these efforts. It was also my belief, for the same reasons, that Mr. Chargois' involvement in these efforts (and in

[4] *See* Decl. of Lawrence A. Sucharow, ¶ 97, Dkt. No. 104 (filed 9/15/16).

the litigation overall) was at ATRS' behest, and certainly (at a minimum) with its complete knowledge and consent. I assumed that ATRS and lead counsel in the State Street litigation regarded the proposed fee percentage for Mr. Chargois to be reasonable and justified by his value to the client, and therefore to the class, based on their knowledge of his work and contributions.

11. My belief during the 2015-2016 timeframe as to the apparent reasonableness of Mr. Chargois' fee interest as "local counsel" was further informed by historical experience at my firm. Over the years, for instance, Lieff Cabraser has been asked to serve as local counsel in a number of securities class actions. In some other types of class actions, including cases involving consumer protection statutes such as the Telephone Consumer Protection Act of 1991 ("TCPA"), Lieff Cabraser has requested counsel in the forum jurisdiction to act as our local counsel. In both circumstances, the local counsel (whether it is us or another firm) has often been offered the option of a fee arrangement predicated on lodestar or based on a percentage. When on a percentage basis, the fee has typically ranged from a low of 5% to a high of 10% of the total fees awarded in class cases. In the two most recent securities class cases in which Lieff Cabraser agreed to serve as local counsel, for instance, the fee share upon which Lieff Cabraser agreed at the outset with putative lead class counsel was 10% of the total fees awarded. While these cases have involved local counsel in the forum court, in contrast with Mr. Chargois' situation in the State Street litigation, this history comprises another baseline for commonly accepted percentage fee arrangements, in my experience, for local counsel in class litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2018.



Daniel P. Chiplock

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN LLP TO SPECIAL MASTER'S SEPTEMBER 7, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully provides this individual response ("Response") to the Special Master's September 7, 2017 Request for Supplemental Submission concerning "the circumstances of the monies paid to Attorney Damon Chargois in the State Street case for his role as a referring attorney and the implications of that payment and circumstances in addressing the charge of Judge Wolf in paragraph 2 of his March 8, 2017 Order."

1. At all times throughout the litigation of the State Street matter and up through August 11, 2017, Mr. Chargois was described and represented to Lieff Cabraser as "local counsel" for Labaton Sucharow LLP ("Labaton") and/or the client, the Arkansas Teacher Retirement System ("ATRS"). Mr. Chargois was never described to Lieff Cabraser as a "referring," "forwarding," or any other kind of counsel by Labaton or Garrett Bradley (who was a partner at Thornton Law Firm LLP ("Thornton") throughout the litigation and, starting in or about 2015, also of counsel at Labaton).

2. Specifically, on April 24, 2013 (when Mr. Chargois' role in the litigation as well as his proposed allocation of a portion of the class attorneys' fee was first broached), Mr. Chargois was described to Lieff Cabraser by Mr. Bradley as "local counsel who assists Labaton in matters involving [ATRS]." *See* LCHB-0053483.[1] In subsequent communications in 2015 and 2016, Mr. Chargois was described to Lieff Cabraser variously as the "[A]rkansas local" (LCHB-0053491), the "Arkansas firm" (LCHB-0053531), the "Arkansas component" (*id.*), and "the local attorney in this matter who has played an important role." (LCHB-0053542). *See also* Chiplock Dep. (Sept. 8, 2017) at 102:3-13; 109:19-110:18; 115:8-117:8; 118:9-22.

[1] Mr. Chiplock, who was the principal Lieff Cabraser attorney on the case, was apparently copied on this initial April 24, 2013 email and one or more responses to it, but did not recall receiving them and did not himself reply. *See* Chiplock Dep. (Sept. 8, 2017) at 68:4-24; *see also* LCHB-0053522, 0053538, 0053541.

3. Lieff Cabraser attorneys, on the subsequent handful of occasions when they referenced Mr. Chargois in written communications to attorneys at Labaton and Thornton—which almost exclusively was in the context of discussing attorney fee allocations—referred in kind to Mr. Chargois as the "local counsel," "Arkansas local," "local Arkansas counsel," or simply "Arkansas" counsel. *See, e.g.,* LCHB-0053493, 0053507, 0053513, 0053522, 0053531, 0053549.

4. The "Agreement of Fees" entered into on August 30, 2016, approximately two weeks prior to the submission of the final settlement and fee approval papers to the Court, similarly references Mr. Chargois as "Labaton Sucharow's local counsel." LCHB-0053552. The fee allocation charts circulated by Labaton after final settlement approval had been granted (in November 2016) also refer to Mr. Chargois as "Labaton's Local Counsel." *See* LCHB-0053553-56, 0053560, 0053567.

5. Lieff Cabraser understood Mr. Chargois' stated role as "local counsel" throughout the litigation to mean that he was assisting ATRS and Labaton in Arkansas, including by interfacing with the client and/or performing local client-sided tasks that were helpful to the litigation. This was the type of role with which Lieff Cabraser was generally familiar from prior experience—and was the type of role played by Ohio-based local counsel (for Ohio-based clients) in the BNY Mellon litigation (in which Lieff Cabraser was lead counsel). Lieff Cabraser assumed that Mr. Chargois' role as local counsel was being performed at the behest of (and with the consent of) ATRS. All of the foregoing was consistent with the descriptions offered to Lieff Cabraser by Labaton and Mr. Bradley of Mr. Chargois' status and role in the litigation. *See, e.g.,* Chiplock Dep. (Sept. 8, 2017) at 101:24-104:18; 109:19-111:9; 115:8-118:22.

6. Lieff Cabraser did not learn that Mr. Chargois (a) actually was not local counsel, (b) had performed no work in the State Street litigation, and (c) was not known to the client

representative for ATRS (George Hopkins), until after Mr. Hopkins (of ATRS) and Mr. Belfi (of Labaton) were deposed on September 5, 2017.

7. Had the Court ordered an accounting of all attorneys' fees and their planned allocation pursuant to Fed. R. Civ. P. 54, or had asked specific questions to that effect at the final approval hearing, Lieff Cabraser has (and had) no reason to believe that Mr. Chargois' allocation (along with all of the others') would not have been made known to the Court. At no time, ever, did Lieff Cabraser agree to "conceal" the existence of Mr. Chargois from anyone, including ERISA counsel, any clients, or the Court,[2] either before[3] or after the final approval hearing (including in the November 28, 2017 "clawback" letter which Lieff Cabraser did not draft and which, without Lieff Cabraser's input, did not divulge Mr. Chargois' identity or fee interest to ERISA counsel).[4]

Dated: November 3, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: 

Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

[2] *See, e.g.,* Chiplock Dep. (Sept. 8, 2017) at 100:7-101:23; 104:19-105:7; 108:19-109:7; 119:4-20; 140:4-141:10.

[3] Mr. Chiplock himself was not aware of Mr. Chargois when the original agreement memorializing a 9% fee allocation for ERISA counsel was signed in December 2013. *See* Chiplock Dep. (Sept. 8, 2017) at 120:19 – 121:15; *see also* LCHB-0053522, 0053538, 0053541. Mr. Lieff, for his part, did not recall Mr. Chargois' existence or stated role after the initial April 2013 email exchange until being reminded by Mr. Bradley in 2015 (and then again in 2016) of Mr. Chargois' putative status as local counsel. LCHB-0053531, 0053538.

[4] *See* Sucharow Dep. (Sept. 1, 2017) at 20:22-23:15; 26:1-24. Lieff Cabraser was not copied on the email correspondence concerning the clawback letter in which it was stated there was "no need for ERISA to see Damon's split." *Id.*

EXHIBIT B

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Chronological Index of Pertinent Emails/Communications[1]

Tab		
1	LCHB-0053483	4/25/13 email from Garrett Bradley of Thornton Law Firm to Robert Lieff, copying Daniel Chiplock and others regarding "the obligation to the local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System." Lieff replies that he is in "full agreement" with proposal to allocate 4 or 5% of awarded attorneys' fees to Damon Chargois.
2	LBS025771	4/25/13 email from Chargois to Bradley (copying Lieff, Chiplock and others) agreeing to the same proposal, thereby confirming the description of him as "local counsel" assisting Labaton Sucharow LLP ("Labaton").
3	LCHB-0053491-92	8/6/15 email from Bradley to Lieff, copying Michael Thornton, referring to Chargois as the "Arkansas local," with an implied fee amount of 5% (arising in the context of negotiating a fee allocation among class counsel).
4	LCHB-0053493-4	8/28/15 string containing email from Lieff to Bradley referring in kind to "Arkansas local counsel," with a provision for 5% of fees. (Also in the context of negotiating a fee allocation among class counsel.)
5	LCHB-0053507-12	8/28/15 exchange between Lieff and Chiplock referring to "Arkansas local" at 5%. (Again, part of the same allocation effort.)

[1] These documents are being transmitted electronically by separate sharefile.

Tab		
6	LCHB-0053513-14	8/28/15 string containing email from Bradley to Chiplock and others regarding fee allocation, indicating that the "Arkansas fee is still being negotiated," with prior emails referring multiple times to either "Arkansas," "Arkansas fee," or "local Arkansas counsel."
7	LCHB-0053522-23	8/30/15 email exchange between Chiplock and Bradley where Chiplock asks for copy of written agreement discussing "local Arkansas counsel" fee component. Bradley responds saying the "Arkansas component" was to "come off the top."
8	LCHB-0053531-32	8/30/15 string containing emails from (i) Chiplock to Bradley asking for a copy of the written agreement relating to Arkansas local; (ii) Lieff to Bradley saying he does not have a copy of the agreement; and (iii) Bradley to Lieff and to Chiplock saying that he re-sent it to Lieff previously and that he will send it again when he gets to his office.
9	LCHB-0053538-40	6/14/16 email from Chiplock to Lieff, forwarding a copy of 8/30/15 and 7/28/15 emails from Bradley to Lieff and Chiplock and Thornton, with the note "I don't know how you get around this." The 8/30/15 and 7/28/15 emails from Bradley to Lieff each forwarded a copy of the original April 2013 email exchange, describing Chargois as "local counsel."
10	LCHB-0053541	6/14/16 email from Chiplock to Lieff indicating that he found the April 2013 email in archives, and that he had no memory of it. Forwarding a copy of the April 2013 email to Lieff and inquiring how "local counsel's" fee is going to be calculated.
11	TLF-SST-057140	7/8/16 email from Bradley to Lieff, Chiplock and others (copying Chargois) describing Chargois as "the local attorney in this matter who has played an important role."

Tab		
12	LCHB-0053542	7/8/16 email from Chiplock to Lieff forwarding a copy of the preceding email, and inviting Lieff to respond.
13	LCHB-0053544-45	7/8/16 email string containing a response from Chargois to Sucharow, copying Lieff, Chiplock and others, confirming his agreement to 5.5% and effectively confirming the description of his role in Bradley's email of the same date.
14	LBS039936-37	7/8/16 string containing email from Lieff to Bradley, copying others, confirming Lieff Cabraser's agreement to "5.5[%] to Chargois."
15	LCHB-0053548-49	String containing 8/12/16 corrective email from Lieff to Bradley, correcting Lieff's prior communication to include a reference to "**local counsel."** (Emphasis in original).
16	LCHB-0053552	August 2016 written agreement concerning proposed allocation of attorneys' fees, referencing "Labaton Sucharow's local counsel."
17	LCHB-0053553-55	11/23/16 email from Nicole Zeiss of Labaton to Lieff, Chiplock and others referring to "Labaton's local counsel."
18	LCHB-0053560-62	11/23/16 email exchange between Chiplock and Lieff agreeing that figures for Lieff Cabraser look correct.
19	LCHB-0053567-69	11/23/16 email from Chiplock to Zeiss confirming that Lieff Cabraser's figures look correct.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES DUE ON JUNE 1, 2017

In accordance with the Federal Rules of Civil Procedure, Lieff Cabraser Heimann & Bernstein, LLP ("LCHB" or the "Firm") hereby responds to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories (the "Interrogatories"), propounded on LCHB on May 18, 2017, as revised on May 23, 2017, and due on June 1, 2017.

GENERAL OBJECTIONS

LCHB makes the following general objections, which are incorporated by reference into each Interrogatory response, whether or not a specific further objection is made with respect to a specific Interrogatory. Each Interrogatory response incorporates, is subject to, and does not waive the general objections.

1. LCHB objects to the Interrogatories and Instructions to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or otherwise is privileged, protected or exempt from discovery.

2. LCHB objects to the Interrogatories and Instructions to the extent they purport to impose obligations that differ from or exceed those imposed by the Federal Rules of Civil Procedure, particularly Rule 33, and by any court decisions interpreting those Rules.

3. LCHB objects to the Interrogatories and Instructions to the extent they seek information beyond the scope of, or not relevant to, the Courts' February 6, 2017 Memorandum and Order in the above-referenced cases.

4. In responding to the Interrogatories, LCHB has made reasonable efforts to respond based on its understanding and interpretation of each Interrogatory. If the Special Master subsequently asserts a reasonable interpretation of an Interrogatory which differs from that of LCHB, LCHB reserves the right to supplement its responses.

5. LCHB will make all reasonable efforts to respond to the Interrogatories on or before the dates specified in the Special Master's May 23, 2017 revised Interrogatories. LCHB, however, reserves the right to supplement its responses should it require additional time, and/or should responsive information be discovered following the designated dates for the responses.

6. LCHB objects to Definition No. 1 and Instruction B, to the extent they seek Interrogatory responses from any source other than the law firm, its partners, associates, of counsel, employees and contractors. LCHB has no "affiliates," and no "agents" or "representatives" that are or would be in the possession of responsive information.

RESPONSES TO THE INTERROGATORIES

INTERROGATORY NO. 1:

Describe each of the Law Firm's practice area(s), including areas of specialty, special services offered, the total number of attorneys and staff, and a brief description of any representative matters.

RESPONSE TO INTERROGATORY NO. 1:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad in that it provides no time-frame for the information sought. LCHB further objects to this Interrogatory on the grounds that it is overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows.

LCHB represents plaintiffs in class, group and individual civil litigation in federal and state courts throughout the country in the following practice areas: securities and financial fraud; antitrust; consumer fraud; data privacy; employment discrimination; whistleblower/False Claim Act; medical device and pharmaceutical mass torts; environmental mass torts; personal injury;

non-personal injury product defect; and, civil and human rights. Attached hereto as Exhibit A is a "description of … representative matters."

As of the date of these Responses, LCHB has 81 attorneys (including 28 Staff Attorneys), 43 document review lawyers working for the Firm via agencies, and 134 staff members (including paralegals, financial analysts, administrative assistants, receptionists, word processors, and employees in the Firm's information technology, library services, human resources, accounting, records, calendaring/conflicts, marketing and office/facilities services departments).

Steven E. Fineman, LCHB's Managing Partner, has knowledge of the information provided in this Response. Numerous Firm attorneys and staff have knowledge of some of the information provided in this Response.

INTERROGATORY NO. 3:

Describe in detail the Firm's involvement in the California Action and in the BNY Mellon Action and how that involvement assisted the Firm in the SST Litigation.

RESPONSE TO INTERROGATORY NO. 3:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

The Firm's involvement in investigating custodial foreign currency exchange ("FX") overcharges dates back to 2008, when it was approached by counsel for the relator (or whistleblower) in a proposed false claims (or *qui tam*) case against State Street. The Firm (and, for a time, Lieff Global, which was headed by current Of Counsel Robert L. Lieff) worked with Thornton and other counsel for the relator to develop and file *qui tam* cases under seal against State Street in California and other states. In connection with this, the Firm helped draft and edit an amended complaint on behalf of several California county or municipal funds based on a

lengthy disclosure statement filed with the California Attorney General ("California AG") outlining the alleged custodial FX scheme carried out by State Street. This is the same scheme that formed the basis for the SST Litigation filed more than two years later.

The California AG intervened in the *qui tam* lawsuit in October 2009, making the FX scheme public. The attendant publicity caused a number of custodial clients to question whether they had been overcharged on FX trades in a similar manner. The questions were not restricted to State Street; BNY Mellon faced similar allegations in *qui tam* lawsuits that were unsealed in Virginia and Florida in early 2011.

In July 2011, LCHB filed, with co-counsel, a class action suit against BNY Mellon in the United States District Court for the Northern District of California on behalf of custodial customers of BNY Mellon who were overcharged on FX trades executed indirectly, or pursuant to "standing instructions." That complaint was subsequently amended and BNY Mellon's motion to dismiss was denied in February 2012. The case was put on an aggressive schedule by Judge William Alsup, resulting in Plaintiff filing its opening brief on class certification by April 2012. In the meantime, Plaintiff and BNY Mellon took or defended more than a dozen depositions and produced and reviewed a substantial number of documents. Shortly after Plaintiff filed its class certification motion, however, the case was transferred to Judge Lawrence Kaplan in the Southern District of New York and consolidated with several other customer, ERISA, and securities fraud cases all alleging the same underlying facts about BNY Mellon's custodial FX practices. These cases (now part of a multidistrict litigation, or "MDL") were in turn coordinated for discovery purposes with a later-filed civil suit brought by the United States Department of Justice ("DOJ") against BNY Mellon. A similarly later-filed separate suit

brought by the New York State Attorney General ("NYAG") in New York state court was also coordinated with the MDL and the DOJ's action.

Once before Judge Kaplan, LCHB was appointed co-lead counsel for the proposed class of custodial customers affected by the FX scheme. In addition, the Firm (specifically Elizabeth Cabraser) was appointed to the three-member Executive Committee overseeing all plaintiffs in the MDL. Between 2012 and early 2015, BNY Mellon aggressively defended the actions, taking 57 depositions of plaintiffs, absent class members, or third parties, and filing counterclaims against the named customer plaintiffs and absent class members. Plaintiffs in the MDL and the DOJ took more than 50 depositions of BNY Mellon. BNY Mellon produced more than 20 million pages of documents. LCHB, working closely with its co-counsel and the DOJ, reviewed these documents with the aid of 13 Staff Attorneys who later (in most cases[1]) went on to work on the SST Litigation. These Staff Attorneys individually averaged nearly 2,200 hours doing discovery work in the BNY Mellon Action. In addition to reviewing and coding documents, the Staff Attorneys prepared highly detailed witness kits and memos to assist the lead attorneys in preparing for depositions. In most cases the documents used in the depositions were hand-picked by the Staff Attorneys. The Staff Attorney efforts were summarized in a declaration submitted by Prof. John C. Coffee of Columbia Law School (being produced with these answers), who noted the fact that private customer counsel (including LCHB) did most of the work and bore most of the expense in achieving the successful global resolution of that case not

[1] Four of the thirteen Staff Attorneys who worked on both the BNY Mellon Action and SST Litigation did at least some work in the SST Litigation before discovery in the BNY Mellon Action was concluded. These were Kelly Gralewski, Joshua Bloomfield, Leah Nutting, and Scott Miloro. Of these four individuals, Ms. Gralewski did the fewest number of hours of discovery work in the BNY Mellon Action (just over 300), and was the only one not to work on the SST Litigation after 2014. The other three individuals did well over 2,000 or 3,000 hours of work (each) in the BNY Mellon Action, and worked on the SST Litigation both before and after 2014.

just for the benefit of the customer classes but also the DOJ, NYAG, and the United States Department of Labor ("DOL") (which did not file a case).

The Firm's experience in the BNY Mellon Action greatly informed the Firm's understanding of both the challenges to and likelihood of success of the claims asserted in the SST Litigation, and the nature and extent of discovery likely to be necessary both to successfully certify a class and prevail at trial. The BNY Mellon Action was a vivid demonstration of how intense and extensive a process the litigation would be should State Street adopt a similarly aggressive defensive posture [redacted]. Perhaps most importantly, however, the fact that the Firm was able to achieve a successful outcome in the BNY Mellon Action after withstanding (along with co-counsel) an extraordinarily aggressive defense was the most important tipping point in the mediation with State Street. The BNY Mellon Action demonstrated to State Street that at least two of the firms they were facing (LCHB and Thornton) had been through the gauntlet of counterclaims and third party discovery in a custodial FX case, which almost certainly cost BNY Mellon more than $100 million in defense costs, and still achieved a highly successful settlement for the class while becoming experts in custodial FX in the process. In short, the Firm had developed into an even more formidable adversary to State Street than when the SST Litigation began. Only after the BNY Mellon Action was settled and preliminary approval papers were filed did the mediation with State Street [redacted]. The DOJ, SEC and DOL, for their part, also all used the global resolution of the BNY Mellon Action as the yardstick for achieving global resolution of their potential claims against State Street.

Daniel P. Chiplock, LCHB Partner has the most extensive knowledge of the information provided in this Response. Robert L. Lieff, LCHB Of Counsel, Richard M. Heimann, LCHB Partner, Steven E. Fineman, LCHB Managing Partner, and Lexi Hazam, LCHB Partner, each have some knowledge of some of the information provided in this Response.

INTERROGATORY NO. 5:

Explain how and when the Law Firm became involved in the SST Litigation, including any conversations between and among the Firm and ARTRS, the Plaintiffs' Law Firms, and/or the ERISA firms.

RESPONSE TO INTERROGATORY NO. 5:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

The Firm had no conversations with ARTRS or the ERISA firms before becoming involved in the SST Litigation. Prior to the initiation of the SST Litigation, the Firm worked with Thornton on the California Action and the investigation of possible claims by other State Street custodial customers. Based on the Firm's prior working relationship with Thornton and the Firm's expertise and institutional knowledge concerning custodial FX pricing practices, the Firm was invited to participate in the SST Litigation by Thornton and Labaton after ARTRS (who was Labaton's client) elected to proceed with the filing of a class action against State Street.

Daniel P. Chiplock, LCHB Partner and Robert L. Lieff, LCHB Of Counsel have the most knowledge of the information provided in this Response. Richard M. Heimann, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner each have some knowledge of some of the information provided in this Response.

INTERROGATORY NO. 6:

Describe the role played by the Law Firm in filing the substantive claims alleged in the SST Litigation, including the filing of the Complaint (Docket #1) and/or the Amended Complaint (Docket #10), a description of any legal or factual research performed, consultations with State Street, legal drafting and/or review of pleadings.

RESPONSE TO INTERROGATORY NO. 6:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad, and seeks information not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

The Firm worked closely from the outset with the other Plaintiffs' Law Firms in, among other things, (a) researching potential causes of action against State Street for overcharging custodial customers on FX trades, (b) drafting both the Complaint and Amended Complaint, (c) briefing Plaintiff's opposition to Defendants' motion to dismiss (with particular responsibility for (i) countering Defendants' statutes of limitations arguments and (ii) supporting Plaintiff's claims under M.G.L. ch. 93A), and (d) researching and drafting memoranda on the viability of class certification (particularly as applied to M.G.L. ch. 93A). The Firm was principally responsible for developing the M.G.L. ch. 93A theory of liability in the SST Litigation, which was particularly valuable since it allowed for double or treble damages (plus prejudgment interest) and (as directed against a Massachusetts-based company and conduct) provided a potentially more readily-certifiable class claim for State Street custodial customers from across the country. During the mediation, the Firm took the lead in researching and presenting on the viability of

class certification under M.G.L. ch. 93A in particular, as well as the availability of double or treble damages and the elements and standards of proof necessary to achieve those results.

Daniel P. Chiplock, LCHB Partner has the most extensive knowledge of the information provided in this Response. Michael J. Miarmi, LCHB Partner also has some knowledge of the information provided in this Response.

INTERROGATORY NO. 8:

Describe the Firm's theory of damages, including an estimate of total damages to the customer and/or ERISA classes, whether this theory changed throughout the course of the SST Litigation, and if so, what factors affected the Firm's theory and total calculation of estimated damages.

RESPONSE TO INTERROGATORY NO. 8:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad, and seeks information not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Plaintiff's basic theory of damages remained fairly consistent throughout the SST Litigation, and consisted essentially of the difference between the prices on FX trades that State Street readily obtained and charged in a competitive marketplace for its custodial customers when dealing with them in a negotiated context, and the prices that State Street actually charged to those same customers when performing comparable trades (involving the same currencies) on an "indirect" or non-negotiated context. The same basic theory of damages underlay the BNY Mellon Action. Even independent of discovery from State Street, analyses that used the average

(or mid-rate) exchange price of the day for major currencies such as USD to British Sterling, Euros, Australian Dollars, or Japanese Yen showed that the "spreads" taken by custodial banks (such as State Street or BNY Mellon) could increase from 2-4 basis points (on a direct, negotiated basis) to 12-20 basis points or more when the trades were done on an indirect or non-negotiated basis. Spreads taken on indirect FX trades for non-major currencies could be even greater, often more than 60 basis points, although the total volume of such trades tended to be smaller than for the major currencies.

Information exchanged during the mediation from State Street confirmed that the spreads taken by State Street on indirect, non-negotiated trades were indeed many multiples of those taken in a direct, negotiated context.[2] In sum, State Street applied fixed markups or markdowns, measured by basis points, to its SSH[3] and AIR[4] indirect FX trades during the class period alleged. The application of the fixed spreads was limited in two circumstances. First, State Street would "net" all of an investment manager's ("IM's") SSH trades in a given currency prior to execution, reducing the amount of currency traded, and, therefore, the total markup or markdown applied to the IM's clients' trades. Second, for SSH trades, the fixed spread markups and markdowns were limited by the high or low of the range of the day. Thus, if the difference between the starting point of the indirect pricing process and the high or low of the day was less than the fixed spread, State Street only applied a markup or markdown to the extent of the high

[2] *See* ¶¶ 121-125 of the Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs [ECF No. 104].
[3] "SSH" refers to Securities Settlement and Handling, meaning purchases and sales of foreign securities.
[4] "AIR" refers to Automated Income Repatriation, meaning dividend and income payments on foreign securities.

or low rate and not beyond. State Street referred to the spread achieved on indirect FX trades after the application of such "netting" and "capping" as the "effective" spread. Plaintiffs' Counsel began with the dollar volume of SSH indirect FX trades for each year for 1998 through 2009. The average effective markup across all currency pairs for SSH trades for 2009 was a narrow basis point range. Plaintiffs' Counsel multiplied the sum total of SSH volume for 1998-2009 by the high end of State Street's stated range of effective markups, to estimate damages on SSH trades at approximately $1.177 billion. Plaintiffs' Counsel then took the dollar volume of AIR indirect FX trades for each year for 1998 through 2009. The volume is a small fraction of the SSH volume. Plaintiffs' Counsel multiplied the annual AIR volume for 1998-2009 by the known markups for each year to estimate damages on AIR trades at approximately $314.49 million.

Based on this information, the total estimated losses to the U.S.-based customer class for the wrongful acts alleged in the SST Litigation were nearly $1.5 billion, before the doubling or trebling (and prejudgment interest) that may have been possible should the class have prevailed on its M.G.L. ch. 93A claim at trial. The total volume of affected trades attributable to ERISA plans (and thus losses potentially actionable under ERISA) was estimated to be anywhere between 9 and 15% of the total.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response. Kirti Dugar, Litigation Support, has knowledge of some of the information provided in this Response.

INTERROGATORY NO. 9:

Identify and describe all risk factors you considered prior to getting involved in the SST Litigation, including any "bad facts," meritorious defenses and/or unsettled legal issues, or other circumstances that affected the potential outcome and total damages recoverable in the case.

RESPONSE TO INTERROGATORY NO. 9:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad, and seeks information not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Some of the risk factors considered prior to getting involved in the SST Litigation included (a) whether or not a custodial bank such as State Street properly could be considered a fiduciary to a custodial customer when offering an elective or courtesy service such as indirect FX trading, where the custodian was acting as a principal on such trades; (b) whether the fact that some custodial customers who engaged in direct/negotiated FX trading while also utilizing indirect FX trading by State Street could undermine Plaintiff's essential theory of the case (in other words, if indirect trading was believed to incur "no charge," why would any putative class member go to the trouble of trading directly with State Street, which took more time and effort?); (c) whether a multi-state class of custodial customers could be certified under the causes of action alleged, particularly a single state's consumer protection law such as M.G.L. ch. 93A; (d) whether statutes of limitation posed risks, given that it was possible to detect adverse FX pricing patterns in one's trades provided one was inspired to look (i.e., by comparing prices achieved to the daily range on the applicable trading days, and consistently comparing them to the mid-rates

of each day); (e) the general reluctance of custodial customers to be in an adverse litigation posture with respect to their custodian; (f) the threat that State Street could turn the tables and file contractual counterclaims and take aggressive discovery of plaintiffs, multiple class members and/or their investment advisors and consultants in an attempt to shift the blame for class member losses (which is precisely what BNY Mellon did); and (g) whether custodial customers of State Street fit the profile of "persons" or businesses that were "engaged in trade or commerce" as contemplated under M.G.L. ch. 93A sections 9 or 11, respectively (the latter of which may require a higher burden of proof).

Daniel P. Chiplock, LCHB Partner has the most extensive knowledge of the information provided in this Response. Richard M. Heimann, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner, each have some knowledge of some of the information provided in this Response.

INTERROGATORY NO. 18:

Describe in detail the nature and the scope of the SST Document Review, including the total number of pages and/or size of the productions, the nature and date of each document production(s) received from State Street, all other document production(s) received in connection with the Litigation, and a general description of the information contained in each production.

RESPONSE TO INTERROGATORY NO. 18:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad. Subject to and without waiving those objections, LCHB responds as follows:

State Street's productions largely took place between December 2012 and November/December 2013. The initial production (in December 2012) of more than 300 CDs

and a hard drive consisted principally of materials gathered and produced by State Street in the California Action, and totaled more than 260,000 documents. The latter productions (bringing the total number of documents to be reviewed in the database to more than 750,000 (including 84,000 native Excel files), and more than 9 million pages or 500 gigabytes) included documents produced by State Street in *Hill v. State Street Corporation*, No. 09-cv-12146-GAO (D. Mass.) (a securities fraud lawsuit filed in the wake of the disclosure of the California Action which contained overlapping allegations of unfair or deceptive custodial FX pricing practices by State Street), in addition to ERISA client contracts and RFP responses. The productions contained, among other things, internal and external email correspondence, custodial contracts and fee schedules, marketing materials, internal compliance and training manuals, investment manager guides, internal and external presentations, analyst reports, customer surveys, codes of conduct, competitive analyses, draft RFP responses, and FX revenue/profit and loss reports.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 19:

Describe in detail how the Law Firm conducted the SST Document Review, including how it selected and/or staffed Staff Attorneys, a description of all training binders/protocols or search terms used for Document Review, and a brief description of the tasks assigned to Staff Attorneys and any other individuals who participated, and how those tasks furthered the Firm's overall litigation strategy.

RESPONSE TO INTERROGATORY NO. 19:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. LCHB further objects to this

Interrogatory on the grounds that it is vague, overbroad, and duplicative of Interrogatory Nos. 18, 20, 22, 28-30, and 33. Subject to and without waiving those objections, LCHB responds as follows:

The Firm refers to and incorporates its responses to Interrogatory Nos. 18, 20, 22, 28-30, and 33. In addition, the Firm responds that LCHB Staff Attorneys were selected in large part from the pool of Staff Attorneys who had worked previously or simultaneously on the BNY Mellon Action and acquired substantial relevant experience concerning custodial FX trading in general, indirect (or "standing instructions) vs. direct/negotiated FX pricing, and custodial FX marketing. These Staff Attorneys included Tanya Ashur, Joshua Bloomfield, James Gilyard, Kelly Gralewski[5], Christopher Jordan, Jason Kim, James Leggett, Andrew McClelland, Scott Miloro, Leah Nutting, Marissa Oh, Virginia Weiss, and Jonathan Zaul. These Staff Attorneys averaged nearly 2,200 hours of work in the BNY Mellon Action (which had a discovery cut-off of January 2015), during which time they helped the lead attorneys prosecuting that case (including Mr. Chiplock) to prepare for and defend scores of depositions. Three other LCHB Staff Attorneys did not have prior or related experience from the BNY Mellon Action—these were Elizabeth Brehm, Jade Butman, and Coleen Liebmann. Two other Staff Attorneys—Ann Ten Eyck and Rachel Wintterle—were hired in March 2015 from an agency that was paid directly by Thornton. The purpose of the work performed by the Staff Attorneys—first by reviewing and coding all documents assigned to them and then by preparing detailed discursive memos on a number of topics of special concern to the litigation—was to synthesize and present the information produced by State Street in as useful a manner as possible so as to prepare the lead attorneys in the case for the next phase of the litigation (follow-up targeted discovery,

[5] *See* FN 1, *supra*.

depositions, and class certification) in the event the mediation ended without the case being resolved.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have the most knowledge of the information provided in this Response.

INTERROGATORY NO. 20:

Describe how the Law Firm utilized the Catalyst database, including all persons who had access to the database, any electronic and/or technical training provided to those individuals, and a description of the information maintained in the Catalyst database during the course of the SST Document Review.

RESPONSE TO INTERROGATORY NO. 20:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is overbroad to the extent it seeks information about those who accessed the database at the direction of Thornton or Labaton. LCHB further objects to the extent this Interrogatory is duplicative of Document Request No. 1 and Interrogatory No. 18. Subject to and without waiving those objections, LCHB responds as follows:

All Staff Attorneys had access to the Catalyst database, as did Kirti Dugar and Litigation Support Staff which included Anthony Grant and former Firm employees Willow Ashlynn and Erwin Ocampo. Online technical training on the database was provided by Kirti Dugar in conjunction with staff at Catalyst. The information maintained in the Catalyst database consisted of material produced by State Street in the SST Litigation, including documents and data previously produced by State Street in the California Action and other litigation brought against State Street. The productions contained, among other things, internal and external email correspondence, custodial contracts and fee schedules, marketing materials, internal compliance

and training manuals, investment manager guides, internal and external presentations, analyst reports, customer surveys, codes of conduct, competitive analyses, draft RFP responses, and FX revenue/profit and loss reports.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 21:

Describe in detail all documents destroyed and/or deleted from the Catalyst database, including the date, and explain why each document was deleted/destroyed.

RESPONSE TO INTERROGATORY NO. 21:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it lacks foundation. LCHB further objects on the grounds that this Interrogatory is overbroad to the extent it seeks information about the actions of those who accessed the database at the direction of Thornton or Labaton. Subject to and without waiving those objections, LCHB responds as follows:

We do not believe that any documents were destroyed or deleted from the Catalyst database. The Catalyst repository was taken offline and the service provided by Catalyst ceased after an agreement in principle to resolve the SST Litigation was reached. However, the underlying document database was saved and shipped to the Firm on an external hard drive that can be restored on other platforms, including Concordance or Relativity.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 22:

Identify and describe any training the Firm provided to Staff Attorneys relating to the substantive allegations in the SST Litigation/SST Document Review, including addressing all legal issues, key witnesses, theories of liability, damages, and critical topics raised in the case.

RESPONSE TO INTERROGATORY NO. 22:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

Staff Attorneys were instructed to review relevant pleadings in the SST Litigation, including the Amended Class Action Complaint and Plaintiff's Memorandum of Law in Opposition to Defendants' to Dismiss [ECF No. 22], as well as a Document Review Coding Fields Quick Reference Guide, in which issue codes were listed and followed by a brief description of their relevance to the case. In addition to these materials, the emails communicating assignments of proposed topics for the factual, legal, and/or discursive memoranda prepared by Staff Attorneys (discussed further below in response to Interrogatory No. 30) contained descriptions, context and/or explanations for the topics assigned. Staff Attorneys also received periodic emailed descriptions or guidance on issues of specific interest to the litigation and document review from Mr. Dugar or the lead attorneys on the SST Litigation.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 26:

Identify any other individuals who worked on the SST Document review who were not Staff Attorneys and explain their affiliation with the Law Firm, their employment status, and how they were compensated for their time.

RESPONSE TO INTERROGATORY NO. 26:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is overbroad to the extent it seeks information about those who accessed the database at the direction of Thornton or Labaton. LCHB further objects to the extent this Interrogatory on the grounds that how any LCHB employee was "compensated for their time" is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Kirti Dugar, Litigation Support Manager and the firm's chief financial analyst, was the on-site supervisor of document review in San Francisco. Mr. Dugar is employed full-time by the Firm and is paid a salary. Apart from providing oversight or responding to questions by Staff Attorneys (as Mr. Chiplock and, to a lesser extent, Mr. Diamand did) or providing technical or logistical support (as did members of our Litigation Support department), no other Law Firm employees worked on the SST Document review.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 28:

Explain how the Firm supervised and/or performed quality control of the work performed by the Staff Attorneys and others who participated in the SST Document Review, including the name, title, and tasks performed by any supervising individual.

RESPONSE TO INTERROGATORY NO. 28:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is overbroad to the extent it seeks information about those

who performed "work" in the SST Litigation at the direction of Thornton or Labaton. Subject to and without waiving those objections, LCHB responds as follows:

For the most part, Kirti Dugar, the Firm's chief financial analyst and head of the Firm's Litigation Support department in San Francisco, supervised the Staff Attorneys on a day-to-day basis. As necessary, Mr. Dugar consulted with the lead attorneys on the case (principally, Mr. Chiplock) as to Staff Attorney work assignments, issues of specific concern and emphasis for the litigation (and therefore the document review), and specific coding questions as they arose. Mr. Dugar was also the Firm's chief internal expert on currency exchange trading throughout both this litigation and the BNYM litigation, having performed estimated damage analyses for several potential clients and class-members himself. Mr. Dugar has over 25 years of experience trading derivatives in financial instruments, equity indices and commodities, including particularly foreign exchange futures and options traded on the Chicago Mercantile Exchange. Mr. Dugar was a key member of the team (led by Richard Heimann, a named partner in our San Francisco office) that analyzed potential claims that could be asserted by the [redacted] against State Street. As a result of that analysis and presentation [redacted], which included a detailed Powerpoint presentation by Mr. Dugar on possible damages, [redacted] achieved a pre-filing settlement with State Street worth roughly 100% of their estimated losses from State Street's FX trading practices. The Firm received no acknowledgement or payment for this.

In addition to Mr. Dugar, Nicholas Diamand, a partner in our New York office, and Mr. Chiplock performed some supervision of Staff Attorneys who worked remotely or in the New York area. Mr. Diamand's emphasis was on timekeeping and ensuring that Thornton received accurate and timely records of work performed by Staff Attorneys whose hours were Thornton's

financial responsibility. Quality control of the work performed by Staff Attorneys was done by way of periodic review by the lead attorneys at the Plaintiffs' Law Firms of "hot documents" as identified by the Staff Attorneys, as well as secondary review of such documents by Staff Attorneys with prior extensive experience in the BNY Mellon Action.

Daniel P. Chiplock, LCHB Partner, Nick Diamand, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 29:

Explain in detail the job responsibilities and tasks performed by the Staff Attorneys assigned to the SST Document Review, including those Staff Attorneys allocated to Thornton, including but not limited to, coding, deposition preparation, creation of witness kits and similar work.

RESPONSE TO INTERROGATORY NO. 29:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

The Staff Attorneys' job responsibilities and tasks consisted entirely of detailed document review and issue analysis in the case. This included subjective reviewing and coding of all documents produced by State Street for six degrees of relevance and/or strength or weakness in support of Plaintiff's theory of the case. In addition to coding for relevance, Staff Attorneys also identified specific issues and subject matters touched on by each of the documents so that they could be sorted and searched by subject matter or issue at a later date. Where necessary, Staff Attorneys had the ability to enter attorney notes to explain or clarify the decision behind a coding determination. There were more than 30 different issue or document-type codes available for assignment by Staff Attorneys to the documents they reviewed. The initial review

of State Street's documents was largely completed by the end of April 2015, after which the Firm's Staff Attorneys were tasked with preparing detailed memoranda on approximately 18 (out of more than 50) selected themes, issues or witnesses to be further developed in depositions and follow-up discovery. Each memo contained hyperlinks to supporting documents from State Street's production, with some memos exceeding 100 pages.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 30:

Describe the process for assigning and reviewing factual, legal, and/or discursive memoranda prepared by Staff Attorneys, including how such memoranda were relevant to, used as part of the SST Litigation, and/or shared among counsel.

RESPONSE TO INTERROGATORY NO. 30:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

The proposed topics for the factual, legal, and/or discursive memoranda prepared by Staff Attorneys were assigned to the Staff Attorneys beginning in April 2015 as the initial review was nearing completion. The proposed topics (of which there were ultimately more than 50) were developed principally by Michael Lesser of the Thornton Law Firm, and were divided up and assigned via email to the Staff Attorneys at each Plaintiffs' Law Firm. The purpose of the memos was to synthesize the state of the firms' knowledge as to key issues concerning liability and proof based strictly on State Street's own documents at the time, and to lay the groundwork for the next phase of discovery—i.e., further document requests, interrogatories, depositions, and requests for admission—in the event mediation ended without resolution of the case. The

memos were circulated to the lead attorneys at each firm on a rolling basis after they were completed. Had the mediation ended without resolution of the case, the memos would have formed the principal repository of knowledge for the lead attorneys as they geared up for the next phase of the litigation.

Daniel P. Chiplock, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 33:

Explain the origin of the cost-sharing agreement with Thornton through which the Firm agreed to allocate the costs associated with a certain number of Staff Attorneys to Thornton, including the names and descriptions of all other matters in which the Firm entered into a similar arrangement (whether or not documented) to share costs with other firms, prior to or after the SST Litigation.

RESPONSE TO INTERROGATORY NO. 33:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

The Firm agreed, based on a telephonic request made in January 2015 by Garrett Bradley of the Thornton Law Firm to Mr. Chiplock, to either host or share financial responsibility for several Staff Attorneys based on Mr. Bradley's description of Thornton's physical space and facilities as being too limited to host a sufficient number of Staff Attorneys. The Firm's agreement to do this was based on and consistent with the general understanding by Thornton, Labaton, and the Firm throughout the litigation that the firms would strive to share the costs of the litigation equitably.

In *In re Lithium Ion Batteries Antitrust Litigation*, No. 4:13-md-02420-YGR (N.D. Cal.),

between September 2014 and February 2016, LCHB hosted in its New York office a Staff Attorney paid by another law firm. That Staff Attorney had previously worked for LCHB reviewing and translating documents from Japanese to English. In the *Batteries Antitrust* case that Staff Attorney was paid by the other firm, reported to the other firm, and helped prepare that firm's lawyers for depositions concerning the documents the Staff Attorney was reviewing and translating.

Daniel P. Chiplock, LCHB Partner, Steven E. Fineman, LCHB Partner, and Kirti Dugar, Litigation Support, have knowledge of the information provided in this Response.

INTERROGATORY NO. 34:

Describe the Firm's understanding, in or about early 2015, as to how Thornton would account for the allocation/sharing of costs for certain of the Firm's Staff Attorneys in its Fee Petition, including the Firm's understanding as to which firm was responsible for reporting the total number of hours worked by those Staff Attorneys on its Fee Petition and/or Lodestar calculation.

RESPONSE TO INTERROGATORY NO. 34:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

In or about early 2015, it was the Firm's understanding that Thornton would include in its lodestar total (to be reported in any Fee Petition submitted by Thornton) any hours worked by Staff Attorneys for which Thornton had borne financial responsibility.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 38:

Describe in detail the process through which the Law Firm invoiced or otherwise sought reimbursement from Thornton for costs of those Staff Attorneys allocated to Thornton as part of the SST Litigation/Document Review.

RESPONSE TO INTERROGATORY NO. 38:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

Invoices for work performed by Staff Attorneys Zaul and Jordan between February 9 and April 10 or 13, 2015 were prepared by the Firm's Accounting Department and emailed by Mr. Diamand of our Firm to Evan Hoffman at the Thornton Law Firm on April 24, 2015. These communications have been produced to the Special Master.

Daniel P. Chiplock, LCHB Partner and Nick Diamand, LCHB Partner, have knowledge of the information provided in this Response, as do staff in the Firm's Accounting Department in San Francisco.

INTERROGATORY NO. 39:

Explain the Firm's process for removing time reported by Staff Attorneys allocated to Thornton for whom Thornton reimbursed the Firm, from the Firm's Fee Petition, including the role of the Firm's Accounting Department, and explain why time reported by Christopher Jordan and Jonathan Zaul for reviewing Thornton folders 2/9/15 to 4/14/15 was not removed from the Firm's timekeeping records.

RESPONSE TO INTERROGATORY NO. 39:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

Shortly after discovering the inadvertent inclusion of time reported by Staff Attorneys Zaul and Jordan in LCHB's lodestar total and Fee Petition for work performed between February 9 and April 10 or 13, 2015, Mr. Chiplock instructed the Firm's Accounting Department to remove all such time from LCHB's time records. This instruction was given in November 2016, shortly after the error was discovered and the November 10, 2016 corrective letter was submitted to the Court. This error appears to have been due to miscommunication in the February – May 2015 timeframe between and among the lead attorney on the case (Mr. Chiplock), the partner tasked with ensuring that time was correctly reported and invoiced to Thornton (Mr. Diamand), the person overseeing Staff Attorneys on a day-to-day basis (Mr. Dugar), the Firm's Accounting Department, and the Firm's Human Resources Department. Although great care was taken to ensure both that Thornton was accurately invoiced for this time and that Thornton received contemporaneous reports of this time (with multiple communications exchanged on these topics), the Accounting Department apparently did not receive a direct instruction from any of the individuals listed above to remove this time from the Firm's timekeeping records once the Accounting Department had received payment from Thornton. This was a pure oversight and not intentional.

When reviewing the Firm's detailed lodestar report prior to submitting the Fee Petition (which took place more than a year later), Mr. Chiplock was under the mistaken belief that any Staff Attorney time for which Thornton was financially responsible was not included in the Firm's timekeeping records. The simple fact that a time entry may have indicated review of "Thornton Naumes folders," or something similar, was not by itself indicative of the need to eliminate that time from the Firm's timekeeping records prior to submitting the Fee Petition

because some of that work, which was done in 2015, was not ultimately paid for by Thornton, and some Staff Attorneys were shifted between firms.

Daniel P. Chiplock, LCHB Partner has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 40:

Explain the Firm's process for removing time reported by Staff Attorneys allocated to Thornton for whom Thornton paid directly through a third-party staffing agency from the Firm's Fee Petition, including the role of the Firm's Accounting Department, and explain why time reported by Staff Attorneys Ann Ten Eyck and Rachel Wintterle for work performed from March through June 2015, was not removed from the Firm's timekeeping records.

RESPONSE TO INTERROGATORY NO. 40:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

Staff Attorneys Andrew McClelland and Virginia Weiss were paid through an outside agency for their work on the SST Litigation. During the February to mid-April 2015 timeframe, that agency was paid directly by Thornton for the work done by these two attorneys. The corresponding time for these two attorneys during that period was accordingly not entered into the Firm's timekeeping records in the first place, and was instead included in Thornton's timekeeping records. Mr. McClelland left his employment with LCHB and Thornton on or about March 27, 2015 to take a position at another firm. LCHB took back financial responsibility from Thornton for Ms. Weiss' hours on April 21, 2015, after which her time entries were included in LCHB's timekeeping records. In short, the Firm understands Mr. McClelland and Ms. Weiss' time entries to have been appropriately allocated between LCHB and Thornton, without

duplication. There was thus no need to remove any of their time entries from the Firm's timekeeping records.

Shortly after discovering the inadvertent inclusion of time reported by Staff Attorneys Wintterle and Ten Eyck for work performed from March through June 2015 in LCHB's lodestar total and Fee Petition, Mr. Chiplock instructed the Firm's Accounting Department to remove all such time from LCHB's time records. This instruction was given in November 2016, shortly after the error was discovered and the November 10, 2016 corrective letter was submitted to the Court. The Firm believes that Ms. Wintterle's and Ms. Ten Eyck's time was inadvertently included in LCHB's time reports in the first place due to an error in their initial training, which may have been made possible by the unfortunate simultaneous absence of several key people in our San Francisco office when Ms. Wintterle and Ms. Ten Eyck commenced work. In our investigation, the Firm concluded that while working in the Firm's offices, Ms. Wintterle and Ten Eyck regularly submitted their time reports directly to the Firm's Word Processing department for entry into the Firm's timekeeping system. While this would have been ordinary practice for Staff Attorneys employed or contracted by the Firm, Ms. Wintterle and Ten Eyck should have been instructed not to do so. The apparent fact that they were not so instructed appears to be due to an honest mistake on the part of whoever trained them on Firm timekeeping policies when they commenced work in our San Francisco office in March 2015. At that time, our regular San Francisco-based Human Resources Department staffer in charge of Staff Attorney hiring and training (Thony You) was out on maternity leave, and our regular time entry staffer (Christine Dunev) was on a leave of absence. Mr. Dugar, who had the most day-to-day interaction with Staff Attorneys in our San Francisco office, was also out for several weeks in March 2015 visiting relatives in India. Ms. Wintterle and Ms. Ten Eyck accordingly may have

been trained on timekeeping protocols by someone in the Firm's Information Technology ("IT") department who lacked specific knowledge of their status as outside attorneys being paid for by Thornton. In short, due to personnel issues, Ms. Ten Eyck and Ms. Wintterle do not appear to have received the same timekeeping training that Mr. McClelland and Ms. Weiss received earlier that year (and whose time, as described above, was correctly allocated).

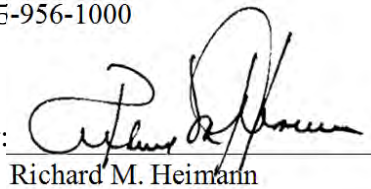
When reviewing the Firm's detailed lodestar report prior to submitting the Fee Petition (which took place more than a year after the document review ended), Mr. Chiplock was under the mistaken belief that any Staff Attorney time for which Thornton was financially responsible was not included in the Firm's timekeeping records. The simple fact that a time entry may have indicated review of "Thornton Naumes folders," or something similar, was not by itself indicative of the need to eliminate that time from the Firm's timekeeping records prior to submitting the Fee Petition because some of that work, which was done in 2015, was not ultimately paid for by Thornton, and some Staff Attorneys were shifted between firms.

Daniel P. Chiplock, LCHB Partner, and Kirti Digar, Litigation Support have knowledge of the information provided in this Response.

Dated: June 1, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: 
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES DUE ON JUNE 9, 2017

In accordance with the Federal Rules of Civil Procedure, Lieff Cabraser Heimann & Bernstein, LLP ("LCHB" or the "Firm") hereby responds to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories (the "Interrogatories"), propounded on LCHB on May 18, 2017, as revised on May 23, 2017, and due on June 9, 2017.

GENERAL OBJECTIONS

LCHB makes the following general objections, which are incorporated by reference into each Interrogatory response, whether or not a specific further objection is made with respect to a specific Interrogatory. Each Interrogatory response incorporates, is subject to and does not waive the general objections.

1. LCHB objects to the Interrogatories and Instructions to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or that otherwise is privileged, protected or exempt from discovery.

2. LCHB objects to the Interrogatories and Instructions to the extent they purport to impose obligations that differ from or exceed those imposed by the Federal Rules of Civil Procedure, particularly Rule 33, and by any court decisions interpreting those Rules.

3. LCHB objects to the Interrogatories and Instructions to the extent they seek information beyond the scope of, or not relevant to, the Courts' February 6, 2017 Memorandum and Order in the above-referenced cases.

4. In responding to the Interrogatories, LCHB has made reasonable efforts to respond based on its understanding and interpretation of each Interrogatory. If the Special Master subsequently asserts a reasonable interpretation of an Interrogatory which differs from that of LCHB, LCHB reserves the right to supplement its responses.

5. LCHB will make all reasonable efforts to respond to the Interrogatories on or before the dates specified in the Special Master's May 23, 2017 revised Interrogatories. LCHB, however, reserves the right to supplement its responses should it require additional time, and/or should responsive information be discovered following the designated dates for the responses.

6. LCHB objects to Definition No. 1 and Instruction B, to the extent they seek Interrogatory responses from any source other than the Law Firm, its partners, associates, of counsel, employees and contractors. LCHB has no "affiliates," and no "agents" or "representatives" that are or would be in the possession of responsive information.

RESPONSES TO THE INTERROGATORIES

INTERROGATORY NO. 17:

Describe in detail all agreements between the Firm/Plaintiffs' Law Firms, on the one hand, and the ERISA firms, on the other, to allocate to the ERISA firms a fixed percentage of the total Fee Award rendered by the Court in the SST Litigation. As to any agreement that did not represent the final agreement for allocation of the Fee Award, explain the reason for modifying a previous agreement, including all persons involved in these discussions and their affiliation/firm.

RESPONSE TO INTERROGATORY NO. 17:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

A written agreement dated on or about December 11, 2013 was entered into by Plaintiffs' Law Firms and the ERISA firms to allocate 9 percent of the total Fee Award rendered by the Court in the SST Litigation to the ERISA firms. On or about August 30, 2016, Plaintiffs' Law Firms agreed amongst themselves to increase the percentage of the total Fee Award to be

allocated to the ERISA firms to 10 percent. Mr. Chiplock believes that this was done at the suggestion of Lawrence Sucharow at Labaton, to which counsel from the other Plaintiffs' Law Firms (Michael Thornton, Daniel Chiplock, and Robert L. Lieff) agreed, and that the increase was to recognize the role that certain counsel from the ERISA firms (in particular, Lynn Sarko and Carl Kravitz) played in the mediation and in liaising with the DOL.

Daniel P. Chiplock, LCHB Partner, and Robert L. Lieff, LCHB Of Counsel, have knowledge of the information provided in this Response.

INTERROGATORY NO. 37:

Explain what knowledge, if any, the Firm had about the existence of a cost-sharing agreement(s) (formal or informal) between Labaton and Thornton to allocate and/or share costs for certain of Labaton's Staff Attorneys assigned to work on the SST Litigation.

RESPONSE TO INTERROGATORY NO. 37:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome to the extent it seeks information LCHB has provided in other Interrogatory responses, or in the production of documents in this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

The Firm was aware that beginning in or shortly after January 2015, both Labaton and LCHB would be either hosting or sharing costs for certain Staff Attorneys with Thornton in order to try to equitably share such costs for the SST Document Review with Thornton. The Firm was not aware of any similar arrangement between Labaton and Thornton prior to that date.

Daniel P. Chiplock, LCHB Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 43:

Describe what knowledge, if any, the Firm had in early 2015 about Michael Bradley's involvement in the SST Litigation, including any knowledge of Thornton's agreement to pay Mr. Bradley an agreed-upon rate of $500/hour.

RESPONSE TO INTERROGATORY NO.43:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

In early 2015, LCHB had no knowledge of Michael Bradley's involvement in the SST Litigation or Thornton's agreement to pay Mr. Bradley an agreed-upon rate of $500/hour.

Daniel P. Chiplock, LCHB Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 44:

Identify and describe all communications relating to Michael Bradley's participation in the SST Litigation/SST Document Review from 2010 through November 2016, including relating to compensation or an hourly billing rate that Thornton would charge for Mr. Bradley's time spent on the matter.

RESPONSE TO INTERROGATORY NO. 44:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is overbroad and burdensome to the extent it seeks information not in the possession of LCHB. Subject to and without waiving those objections, LCHB responds as follows:

LCHB was not part of any communications at all relating to Mr. Bradley's participation in the SST Litigation/SST Document Review from 2010 through November 10, 2016. After that

date, LCHB received several emails from attorneys at Labaton and Thornton inquiring whether it was possible to document through the Catalyst database or user data any time that Mr. Bradley spent on the Catalyst database. Mr. Dugar of our Firm confirmed that this was not possible due to the Catalyst database having been taken offline more than a year prior (2015). LCHB was not part of any communications at any time relating to compensation or an hourly billing rate that Thornton would charge for Mr. Bradley's time spent on the matter, and accordingly can identify no such communications.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response. Kirti Dugar, Litigation Support Manager, has knowledge of some of the information provided in this Response.

INTERROGATORY NO. 47:

Explain how the Law Firm determines annual billing rates for all attorneys, including Staff Attorneys. Please identify and describe all factors considered and/or resources relied upon in making these determinations.

RESPONSE TO INTERROGATORY NO. 47:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad and that it provides no timeframe for the information sought. LCHB further objects to this Interrogatory on the grounds that it is burdensome in that this information was or could have been elicited during the deposition of Steven E. Fineman in this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

LCHB determines annual billing rates for all Firm attorneys, including Staff Attorneys, in January-February of each calendar year. In recent years, as reflected in documents produced by

LCHB in this proceeding, LCHB's billing rates have increased modestly on an annual basis. These annual adjustments are consistent with our understanding of the market rates for other plaintiff-side firms that handle complex and class litigation in the San Francisco and New York markets, where the vast majority of LCHB's attorneys, including Staff Attorneys, practice.

The process by which LCHB's annual billing rates are adjusted includes initial communication between the Firm's Managing Partner, Steven E. Fineman, and the Firm's Director of Operations, Joseph Dragicevic. During that initial communication (or communications), Mr. Fineman and Mr. Dragicevic discuss the changes in the relevant market places for legal services, the accessibility of publicly available information concerning the hourly rates of comparable plaintiff-side law firms and of "big law" firms in the New York and San Francisco markets. Such publicly available information may include publicly filed fee applications or published salary surveys. Based on the Firm's historical hourly rates, the collection of any new and instructive publicly available information about billable rates, and most importantly, based on what courts have said in the preceding year or years about the Firm's rates, Mr. Fineman makes a recommendation to the Firm's Executive Committee on adjustments to the Firm's billable rates for that calendar year. That recommendation is then typically discussed and approved at an Executive Committee meeting or as a result of subsequent e-mail communications or telephone conversations by and among members of the Executive Committee.

With respect to Staff Attorneys specifically, for a number of years prior to 2016, hourly rates were set to be consistent with the rates of "on-track" Firm attorneys with the same or comparable levels of experience. However, as our Staff Attorneys became increasingly experienced and senior, that approach began to result in rates the Firm felt were too high.

Therefore, beginning in 2016, all Firm Staff Attorneys who continued to work at the Firm billed at a rate of $415 per hour (the equivalent of a fourth year "on-track" associate). This rate was determined based on the Firm's understanding of the market for Staff Attorneys performing document review, coding and analysis, and the preparation of issue and witness memoranda in the kind of large complex cases handled by LCHB. The Firm determined this to be a fair and appropriate rate, even though LCHB's Staff Attorneys, by and large, have many more than four years of relevant experience (in the SST litigation, for example, five of the Staff Attorneys have more than 15 years of experience, six have between 10 and 15 years of experience, and six have between 5 and 10 years of experience). The Firm determined to set the same rate for all Staff Attorneys (including attorneys on LCHB's payroll and hired via agencies) beginning in 2016 as the functions of the Staff Attorneys are primarily the same and do not appreciably vary year to year (though the rates may gradually increase as the relevant market dictates). Thus far, courts that have considered our Staff Attorneys' rates have found them appropriate for purposes of lodestar crosscheck or lodestar fee payment.

Steven E. Fineman, LCHB's Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 48:

Please explain how the process described above does or does not vary in determining billing rates charged to hourly clients and why.

RESPONSE TO INTERROGATORY NO. 48:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad and that it provides no timeframe for the information sought. LCHB further objects to this Interrogatory on the grounds that it is

burdensome in that this information was or could have been elicited during the deposition of Steven E. Fineman in this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Although LCHB is normally compensated for legal services on a contingent fee basis, the Firm has occasionally represented plaintiffs on an hourly basis. In those instances, the Firm has charged its customary hourly rates (*see* Response to Interrogatory No. 47, above) unless otherwise agreed to by LCHB and a specific client. On occasion, the Firm has discounted its hourly rates in negotiation with specific hourly clients.

Steven E. Fineman, LCHB's Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 53:

Explain how the Firm adjusts its hourly rates to reflect the geographic region in which a matter is filed/pending. If the Firm does not adjust its rates, explain why not.

RESPONSE TO INTERROGATORY NO. 53:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad and that it provides no timeframe for the information sought. Subject to and without waiving those objections, LCHB responds as follows:

LCHB does not adjust its hourly rates to reflect the geographic region in which a matter is filed/pending. All of the Firms' "hourly" representations have taken place in California or New York – the principal places of the firm's business. In the vast majority of the Firm's class action cases, fees are provided for on a contingent, percentage of the recovery basis (subject to court approval), and therefore hourly rates are not an essential part of the representation. In

those instances in which a court in a class action case performs a lodestar crosscheck against a percentage of the recovery fee, or awards a fee based on lodestar, the Firm relies on its customary rates (*see* Response to Interrogatory No. 47, above). The Firm has never been advised by a court that its rates are inappropriate or unacceptable because they were not expressly predicated on the market rates in a jurisdiction other than California or New York.[1]

Steven E. Fineman, LCHB's Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 56:

Describe in detail how the Firm prepared the Fee Petition and identify all individuals who assisted in the preparation and the nature of their contribution(s).

RESPONSE TO INTERROGATORY NO. 56:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it vague and overbroad, and seeks information that is not relevant to the subject matter of this proceeding. LCHB further objects to the Interrogatory to the extent it seeks attorney work product. Subject to and without waiving those objections, LCHB responds as follows:

Daniel Chiplock prepared the individual Fee Petition for the Firm, which was submitted as an exhibit to the Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for an Award of Attorneys' Fees,

[1] A meaningful portion of the Firm's business involves representation of plaintiffs in federal multidistrict litigation proceedings based in jurisdictions throughout the United States. In such proceedings, to the extent the Firm's lodestar is relevant, it is always submitted as it is maintained in the normal course of business by the Firm. The same is true for all other plaintiff-side firms in MDL proceedings.

Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Sucharow Declaration"). Much of the language in the Firm's individual Fee Petition (particularly, the language in paragraph 5) was provided via template by Labaton. Staff in the Firm's Accounting Department supplied lodestar and cost reports for the duration of the SST Litigation to Mr. Chiplock. While drafting and finalizing the Firm's Fee Petition, Mr. Chiplock corresponded with Nicole Zeiss and David Goldsmith at Labaton, who provided edits and requests for formatting changes in the Firm's Fee Petition to Mr. Chiplock. Mr. Chiplock also supplied a small handful of edits to the Sucharow Declaration on or about September 13, 2016, mostly addressing the scope of the Staff Attorneys' work in the SST Litigation and specific questions concerning the settlement in the BNY Mellon Action.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 57:

Describe in detail any review or steps taken to scrutinize or verify the time reported by the Law Firm prior to submitting the Firm's Fee Petition/Lodestar calculation. If the answer is none, explain why.

RESPONSE TO INTERROGATORY NO. 57:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that the phrases "scrutinize or verify" is vague. Subject to and without waiving those objections, LCHB responds as follows:

Prior to submitting the Firm's Fee Petition/Lodestar calculation, on at least two separate occasions, Mr. Chiplock examined the Firm's timekeeping records with a particular eye toward ensuring that no time exclusively devoted to unrelated or separate matters (such as time spent on

individual *qui tam* cases or the California Action) was included in the time submitted with the Firm's Fee Petition.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 58:

Describe what, if any, steps the Law Firm took to review, verify, or compare the Fee Petitions and/or Lodestar calculations prepared by the Plaintiffs' Firms or ERISA firms with the Firm's Fee Petition prior to filing its Fee Petition with the Court. If no action was taken, explain why not.

RESPONSE TO INTERROGATORY NO. 58:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that the word "verify" is vague. Subject to and without waiving those objections, LCHB responds as follows:

The Firm was not privy to the individual Fee Petitions (whether in draft or final form) and/or complete Lodestar calculations prepared by the other Plaintiffs' Firms or ERISA firms prior to the filing of each Fee Petition with the Court, and thus was not able to review, verify, or compare them with the Firm's Fee Petition. To the best of the Firm's knowledge, only Labaton had access to all of the Plaintiffs' Law Firms Fee Petitions and complete Lodestar calculations before they were filed with the Court on September 15, 2016.

During the life of the SST Litigation, LCHB circulated its then-current lodestar reports to Labaton and/or Thornton on at least three occasions—on or about 12/9/13, 5/15/14, and 5/21/15—each time at the request of either Labaton or Thornton. LCHB reciprocally received Labaton's lodestar reports on at least two occasions—5/27/14 and 6/29/15. However, LCHB

never received a complete and/or current lodestar report from Thornton (with Staff Attorney names and hours identified) before the Fee Petitions were filed with the Court.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 59:

Identify and describe all communication the Firm had with the Plaintiffs' Law Firms and/or ERISA counsel relating to the Firm's preparation of the Fee Petition, including but not limited to preparation of the Lodestar calculation, the inclusion of Staff Attorneys for whom Thornton had paid costs, calculation of a Lodestar multiplier, and reasonableness of attorneys' fees.

RESPONSE TO INTERROGATORY NO. 59:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. LCHB further objects to this Interrogatory on the grounds that it is burdensome to the extent responsive communications have been or will be produced in this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

The Firm communicated principally with attorneys at Labaton relating to the Firm's preparation of its Fee Petition, which took place between August 31 and September 15, 2016, and these communications (principally between Mr. Chiplock of LCHB and Mr. Goldsmith and Ms. Zeiss at Labaton) related primarily to (a) the circulation of a template for the Fee Petition by Labaton, (b) making minor lodestar adjustments requested by Labaton (such as removing any timekeepers with fewer than 5 hours), (c) confirming the Firm's litigation fund contributions and

expert costs during the SST Litigation, (d) the inclusion of Robert L. Lieff's costs and lodestar in the Firm's Fee Petition, (e) presenting time and cost information in a uniform format, and (f) one email received by LCHB late in the evening on 9/14/16 (the evening before the Fee Petitions were filed) in which Labaton provided the total lodestar number (and resulting multiplier when compared to the requested 25% fee) for all Plaintiffs' Firms and ERISA firms.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 60:

Identify all individuals at the Firm who reviewed, assisted or contributed to the preparation and submission of Thornton's Fee Petition and, if appropriate, describe the nature of their contributions.

RESPONSE TO INTERROGATORY NO. 60:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it lacks foundation. LCHB further objects to this Interrogatory that it is burdensome to the extent it seeks information not in the possession of LCHB. Subject to and without waiving those objections, LCHB responds as follows:

No individuals at the Firm reviewed, assisted or contributed to the preparation and submission of Thornton's Fee Petition.

Daniel P. Chiplock, LCHB Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 62:

Identify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation and the reasons therefor.

RESPONSE TO INTERROGATORY NO. 62:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Time entries for any personnel who worked minimal (fewer than 5) hours in the SST Litigation were not included in the Firm's Fee Petition/Lodestar calculation. This is a fairly routine modification to lodestar reports in complex class cases such as this. The deleted attorney time and lodestar for the Firm included the following: 0.5 hours by Robert J. Nelson totaling $437.50, 1.6 hours by Kathryn E. Barnett totaling $1,200.00, 0.7 hours by Rachel J. Geman totaling $490.00, 0.1 hours by Roger Heller totaling $62.50, 0.8 hours by Sharon E. Lee totaling $480.00, 3.3 hours by Nancy Chung totaling $1,617.00, 2 hours by Pamela Owens totaling $830.00, and 2.8 hours by Bruce W. Leppla totaling $1,918.00. The deleted staff-level time and lodestar entries (predominantly for paralegals and research associates) included a combined 19.8 hours by 11 timekeepers, totaling $6,094.50.

The Firm also did not include any time entries for time expended preparing the Firm's Fee Petition/Lodestar calculation, for the final approval hearing on November 2, 2016, or on time otherwise expended on settlement issues between August 30, 2016 and November 8, 2016. This time and lodestar totaled 43.7 hours (37 hours by Daniel Chiplock, 2.8 hours by Robert L.

Lieff, 3.8 hours by Michael J. Miarmi, and 0.1 hours by Paralegal Alexander Zane), or $32,011.00 (at current rates).

With respect to costs and expenses, any unreimbursed costs incurred by the Firm in connection with the SST Litigation are minimal. In responding to this Interrogatory, the Firm is not including any time or expense associated with the Special Master's inquiry.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 63:

Explain the significance of the statement made in Paragraph 5 to the *Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP In Support of Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Expenses* (Docket #104-17), affirming that the hourly rates included in Exhibit A to the Declaration are the Firm's "regular rates charged for their services, which have been accepted in other complex class actions." Please describe any other instances in which the Firm has submitted a Fee Petition with the same or similar language.

RESPONSE TO INTERROGATORY NO. 63:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that the word "significance" and the phrase "…or similar language" are vague and overbroad. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad and seeks information not relevant to the subject matter this proceeding in that no timeframe is placed on the request for a description of fee applications in other LCHB cases. LCHB further objects that it would be unduly burdensome to collect and review every Firm fee petition, without regard to a specific timeframe, to determine instances in which the

Firm submitted a fee petition with "similar language" to that used in the *Declaration of Daniel P. Chiplock* in the SST litigation. Subject to and without waiving those objections, LCHB responds as follows:

The language quoted in this Interrogatory was intended to signify that the rates reflected in the Firm's Fee Petition are the Firm's regular rates which have been routinely accepted in other complex class actions for purposes of a lodestar cross-check. LCHB has also charged the same or comparable rates to paying clients of the Firm in non-contingent fee cases. The Firm submitted a Fee Petition in the BNY Mellon Action with language that conveyed the same information, and has done the same in fee petitions in other complex class actions.

Daniel P. Chiplock, LCHB Partner, has knowledge of the information provided in this Response as it relates to his Declaration in the SST litigation. Steven E. Fineman, LCHB's Managing Partner, has knowledge of the information provided in this Response regarding "other instances" in which the firm has submitted a fee petition with "the same or similar language" to that used in the *Declaration of Daniel P. Chiplock* in the SST litigation.

INTERROGATORY NO. 64:

Do you contend that the rates listed in the Firm's Fee Petition represent the prevailing rates in the community for similar services performed by lawyers of reasonably comparable skill, experience and reputation for each of the respective tasks performed? Why or why not?

RESPONSE TO INTERROGATORY NO. 64:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

For the reasons stated in Response to Interrogatory No. 47, above, LCHB answers this Interrogatory in the affirmative. Most fee awards in the Firm's class action cases have been

awarded on a percentage of the recovery basis. In recent years, some courts have conducted a "lodestar cross-check" to determine that the percentage of the recovery award is not excessive. And, in rare cases, courts have determined our class action fees on a lodestar basis. In both the cross-check and lodestar fee award contexts, LCHB's hourly rates, including those of our Staff Attorneys, are routinely included and approved in class action fee awards. For example:

- *In re Bank of New York Mellon Corp. Forex Transactions Litigation*, 12-md-2335 LAK (S.D.N.Y.) – Over 28,000 hours of Staff Attorney time, involving many of the same Staff Attorneys at issue here and at roughly the same hourly rates applied in the SST Litigation, were included as part of the lodestar cross-check conducted by Judge Kaplan in approving class counsel's requested attorneys' fees. At the final fairness and attorney fee hearing, Judge Kaplan of the Southern District of New York said, in part: "This was an outrageous wrong committed by the Bank of New York Mellon, and plaintiffs' counsel deserve a world of credit for taking it on, for running the risk, for financing it and doing a great job. I accept the lodestar. I accept as fair, reasonable and accurate everything that went into it."
- *Allagas, et al. v. BP Solar International, Inc., et al.*, 3:14-cv-00560-SI (N.D. Ca.) – In 2016, Judge Illston of the Northern District of California approved a percentage of the recovery fee for LCHB and co-class counsel but also conducted a lodestar cross-check. Judge Illston concluded that the Firm's "hourly rates, used to calculate the lodestar here, are in line with prevailing rates in this District and have recently been approved by federal and state courts." Judge Illston's lodestar

cross-check included two LCHB Staff Attorneys billed at $415 per hour, the same as most of the Staff Attorneys in the SST Litigation.

- *In re High Tech Employee Antitrust Litigation*, No. 11-cv-02509-LHK (N.D. Ca.) – In this complex antitrust class action in 2015, Judge Koh of the Northern District of California awarded LCHB and its co-lead counsel attorneys' fees based on the lodestar methodology. Judge Koh found:

> Having reviewed the billing rates for the attorneys, paralegals, litigation support staff at each of the firms representing Plaintiffs in this case [including co-lead counsel LCHB], the Court finds these rates are reasonable in light of prevailing market rates in this district and that counsel for Plaintiffs have submitted adequate documentation justifying those rates.

Judge Koh further found in *High Tech* that the "billing rates submitted vary appropriately based on experience," and found that the "billing rates for non-partner attorneys, including senior counsel, counsel, senior associates, associates and staff attorneys, range from about $310 to $800, with most under $500." (Emphasis added.). LCHB's lodestar submission included a number of Staff Attorneys whose hourly rates were consistent with the rates submitted in the SST Litigation a year later.

- *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL 3:07-md-1827 SI (N.D. Ca.) – In 2011, Judge Illston approved a percentage of the fee recovery for LCHB and its co-lead counsel "and confirmed" the fee by a lodestar cross-check. Included in LCHB's lodestar submission was the time of several Staff Attorneys whose rates ranged from $385 to $475 per hour in 2011 when the fee submission was made.

Steven E. Fineman, LCHB's Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 66:

Describe when and how the Law Firm first learned about the Boston Globe's inquiry into the Fee Award, and underlying billing practices employed by the Firm and other counsel in the SST Litigation, that preceded the publication of the December 17, 2016 Article.

RESPONSE TO INTERROGATORY NO. 66:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it lacks foundation in that the firm is not aware that the Boston Globe is engaged in an inquiry into the "underlying billing practices employed by the Firm." LCHB further objects to this Interrogatory on the grounds that the suggestion in the Interrogatory that the Boston Globe is inquiring into the "underlying billing practices employed by the Firm" is argumentative. LCHB further objects to this Interrogatory on the ground that it seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

The Firm first learned about the Boston Globe's inquiry into the Fee Award by way of a telephone call from David Goldsmith at Labaton to Daniel Chiplock of LCHB on November 8, 2016. The Boston Globe has not, to the Firm's knowledge, questioned LCHB's "billing practices," and notably omitted to report (as disclosed at the March 7, 2017 hearing before Judge Wolf, at which the Boston Globe was present) that LCHB has charged paying clients regular market rates that are the same or comparable to those reported in LCHB's Fee Petition. The Firm has never been contacted by the Boston Globe in this matter, either before the December 17, 2016 Article or afterwards.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 67:

Describe when and how the Law Firm first identified duplicative billing entries reflected in the Firm's Fee Petition and describe all actions taken by the Firm to review, confirm, and/or correct those errors.

RESPONSE TO INTERROGATORY NO. 67:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that the phrase "duplicative billing entries" lacks foundation and is argumentative in that LCHB did not "bill" any client in this case. LCHB submits the proper inquiry should be when and how LCHB first identified duplicative "time" entries reflected in the *Declaration of Daniel P. Chiplock.* Subject to and without waiving those objections, LCHB responds as follows:

The Firm first identified duplicative time entries reflected in the Firm's Fee Petition on November 9, 2016. Mr. Chiplock identified the duplicative time entries (a) by re-tracing prior email correspondence between and among Firm personnel and personnel from the other Plaintiffs' Law Firms during the early to mid-2015 timeframe, (b) through confirmatory emails from Mr. Diamand, the Firm's Accounting Department, and counsel at Thornton, (c) by re-reviewing the detailed lodestar reports for the Staff Attorneys whom LCHB either shared with or hosted for Thornton, and (d) reviewing Thornton's Fee Petition.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 68:

Describe in detail how the Law Firm participated in the drafting of the November 10, 2016 Letter, including the full names of all individuals who contributed to the Letter, the nature of any internal review by the Firm, and all individuals outside the firm who reviewed and/or contributed to the Letter and the nature of their contribution(s).

RESPONSE TO INTERROGATORY NO. 68:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that the "how" and phrase "internal review" are vague. LCHB further objects to this Interrogatory on the grounds that the requests for information concerning individuals "outside the firm who reviewed and/or contributed to the Letter" lacks foundation. Subject to and without waiving those objections, LCHB responds as follows:

Mr. Chiplock reviewed and contributed edits to the November 10, 2016 Letter during its drafting. Robert L. Lieff, Of Counsel to the Firm, also reviewed and contributed some edits to the November 10, 2016 Letter. A draft of the November 10, 2016 Letter also was circulated to Steven E. Fineman, the Firm's Managing Partner, and to the Firm's Executive Committee prior to its submission to the Court.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response. Richard M. Heimann, LCHB Partner, Steven E. Fineman, LCHB Managing Partner, and Robert L. Lieff, LCHB Of Counsel, also have some knowledge of some of the information provided in this Response.

INTERROGATORY NO. 69:

Identify and describe all documents relied upon by the Law Firm in the drafting of the November 10, 2016 Letter.

RESPONSE TO INTERROGATORY NO. 69:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

In reviewing and contributing edits to the November 10, 2016 Letter, the Firm relied upon the same documents identified in response to Interrogatory No. 67 above.

Daniel P. Chiplock, LCHB Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 72:

Identify, in detail, any additional errors in your any communication with the Court or with the Special Master, since filing of the Fee Petition(s) and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s).

RESPONSE TO INTERROGATORY NO. 72:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that the phrase "additional" errors is vague. LCHB understands the question to be whether we have identified errors in the Fee Petition, specifically the *Declaration of Daniel P. Chiplock*, in addition to or other than those described in the November 10, 2016 Letter. Subject to and without waiving those objections, LCHB responds as follows:

Since filing the corrective letter on November 10, 2016, the Firm has identified the inadvertent and erroneous inclusion in the firm's Lodestar total for the SST Litigation of 4 hours on 5/11/14 by Michael J. Miarmi, LCHB Partner, for an unrelated matter with a similar internal LCHB timekeeping number. We believe this time was included in the firm's Lodestar total for the SST Litigation due to keystroke error, and it has since been moved over to the appropriate

matter. This error was disclosed in a communication to Counsel for the Special Master on March 23, 2017, and corrected at that time.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 73:

Identify and explain any mistakes you have identified in the Fee Petition, Motion for Attorneys' Fees, and/or Fee Award, not described above.

RESPONSE TO INTERROGATORY NO. 73:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has not identified any other mistakes in its Fee Petition or the Motion for Attorney's Fees not described above or in the November 10, 2017 Letter. The Firm does not believe there was a mistake in the Fee Award.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 74:

Identify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge.

RESPONSE TO INTERROGATORY NO. 74:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that there are no individuals at the Firm with knowledge material to the Firm's Responses to the Interrogatories that are not otherwise mentioned or identified in these Responses (including those Responses that were served previously or those to be served on July 10). As for other individuals at the Firm with knowledge of the SST Litigation

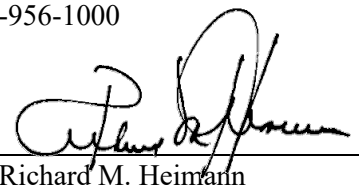
generally, the firm refers to the Firm's Fee Petition and the timekeepers listed therein as having knowledge specific to their assignments or involvement in the SST Litigation, as reflected in their detailed timekeeping entries (which have been produced).

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

Dated: June 9, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: 

Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

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
PROPOUNDING AN APPROPRIATE TOTAL FEE AWARD

TABLE OF CONTENTS

As invited by the Court (Dkt. 518), the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") files this memorandum addressing the reasonableness of the $74,541,250 attorneys' fee award that the Special Master uses as a baseline for his Report and Recommendations ("Report," Dkt. 357) and the Proposed Partial Resolution of Issues for the Court's Consideration ("Proposed Resolution," Dkt. 485) with respect to Labaton Sucharow LLP ("Labaton").

CCAF recommends instead using a baseline fee award of $50 million (approximately 16.75% of the $300 million gross settlement fund less administrative and litigation expenses). The Court should calculate a proportionate baseline fee award for each law firm based on a corrected lodestar that more accurately values the time of contract and staff attorneys. From this baseline, the Special Master's recommended sanctions should be applied and the costs of the investigation can be taxed equitably on the firms in proportion to their responsibility for the costs.

EXECUTIVE SUMMARY

Before deciding sanctions and costs, the Court should determine a baseline attorneys' fee award that would have not been unreasonable in the absence of misconduct and error.

Appropriate aggregate fees in this case would be substantially lower than the 24.85% award that the Court approved in its now-vacated order. Dkt. 111. The award was based in part on Class Counsel's misrepresentation that a nearly 25% award was "right in line with Professor Fitzpatrick's findings." Dkt. 103-1 at 10-11 (citing Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) ("Fitzpatrick"), filed at Dkt. 104-31). Class Counsel brazenly failed to tell the Court that "[f]ee percentages were strongly and inversely associated with the size of the settlement." *Id.* at 811. Thus, while attorneys' fees are about 25% on average of *all* class action settlements, "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent." *Id.* at 838. Larger common funds produce smaller percentage fee awards because the

effort required to obtain a $100 million settlement is nearly always substantially less than one hundred times the effort to obtain a $1 million settlement. Economies of scale should benefit class members, not merely class counsel. Fitzpatrick actually shows that the mean fee award in a settlement of $250 million to $500 million is 17.8%. *Id.* at 839.

Here, any award more than 17% of the net common fund, or about $50 million, at most, would be unreasonable. Such fee will return over $24 million to class members, before assessing the Special Master's recommendations for sanctions, which should be applied to this corrected baseline.

The reasonableness of an award is confirmed through a lodestar crosscheck. The crosscheck should take into account the market rates of contract and staff attorneys. Using very generous rates, a maximum corrected lodestar figure is about $27.4 million, so a $50 million fee award represents a lodestar multiplier of about 1.82. Such a lodestar multiplier more than adequately compensates class counsel for the results in this case; indeed, Class Counsel themselves argued that multiplier is appropriate.

A 1.82 multiplier is, in fact, too generous because the vast majority of hours were billed in this case after the case was stayed for mediation and after an agreement-in-principle was reached in *In re Bank of New York Mellon FOREX Transactions Litigation* ("*BONY Mellon*"), which Class Counsel describes as the "template" for this settlement. Dkt. 401-9 (Chiplock Depo.) at 110. There was little risk of non-payment to counsel after the case entered mediation. Lodestar multipliers are intended to compensate for risk, and Class Counsel had none when they cynically ramped up their document review in the first half of 2015 to a platoon of over 30 attorneys frantically churning on the eve of settlement (and a bit after). The multiplier also compares very generously to other cases, notably the *BONY Mellon* itself, where the defendant engaged in scorched earth tactics and counsel very well could have walked away empty-handed from a pugilistic litigant. Even though *BONY Mellon* involved many of the same firms and attorneys, the lodestar in that case was only $15 million more than this case,

even though 110 depositions were taken, and only a 1.6 multiplier was awarded by that court. This case was dramatically less risky and less efficiently litigated that *BONY Mellon*.

Finally, given the conduct the Special Master has uncovered, and in view of the oversized fee request and lodestar submitted by Class Counsel, it will not be enough to reduce class counsel's fee request to 16.75% of the megafund. Instead, CCAF recommends apportioning the fee award to each law firm, and then taxing costs and imposing sanctions on those firms in proportion to their conduct in this case.

I. Research shows a settlement of $300 million generally merits about 10-18% attorneys' fees.

A $300 million settlement is a megafund, and courts typically award less than 20% of the fund as fees in mega-fund cases of this size. Several studies independently confirm that the appropriate rate for a settlement over $250 million is less than 20% of the net fund (that is, the gross fund minus expenses). Here, an appropriate fee award for all counsel totals approximately 17% of the net common fund, or $50 million.

A. Attorneys' fees for megafunds tend to be awarded on a sliding scale so that counsel does not reap a windfall from valuable client claims.

Attorneys who achieve a valuable benefit for others should be paid due to "the equitable principle that those who have profited from litigation should share its costs." *In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 n.6 (1st Cir. 1995). Amicus agrees that attorneys' fees awarded as a percentage of the common fund may be reasonable and such awards have "distinct advantages" over lodestar awards. *Id.* at 307. However, there is nothing equitable about awarding attorneys a windfall due to the intrinsic value of the claims, especially when the high settlement value hinged on the success of other litigation, for which attorneys have already been generously compensated.

Because of economies of scale, a reasonable fee award tends to be a smaller percentage in larger settlements to prevent a windfall for plaintiffs' attorneys at the expense of the class. "It is generally not 150 times more difficult to prepare, try and settle a $150 million case than it is to try a $1 million case." *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 486 (S.D.N.Y. 1998). Thus, "[i]n cases with exceptionally large common funds, courts often account for these economies of scale by awarding fees in the lower range." *In re Citigroup Inc. Bond Litig.,* 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013) (cleaned up). "The existence of a scaling effect—the fee percent decreases as class recovery increases—is central to justifying aggregate litigation such as class actions. Plaintiffs' ability to aggregate into classes that reduce the percentage of recovery devoted to fees should be a hallmark of a well-functioning class action system." Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 263 (2010).

But why should someone who provides $300 million to class members not get three hundred times as much as someone who provides $1 million? Basically, a flat percentage fee award on every dollar would allow class counsel (and not the class) to reap the efficiency awards of the class action mechanism. "In many instances the increase is merely a factor of the size of the class and has no direct relationship to the efforts of counsel." *NASDAQ Market-Makers*, 187 F.R.D. at 486 (quoting *In re First Fidelity Secs. Litig.*, 750 F. Supp. 160, 164 n.1 (D.N.J. 1990)). Thus, "in 'mega-cases' in which large settlements or awards serve as the basis for calculating a percentage, courts have often found considerably lower percentages of recovery [than 25%] to be appropriate." Federal Judicial Center, MANUAL FOR COMPLEX LITIGATION (FOURTH) ("MCL") §14.121 at 188.

Empirical research shows that in class actions "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent." Fitzpatrick (Dkt. 104-31), at 835. Prof. Fitzpatrick—whose data Class Counsel misrepresented as supporting their 25% fee request—conducted a comprehensive survey of

all class action settlements in 2006 and 2007, a total of 668 cases. *Id.* at 811. Fitzpatrick found that percentage awards tend to decrease with the size of settlement, and for settlements between $250 and $500 million, the mean fee is 17.8%. *Id.* at 839.

A broad review of cases from 1993-2008 found even lower percentages. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 265 tbl. 7 (2010) (in cases over $175 million, a 12% mean and 10.2% median fee award). Earlier surveys reached similar conclusions. An earlier version of the Eisenberg & Miller study reported a 12% mean and 10.1% median in settlements over $190 million through 2002. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study,* 1 J. Empirical Legal Stud. 27, 73 (2004). An empirical survey in 2003 showed average recovery of 15.1% where recovery exceeded $100 million Logan, Stuart, et al., *Attorney Fee Awards in Common Fund Class Actions*, 24 CLASS ACTION REPORTS (March-April 2003). "One court's survey of fee awards in class actions with recoveries exceeding $100 million found fee percentages ranging from 4.1% to 17.92%." MCL §14.121 at 188-189 (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 339 (3d Cir. 1998)).

A more recent study of settlements from 2009 to 2013 breaks down fee percentages by only decile, so lumps the largest 10% of all settlements together, settlements above $67.5 million, and finds that the mean fee percentage of this broad range is 22.3%. Theodore Eisenberg, Geoffrey Miller, & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937, 948 (2017). The authors also conduct a regression of fees versus gross recovery, which predict the fee percentage for a $300 million fee award would be about 20%. *Id.* at 970.[1]

[1] The regression table shows that controlling for gross recovery, the base-ten logarithm (log) of the predicted fee = 0.94 x log (gross recovery) - 0.189. *Id.* If we look up log($300,000,000) on a slide rule or calculator, it is 8.477, and thus the log (fee) = (8.477 x 0.94) – 0.189 = 7.7795. The anti-

To date, Class Counsel has not acknowledged their misrepresentation of Fitzpatrick, nor have they shown that 25% would be a reasonable percentage for a settlement of this size.

B. Case law confirms an appropriate percentage in this case about 12-18%.

In their original fee motion, Class Counsel cherry-pick a handful of megafund cases that awarded more than 25%. Dkt. 103-1 at 7. These are unremarkable—CCAF expects that Class Counsel may generate an even larger cherry-picked list in response to this filing; with over 300 class action settlements a year approved in federal courts, there are certainly examples of counsel sliding excessive unopposed fee petitions by overburdened judges. "It does not take a statistical whiz" to realize "a non-random sample of five fee awards amounts to no more than looking over a crowd and picking outs one's friends." *In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517, 523 (S.D.N.Y. 2015). "[A]lthough counsel's case citations are accurate, there are many others where the percentage fee awarded in settlements as large as this one is typically lower—often substantially lower—than 20%." *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 374 (S.D.N.Y. 2013). Moreover, in the megafund context, class counsel have the incentive and financial cushion to regularly support their petitions with a "bless-the-fee" expert declaration. *See, e.g., In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *22 n.8 (N.D. Cal. Aug. 17, 2018) (describing "multiple shortcomings in Professor Rubenstein's calculation").

However, Class Counsel's expert inadvertently provides a solution to the cherry-picking problem. While counsel's expert Prof. Rubenstein has provided a report and two expert declarations, none of these argue that the *percentage* here is appropriate for a megafund, and instead they chiefly concern the supposedly-appropriate lodestar rates for contract/staff attorneys and the multiplier crosscheck used in this case. *See* Dkts. 368, 401-234, and 446-2 (collectively the "Rubenstein Reports").

log of this number (in formula: 10 ^ 7.7795) results in a predicted fee award of $60,185,781 or 20.06% of $300 million.

There is good reason for this—Prof. Rubenstein's own treatise, his opinion in another litigation, and the cases he relies here upon suggest a smaller aggregate percentage for a large fund like this one.

> Interestingly, empirical data on class action fee awards do demonstrate that the percentage awarded to counsel decreases as the size of the fund increases, though more along the lines of a sliding scale (smooth decrease) than a megafund (cliff-like decrease). [Recounts results of Fitzpatrick (2010) and Eisenberg & Miller (2010).] **Similarly, the author's own database, taken from a six-year sample, shows the average . . . for settlements over $44.625 million is 20.9%**.

Rubenstein, 5 NEWBERG ON CLASS ACTIONS § 15:81 (5th ed.) at 305. Opining as a fee expert in *Aranda v. Carribbean Cruise Line, Inc.*, Prof. Rubenstein acknowledged that "Seventh Circuit courts tend to award declining percentage as the size of the class's recovery increases." No. 12-cv-4069, 2017 WL 3642012, at *3 (N.D. Ill. Aug. 24, 2017).

Rubenstein's own citations here confirm that the vacated 25% fee award here was excessive. Because Rubenstein was not cherry-picking cases based on *percentage*, his citations provide a convenient unbiased sample of what other courts have awarded. Rubenstein lists 20 reported settlements he categorized as between $100 and $500 million. Dkt. 368, Ex. E. Of all of these cases—a sample that Class Counsel's own expert generated—attorneys were awarded more than 20% of a settlement fund greater than $100 million ***in just 2 of the cases***,[2] and the average fee award of these twenty cases was ***13.16%***. *See* Declaration of M. Frank Bednarz ("Bednarz Decl."), ¶ 12. Several of Rubenstein's citations show exactly the sort of scrutiny that the Court should apply here. *See*, *e.g.*, *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 130 (S.D.N.Y. 2009) (awarding 15.25% of $336 million fund rather than the requested 25.5%); *Pennsylvania Pub. Sch. Employees' Ret. System v. Bank of Am. Corp.*, 318 F.R.D.

[2] One cited case was not actually over $100 million, but instead established a $95 million fund. *See In re Lupron Mktg. and Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005).

19, 27 (S.D.N.Y. 2016) (awarding 12% of $335 million fund rather than requested 15% to "avoid a windfall to Barrack for charging more than $350 per hour for associates who are contract attorneys in all but name"); *In re High-Tech Employee Antitrust Litigation* ("*High-Tech*"), No. 11-CV-02509-LHK, 2015 WL 5158730, at *13 (N.D. Cal. Sept. 2, 2015) (awarding 9.8% of $415 million fund rather than the requested 19.5%).[3] While CCAF could cite many other cases in support of this point,[4] no such cherry-picking is necessary because Prof. Rubenstein's own list of similarly-sized settlements confirms that 25% is a remarkably high fee for a case of this size.

CCAF anticipates that Class Counsel may submit additional expert testimony in support of their 25% rate. While CCAF and Burch Porter do not have the resources to retain their own expert for this matter, the amicus respectfully requests an opportunity to reply to any new arguments advanced by Class Counsel on this issue.

C. A maximum fee award no higher than $50 million, absent misconduct, would return over $24 million to the class.

A reasonable percentage should be reckoned from the net fund—the amount sent to class members minus reimbursements and administration expenses—but this adjustment makes relatively little difference in this case. "In order to determine a reasonable fee for the services of counsel, it is necessary to understand what counsel has actually accomplished for their clients, the class members. This can only be done when the expenses paid by the class are deducted from the gross settlement." *Teachers' Ret. Sys. v. A.C.L.N., Ltd.*, No. 01-CV-11814(MP), 2004 WL 1087261, at *7 (S.D.N.Y. May

[3] *See also In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 375 (S.D.N.Y. 2013) (awarding 16% rather than 20% in $730 million settlement, in part due to objection by class member represented by CCAF) (cited by Rubenstein at Dkt. 368, 20).

[4] *E.g. Alexander v. FedEx Ground Package System, Inc.*, 05-CV-00038-EMC, 2016 WL 3351017, at *2-3 (N.D. Cal. June 15, 2016) (finding that requested 22% of a $226 million megafund settlement was "well above the typical range" and awarding instead 16.4%, "consistent with the higher end of awards in megafund cases").

14, 2004); *see also Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (excluding administration expenses in calculating fee percentage because such expenses are "costs, not benefits"). "It is only commonsense that a percentage-based fee should be based on the amount actually recovered by the class . . . and not include a percentage of the sums going to pay costs." *Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2014 WL 806072, at *2 (N.D. Cal. Feb. 27, 2014); *accord* 2003 Advisory Committee Notes to Amendments to Rule 23(h) ("fundamental focus is the result *actually achieved* for class members" (emphasis added)).

This district has followed this approach. Judge Young stated that going forward, he "will award attorneys' fees by reference to the value of benefits actually put in the hands of the class members." *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 410 (D. Mass. 2008). More recently, he adhered to this approach noting that "[c]ounting administration fees as part of the settlement valuation for attorneys' fees purposes might also inadvertently incentivize the establishment of costly and inefficient administration procedures which would inflate the benefits valuation without increasing actual benefit for class members." *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 170 (D. Mass. 2015).

Here, the administration expenses are relatively minimal. As of November 2017, $101,237 was paid, with the court approving an additional $49,673 to send an initial round of checks. Dkt. 213-1. Because litigation expenses were $1,257,697.94, the net settlement fund is less than half a percent smaller than the gross fund. Nonetheless, establishing the right rule is vital public policy by "encourage[ing] class counsel's prudence and discretion in incurring expenses—expenses that may not be as closely scrutinized given that there is no single client footing the bill." *In re Libor-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262, 2018 WL 3863445, at *4 (S.D.N.Y. Aug. 14, 2018).

Absent misconduct, a Rule 23(h) fee award to class counsel no more than about $35.8 to $53.75 million (representing 12-18% of net recovery) cannot be said to be too low and may well be

too high. The fee award here should not exceed $50 million, at most, representing 16.75%, which would increase relief to class members by over $24 million. This figure compares generously—perhaps overly so—with cases Rubenstein cited. *E.g. Currency Conversion Fee*, 263 F.R.D. at 130 (awarding 15.25% of $336 million fund, and 1.6 lodestar multiplier, rather than the requested 25.5%).

II. An 16.75% fee award represents a corrected lodestar crosscheck of 1.82, which Class Counsel already has supported as appropriate for the results in this case.

"[C]ourts making common fund fee awards are ethically bound to perform a lodestar cross-check." Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings About Reasonable Fees in Common Fund Cases*, 18 GEO J. LEGAL ETHICS 1453, 1454 (2005). Justice Gorsuch and Third Circuit nominee Paul Matey have called the lodestar cross-check an "important safeguard against attorney over-billing." Neil M. Gorsuch & Paul B. Matey, *Settlements in Securities Fraud Class Actions: Improving Investor Protection*, WASH. L. FOUND., 23 (2005), *available at* http://www.wlf.org/upload/0405WPGorsuch.pdf. The crosscheck helps uncover the "disparity between the percentage-based award and the fees the lodestar method would support." *Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1124 n.8 (9th Cir. 2002). "[I]n megafund cases, the lodestar cross-check assumes particular importance." *Alexander*, 2016 WL 3351017, at *2; *see also In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1298 (9th Cir. 1994) (describing how percentage-based awards become particularly arbitrary in a megafund context).[5]

The amicus agrees with Class Counsel that a lodestar crosscheck requires somewhat less rigor than a lodestar-based fee calculation, but the Court should not accept questionable billing rates in

[5] Prof. Rubenstein has opined that lodestar crosschecks are entirely discretionary in the First Circuit. Dkt. 446-2 at 8 n.4. That said, he has also testified that he is not opining as an expert on ethics. Dkt. 401-243 (Rubenstein Depo.) at 150. (Note, however, that Thornton apparently retained him to provide an ethics opinion in this case in 2011. Dkt. 401-275 at 38 ("Read draft opinion from W. Rubenstein to Thornton").) In Rubenstein's personal view courts should always conduct lodestar crosschecks. Dkt. 446-2 at 52. "[C]lass members lose millions, if not tens of millions, of dollars a year because judges don't ask for submission of the lodestar and crosscheck the percentage of work." *Id.*

conducting the crosscheck. A district court "is not bound by the hourly rate requested by the victor's counsel." *Bogan v. City of Boston*, 489 F.3d 417, 429 (1st Cir. 2007). The lodestar "serves little purpose as a cross-check if it is accepted at face value." *In re Citigroup Secs. Litig.*, 965 F. Supp. 2d 369, 389 (S.D.N.Y. 2013). "A reasonable rate is determined by reference to 'the prevailing hourly rate in Boston for attorneys of comparable skill, experience, and reputation.'" *Rudy v. City of Lowell*, 883 F. Supp. 2d 324, 326 (D. Mass. 2012).

Here, the rates for contract and staff attorneys are exorbitant and should be brought in line with prevailing market rates. Like the Special Master, CCAF observes that the proper rate for temporary contract attorneys is their cost on the open market and that highly marked-up rates are an "unfair burden on class members." Report at 189. Sophisticated clients like State Street pay cost for such attorneys, and so absent class members should not be asked to pay more for the purpose of a lodestar crosscheck. Similarly, clients in the market for staff attorneys tend to pay much lower rates than the rates of up to $515/hour claimed by Lieff. Most of the staff attorneys engaged exclusively in document review, and they certainly should not be paid more than the rate of a first year associate. *See generally Lipsett v. Blanco*, 975 F.2d 934, 940 (1st Cir. 1992) (rates should be commensurate "to nature of the tasks"). Upon information and belief, WilmerHale LLP's staff attorneys are billed to paying clients at such rates.

Unless discovery shows that the market rate for such staff attorneys is higher, all document review-focused staff should be billed no more than a maximum of $200/hour, which represents four times their average salary and healthy leverage for Class Counsel even before allowing a lodestar multiplier. A few staff attorneys engaged in more sophisticated work comparable to a midlevel associate, and for these attorneys only somewhat higher rates would be appropriate, yielding a rate of no more than a maximum of $375/hour.

Once these still generous adjustments to rates are applied, the corrected lodestar is $27.4 million. This yields a lodestar multiplier of 1.82. Such lodestar multiplier is appropriate for the results achieved in this case for several reasons. This is almost identical to the 1.8 the multiplier Class Counsel itself argued for in its fee motion. *See In re Petrobras Secs. Litig.*, 317 F. Supp. 3d 858, 876-77 (S.D.N.Y. 2018) (declining to deviate upward from class counsel's originally-requested 1.78 multiplier after court determined lodestar reduction was necessary).

A. The market rate for contract attorneys is their cost on the open market.

Contract attorneys are hired to do relatively unskilled document review work that discerning paying clients refuse to pay a premium for and certainly don't pay rates of up to $515/hour, which is what Lieff and TLF request from the settlement fund. Lieff and TLF seek to credit hourly rates for contract attorneys that are ***ten times*** their market cost, with an additional 2.01 multiplier on top of that. Lieff is correct that "[m]ost important in determining the reasonableness of hourly rates for lodestar purposes is the 'market value of counsel's services.'" Dkt. 367 at 79 (quoting *U.S. v. One Star Class Sloop*, 546 F.3d 26, 40 (1st Cir. 2008)). For contract attorneys, this value is straightforward: their market value is their cost on the market. Unlike the rates for contingency fee attorneys never retained by a paying client, the market rate of contract attorneys can be accurately ascertained—it is the rate they are actually paid by class plaintiffs and defendants across the country.

The Special Master has already determined what Lieff and TLF paid for their seven contract attorneys and has also checked this rate against the rate defendants paid. Report at 167. Evidence of how the plaintiffs' adversary litigates and how they bill is "certainly" "helpful" to the lodestar determination. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1214 (9th Cir. 1986). This evidence should be used, and it suggests the correct rate for contract attorneys in this case is $50/hour.[6]

[6] CCAF departs somewhat from the Special Master's recommendation to also reimburse the contract attorneys as costs. While this is indeed the standard practice for paying clients, contingency

"[T]here is absolutely no excuse for paying these temporary, low-overhead employees $40 or $50 an hour and then marking up their pay ten times for billing purposes." *In re Beacon Assocs. Litig.*, No. 09 Civ. 777, 2013 WL 2450960, at *18 (S.D.N.Y. May 9, 2013). *See also Lola v. Skadden, Arps, Slate, Meagher & Flom*, 620 Fed. Appx. 37, 40 (2d Cir. 2015) (observing that plaintiff contract attorney was paid $25 per hour, and holding that the work described was so devoid of legal judgment it may not even constitute the practice of law); *Pa. Pub. Sch. Employees Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 26 (S.D.N.Y. 2016) (holding that charging the class $362/hr for temporary attorney work "is unreasonable and warrants a reduction in the attorneys' fees").

Counsel objects that other courts have awarded such rates, but they conflate *ex post* (and largely *ex parte*) fee awards with the actual market rate for legal services. A lodestar calculation depends upon the market rates, so the best authority for how contract attorneys should be billed is the market itself, not fee orders issued from typically-unopposed fee motions. Too often, "[w]ithout the adversarial process, there is a natural temptation to approve a settlement, bless a fee award, sign a proposed order submitted by plaintiffs' counsel, and be done with the matter." *Marshall v. Deutsche Post DHL & DHL Express (USA) Inc.*, 2015 WL 5560541, at *1 (E.D.N.Y. Sept. 21, 2015); *see also, e.g., In re MagSafe Apple Power Adapter Litig.*, 571 Fed. Appx. 560, 571 (9th Cir. 2014) (reversing settlement and few award where district court accepted class counsel's lodestar with "a few boilerplate recitations about the attorneys' skill and the risks of proceeding with the litigation"). That in turn, leads to "proposed orders masquerading as judicial opinions" and ultimately, an entire self-sustaining jurisprudence that has become "so generous to plaintiffs' attorneys." *Fujiwara v. Sushi Yasuda Ltd.,* 58 F. Supp. 3d 424, 436 (S.D.N.Y. 2014). There is no better time than now to break the deleterious cycle.

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class actions attorneys can earn a multiplier to compensate for their risk of non-payment when appropriate in a particular case. Earning a reasonable multiplier for contract attorneys billed at their actual market rate of about $50/hour, is very different from the obscene $515/hour rate Lieff proposes to charge for some of its contract attorneys and then multiply by an additional 2.01.

The fact is that the outmoded orders cited by counsel do not capture the current reality of contract attorney billing, which is almost universally passed on to paying clients at cost. While many courts have approved higher rates for contract attorneys, they do this mostly *sub silentio* without awareness of the issue. Such rates were approved without objection *in this very case* prior to the *Boston Globe*'s article about the award. Contract attorney rates are simply often misunderstood by the judiciary:

> I think the jurisprudence indicates that the rates -- the lodestar is supposed to be calculated on what lawyers are charging to paying clients in the community, however it's properly defined, not -- I think probably many other judges made the same mistake -- well, have understood the representations made the way I have for many years when we try to do that lodestar reasonableness check.

Dkt. 176 at 94 (Tr. 3/7/17).

In the marketplace for legal services, paying clients do not tolerate marking up temporary employees in the way plaintiffs propose to charge the absent class.[7] Imagine if plaintiffs decided to bill Uber drivers (and their trips to and from depositions) as "contract paralegal" fees at ten times the firm's cost. Or imagine expert consultants, technical assistance, or word processing billed in this way. After all, Lieff charges the class $360/hour for a computer systems support (Dkt. 401-247 at 38), so what in principle would prevent them from billing outsourced technical costs the same way as they bill contract attorneys—other than insufficient chutzpah?

A paying client would not tolerate extensive markup on any temporary employees because such workers are fundamentally different from law firm associates, who require ongoing investment, benefits, and salary from the firm whether work is plentiful or scarce.[8] Firms must develop their

[7] Class Counsel have objected that their exorbitant rates do not "charge" anything to class members because the rates are only used to roughly ascertain the fee award as a cross-check. Dkt. 367 at 68. But this is a distinction without difference. The Court must set a reasonable fee, so *of course* excessive rates, if uncritically accepted, will cost class members money.

[8] The Special Master does not explore whether all of the staff attorneys nominally paid for by TLF should be considered contract attorneys. TLF paid Lieff and Labaton for staff attorneys wages

associates, so they select them carefully from among the most qualified applicants. Firms retain associates only when they exhibit superior motivation, work ethic, judgment, and quality; law firm associates are intrinsically costly and they represent the most promising attorneys in their cohort. Contract attorneys, in contrast, are hired to an expressly limited engagement and may be terminated within hours when no longer needed. While they are hired based in part on their past experience reviewing documents, contracting firms gain no benefit from further developing them. So contract attorneys receive no professional development investment, and frequently do not even get health insurance or other benefits. *See Down in the Data Mines A Tale of Woe from the Basement of Legal Practice*, 94 ABA J. 32 (Dec. 2008).

For this reason, knowledgeable clients have long paid contract attorneys at cost, often making their own relationships with staffing agencies as the defendant has in this case. Dkt. 85 (Tr. 3/7/2017) at 84-85; *see generally* David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 Minn. J.L. Sci. & Tech 151, 163-64 (2011).

In short, the marketplace compensates contract attorneys differently than associate attorneys because they *are* different in terms of cost, investment, overhead, type of work, skill level, and experience. Lieff and Rubenstein cannot change this reality by pretending that the market compensates all attorneys linearly based on their year of graduation.

Case law reflects this practice among paying clients. Rubenstein looks to bankruptcy filings for the billing rates of associates and partners at big law firms (Dkt. 446-2 at 12), and a similar comparison can be done with contract attorneys. When sophisticated corporate clients are entitled to fee shifting from each other, they only seek—and are awarded—contract attorney time at or near the

so that TLF would shoulder more of the cost (and get more of the profit) from the litigation. But from TLF's perspective, all of them were short-term workers akin to agency contract attorneys. For the sake of limiting the length of this memorandum, we treat the staff attorneys paid by TLF as if they were TLF's own employees, but it's not obvious why this legal fiction should be credited.

cost of such time. *See*, *e.g.*, *Perfect 10, Inc. v. Giganews, Inc.*, No. 11-cv-07098-AB, 2015 WL 1746484, at *16 (C.D. Cal. Mar. 24, 2015) (awarding defendant in copyright infringement action requested $100/hour for contract attorney time); *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-1846-LHK, 2012 WL 5451411, at *3 (N.D. Cal. Nov. 7, 2012) (party submitted hourly rate of $125 for contract attorney time in connection with Rule 37 sanction); *4Kids Entm't, Inc. v. Upper Deck Co.*, No. 10-cv-3386, 2012 WL 2426569, at *7 (S.D.N.Y. June 21, 2012) (setting $50/hour rate for contract attorney time); *Tampa Bay Water v. HDR Engr., Inc.*, 8:08-CV-2446-T-27TBM, 2012 WL 5387830, at *15 (M.D. Fla. Nov. 2, 2012) (awarding $85/hour for contract attorneys). Lieff seeks to subject absent class members to fees that multinational corporations do not bear.

B. The lodestar is overstated by over $7 million because the staff attorneys' rates are exorbitant for document review.

As used by big law firms retained by sophisticated clients, staff attorneys are used to save clients' money on routine work such as document review. Paid about half the salary of partnership-track associates, staff attorneys are typically billed at the rates of junior associates—or even lower. *See At Well-Paying Law Firms, a Low-Paid Corner*, N.Y. TIMES (May 23, 2011) (describing emergence of staff attorneys, describing their work, and noting entry level salaries that are only 30-40% as much as associates at the same firms).[9]

As employed by Class Counsel in this case, staff attorneys are a cynical profit center. Rates claimed for staff attorneys—up to $515/hour—actually exceed the costs these firms could credibly bill for junior associates doing the same work. Dkt. 104-17 at 8 (four staff attorneys with rates of $515/hour billed for over $2 million combined lodestar). Yet the salary for these attorneys is much lower than the salary for junior associates: "the vast majority of the staff attorneys were paid in the range of $40-$60 an hour, plus benefits." Report at 177. While law firms are entitled to markup full-

[9] Available online at: http://www.nytimes.com/2011/05/24/business/24lawyers.html.

time employees, the rates awarded must bear some resemblance to actual market rates. Staff attorney rates in this case simply do not pass the laugh test. As Lieff admits, $515/hour is the rate of an eighth-year associate on the verge of partnership. Dkt. 369-1 at 22. In fact, one of the partners in this case—Evan Hoffman—billed just a smidgen more than this rate ($535/hour).

Class Counsel pretends that their staff attorney rates represent a savings over associate because their staff attorneys have graduated years ago, but this assertion is a non-sequitur. The market for legal services does not value every lawyer ten years out of law school at $600 an hour. CJA panel attorneys would be surprised by this immodest premise. The market for legal services compensates time for staff attorneys differently than partnership-track associates because they *are* different—they are paid less and generally confined to lower level work even if they have a senior graduation year. 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 earlier approved here.

Except for the rate of Michael Bradley, the Special Master does not adjust the rates of any staff attorney, even though he notes the rates TLF charges for the very same attorneys are almost uniformly higher than rates claimed by Labaton and Lieff. *See* Report at 169 n.134. He concludes that because some staff attorneys were doing the work of associates, the rates are essentially fine, thus giving a pass to ***over half the lodestar value claimed in this case***. *Id.* at 72. While some of the staff attorneys sometimes "prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore" (*id.*), Class Counsel's detailed billing records reflect that the vast majority of staff attorney time was consumed with document review, which militates in favor of lower fees for the purpose of the crosscheck.

Even if the review of documents was assigned to associates, many courts refuse to permit full lodestar rates to be charged, given that large-scale document review can be performed more economically by other professionals. *E.g., City of Pontiac Gen. Empls. Ret. Sys.*., 954 F. Supp. 2d at 280

("a sophisticated client, knowing these contract attorneys cost plaintiff's counsel considerably less than what the firm's associates cost (in terms of both salaries and benefits) would have negotiated a substantial discount in the hourly rates charged the client for these services").

Especially given Class Counsel's deceptive statements about the "regular rates charged" for attorneys' services, the Court should strive to use realistic market rates in its crosscheck. The market rates for discovery-focused staff attorneys can be discovered from WilmerHale, which employs them. "One way to judge the legitimacy of the plaintiff's fees is to look at the defendant's fees." *Dreher v. Experian Info. Solutions, Inc.*, 2016 WL 4055638, at *2 (E.D. Va. Jul. 26, 2016).

Failing that, staff attorney time should be adjusted to the rates of junior associates, which better comports with the Report's findings about their work level, and which are inconsistent with $415/hr and higher rates. *See* Report at 169 ("the staff attorneys performed associate-level work (albeit that of a junior-level associate)"). Any rate higher than $200/hour for the vast majority of staff attorney time, which consists of document review, would be unduly excessive. Such rate is, if anything, overly generous for attorneys doing the work of junior associates. *See Gonzalez v. Scalinatella, Inc.*, 112 F. Supp. 3d 5, 28 (S.D.N.Y. 2015) ("$250.00 for a third-year associate, $200.00 for a second-year associate, $175.00 for a first-year associate, and $125.00–$130.00 for paralegals—'are higher than the norm in this district'"). CCAF proposes using this rate only for the purpose of a crosscheck in the absence of discovery on actual market rates for discovery staff attorneys. Better evidence would be needed to calculate a lodestar-based award, and the time entries would need to be further scrutinized as the Special Master did not conduct a line-by-line review. Erroneous overbilling is evident on the face of Class Counsel's detailed hours. *See* Section IV.

Among the rates that should be reduced to no more than $200/hour at most is the one for Michael Bradley, which answers TLF's objection that his rate has been singled out by the Report "despite [his] similarity" to other staff and contract attorneys. Dkt. 361 at 85. CCAF agrees that the

Special Master's conclusion that "the work he performed was simple, straightforward, and unmonitored document review" should compel a systematic adjustment to all staff attorneys. *Id.* at 84.[10]

The Special Master has found that some staff attorney work more closely resembles tasks assigned to a mid-level associate, and a review of attorney billing descriptions suggests this is true. While the vast majority of staff attorney time was devoted to rote document review, some staff attorneys appear to have had a more supervisory role. The undersigned has sorted the billing descriptions of contract attorneys and has identified the billers with more sophisticated roles in the case. For the purpose of a cross-check, these attorneys should be billed at no more than the rate of a mid-level associate—about $375/hour, not $515. The reasonableness of this lower rate is confirmed by the fact that Joshua Bloomfield, who Lieff claims at $515/hour with a total lodestar of over $1 million, has since moved to Gibbs Law Group as an associate, where his billing rate is now $395. *See In re Anthem, Inc. Data Breach Litigation*, No. 15-md-02617-LHK, Dkt. 944-6 at 7 (N.D. Cal. Jan. 25, 2018) (fee request). The following staff attorneys either billed more than 10% of their time on tasks besides routine document review and/or were mentioned billing descriptions of associates and partners more than once: D. Alper, J. Bloomfield, T. Kussin, L. Nutting, and R. Yamada. Bednarz Decl. ¶ 9. These attorneys' hours as staff attorneys have been counted at $375/hour for the purpose of the cross-check.

Finally, several non-attorneys who supported document review should have their rates reduced. Namely, K. Dugar, various described as "staff attorney supervisor" (Dkt. 446-5 at 4) and "litigation support manager" (Dkt. 367 at 56) should have his or her rate reduced from $450 to no

[10] That said, Michael Bradley was indeed uniquely unmonitored. Class Counsel's document review supervisors had no idea what he was doing. Report at 193. No evidence appears to exist showing that he performed any task that benefited the class.

more than $325/hour, which is a generous rate for an experienced paralegal. The same rate should also be applied to Anthony Grant and Willow Ashlynn, who apparently supported staff attorneys using the Relativity database. Dkt. 407-57 at 16.

C. Applying these generous rates yields a lodestar multiplier of 1.82.

Adjusting the billing rates to the maximum rates discussed above results in a revised lodestar multiplier of 1.82 for a fee award of $50 million.

To prepare its lodestar cross-check, the undersigned reconstructed staff and contract attorney hours.[11] *See* Bednarz Decl. ¶¶ 3-10. Using these hours, and applying the upper-end rates of $50/hour for contract attorney time and $200 or $375/hour for staff attorneys, and $325/hour for the staff listed above results in a corrected lodestar of $27.4 million. The table below shows the originally-claimed lodestar for each firm, which includes $4.05 million of fictitious double-counting (Dkt. 104-24) and the corrected lodestar. The third column scales up this award by the overall multiplier of 1.82 to show an allocation for the maximum fee award of $50 million (absent reductions resulting from Class Counsel's error and misconduct).

Firm	Claimed Lodestar	Corrected Lodestar	Share of $50 Million
Labaton Sucharow LLP	$17,368,905.50	$9,872,573.00	$18,008,302.66
Thornton Law Firm LLP	$7,460,139.00	$5,623,724.50	$10,258,089.04
Lieff Cabraser Heimann & Bernstein LLP	$9,800,487.50	$5,220,509.00	$9,522,594.17
Keller Rohrback LLP	$2,561,287.00	$2,561,287.00	$4,671,976.75
McTigue Law LLP	$2,625,503.75	$2,625,503.75	$4,789,112.84
Zuckerman Spaeder LLP	$1,174,925.00	$1,174,925.00	$2,143,150.02

[11] Surprisingly, neither Class Counsel nor the Special Master states how many hours were actually billed by each attorney in the case. For example, the only document purporting to show the alleged $37,265,241.25 lodestar and 2.01 multiplier appears to Labaton's November 10, 2016 letter to the court, which does not show its work. Dkt. 116. In spite of valiant effort, the undersigned has not been able to replicate this exact number. Bednarz Decl. ¶ 8. This showing would not suffice to justify a lodestar-based award. *See Weinberger v. Great N. Nekoosa*, 925 F.3d 518, 527 (1st Cir. 1991).

Richardson Patrick Westbrook & Brickman LLC	$137,411.00	$137,411.00	$250,647.82
Beins Axelrod PC	$187,712.00	$187,712.00	$342,400.56
Feinberg Campbell & Zack PC	$7525.00	$7525.00	$13,726.16
Total:	$41,323,895.75	$27,411,170.25	$50,000,000

Bednarz Decl. ¶ 11.

A maximum lodestar multiplier of 1.82 is more than reasonable given that the majority of hours were billed in the final months—after an agreement-in-principle was reached in *BONY Mellon*—when the case was substantially less risky. *See* Section II.D, below. In fact, the multiplier is actually higher than the 1.8 multiplier Class Counsel requested and higher than the average multiplier in class action settlements. *See* Rubenstein, 5 NEWBERG ON CLASS ACTIONS, § 15:89 (reporting 1.42 average multiplier); Fitzpatrick at 833-34 (1.65 average multiplier).[12]

Interestingly, the awards set forth in the table above results in significantly higher awards for ERISA counsel even though the overall fee award is reduced by 50%. This occurs for two reasons. First, the original fee application gave a misleading picture of what ERISA counsel would receive. While the original (fictitious, double-counted) lodestar figures suggested ERISA counsel had billed 16.2% of the lodestar, because of Class Counsel's undisclosed fee sharing agreement, ERISA counsel's percentage of the fees was limited to 10%. Second, because ERISA counsel did not employ armies of contract and staff attorneys, their lodestar figures were not as exorbitantly over-inflated and thus require less downward adjustment. Thus CCAF reckons the correct share of the award for ERISA counsel is 24.4%. Under this calculation and using the maximum fee award set forth above, ERISA counsel would share about $4.7 million more than they received in 2016 (*see* Report at 88), which renders obsolete the Special Master's propose resolution to direct most of the Chargois fee disgorgement to ERISA counsel. That money should go instead to the class.

[12] Where multipliers have been higher in megafund cases, this is because courts often fail to even perform a lodestar crosscheck, which results in too-common windfall payments.

III. A fee award of no more than 16.75% for a 1.82 lodestar multiplier is, if anything, too generous in this case because the majority of attorney time was cynically churned when the case was not risky.

The proposed $50 million fee award has a higher multiplier than awarded in *In re Bank of New York Mellon FOREX Transactions Litigation* ("*BONY Mellon*"), which achieved better results with much more risk than this case. No. 12-md-2335 (LAK) (JLC), Dkt. 637 at 3 (S.D.N.Y. Sept. 24, 2015). By all indications, this case was less costly, less risky, and less successful than the settlement achieved in *BONY Mellon*, where counsel were awarded a 1.6 lodestar multiplier. *Id.* A 1.8 multiplier in this case more than adequately compensates counsel for their work and risk.

While the First Circuit has not provided a list of factors for evaluating the reasonableness of a fee award, courts in this district often use the *Goldberger* factors from the Second Circuit:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations.

In re Neurontin Mktg. and Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir.2000)).

An examination of these factors shows that a $50 million fee award is cannot be said to be too low and may well be too high. Awards in similar cases are examined in Section I, and these overwhelmingly show that a 25% award is excessively high for a settlement of this size. The Special Master and Class Counsel make much of the "outstanding result" achieved in this class, but this result was not achieved by the approximately 60,000 hours of document review billed in this case. Before the settlement agreement was filed on July 26, 2016, the case had been stayed for mediation continuously since November 19, 2012. Dkt. 62. Over this time, no depositions were taken. No motions were argued. Instead, the parties negotiated toward settlement.

In short, this case was not risky while it was in mediation, and so the lodestar multiplier—to the extent one is appropriate at all—should be modest. Ted Frank explained this concept in his November 13, 2016 memo to Andrea Estes of the *Boston Globe*, and the Memo has been in the record of this case since February 17, 2017:

> 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%.

Dkt. 125-2 at 4.

CCAF is disappointed that the Special Master did not question Class Counsel about their misrepresentation of Fitzpatrick or second-guess the assumption that the case was especially risky. But the record suggests that Class Counsel intentionally churned during the final months from February to June 2015, by which time the *BONY Mellon* case had reached an agreement-in-principle with the joint effort of private counsel and the Department of Labor.

As that case settled, the writing was on the wall to both plaintiffs and defendant that this case would follow, and on similar terms—so similar that the *BONY Mellon* settlement was called a "template." Dkt. 401-9 at 110. This is precisely when Class Counsel staffed platoons of document reviewers to churn on this case—not to improve recovery to the class, but to obtain a larger slice of

the fee pie from each other. Because there was no risk to counsel toward the end of the case, when the goal was only to "jack up" the lodestar, no risk multiplier should be awarded for this portion of the billing. Dkt. 401-63 at 3.

No paying client would tolerate their attorneys billing a case to death on the eve of certain settlement—it's outrageous conduct. Since ATRS seems to have had little interest in overseeing Class Counsel (and indeed instructed counsel not to tell them about referral fees), the Court must act as the fiduciary for the class. This Court should emphatically reject the argument proffered by Class Counsel that multipliers of 3 or even higher could be blessed in a case where counsel spent years in mediation and "jacked up" half of the entire lodestar when settlement was inevitable. A 1.82 multiplier can be thought of as the equivalent of a 5.0 multiplier for work prior to the motion to dismiss (suggesting a very pessimistic 80% risk of failure), a 1.5 multiplier for work after the case was stayed for mediation until February 2015 (33% risk of failure), and a 1.0 multiplier for the last few portion of the bill when settlement was inevitable and counsel cynically churned staff and contract attorney time in order to capture a larger slice of the certain pie. If anything, this structure is overly generous.

A. Lodestar multipliers chiefly exist to compensate for the risk counsel takes in prosecuting a case on contingency, but the vast majority of the billing in this case was churn billed without risk.

"A proper attorneys' fee award is based on success obtained *and* expense (including opportunity cost of time) incurred." *Mirfasihi v. Fleet Mortg. Corp.*, 551 F.3d 682, 687 (7th Cir. 2008). In awarding fees, courts utilize the lodestar crosscheck to "confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 945 (9th Cir. 2011); *In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001) ("The goal of [the lodestar cross check] is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel.").

The lodestar multiplier exists to compensate counsel for the risk of nonpayment. In *Steinlauf v. Continental Illinois Corp.*, 962 F.2d 566, 569 (7th Cir. 1992), Judge Posner described the effect of risk on setting a reasonable multiplier:

> Suppose a lawyer can get all the work he wants at $200 an hour regardless of the outcome of the case, and he is asked to handle on a contingent basis a case that he estimates he has only a 50 percent chance of winning. Then if (as under the lodestar method) he is still to be paid on an hourly basis, he will charge (if risk neutral) $400 an hour for his work on the case in order that his expected fee will be $200, his normal billing rate. If the fee award is to simulate market compensation, therefore, the lawyer in this example is entitled to a risk multiplier of 2 (2 × $200 = $400).

In general, we can expect that plaintiffs' counsel in the *ex ante* world would not agree to a contingent fee unless, given the risk of nonpayment and the stakes of the case, the percentage of recovery would, on average, produce an expectation of at least a lodestar amount on average. After all, attorneys can realize lodestar simply by offering hourly billing rates to defendants or other clients who pay in advance.

While a multiplier of two may be appropriate in a case with extraordinary risk and results (perhaps 50% risk of nonpayment), from the time this case entered mediation, the risk was lower. By mediating, instead of fighting tooth-and-nail, the defendant signaled it was willing to settle. And the case stayed in mediation—*for years*—because Class Counsel accurately perceived that the defendant would settle and was not just stringing them along. Thus, there was a high likelihood that Class Counsel would collect fees at that point, and it was just a question of how large the pot would be.

Class Counsel's defense of high multipliers fails to take risk into account. There is a "strong presumption that the lodestar is sufficient" without an enhancement multiplier. *Perdue v. Kenny A.*, 130 S. Ct. 1662, 1669 (2010). A lodestar enhancement is justified only in "rare and exceptional" circumstances where "specific evidence" demonstrates that an unenhanced "lodestar fee would not

have been adequate to attract competent counsel." *Id.* at 1673.[13] "[T]he burden of proving that an enhancement is necessary must be borne by the fee applicant." *Id.* Instead, Class Counsel and Prof. Rubenstein have simply cited to cases where high multipliers—sometimes appallingly ridiculous multipliers—were approved, to argue that a 2.01 or 2.07 or 3.0 multiplier here would be "well within the range of reasonableness." Dkt. 446-2 at 21; *see also* Dkt. 367 at 72. This is incorrect: when there is no risk, a multiplier of 1.0 is presumptively reasonable. While the Court found that the case was "risky" (Dkt. 114 at 36), it also found rates were reasonable. Uncontested representations often do not withstand adversarial scrutiny, and this is no exception.

After the case survived a motion to dismiss and entered mediation, there was no particular reason to find the case risky. To the contrary, the Department of Justice, Department of Labor, and state governments' coordinated investigation of the same underlying conduct suggested that State Street would sooner or later have to reckon with private claimants as well.

The risk of non-payment dropped to essentially zero on February 5, 2015, when an agreement-in-principle was reached in analogous litigation by Ohio pension funds in *BONY Mellon*. No. 12-md-2335, Dkt. 630, Mot. For Final Approval (S.D.N.Y. Sep. 15, 2015), at 6. Lieff and TLF immediately knew of this development because they were also counsel in *BONY Mellon*.

B. Class Counsel's request for a 1.6 multiplier in *BONY Mellon* shows why a $50 million fee award with 1.82 multiplier in this case may be too high.

This case settled not due to any particular good bit of lawyering in this case, but due to success in *BONY Mellon*. This case, which was stayed for almost 4 years without substantive action, became more valuable and even less risky due to success in *BONY Mellon*. In Daniel Chiplock's own words,

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[13] *Perdue*'s limitation on enhancements was made in the context of interpreting 42 U.S.C. § 1988's language of "reasonable" fee awards, but several courts hold it has equal application to "reasonable" fee awards in class actions made under Fed. R. Civ. P. 23(h). *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 Fed. Appx. 496, 500 (6th Cir. 2011); *Weeks v. Kellogg Co.*, No. 09-cv-8102, 2013 WL 6531177, at *34 & n.157 (C.D. Cal. Nov. 23, 2011); *cf. also In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 361 (3d Cir. 2010) (Weis, J. concurring/dissenting) (referring to *Perdue* as an "analogous statutory fee-shifting case.").

the *BONY Mellon* result "doubled the value of State Street." Dkt. 401-86 at 5. True, many of the same attorneys were involved, but they were already paid for the risk and unexpected success of *BONY Mellon*—by the judge in *BONY Mellon*. No. 12-md-02335, Dkt. 637 (S.D.N.Y. Sep. 24, 2015).

Unlike the defendant here, BONY Mellon did not agree to endless mediation, but fought a scorched earth war of attrition against its opposing plaintiffs. An astonishing 110 depositions were taken, including 18 harassment-maximizing depositions of plaintiff fund officers. BONY Mellon wielded counterclaims against the named plaintiffs, which the district court refused to dismiss, and which could potentially make the Ohio public funds plaintiffs liable for millions of dollars of attorneys' fees (potentially subjecting the officers to public criticism and malpractice suits). In the end, plaintiffs emerged with a $336 million settlement that paid its class members 35% of the estimated damages. Plaintiffs sought and were awarded 25% of this common fund, for an average 1.6 lodestar multiplier—which the court justified based on the phenomenal results, breathtaking risk, and heroic effort. *BONY Mellon*, Dkt. 12-md-02335-LAK, Dkt. 642, Transcript (S.D.N.Y. Sep. 24, 2015). But that case is over. The attorneys responsible for that success have already been paid.

This settlement compares unfavorably in almost every way to *BONY Mellon*. While this settlement's recovery of 20% of estimated damages is not unreasonable for a class action, it's no *BONY Mellon* in terms of success. The risk here was comparatively minute once plaintiffs survived a motion to dismiss, as plaintiffs' expert in *BONY Mellon* observed. Prof. John Coffee opined that the 25% fee request in *BONY Mellon* was justified due to the unprecedented success and high risk that class counsel in that case would recover nothing. About this case, he remarked:

> The only other custodial FX class case of which I am aware, Arkansas Teacher Retirement System v. State Street Corporation, et al., No. 11-cv-10230 MLW (D. Mass.), survived a motion to dismiss in 2012, but then was ordered into mediation by the presiding judge, where it has remained throughout the pendency of this MDL. That case involved far fewer causes of action than those alleged here, and also benefitted from a powerful unifying theory of liability that was not generally available to class members in this case (namely,

> violation of the Massachusetts consumer protection statute, which has been held by some courts to be available to out-of-state plaintiffs suing an in-state defendant, and which provides for double or treble damages and prejudgment interest at a rate of up to 12%).

BONY Mellon, Dkt. 12-md-02335-LAK-JLC, No. 620 at 14 n.15 (S.D.N.Y. Aug. 17, 2015). Prof. Coffee's assessment of the "powerful" Ch. 93A claims here matches Class Counsel's own candid banter about the case. *See* Dkt. 107-86 at 3 (Lieff attorney taking credit for having "developed the ch. 93A theory (the most readily certifiable claim in State Street, and by far the most valuable).").

The fact that defendant was willing to settle and that the value of the settlement turned on other litigation demonstrates that a 25% award here would constitute a windfall. For an extreme example of this principle, the plaintiffs in *Heien v. Archstone* sought a 33% award of the $1.3 million settlement they negotiated, but Judge Young awarded them $29,250 (2.25%), or less than half the lodestar plaintiffs claimed. 837 F.3d 97, 99 (1st Cir. 2016). The First Circuit affirmed, finding the district court correctly pointed out the "relevant legal issues had already been resolved" in another case and that *Heien* "had not proceeded to discovery, nor had the parties engaged in any significant motion practice." *Id.* at 101. The First Circuit further found that the district court had reasonably deducted hours from the lodestar award for waste, and rejected plaintiffs argument "that the fee award constitutes an impermissibly low percentage of the total common fund." *Id.* at 102.[14] While plaintiffs' claims were not decided by *BONY Mellon* litigation, similar reasoning applies here. This case was stayed for *years*, the value of the settlement increased greatly on the resolution of *BONY Mellon*, and the lodestar claimed by Class Counsel appears to be the product of strategic churn—deliberate waste calculated to increase the attorneys' fee award.

[14] At the November 7 hearing, the undersigned advised that a guardian *ad litem* could appeal a decision it believed to be erroneous. Dkt. 519 (Tr. 11/7/2018) at 95. The possibility of an appeal exists but the likelihood of an appeal appears to be modest. CCAF attorneys do not anticipate they would find such appeal fruitful given the abuse of discretion standard for fee awards.

C. Half of Class Counsel's hours were billed as apparent make-work between February and June 2015, after the *BONY Mellon* agreement made settlement near-certain.

It is difficult to fathom how much higher the lodestar in this case is relative to *BONY Mellon*. Class Counsel asserts that the non-double-counting lodestar here is $37,265,241.25. Dkt. 116. In *BONY Mellon*, with many of the same attorneys billing similar rates,[15] the lodestar was $52,097,202.06. For just $15 million more, the plaintiffs in *BONY Mellon* took and defended 110 depositions (0 here), exchanged 11 expert reports (0 here), and defeated four motions to dismiss in two venues (1 here). Plaintiffs in *State Street* instead mediated and reviewed documents for years on end, dramatically expanding their staffing in the final few months. Document production was not more burdensome in this case either; the reverse is true. State Street produced 19 million pages, compared to 20 million produced by defendants in *BONY Mellon*. ATRS and other plaintiffs produced about 80,000 pages, compared to 6 million pages produced by plaintiffs in *BONY Mellon* in response to tooth-and-nail counterclaim discovery. BONY Mellon also conducted extensive third-party discovery; 3.3 million pages from third parties were produced and needed to be reviewed in that case. *BONY Mellon* thus had 50% more documents than this case, and reviewing them was much more time sensitive due to rapid-fire fact depositions.

These differences sharply call into question the reasonableness of the lodestar here. Roughly the same number of hours was spent on document review in this case, which was never litigated

[15] The Special Master finds staff attorney rates reasonable in part because some of the same attorney's rates were approved in *BONY Mellon*. Report at 225. However, this conclusion is unwarranted because the Judge in *BONY Mellon* has not been shy about slashing similar fees to avoid windfalls. *See In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517, 523 (S.D.N.Y. 2015) (accepting rates of $210 to $420 for associates, but finding 32,000 hours devoted to discovery unreasonable in a case with "only" 15 depositions, and reducing hours and awarding 1.33 of adjusted lodestar or 8.2% of $346 million fund). Rather, the *BONY Mellon* billing request was approved in full because "[t]his really was an extraordinary case in which plaintiff's counsel performed, at no small risk, an extraordinary service, and they ought to be compensated for it." No. 12-md-02335-LAK, Dkt. 642, Transcript (S.D.N.Y. Sep. 24, 2015). These facts do not exist here.

beyond a single motion to dismiss, and which had much less voluminous and acrimonious document discovery. The hours billed in *BONY Mellon* seem like hours efficiently spent to win hard-fought victory for class members. The hours billed in this case appear largely to be churn performed by Class Counsel competing for a larger slice of the pie under their 20/20/20 agreement (where each lead firm was guaranteed 20% of the fee award, but the remaining money would be allocated based on lodestar). Dkt. 401-82. Each firm thus had an incentive to "jack up" their lodestar, as Garret Bradley indelicately put it on February 6, 2015. Dkt. 401-63 at 3.

The hours billed during the first half 2015 are especially suggestive. Document review was ramping up precisely when *BONY Mellon* reached an agreement-in-principle, on February 5, 2015.

> Between January and March 2015, Labaton bolstered their document review team, maintaining more than fifteen to twenty different SAs on the *State Street* case at any given time. Lieff did the same, assigning fifteen SAs (thirteen of whom transitioned directly from the *BONY Mellon* review) and two "contract" attorneys to complete the review.

Dkt. 401-232 (Gellers Report) at 12.

The sudden urgency Class Counsel apparently felt toward document review in *State Street* is difficult to explain as a matter of legal strategy. The case continued to be stayed, and the Court had expressed no reservations about extending the stay. But as a matter of game theory, the ramp-up makes perfect sense: Class Counsel realized settlement would soon occur, precipitated by the template *BONY Mellon* settlement, and a land rush was on to claim the largest slice of the certain fee award through make-work document review.[16] This suggest that the risk of the case was much lower than

[16] After the land rush ended, in August 2015, attorneys got testy—paranoid that they might "suddenly see an additional 12,000 hours mysteriously appear" on another firm's bill. Dkt. 401-150. Daniel Chiplock proposed fixing the exact fee split between Class Counsel in writing, but Garrett Bradley replied they should wait for the actual fee award before deciding how to split it. Dkt. 401-84 at 1. Chiplock answered there was no need to wait because the Court was "not a skeptical judge, as far as we can tell," unlike Judge Kaplan in *BONY Mellon*. *Id.*

in *BONY Mellon*, particularly in the final months, and that the effort expended in these months was more for the benefit of the firms involved than the class members. These riskless hours themselves should be discounted steeply as excessive. *Cf. e.g., In re Citigroup Secs. Litig.*, 965 F. Supp. 2d 369, 391-92 (S.D.N.Y. 2013) (eliminating post settlement hours).

In any event, the lower risks here compared to *BONY Mellon* confirm that a 25% fee award and a 1.6 lodestar multiplier would be excessive compensation for Class Counsel for their results here.

IV. The Court should calculate an appropriate fee award for each firm, and only then deduct costs and impose penalties.

The Special Master's Report and Proposed Resolution recommends adjustments to fees retained by the law firms, but this entire approach oddly treats Class Counsel's division as the baseline. Class Counsel's fee division was an arbitrary and concealed product of compromise among the firms. There is nothing sacrosanct about how Class Counsel decided to carve up $75 million—especially given the undisclosed $4.1 million diversion to Chargois—and this status quo makes a poor baseline.

For this reason, once a reasonable total fee award has been decided, the Court should set the fee award on a much firmer foundation. As the Court observed, it has the authority to set fee awards with respect to each individual firm. Dkt. 519 at 84 (Tr. 11/7/18). "In a class action settlement, the district court has an independent duty under Federal Rule of Civil Procedure 23 to the class and the public to ensure that attorneys' fees are reasonable and divided up fairly among plaintiffs' counsel." *In re High Sulfur Content*, 517 F.3d 220, 227 (5th Cir. 2008). "[T]he district court must not . . . delegate that duty to the parties." *Id.* at 228 (internal quotation marks omitted).

If fees are allocated by the district court in accordance with the fee papers submitted, it encourages class counsel to truly police one another's hours for reasonableness, rather than turning a blind eye to lack of billing judgment. *See* Jessica Erickson, *The Market for Leadership in Corporate Litigation*, 2015 U. Ill. L. Rev. 1479 (2015) (counsel will punish inefficiency when dividing up the fee award). The

Court should not award a lump sum to be privately and secretly partitioned; rather "the better practice" is for the parties to propose an allocation and for the court to approve or disapprove it. *In re Critical Path, Inc., Sec. Litig.*, No. C 01-00551 WHA, 2002 WL 32627559, at *8 (N.D. Cal. Jun. 18, 2002). After the 2003 amendments to Rule 23, in some courts this better practice has become a required practice. *High Sulfur*, 517 F.3d at 228. Class Counsel's own expert believes courts should exercise such oversight more often. "Look, the law says that the judge is a fiduciary and oversees fee allocation. Ninety-nine percent of the judges say we don't want to know. . . . the class representative . . . [is] not really to be able to oversee and manage the lawyers. It's precisely why we make the judge the fiduciary for the absent class members, and the judges themselves neglect this authority." Dkt. 401-243 (Rubenstein Depo.), at 142-43.

Setting an award for each firm involves slightly more arithmetic, but it is worth the effort. Counsel cannot be prejudiced by such an process. To the extent that a new bespoke fee order awards a smaller payment than previously received, each firm will have to forfeit the excess—which has been deposited in their bank accounts since 2016. For each firm that owes money back to the class, or possibly to ERISA counsel, the firm has effectively enjoyed an interest-free loan on the difference.

A. Awarding attorneys' fees to each firm provides a firmer basis for untangling the double-counting, and the Special Master's other recommendations can be applied on top of firm-specific fee award.

Setting fee awards for each firm ensures that every firm is dealt with equitably and better rationalizes the Special Master's recommendations.

For example, the Special Master proposes to disgorge $4.05 million from Class Counsel, but an adjustment of this magnitude becomes unnecessary should the Court assign reasonable awards for each firm. The problem with the Report's recommendation is that it incorrectly identifies this disgorgement as a sanction. One third of this $4 million disgorgement—$1.35 million—seems wholly disproportionate to TLF and Lieff, which share comparatively little blame for the actual double-

counting error. Dkt. 515 at 6. Instead, the Special Master's recommended disgorgement should be thought of as an adjustment to the total fee award—effectively removing the excess billing to give Class Counsel the multiplier they originally sought. Seen this way, CCAF's recommended approach makes it unnecessary to apply the entire proposed $4.05 million adjustment for the double-counting error. The heavy lifting is resolved by simply calculating reasonable fees that should have been awarded to begin with in the absence of double-counting or other misconduct.

Having removed the excess billing *ab initio*, the Court is free to assign a more reasonable adjustment for the misleading statements and errors in the TLF and Labaton declarations. For example, the Special Master recommends a sanction "in a range of $400,000 to $1 million" for TLF's misleading declaration. Report at 365. Perhaps a similar-magnitude sanction would be appropriate for Labaton for their declaration due to its: (1) similarly misleading language about rates, (2) failure to disclose the Chargois arrangement, and (3) failure to perceive the double-counting error when they had the only opportunity to catch it. A sanction of this magnitude for the double-counting error seems more defensible than $4.05 million.

Calculating the fee award that ought to have been granted also eliminates the need to apply kludgy disgorgement as to Lieff and TLF for their use of contract attorneys. As explained above, all contract attorney time has been reasonably assessed at $50/hour, as the market values it, so further adjustment is unnecessary.

B. Additional sanctions and the costs of the investigation should be taxed to each firm's individual fee award.

By precisely apportioning each fee award, the Court can then apply sanctions and tax costs on the firms responsible for them. "A party whose unreasonable behavior has occasioned the need to appoint a master . . . may be charged all or a major portion of the master's fees." Advisory Committee Notes to 2003 Amendments to Rule 53. "[T]he district court enjoys broad discretion to allocate the

master's fees as it thinks best under the circumstances of the case." *Aird v. Ford Motor Co.*, 86 F.3d 216, 221 (D.C. Cir. 1996); *accord Latin Am. Music Co. v. Archdiocese*, 499 F.3d 32, 43 (1st Cir. 2007); *K–2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471, 476 (9th Cir.1974). "[E]quity requires that the loss, which consequence thereof must fall on one of the two, shall be borne by him by whose fault it was occasioned." *Neslin v. Wells*, 104 U.S. 428, 437 (1882).

Should the Court ultimately appoint a guardian *ad litem*, the guardian's fees could also be taxed to firms as appropriate.[17] Such costs would "'pale in comparison to the significant amounts of money' to be divided between plaintiffs and counsel in high-value cases." *Laffitte v. Robert Half Int'l., Inc.*, 376 P.3d 672, 691 (Cal. 2016) (Liu, J., concurring) (quoting William Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. Rev. 1435, 1455 (2006)).

C. Any fee award should be decreased further because of class counsel's misleading fee petition.

An appropriate sanction for overinflating lodestar is to reduce the multiplier on the actual lodestar. "[I]t is absolutely imperative that attorneys submit honest and accurate fee petitions." *Young v. Smith*, 905 F.3d 229, 234 (3d Cir. 2018). If the only consequence from trying to claim more than what class counsel is entitled to is that class counsel will get what they would have been entitled to if they had filed a fair petition in the first place, there is no incentive to be forthright with a court in the original request. On the rare occasions they get caught, they are no worse off; if no objector investigates, they receive a windfall. If "the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would

[17] The Court inquired whether *amici* could be compensated. Little law exists on this question, and none in the First Circuit, but some other circuits have found that *amici* could be compensated if appointed by a court and if the fee is "paid by the party responsible for the situation that prompted the court to make the appointment." *Morales v. Turman*, 820 F.2d 728, 731 (5th Cir. 1987); *see also Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 853 (D.C. Cir. 1981).

be reduction of their fee to what they should have asked for in the first place. To discourage such greed a severer reaction is needful." *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir. 1980); *see also First State Ins. Grp., v. Nationwide Mut. Ins. Co.*, 402 F.3d 43, 44 (1st Cir. 2005) (endorsing *Brown*). "A request for attorney's fees" is "not an opening gambit in negotiations to reach an ultimate result." *Lewis v. Kendrick*, 944 F.2d 949, 958 (1st Cir. 1991). An "outside-chance opportunity for a megabucks prize must cost to play." *Commonwealth Electric Co. v. Woods Hole*, 754 F.2d 46, 49 (1st Cir. 1985). Public policy and the law demand that there be material consequences for the assertion that lodestar is over $41 million when it includes $4 million of wholly imaginary double-billing and is inflated by at least another $9 million. In the face of excessive and misleading submissions, the Court has discretion to reduce hours across the board. *E.g., Cent. Pension Fund of the Int'l Union of Operating Engineers & Participating Employers v. Ray Haluch Gravel Co.*, 745 F.3d 1, 5 (1st Cir. 2014) (affirming a 33% across the board reduction for excessive billing); *cf. also Jacobson v. Persolve, LLC*, 2016 WL 7230873, at *6-7 (N.D. Cal. Dec. 14, 2016) (weighing counsel's disregard for the interests of absent class members in the fee calculus). Let the punishment fit the crime.

Class counsel will argue "But everyone does it," and that shows deterrence is necessary because it's so infrequently caught. If class counsel overstated their lodestar by $13 million, then their fees could be capped below lodestar minus the $13 million overstatement—otherwise, if class counsel is caught only half the time, they would come out ahead. And courts are surely failing to catch Class Counsel's overbilling half the time.

V. The hours submitted in this case may not be completely reliable, and additional scrutiny would be necessary to issue a fee award based on lodestar.

Should the Court wish to instead award fees on the basis of lodestar, a more careful review of the billing should be performed. District courts "should exclude" "hours that were not reasonably

expended" where cases are "overstaffed" and hours are "excessive, redundant or otherwise unnecessary." *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983).

The Special Master did not review the detailed bills line-by-line, and CCAF did not have enough resources to carefully scrutinize it, but several examples of excess billing are apparent:

- Obvious errors remain in the detailed hours, unacknowledged and uncorrected. For example, Lieff indicates that K. Gralewski billed 45 hours on March 5, 2013, which is included in her 1478.9 hour total. *See* Dkt. 401-248 at 33; Dkt. 104-17 at 8. This is an obvious data entry mistake, which Lieff apparently contends to be worth $16,807.50 as part of a lodestar crosscheck. Bednarz Decl. at 11.[18]
- As discussed in Section III.C, significant document review time was billed in the final months of the case before an agreement-in-principle was reached in June 2015. Furthermore, many staff attorneys continued frantically reviewing documents 7-10 days after the agreement-in-principle was reached (no later than June 21, 2015), which a sophisticated client would not tolerate. *See Citigroup*, *supra*.
- Labaton appears to have included many hours spent researching and preparing its own fee motion. Dkt. 401-264 at 466-67. In common fund cases, "fees on fees" are generally not permitted because they do not benefit the class. *See In re Fidelity/Micron Secs. Litig.*, 167 F.3d 735, 738 (1st Cir. 1999).
- Pure travel time is billed, which sophisticated clients generally do not tolerate. *See*, *e.g.*, Dkt. 401-258 at 51 ("Fly back to Los Angeles." 8 hours, at $1000/hour). "[T]ravel time

[18] Class Counsel will argued that the potential overbilling documented in this section makes no material difference to the lodestar crosscheck. For example, if the cited figure should actually be 4.5 hours instead of 45, it's a 40.5 hour mistake in a case with over 86,000 hours billed. While this is true, the continued existence of such trivial and frankly dumb errors calls the reliability of the lodestar total into question.

is widely recognized as less productive than regular time." *Automobile Club of New York, Inc. v. Dykstra*, No. 04-cv-2576 SHS, 2010 WL 3529235, at *3 (S.D.N.Y. Aug. 24, 2010) (reducing travel time rates by 50%).

As a general matter, 86,000 hours claimed in a five-year litigation, stayed for four-years, and settled on docket number 103 is unconscionable, even in a complex document-heavy securities case. *Contrast, e.g., In re IndyMac Mortgage-Backed Secs. Litig.*, 94 F. Supp. 3d 517, 527 (S.D.N.Y. 2015) (refusing to credit 55,372 billable hours claimed in a virtually-unstayed five-year litigation to be "eyebrow-raising") and eliminating 25% of discovery hours). If the Court would prefer to award attorneys' fees on the basis of lodestar (rather than as a percentage with lodestar cross-check), significantly more scrutiny should be given to the billing in this case, and the amicus hopes to file a supplemental memorandum if this occurs.

CONCLUSION

The underlying settlement created a $300 million megafund, and the vast majority of courts award substantially less than 25% for such a settlement to avoid providing a windfall to counsel. The now-vacated 25% attorneys' fee award would be especially inappropriate here given the other questionable conduct the Special Master uncovered.

The Court should base its final fee decision on what would have been a reasonable award in the absence of error or misconduct. Here, a rate of no more than 16.75% ($50 million) would not be too low, and perhaps too high. Such an amount more closely resembles the average fee award for a case of this size and—when contract and staff attorneys are appropriately billed at market rates—would deliver counsel a 1.82 lodestar multiplier which is higher than even they have indicated is appropriate. Indeed, this multiplier is slightly higher than the multiplier Class Counsel sought on the basis of fanciful rates and double-counting. More importantly, it more than fairly compensates counsel given that there was little risk when most hours were billed, and is especially generous in view of the

1.6 multiplier earned in *BONY Mellon*, where counsel bore significant risk and engaged in much less wasteful churn than in this case. The Court should apportion the fee award to each firm and then use this baseline to apply additional penalties recommended by the Special Master, to the extent the penalties are warranted.

Respectfully submitted,

Dated: November 20, 2018

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CERTIFICATE OF SERVICE

I certify that on November 20, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: November 20, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP's
RESPONSE AND OBJECTIONS TO THE SPECIAL MASTER'S PARTIALLY REVISED REPORT AND RECOMMENDATIONS

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Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this Response and Objections to the Special Master's Partially Revised Report and Recommendations, ECF No. 524 ("Revised Report").

I. INTRODUCTION

The Revised Report contains no case law, new facts, or equitable principle that supports the Special Master's recommendation that Lieff Cabraser "disgorge," "forfeit," or have its fee reduced by, $3,593,765 – or roughly 24% of the $15,116,965.50 in fees the firm received in the State Street Action.[1] The Master seeks this penalty against Lieff Cabraser in addition to the $1,152,000 the firm has already spent on the Master's investigation, plus the $456,853 in additional costs and $2,552,669 in lodestar the firm has spent defending itself in this proceeding.

In the absence of any jurisprudence to support his recommendations or overcome Lieff Cabraser's objections, and in disregard of his own critical factual findings in his Report and Recommendations, ECF Nos. 357 and 357-1 ("Report"), the Master offers only platitudes about "equity" and "deterrence" and the "integrity of the legal process," despite the fact that he identifies no intentional or wrongful conduct by the firm. The Master also spills much ink mischaracterizing a sentence in Lieff Cabraser's fee declaration in a brand new effort to cast doubt on the accuracy of the declaration, only to acknowledge the inconsequence of his argument and recommend no economic remedy against the firm.

In further response to the Master's Report, and in response to his Revised Report, Lieff Cabraser makes the following essential points:

[1] All of the defined terms herein (identified by initial capitalization), are the same terms defined in Lieff Cabraser's Response and Objections to the Special Master's Report and Recommendations, ECF No. 367 ("Response and Objections").

- *Lieff Cabraser should not be required to disgorge or forfeit, or have its fee reduced by, any portion of the firm's inadvertently double-counted lodestar.*
- *In the event the Court requires Lieff Cabraser to disgorge or forfeit, or reduce the firm's fee award by, any portion of the firm's double-counted lodestar, that disgorgement or reduction should be commensurate with the firm's "relative" lesser role in the double-counting.*
- *Customer Class Counsel, including Lieff Cabraser, should not be required to treat the time of staff attorneys paid by an agency as a "cost" instead of including it as part of the aggregate lodestar for cross-check purposes.*[2]
- *Even if the Court agrees that the firm's agency lawyers should be treated differently than Lieff Cabraser's payroll staff attorneys for purposes of the lodestar cross-check, the Special Master's recommended disgorgement/forfeiture penalty should be rejected.*
- *The Master's criticism of a sentence in Lieff Cabraser's fee declaration was never raised during the Master's investigation, is factually baseless, and is, by the Master's own admission, inconsequential.*

II. STATEMENT OF RELEVANT FACTS

A. A Comprehensive And Accurate Statement Of The Factual And Procedural Background Of The State Street Action And The Master's Investigation Is Set Forth In Lieff Cabraser's Response And Objections.

The Master's Revised Report is highly selective in its reference to the factual record developed during the 14-month-long investigation, omitting or misstating a number of crucial

[2] Internally, Lieff Cabraser uses the term "staff attorneys" to refer to those licensed attorneys with relevant experience who work for the firm conducting document review, coding, and analysis, and who write related issue and/or witness memoranda (as necessary), in the firm's large, complex cases. Their specific tasks generally, and in the State Street Action specifically, are described in detail in Lieff Cabraser's Response and Objections at 9-13, 20-28. The term "staff attorneys" includes personnel paid directly by the firm and lawyers paid by an outside agency (which in turn bills the firm for those lawyers' services). *See* Response and Objections at 11-13.

facts. Indeed, the Master now claims he is "not bound by the factual findings in the Report."[3] It is all the more important, therefore, to remind the Court that a comprehensive and accurate statement of the factual and procedural background of the State Street Action, the Master's investigation, the Master's findings as to Lieff Cabraser, and the financial impact on the firm as a result of the investigation, is set forth in detail in Lieff Cabraser's Response and Objections at pages 9-66.[4]

B. The Master's Characterization Of His Inability To "Reach An Agreement" With Lieff Cabraser Is Misleading.

In his Revised Report, the Master states that in late August 2018, he "took steps to determine if a global resolution with all firms was viable."[5] The Master writes that with the Court's approval, he invited "all firms to attend an all-day meeting in Boston to further explore the possibility of a global resolution."[6] The Master then advises the Court that he was "not able to reach an agreement with Lieff… consistent with his understanding of his responsibilities to the Court, and therefore, Lieff's… objections remain outstanding and require a response from the Special Master."[7] This characterization of events is misleading.

In August 2018, Lieff Cabraser learned that the Special Master was engaged in separate "settlement" or "resolution" discussions with Labaton, Thornton, and ERISA Counsel.[8] On

[3] Revised Report at 6. *See also* Revised Report at 15 (characterizing important factual findings as "general observations" and claiming they are "not binding findings of fact at this stage in the post-Report proceedings.")

[4] An updated account of the financial impact the Master's investigation has had and could have on the firm is set forth *infra* at Section IV.

[5] Revised Report at 2.

[6] *Id.*

[7] *Id.*

[8] The facts presented here are attested to in the accompanying Declaration of Richard M. Heimann in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein,

September 6, 2018, the Master informed the Court that the Master had invited all parties to a September 11, 2018 in-person meeting "to continue discussions and pursue a final resolution, if possible."[9] Between the time the firm learned about the Master's efforts at a "global resolution," and the September 11, 2018, in-person meeting in Boston, Lieff Cabraser had *no* settlement or resolution discussions with the Special Master or his counsel. At no time prior to the September 11 meeting did the Master make any offers of resolution of any kind to Lieff Cabraser.[10]

The first meeting Lieff Cabraser had with the Master and his counsel concerning potential resolution took place in the Boston office of JAMS on September 11, 2018, and lasted less than 30 minutes. During that encounter, the Master made it clear that his recommended disgorgement/forfeiture penalties concerning the firm's inadvertent double-counting of certain staff attorney lodestar and its use of agency/contract attorneys was non-negotiable. The Master was adamant that any agreed-upon resolution must include payment to the class by counsel of an amount equal to that which he had recommended in his initial Report. For its part, Lieff Cabraser advised the Master that it viewed the Master's proposed penalties against the firm as factually and legally unsupportable. The firm also advised the Master that it strongly disagreed with his position that he has a duty or responsibility to the Court to reallocate attorneys' fees paid to Customer Class Counsel, including Lieff Cabraser, to the class.[11]

Following the initial short meeting, the firm had a second brief conversation with the Special Master (without his counsel). During that discussion, the firm attempted to explain that if one entirely eliminated the lodestar of Lieff Cabraser's agency/contract attorneys, or simply

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LLP to the Special Master's Partially Revised Report and Recommendations ("Heimann Decl."), filed herewith, at paragraphs 2-6.

[9] ECF No. 463.

[10] Heimann Decl., ¶¶ 2-6.

[11] *Id.*

reduced their hourly rates, the resulting aggregate lodestar multiplier (as well as Lieff Cabraser's individual multiplier), measured against the original fee award, would not materially change. At the conclusion of that conversation, the Master requested that the firm calculate and present to him a summary of the impact on the lodestar multiplier if the agency/contract attorney time was reduced to a range of $50 through $250 hour, in $50 increments. The firm provided the Master with that information on September 13, 2018. The memoranda describing that analysis are attached as Exhibit A to the Heimann Declaration. The Master never responded to these memoranda, and neither they nor their content are mentioned in his Revised Report.[12]

Since the September 11, 2018 meeting, Lieff Cabraser has had no further discussions with the Special Master concerning resolution. Lieff Cabraser's objections to the Master's Report are ripe for adjudication by the Court.

III. ARGUMENT

A. Lieff Cabraser Should Not Be Required To Disgorge Or Forfeit, Or Have Its Fee Reduced By, Any Portion Of The Firm's Inadvertently Double-Counted Lodestar.

In his Report, the Special Master recommends that Labaton, Thornton and Lieff Cabraser disgorge or forfeit and "return" to the class $4,058,000 in double-counted staff attorney time, and that Lieff Cabraser pay one-third of that amount ($1,352,667).[13] In its Response and Objections, Lieff Cabraser emphasizes that, contrary to the Special Master's recommendation, which is not supported by any case law or other legal principle, the proper way to address the inadvertent double-counting issue is to remove the double-counted lodestar from the aggregate lodestar, and

[12] *Id.*

[13] Executive Summary at 49, Report at 364.

then determine whether the resulting aggregate multiplier of 2.0 (and Lieff Cabraser's individual multiplier of 1.69) is appropriate.[14] As Professor Rubenstein puts it:

> In a case where a court employs the percentage method to determine class counsels' fee, and uses the lodestar only for cross-check purposes, the reduction of an hour of time recalibrates the lodestar multiplier and requires further analysis of whether that lower amount can continue to sustain the requested percentage award. But it does not require the "repayment" of that hour of time since counsel was never "paid" for that hour of time; counsel were paid a percentage of the recovery.[15]

Given the proper analytic framework for addressing the inadvertently double-counted lodestar, the only question becomes whether the recalibrated lodestar multiplier can sustain the requested percentage award.[16] Here, removing the aggregate double-counted lodestar of $4,058,000 from the aggregate lodestar of $41,323,895.75, results in a corrected aggregate lodestar of $37,265,241.25. Applying that corrected lodestar as a cross-check against the aggregate fee award of $74,541,250 results in a 2.0 multiplier. Such a multiplier, used for lodestar cross-check purposes, is more than reasonable under controlling legal authority.[17] Moreover, in his Report, the Special Master finds that the aggregate multiplier of 1.8 (the lodestar multiplier based on the original fee submissions) to be "certainly within the reasonable range," and cites as support for that statement cases that applied multipliers ranging 1.987 up to 4.0.[18]

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[14] *Id.* at 71-73.

[15] Declaration of William B. Rubenstein in Support of Lieff Cabraser Heimann & Bernstein, LLP's Response and Objections to the Special Master's Report and Recommendations ("Rubenstein Declaration II"), ECF No. 368, at 20-21 and fn. 80 (noting that "[numerous] legal decisions have understood this distinction, after adjusting the lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remains reasonable" and citing several of those decisions).

[16] *Id*. at 17-21; Response and Objections at 71-73.

[17] *Id*. *See also* Expert Declaration of William B. Rubenstein at 30-34, ECF No. 368, Exhibit A ("Rubenstein Declaration I").

[18] *Id*.

Despite the clarity of the appropriate approach to addressing the inadvertent double-counting of staff attorney lodestar, the Master continues to maintain his position that the firm disgorge or forfeit one-third of the inadvertently double-counted lodestar ($1,352,667.67). In doing so, the Master again offers no case law, no legal principle, and no scholarship or legal commentary to support his view. Faced with the absence of a credible legal argument, the Master now claims that he is justified in recommending this penalty against Lieff Cabraser because it satisfies the "equitable tasks delegated to the Special Master," and "accomplishes a larger goal of rough justice."[19] The new rationale for the Master's recommended "equitable" remedy against Lieff Cabraser is meritless and should be rejected.

The Master's belated "equitable" arguments in support of his recommended disgorgement/forfeiture remedy are not presented in a clear and cohesive manner and are frequently at odds with the factual record.[20] In order to best respond to the Master's presentation, Lieff Cabraser organizes its reply as follows: (1) the Master's authority does not include the right to disregard controlling legal authority for the purpose of determining attorneys' fees in class actions; (2) the facts show the firm's double-counting of certain staff attorney lodestar was inadvertent and not material; (3) the Master's proposed disgorgement/forfeiture remedy for an inadvertent mistake that had no negative impact on the class is *not* equitable, it is punitive; (4) the Master's argument that disgorgement/forfeiture will "deter" future inadvertent mistakes in preparing future fee petitions is nonsensical; and (5) Lieff Cabraser has already been penalized significantly for its double-counting mistake.

[19] Revised Report at 9 and 10.

[20] Revised Report at 8-21.

1. The Master's Authority Does Not Include the Right to Disregard Controlling Legal Authority for the Purpose of Determining Attorneys' Fees.

Lieff Cabraser fully understands that the Court has vacated the original fee award.[21] The firm also appreciates that this Court has the discretion, consistent with controlling legal principles and the factual record, to award an aggregate attorneys' fee and to allocate that fee among counsel as it deems appropriate.[22] Lieff Cabraser does not, however, agree with the Master that the Court should reduce the firm's fee by any amount based on the inadvertent double-counting of certain staff attorney lodestar. Moreover, the firm does not agree with the Master that the Court should in effect disregard the application of lodestar cross-check principles.

The Master states that he is "not persuaded by Lieff that courts are constrained by the percentage-of-fund or lodestar methodology traditionally employed by the district courts [in] reviewing… a fee award for the first time."[23] It does not matter whether the Master is "persuaded" or not – the principles for determining attorneys' fees in class actions are well settled in the First Circuit.[24]

The fact that the Court has discretion and flexibility in applying the percentage-of-the-recovery/lodestar cross-check approach does not mean, as the Master seems to suggest, that the Court should now abandon the methodology for determining attorneys' fees the Court employed in determining a reasonable fee in this case.[25] Indeed, in exercising its discretion and flexibility

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[21] ECF No. 331; *see also* ECF No. 445 at n. 1; Revised Report at 7, 10-11.

[22] ECF 445 at n. 1.

[23] Revised Report at 10.

[24] *See* Customer Class Counsel's Memorandum of Law in Support of the Reasonableness of the Attorneys' Fee Award, filed December 18, 2018 ("Customer Class Counsel's Memo.") at 4-14; Response and Objections at 34-36, 68-73, 79-82.

[25] *See* Revised Report at 10-11.

in assessing the attorneys' fee, the Court is of course free to consider whatever lodestar it believes appropriate for cross-check purposes against a percentage-of-the-recovery award. Inadvertently double counted lodestar should, as has been made clear by Customer Class Counsel since the November 10, 2016 Goldsmith Letter, be eliminated from the aggregate lodestar the Court uses for cross-check purposes. It is for the Court to then determine whether the resulting multiplier is appropriate and justified.

The Master refuses to follow this analytic model because it results in what would still be a reasonable multiplier, and runs counter to his narrative that a substantial sum of money should be reallocated from Customer Class Counsel (including Lieff Cabraser) to the class.[26] As the Master puts it "if Lieff were correct that the Court should order disgorgement only upon a yield of an excessive multiplier, the Court's hands would be tied to redress any misstatements – no matter how egregious – absent a multiplier that registers as 'unreasonable' according to historical benchmarks. [Footnote omitted.] This result would render the Court's and the Special Master's review a mere formality," and would "fundamentally collide with the recognized need in the First Circuit for courts to be flexible when determining the scope of an appropriate fee."[27]

Lieff Cabraser has never argued that a court may order disgorgement only upon a yield of an excessive multiplier. Rather, the firm maintains, with support from Professor Rubenstein in line with all of the relevant case law, that when an adjustment, typically a reduction, is made to the lodestar submitted for cross-check purposes, the proper next step is to determine whether the resulting or corrected lodestar still supports the percentage-of-the-recovery awarded.[28] Intentional misstatements by counsel, including "egregious" misstatements, would be, as they

[26] *See id*.

[27] Revised Report at 11.

[28] *See* Response and Objections at 68-73, 91-94; Rubenstein Declaration I at 7-12, 30-34; Rubenstein Declaration II at 17-21.

always are, addressed under appropriate rules, including Rule 11 of the Federal Rules of Civil Procedure. The Special Master expressly found as a fact that Lieff Cabraser did not engage in any such sanctionable conduct. In short, by applying the basic lodestar cross-check rules and principles here, the Court's hands are in no way "tied."

2. The Firm's Inadvertent Double-Counting of Certain Staff Attorney Lodestar Was Inadvertent and Was Not Material.

As articulated in his Revised Report, the principal factual basis for the Master's punitive disgorgement/forfeiture remedy against Lieff Cabraser is that the firm contributed to, or played a part in, the double-counting of certain staff attorney time, and that Customer Class Counsel's original fee petition overstated Plaintiffs' Counsel's aggregate lodestar.[29] What is notable about the Master's focus on the *fact* of Lieff Cabraser's double-counting as the main basis for imposing substantial economic penalties on the firm is that there is *no* dispute that Lieff Cabraser mistakenly included $868,417 in staff attorney lodestar as part of Customer Class Counsel's original fee petition.[30] Indeed, Lieff Cabraser, along with the other Customer Class Counsel, informed the Court of the accidental double-counting in the November 2016 Goldsmith Letter, promptly after having become aware of the issue.[31] Customer Class Counsel, including Lieff Cabraser, told the Court in the Goldsmith Letter that the double-counting was accidental and inadvertent, and after his exhaustive investigation, the Master found that to be true, in particular as to Lieff Cabraser.[32]

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[29] *See* Revised Report at 8, 9, 10, 12 and 18.

[30] Response and Objections at 3, 7, 38, 66, 75, 77, 99. It bears noting that in an apparent reference to Lieff Cabraser mistakenly including $868,417 in staff attorney lodestar as part of the fee petition, the Master mistakenly multiplies that number by a factor of almost 10, referring to "the $8,670,000 mistake [Lieff Cabraser] made." Revised Report at 14, n.15. Clearly, even the Master is capable of making a numerical mistake—even a reasonably obvious one.

[31] Response and Objections at 39-40.

[32] Executive Summary at 14-15; Report at 363.

Although the Master states repeatedly that Lieff Cabraser contributed to the inadvertent double-counting, he offers no facts from the record that support translating that simple fact into a multi-million dollar penalty. Perhaps sensing the weakness in his position, in the Revised Report, the Master now maintains that Lieff Cabraser's inadvertent double-counting was "material" and was an error of particular "magnitude."[33] These findings or characterizations are not supported by the factual record, and are directly contradicted by the Master's original findings of fact. Indeed, the following facts undermine the Master's position that the fact of the double-counting itself warrants the imposition of a stiff economic penalty:

- Lieff Cabraser had 18 staff attorneys who worked on the State Street Action.[34]
- In early 2015, Lieff Cabraser agreed to share and or host six staff attorneys that would be partially or fully paid for by Thornton.[35]
- This arrangement was used due to Thornton's limited physical facilities and so that Thornton could bear an appropriate share of the costs of the document review and analysis Customer Class Counsel was then engaged.[36]
- It was clearly understood by Lieff Cabraser that Thornton would include the lodestar of the staff attorneys it paid for in any later fee request.[37]
- Two of the staff attorneys Lieff Cabraser "shared' with Thornton were on Lieff Cabraser's payroll and both continue to work for Lieff Cabraser to this day.[38]
- For roughly a nine week period between February and April 2015, Lieff Cabraser invoiced Thornton, and Thornton paid Lieff Cabraser, for the work performed by these attorneys.[39]
- Two other staff attorneys Lieff Cabraser shared with Thornton worked in Lieff Cabraser's San Francisco office and were paid by an agency.[40]

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[33] Revised Report at 10, 13.
[34] Response and Objections at 24-28, and Appendices A and B thereto.
[35] *Id.*
[36] *Id.* at 29.
[37] *Id.*
[38] *Id.*
[39] *Id.*

- From February to mid-April 2015, Thornton paid an agency directly for the legal services of these two attorneys as part of its arrangement with Lieff Cabraser.[41]

- Two additional staff attorneys were hired through and paid by an agency, which in turn was paid directly by Thornton, while they worked physically in Lieff Cabraser's San Francisco office between February and June 2015.[42]

- On November 8, 2016, Lieff Cabraser learned that a reporter from the Boston Globe had inquired about the appearance of certain attorneys on more than one of Customer Class Counsel's Lodestar Reports (as part of their fee application).[43]

- Upon learning of that inquiry, the firm promptly identified time and lodestar included in the firm's Lodestar Report that was also included as part of the Thornton fee submission.[44]

- The firm's internal review showed that two of the staff attorneys who had split time performing work for both Lieff Cabraser and Thornton showed no duplicative time on Lieff Cabraser's or Thornton's reports.[45]

- Two other staff attorneys who split time between Lieff Cabraser and Thornton did have time that was inadvertently duplicated in Lieff Cabraser's Lodestar Report.[46]

- These two attorneys worked for Lieff Cabraser and were paid directly by the firm before, during and after their brief stints for Thornton, and therefore regularly submitted their contemporaneous time records to the firm on a daily basis.[47]

- The inadvertent duplication of their time on Lieff Cabraser's Lodestar Report occurred because the time these two attorneys lodged with Thornton between February 9, 2015 and April 14, 2015 was mistakenly not removed from Lieff Cabraser's timekeeping records after the firm's accounting department invoiced and received payment for those hours from Thornton. This was an inadvertent bookkeeping error.[48]

- The two attorneys who were hired through an agency that was paid directly by Thornton, should not have entered any time summaries into Lieff Cabraser's

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[40] *Id*. at 30.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 36.
[44] *Id*.
[45] *Id*. at 37.
[46] *Id*.
[47] *Id*.
[48] *Id*.

timekeeping system.[49] They did so, however, during the time they worked in Lieff Cabraser's San Francisco office from March to June 2015 by emailing their time summaries directly to the firm's word processing department (consistent with typical staff attorney practice), while also reporting their time to both their employing agency and to Thornton.[50]

- After these errors were discovered on November 9, 2016, Lieff Cabraser's accounting department was directed to remove all of the erroneously recorded hours that had in fact been Thornton's financial responsibility from Lieff Cabraser's timekeeping records.[51]

- Lieff Cabraser then provided its "corrected lodestar" figures – a reduction from $9,800,487.50 to $8,932,070.50, a difference of $868,417 (or 8.8%) – to Labaton and assisted in the drafting and submission two days later of the November 10, 2016 Goldsmith Letter.[52]

- Lieff Cabraser was not responsible for assembling or reviewing the lodestar reports from all Plaintiffs' Counsel as part of the fee application process (that was Lead Counsel's responsibility), neither Thornton's, nor any other firm's Lodestar Reports, as the final fee submission, were shared with Lieff Cabraser before they were filed.[53]

- The portion of the double-counted lodestar attributable to Lieff Cabraser ($868,417) is only 2% of the total aggregate lodestar originally submitted to the Court, and only 1.16% of the aggregate fee awarded by the Court.

Lieff Cabraser recounts these facts (provided with even greater detail in the firm's Response and Objections) to assure the Court that the Master was correct when he concluded that the firm's double-counting was inadvertent.[54] These facts also serve to refute the notion raised in the Revised Report that Lieff Cabraser's double-counting mistake were "material" or of a "magnitude" that warrants the imposition of the penalty advocated by the Master.

After his exhaustive investigation, the Master found:

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[49] *Id*. at 37-38.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*. at 33, 76.
[54] *Id.* at 61-62 (citing Executive Summary at 14-15; Report at 363).

> Each of the three firms bears different degrees of responsibility for the double-counting and, accordingly, the firms' respective roles are addressed *seriatim* here.
>
> Lieff… has acknowledged that it made a mistake in claiming the hours of the staff attorneys and agency attorneys loaned to Thornton on its lodestar. Contemporaneous evidence also indicates that Lieff anticipated that [certain of] its staff attorneys would be included on Thornton's petition. Notwithstanding this error, Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting. Lieff had, early in this litigation, agreed to the "loaning" of [certain of] its staff attorneys and agency attorneys to Thornton as a means of sharing the costs and risks of employing these attorneys and the litigation as a whole. While the agreement to "loan" the staff and agency attorneys to Thornton was, perhaps, an ill-considered judgment since the cost-sharing of this case could have been achieved in other ways, *it cannot be said that the agreement to share costs through this mechanism was a significant cause of the double-counting.* Thus, while Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent.[55]

Lieff Cabraser made an honest mistake – one that it acknowledged and corrected well before the Master was appointed, let alone before the Master's investigation commenced. Nothing about the firm's inadvertent double-counting, however, warrants the punitive disgorgement/forfeiture or fee reduction sought by the Master.

3. The Master's Proposed Disgorgement/Forfeiture Remedy for an Inadvertent Mistake That Had No Negative Impact in the Class is *Not* Equitable.

The Master argues that his recommendation "that the $4.1 million, representing the overstated lodestar, be paid back to the class as an equitable remedy [is] tailored to make the class whole…."[56] The Master made similar arguments in his Report. In the firm's Response and Objections, the firm challenged the notion that any of its attorneys' fees should be "returned to

[55] *Id*. (Emphasis added)

[56] Revised Report at 8-9.

the class" and emphasized that the Special Master had identified no harm to the class that justifies such a remedy.[57] The fact that the Master has now couched his argument in terms of equity does not change the fact that the inadvertent double-counting has had *no negative impact* on the class. Indeed, the Master does not and cannot explain how shifting more than $1.3 million in attorneys' fees from Lieff Cabraser to the class will make the class "whole."

Again, the factual record, as well as the Master's own findings, undercut his proposal to "return" a significant portion of Lieff Cabraser's fees to the class. The Master found that the $300 million settlement Plaintiffs' Counsel achieved on behalf of the class was an "excellent result," particularly in light of the difficult risks and challenges presented by the novel legal theories advanced in the State Street Action, and given the skill and resources of State Street's attorneys.[58] In his Report, the Master recognizes that the class received significant economic benefits as a consequence of the "highly dedicated and professional skilled work of the class's law firms."[59] Class members were informed of the financial benefits they had received from the settlement, and were told that class counsel would seek a fee up to approximately 25% of the amount recovered.[60] Not one class member of the sophisticated class of institutional investors opted out of the certified settlement class or objected to the settlement or the proposed fee award.[61] The class received exactly what it was notified it would receive, and what it unanimously agreed to.

As explained in detail in the concurrently filed Customer Class Counsel's Memo concerning the reasonableness of the Court's original fee award, the approximately 25% of the

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[57] *See* Response and Objections at 73-74.
[58] *Id*. at 34-36, 57-61, 73-74.
[59] *Id*.
[60] *Id*.
[61] *Id*.

recovery fee awarded to Plaintiffs' Counsel was fully consistent with First Circuit authority.[62] Further, as explained in that brief, in Lieff Cabraser's Response and Objections, and above, and even as acknowledged by the Special Master, a multiplier of 2.0 (or around 2.0) supports the 25% percentage-of-the-recovery in a lodestar cross-check.[63] The Master identifies no harm suffered by the class as a consequence of the double-counting that justifies paying "back to the class" any amount of its well-earned attorneys' fees.

4. The Master's Argument That Its Recommended Disgorgement/Forfeiture Remedy Will "Deter" Future Inadvertent "Mistakes in Preparing Future Fee Petitions" is Nonsensical.

In his Revised Report, the Master offers a new rationale for ignoring the appropriate method of eliminating inappropriate lodestar for cross-check purposes: deterrence. The Master recommends that Lieff Cabraser disgorge or forfeit $1,352,667.67, in part, to "deter further mistakes,"[64]; "deter firms from making such material mistakes in preparing future fee petitions"[65]; "address the magnitude of the error and need for deterrence"[66]; "serve[ ] as a deterrence against future mistakes"; and "serve[ ] as a substantial deterrent against putting themselves in positions fraught with such risk in the future;"[67] and, "discourage Lieff and its counterparts from entering into similarly perilous arrangements in the future and to nullify any financial benefit conferred upon it by its own imprecision and poor judgment."[68]

In short, the Master recommends more than $1.3 million in the form of a punitive sanction against Lieff Cabraser in order to (a) deter it from making inadvertent

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[62] *See* Customer Class Counsel's Memo at 4-14.
[63] *Id.*; Response and Objections at 41-49, 61, 64-66, 71-73; Report at 245-246.
[64] Revised Report at 9.
[65] *Id*.
[66] *Id*. at 10.
[67] *Id*. at 12.
[68] *Id*. at 14.

timekeeping/accounting mistakes in the future, and (b) not to again enter into cost/personnel sharing arrangements with co-counsel. As to the first point, it is of course nonsensical to extract more than $1.3 million from Lieff Cabraser in order to deter it from again making an accidental bookkeeping mistake. Lieff Cabraser has been in the business of litigating class actions and complex cases for more than 46 years, and during that time the firm has handled as lead counsel, and participated in as additional counsel, hundreds of class action fee applications.[69] The State Street Action is the first time, and the only time, the firm has had to revise a fee petition and to withdraw inappropriately included lodestar. The firm requires no patronizing lectures or financial penalties to "deter" it from making bookkeeping mistakes in the future.

Second, it is abundantly clear that the Master disapproves of the cost/personnel-sharing arrangement between Lieff Cabraser and Thornton (and presumably the cost-sharing agreement between Labaton and Thornton).[70] That displeasure does not make it unlawful or even improper, and the Master does not contend otherwise. In his Report, even as he criticized the cost-personnel-sharing agreement, the Master finds that "*it cannot be said the agreement to share costs through this mechanism was a significant cause of the double-counting.*"[71]

The arrangement between Lieff Cabraser and Thornton made sense in the context of the litigation and the longstanding relationship between the firms.[72] There is and was nothing untoward about the arrangement which was designed as an accommodation to co-counsel, not as a vehicle for enhancing Lieff Cabraser's lodestar or fee request.[73] And the firm rejects the Master's suggestion that the arrangement reflected "poor judgment" (termed less pejoratively in

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[69] Response and Objections at 9-10.
[70] Revised Report at 9-14.
[71] Executive Summary at 14-15.
[72] Response and Objections at 28-30.
[73] *Id.*

the Report as "perhaps, an ill-considered judgment").[74] All that said, as the Master notes, the firm has not previously entered into such an arrangement and has no intention of doing so again. Calling on the firm to surrender $1.3 million of attorneys' fees to deter it from engaging in a lawful business arrangement, but one that it has no track record of engaging in before and no intention of repeating, is again, nonsensical, and is unnecessarily punitive.

5. Lieff Cabraser Has Already Been Penalized Significantly for Its Double-Counting Mistake.

The Master maintains that "inadvertence does not guarantee the Customer Class firms a free pass."[75] In a similar vein, the Master accuses Lieff Cabraser of attempting to "brush aside the double-counting mistakes."[76] Of course, Lieff Cabraser has hardly had a free pass or been able to "brush aside" the consequences of its inadvertent double-counting.[77] The Master's investigation has thus far required the firm to spend $1.152 million for the fees and expenses of the Special Master and his team. Moreover, the firm has also incurred an additional $456,853 in out-of-pocket costs, and $2,552,669 in firm lodestar, to defend itself during the investigation and in response the Master's advocacy. *See* discussion *infra* at Section IV.

Despite the financial impact on the firm of the Master's investigation and advocacy, the Master baselessly claims that the disgorgement he seeks is "proportionate to the significant monetary recovery realized by Lieff."[78] According to the Master, "the forfeiture of

[74] Executive Summary at 14-15; *see also* Report at 363.
[75] Revised Report at 8.
[76] *Id*. at 13.
[77] *See* Response and Objections at 98-100.
[78] *Id*. at 14.

$1,352,666.67 amounts to a disgorgement of 8.9% [footnote omitted] of Lieff's recovery – hardly an excessive penalty."[79] The facts do not support the Master's views.

Based on the factual record, the Master properly concluded that Lieff Cabraser's double-counting was inadvertent. The Master made no finding that Lieff Cabraser engaged in any professional or intentional misconduct. Further, the Master concluded that the firm bears the least amount of responsibility for the accidental double-counting of lodestar of four staff attorneys, an unintentional overstatement of $868,417, a fraction of the aggregate lodestar and of the ultimate fee award. *See* discussion at Section III.A.2, *supra*. For that mistake, *which caused no harm to the class*, the Special Master recommends that Lieff Cabraser "return" to the class $1,352,667. There is absolutely nothing proportionate about the Master's punitive recommendation in this regard – it is unquestionably "an excessive penalty."

B. <u>In the Event the Court Requires Lieff Cabraser to Disgorge or Forfeit Any Portion of the Firm's Inadvertently Double-Counted Lodestar, That Disgorgement Should be Commensurate with the Firm's "Relative" Role in the Double-Counting.</u>

In its Response and Objections, Lieff Cabraser states that in the event the Court overrules the firm's objection to the imposition of any "remedy" for the double-counting, the firm objects to the Special Master's recommendation that the appropriate result is "disgorgement by all three firms in equal amounts" of the $4,058,000 in inadvertently double-counted time (i.e., $1,352,667 each).[80] Lieff Cabraser objects to this recommendation because such an outcome is inconsistent with the factual record and the Special Master's own substantive findings.[81]

In its Response and Objections, Lieff Cabraser contends that, based on the firm's limited fee interest in the State Street Action (24% among Customer Class Counsel and 20.3% among all

[79] *Id.*
[80] *Id.* at 67-76.
[81] *Id.*

plaintiffs' counsel), the actual amount of the lodestar the firm inadvertently double-counted ($868,417 or 2% of the total aggregate lodestar submitted for cross-check purposes), the relatively small percentage of the total double-counted amount that can be attributed to Lieff Cabraser (21%), and given the Special Master's findings that the firm was the least responsible for failing to catch and correct the inadvertent double-counting, if the Court requires any disgorgement, the firm should be obliged to pay significantly less than an "equal share" of the total double-counted lodestar (i.e., not 33 1/3%).[82]

As to the "relative responsibility of Lieff Cabraser for the double-counting, the Master found in his Report that "each of the three Customer Class law firms bears widely varying degrees of responsibility," and "[e]ach of the three firms bears different degrees of responsibility for the double-counting."[83] In his Report, the Master finds that "Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting."[84] The Master concludes in his Report that "while Lieff bears some responsibility for the double-counting, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent."[85]

In his Report, the Master compares Lieff Cabraser's relatively minor (i.e., "some") share of responsibility for the double-counting with Thornton's "significant responsibility for the double-counting," and Labaton's "ultimate responsibility."[86] Despite describing the relative roles of the firms in the inadvertent double-counting and finding Lieff Cabraser the least

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[82] *Id.*
[83] Executive Summary at 10, 13 and 14. *See* Response and Objections at 75-77.
[84] Executive Summary at 14. *See* Response and Objections at 75-77.
[85] Executive Summary at 15. *See* Response and Objections at 75-77.
[86] Executive Summary at 15-19.

responsible, the Master nevertheless recommends "disgorgement in equal amounts" of the total double-counted lodestar.[87]

Instead of acknowledging his factual findings that *minimize* Lieff Cabraser's role in the double-counting, in the Revised Report the Master offers several new justifications for penalizing the three Customer Class Counsel firms equally: (1) the Master is not bound by its prior factual findings; (2) the existence Lieff Cabraser-Thornton cost and personnel sharing arrangement mandates equal remedial treatment with Labaton and Thornton; (3) the November 2016 Clawback Agreement suggests that Lieff Cabraser anticipated the Master's May 2018 recommended disgorgement/forfeiture against the firm; and, (4) the firm was expected to pay one-third of the Master's fees and expenses, and is partly responsible for the extraordinary costs of the Master's investigation because it "prolonged" the investigation.

1. The Master is Bound by the Factual Record and the Factual Findings in his Report.

In his Revised Report, the Master makes no effort to explain the inconsistency between the factual findings of Lieff Cabraser's lesser responsibility for the inadvertent double counting and his proposed remedy. Instead, the Master doubles down, characterizing its prior factual findings as mere "general observations," and stating, incredibly, that those observations, "in any event, are not binding findings of fact at this stage in the post-report proceedings."[88] Lieff Cabraser objects to the Master's contention that he is not bound by his own findings of fact.

The Master was appointed by this Court investigate and prepare a report and recommendations concerning a range of issues regarding the attorneys' fees sought by and

[87] Executive Summary at 59. *See* Response and Objections at 75-77.

[88] Revised Report at 15. *See also* Revised Report at 6, where the Master states: "The Special Master, of course, is not bound by the factual findings in the Report."

awarded to Plaintiffs' Counsel.[89] After 14 months and millions of dollars spent on an "extensive investigation of the underlying facts and circumstances,"[90] the Master issued his Report containing one hundred and thirty pages of "findings of fact."[91] While the firm does not quarrel with the authority of the Master to revise his Report in light of any *new* facts (or law) that have emerged since he filed his Report, or question the Master's right to revise his Report based on the firm's objections to the Report, Lieff Cabraser is aware of no directive from this Court or any legal authority that allows the Master to ignore or disregard the factual record, including those findings of fact contained in his Report. Surely, Lieff Cabraser, along with all the other participants to this proceeding, as well as this Court, are entitled to rely on, or attempt to refute, the Master's findings.

In his Revised Report, the Master does not present any new facts regarding Lieff Cabraser's inadvertent double-counting. Rather, the Master ignores his prior factual findings of Lieff Cabraser's lesser degree of responsibility for the double-counting, and exaggerates Lieff Cabraser's mistake, while ignoring other inconvenient parts of the factual record. For example, whereas in his Report the Master concluded that "Lieff bears some responsibility for the double-counting" and compared that "degree" of accountability to the "significant" and "ultimate" responsibility borne by Thornton and Labaton, respectively, the Master now states, based on no new facts, that "Lieff attorneys played a substantial role" and that the firm's contribution to the accidental double-counting was "significant."[92] This change in the Master's findings regarding Lieff Cabraser's conduct is not borne out by the facts (*see* discussion *supra* at Section III.A.2),

[89] Exhibit 163 to Report, ECF No. 173, at 2-3.
[90] Revised Report at 8.
[91] *See* Report at 8-138.
[92] Revised Report at 15 and 20.

and seems offered now solely in an effort to justify the Master's proposed remedy. That is a tactic of a litigation adversary, not a Rule 53-appointed Special Master.

2. The Lieff Cabraser-Thornton Cost/Personnel Sharing Arrangement is Not a Basis for Treating the Three Customer Class Counsel Firms Equally if a Penalty or Fee Reduction is Imposed for the Inadvertent Double-Counting.

The Master claims that Lieff Cabraser's cost/personnel sharing arrangement with Thornton warrants the imposition of his recommended disgorgement/forfeiture penalty equally among Customer Class Counsel.[93] The Master criticizes the arrangement's "unusual existence," the fact that the arrangement was not committed to writing (although its terms were perfectly clear to Lieff and Thornton), and the fact that the firm did not explain or describe the cost and personnel sharing arrangement in its fee petition (not that it was required or necessary). Yet, as explained above, there is nothing inappropriate or unlawful about the arrangement between Lieff Cabraser and Thornton (*see* discussion *supra* at Section III.A.4), and in his Report, the Master concludes that "*it cannot be said that the agreement to share costs through this mechanism was a significant cause of the double-counting.*"[94] The Master's findings of fact are directly at odds with his argument that Lieff and Thornton's cost and personnel sharing arrangement is itself a basis for penalizing Lieff Cabraser equally for the inadvertent double-counting. The Master's argument should be rejected.

3. The November 2016 Clawback Agreement is Not A Basis for Treating the Three Customer Class Counsel Firms Equally if a Penalty or Fee Reduction is Imposed for the Inadvertent Double-Counting.

The Master argues that Lieff Cabraser should be penalized equally with the other Customer Class Counsel firms for the inadvertent double-counting by bizarrely contending that

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[93] *See* Revised Report at 15-18.

[94] Executive Summary at 14-15; Report at 363; Response and Objections at 61-62. Emphasis added.

the firm's participation in the November 2016 Clawback Agreement among all Plaintiffs' Counsel indicates that the firm should have anticipated the Master's proposed disgorgement/forfeiture penalty and its equal application to the firm.[95] The Clawback Agreement, described in the firm's Response and Objections at 40-41, was agreed to by all Plaintiffs' Counsel after the Goldsmith Letter, but before the Court responded or reacted to that Letter, to assure Lead Counsel (Labaton) that if the Court reduced the aggregate fee award after the disbursement of the court-awarded fees, all Plaintiffs' Counsel (including ERISA counsel) would return their *pro rata* share of those fees into the Lead Counsel Escrow Account. It was a reasonable precaution, but in no way an admission or concession that a fee reduction would be appropriate.

At that time, in November 2016, Lieff Cabraser could not have contemplated that four months later the Court would appoint a special master, and that 14 months after that the Master would make his disgorgement/forfeiture recommendations based on Customer Class Counsels' inadvertent double-counting. By virtue of agreeing to the Clawback Agreement, Lieff Cabraser *did not* anticipate or contemplate the Master's recommendation that the firm be penalized $1.3 million for its bookkeeping mistake, or that it would be penalized equally with Labaton and Thornton.

4. Lieff Cabraser Has Paid 24% (Not One-Third) of the Master's Fees and Expenses, and It Did Nothing to "Prolong" the Master's Investigation.

In his Revised Report, the Master attempts to dismiss the firm's argument that it has already been meaningfully penalized for its inadvertent double-counting by virtue of the $1.152 million it has spent on the Master's investigation, along with the additional $456,853 in costs and

[95] *See* Report at 18-19.

$2,552,669 in lodestar it has expended responding to the Master's investigation and advocacy. *See* discussion *infra* at Section IV.[96]

The Master first maintains that he has "consistently taken the position that the three Customer Class firms should share equally in the cost of the investigation."[97] Lieff Cabraser is unaware of any communications from the Master in which he has ever, let alone "consistently," taken such a position. But more importantly, it is not and never has been up to the Master how the firms share in the costs of the investigation. Indeed, Customer Class Counsel have from the outset of the Master's investigation shared the attendant costs based on the same percentage they shared in the fees awarded by the Court. This means that Lieff Cabraser has paid 24% of the Master's expenses.[98] The Master's recommendation that Lieff Cabraser pay one-third of the penalty for the inadvertently double-counted lodestar is disproportionate to its 24% share of the Master's fees and expenses and its 24% fee interest in the State Street Action (among all Plaintiffs' Counsel Lieff Cabraser's fee interest is 20.3%).

The Master responds further to Lieff Cabraser's argument that it has already paid enough as a consequence of its inadvertent double-counting by asserting that the "prolongment of the investigatory phase, after emails referencing Damon Chargois came to light, was as much Lieff's responsibility as it was Labaton's and Thornton's."[99] The Master complains that the firm did not take any steps to bring Chargois to the attention of the Special Master of its "own volition or in response to the Master's discovery requests" prior to August 2017, which, without further

[96] *See also* Responses and Objections at 98-100; Revised Report at 20-21.
[97] Report at 20.
[98] *See* Responses and Objections at 41, 64-66.
[99] Revised Report at 20.

explanation, the Master states "contributed to the prolongment of the investigation."[100] Once again, this rendition of events is inconsistent with the factual record.

As Lieff Cabraser was misled about Chargois's role (believing him to be a legitimate local counsel for Labaton and Lead Plaintiff), and otherwise had no relationship with Chargois, Lieff Cabraser had no reason to bring the matter to the Master's attention.[101] Further, Lieff Cabraser did not produce any discovery that would have identified Chargois or his purported role in the State Street Action earlier than it did because none of the Special Master's discovery requests called for the production of such information.[102] In his Report, the Special Master specifically concedes as much: the Master "does not conclude that the non-disclosure constitutes discovery misconduct."[103] And, beginning in August 2017, at the Master's behest Lieff Cabraser responded repeatedly to the same inquiries concerning Chargois, including in written discovery responses, depositions, supplemental written submissions and experts for discovery.[104] The Master does not explain how starting that discovery exercise sooner would have minimized the costs of his investigation (the vast majority of which did not concern Lieff Cabraser).

The Master's final argument in support of its position that Lieff Cabraser somehow brought the financial burden of the Master's investigation upon itself criticizes the firm and its

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[100] *Id*.

[101] *See* Response and Objections at 96-98 (and internal citations).

[102] *See* Response and Objections at 49-56, N.227. The Annotated and Revised Document Request Interrogatories to Lieff Cabraser dated May 23, 2017 specifically eliminated Former Request No. 20, which sought all "documents and/or communications relating to or evidencing discussions between and among the Law Firm, the Plaintiffs' Law Firms and/or ERISA counsel, regarding the allocation of a certain percentage of the Fee Award among counsel, including but not limited to agreements to pay ERISA counsel a fixed percentage of the total Fee Award." That withdrawn request is the only request issued to Lieff Cabraser that would have concerned Chargois. Meanwhile, no interrogatory directed to LCHB sought details concerning the specific fee allocations between and among Plaintiffs' Counsel.

[103] Report at 119, n. 98

[104] *See* Response and Objections at 49-56.

experts for arguing and litigating "extensively the Customer Class Counsel firms were under no obligation to inform the Court or Class of the [Chargois] payment."[105] This argument turns the record on its head. Lieff Cabraser had no choice but to respond to the extensive and repetitive interrogatory, document and deposition discovery propounded by the Master as part of his Chargois investigation.[106] It is more than passing strange that the Master now accuses Lieff Cabraser of prolonging his investigation by responding fully and accurately to his discovery requests.

Even more perplexing is the Master's contention that there was something inappropriate or wasteful about Lieff Cabraser offering expert reports by Professor Rubenstein and Massachusetts attorney Timothy Dacey *in response* to the Master's expert, Professor Stephen Gillers. That expert initially opined that all Customer Class Counsel, including Lieff Cabraser, were obligated to disclose the Chargois Arrangement to the Court and to the class under federal judicial precedent and pursuant to Massachusetts ethical rules. Indeed, Gillers specifically opined that Lieff Cabraser's failure to disclose the arrangement with Chargois was a violation of law and Massachusetts rules of preferred conduct.[107] Gillers, of course, recanted that opinion as to Lieff Cabraser during his deposition and in his Supplemental Report – as a direct result of litigation by Lieff Cabraser and the testimony of the firm's experts, all necessitated by the Master's strategy, decisions and arguments. In the end, the Special Master found as fact that Lieff Cabraser was misled and uninformed about the nature and details of the Chargois

[105] Revised Report at 20.
[106] *See* Response and Objections at 49-56.
[107] *See* Response and Objections at 53-55.

Arrangement, and was not required to disclose the Arrangement or anything else about Chargois under the federal law or Massachusetts ethical principles.[108]

C. Lieff Cabraser Should Not Be Required To Treat The Firm's Staff Attorneys Paid Through An Agency As A "Cost" Instead Of Including Them In Its Lodestar As Part Of The Aggregate Lodestar Cross-Check.

In his Report, the Special Master recommends that the time of Lieff Cabraser's seven staff attorneys who were paid by an agency for at least a portion of their time on the case be treated as an expense, and not as a component of lodestar for cross-check purposes.[109] In its Response and Objections, Lieff Cabraser objects to this recommendation on the following grounds: (1) the controlling and relevant case law, including from within the First Circuit, has expressly *rejected* the Special Master's unsupported opinion that the time of the firm's agency lawyers should be treated as a cost; and (2) the purported "factual" distinctions the Special Master attempts to draw between the firm's staff attorneys on payroll and those paid by an agency are either insignificant or not supported by a fair reading of the record.[110]

In his Revised Report, the Master "continues to recommend that contract or agency attorneys employed by third-party staffing companies be billed as an expense."[111] Consistent with his original Report, in the Revised Report the Master cites no case in which a court has ever held that the time of the firm's "agency" attorney must be treated as a cost. As Professor Rubenstein has observed, the federal courts are

> unanimously opposed to the Special Master's Report's approach. Numerous courts have explicitly rejected the argument that contract attorneys must be billed as a cost [footnote omitted] and many other courts – far too numerous to enumerate – have approved fee petitions that include contract attorneys and counsels' lodestar or lodestar cross-check

[108] *See* Report at 106, 109-113, 287-289, 301-302, 331, 350-352; Executive Summary at 26.
[109] Report at 367-68.
[110] Response and Objections at 77-90.
[111] Revised Report at 21-25.

> submission. [Footnote omitted.] By contrast, I am not aware of a single court in the United States that has ever held that contract attorneys must be billed to the client as a cost rather than included in the lodestar at an attorney rate. [Footnote omitted.][112]

In Lieff Cabraser's Response and Objections, the firm identifies numerous cases, including the leading case from a district court in the First Circuit, which specifically reject the argument that contract attorneys be treated as an expense instead of being included as part of lodestar. *See e.g.*, *In re Tyco Intern. Ltd. Multi-District Litigation*, 535 F. Supp. 2d 249, 271-273 (D.N.H. 2007) ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney," and it is "therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar"); *In re Citigroup, Inc. Securities Litigation*, 965 F.Supp.2d 369, 394 (S.D.N.Y. 2013) (rejecting treating as a cost "attorneys who were not permanent employees of the law firm, are hired largely from outside staffing agencies, are not listed on counsel's law firm website or resume, are paid by the hour, and are hired on a temporary basis to complete specific projects related to a particular action."); *City of Potomac General Employees' Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276, 280 (S.D.N.Y. 2013) (acknowledging that "it is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm"); *In re AOL-Time Warner Shareholder Derivative Litig.*, No. 02-CIV-6302 (CM), 2010 WL 363113 at *25 (S.D.N.Y. Feb . 1, 2010) (rejecting an objector's argument that contract attorneys should be treated as an expense, finding that the "contract attorneys here were not mere clerks, but

[112] Rubenstein Declaration I at 12. *See also*, Rubenstein, Newberg on Class Actions at §15:41 n5 (listing cases rejecting the argument that contract attorneys must be billed as a cost).

exercised judgment typically reserved for lawyers, under the supervision of the firm's regular attorneys.").[113]

The Special Master attempts to dismiss the unanimous directive of existing case law (and entirely ignores Professor Rubenstein's opinions), claiming that the firm's reliance on the unequivocal jurisprudence on the subject amounts to "an overly simplistic observation of current trends," and "Lieff boldly argues that Federal Courts are, instead, unanimously opposed to the Master's position that contract attorneys be billed at costs rather than marked-up as a legal fee."[114] There is nothing overly simplistic about the firm's (or Professor Rubenstein's) reading of and presentation of the law. Contrary to the Master's suggestion, there is no "current trend" to treat agency/contract attorneys' time submitted for lodestar cross-check purposes as a cost. Moreover, there is no suggestion in this case that Lieff Cabraser's agency/contract attorneys be "marked-up as a legal fee." Rather, consistent with applicable case law, Lieff Cabraser included the lodestar of its agency/contract attorneys as part of the lodestar submitted on behalf of all Plaintiffs' Counsel (including ERISA Counsel) for purposes of an aggregate lodestar cross-check. That, contrary to the Master's idiosyncratic view, is entirely consistent with controlling law.

Faced with the fact that *no case law supports his position*, and that *an abundance of authority specifically rejects his opinion*, in his Revised Report the Master relies on four equally weak and unpersuasive positions to rationalize his novel view. *First*, the Master claims that he has "waded" more "deeply" than any other Court into the issue of how to treat contract/agency lawyers in the context of a lodestar cross-check analysis. Therefore his opinion on the purported factual distinctions between Lieff Cabraser's staff attorneys on the firm payroll and those who

[113] *See* cases cited and analysis at pages 79-85 of the Response and Objections.
[114] Revised Report at 21.

were paid by an agency is better informed than the unanimous conclusions of every federal court that has addressed the issue.[115] *Second*, the Master justifies "parting ways" with those courts by contending that their analyses are flawed or incomplete. *Third*, the Master maintains that including agency/contract attorney lodestar as part of the lodestar cross-check in this case implicates the "integrity of the legal process and public confidence in how attorneys are compensated." And, *further*, the Master suggests that the firm's decision to use agency/contract attorneys in the State Street Action was somehow improper, requiring that their time be treated as a cost.[116] Each of these positions must be rejected.

1. The Master's Opinion That There Are Meaningful Factual Distinctions Between the Firm's Staff Attorneys on Payroll and Those Paid Through an Agency Is Contrary to the Factual Record, and Is Irrelevant to the Question of Whether the Agency/Contract Attorneys' Time Must Be Treated as a Cost.

In his Report, the Special Master acknowledged that there was *no distinction* between staff attorneys on the firm's payroll and the firm's agency/contract attorneys as to the work actually performed in the State Street Action. For example,

- In his Report, the Special Master recognizes the staff attorneys' stellar educational and professional backgrounds, and repeatedly praises the quality and value of their work in the State Street Action, without regard to which, if any of those staff attorneys, were paid by an agency.[117]
- In his Report, the Master finds that the hourly rates for Lieff Cabraser's staff attorneys (mostly $415 per hour), and the number of hours worked by those attorneys, were reasonable based on the nature and quality of their work, which the Master equates to that of a junior to mid-level associate, without to regard to whether the attorney was on Lieff Cabraser's payroll or paid through an agency.[118]

[115] Revised Report at 21-25.
[116] *Id.*
[117] Response and Objections at 57-61 and 87, and Appendices A and B thereto.
[118] *Id.*

- And in his Report, the Master concedes that there is no distinction between payroll staff attorneys and agency staff attorneys as to the actual work performed for the benefit of the class, finding that there "is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary."[119]

Despite these findings, the Master claims that differences in the relationship between Lieff Cabraser and its staff attorneys on payroll and those hired through an agency – employment status, continuity with the firm, the availability of benefits, etc. – support his opinion that the agency/contract attorneys should be treated as a cost. As explained at length in its Response and Objections, not only are the Master's personal views unsupported by any authority, they rely on a mischaracterization of the facts regarding the firm's relationship with its agency/contract attorneys.[120]

Now, in his Revised Report, rather than make any effort to address Lieff Cabraser's fact-based response, the Master merely restates the same erroneous arguments contained in his Report and pejoratively characterizes Lieff Cabraser's agency/contract attorneys as "temporary workers" and "rented."[121] In order to highlight the significant flaws in the Master's reasoning, Lieff Cabraser provides below a summary of the actual facts concerning the firm's "agency" attorneys, which are described more fully in the Response and Objections and in Appendices A and B thereto:

- Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast number of documents produced in these massive cases.[122]
- The firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and document review and analysis in

[119] Report at 183; Response and Objections at 87.
[120] Response and Objections at 86-90.
[121] Revised Report at 22-23, 27-28.
[122] Response and Objections at 11.

complex cases, and have made the lifestyle and career choice to work a more limited number of hours than do traditional law firm partners and associates.[123]

- The firm's staff attorneys are paid directly by the firm and may receive benefits provided by the firm.[124]
- Given the large number of complex cases the firm handles at one time, Lieff Cabraser sometimes has the need for attorney document review and analysis support beyond the firm's available staffing. When such need arises, the firm retains the services of "agency" or "contract" attorneys.[125]
- Frequently, as was the case for four of the seven staff attorneys who worked on the State Street Action, attorneys who start working for the firm while paid by an agency transition to direct employment by the firm.[126]
- The firm staff attorneys, whether on payroll or paid through an agency, all performed substantially the same document review, analysis and litigation support functions, and all utilized, to varying degrees, the firm's infrastructure and resources.[127]
- The hourly rates, including for Lieff Cabraser staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for lawyer services, primarily in the San Francisco and New York marketplaces.[128]
- Of the 18 Lieff Cabraser staff attorneys who worked on the State Street Action, seven spent at least part of their time working on the Action while being paid through an agency.[129]

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[123] *Id*. at 11-12.

[124] *Id*. The benefits include the right to participate in the firm's health insurance plan, and the right to participate in the firm's retirement plan. Of course, whether an employee takes advantage of those benefits is solely up to that person. Not surprisingly, a number of firm employees, including staff attorneys, do not participate in either Lieff Cabraser's health or retirement plans.

[125] *Id*.

[126] *Id*.

[127] *Id*. at 12-13.

[128] *Id*. at 14. *See* Response and Objections at 13-15 for description of how Lieff Cabraser's hourly rates are set and that they are routinely approved by Courts.

[129] Response and Objections at 24-28 and 86-88, and Appendices A and B thereto. These Appendices provide narrative biographical information about each of Lieff Cabraser's 18 staff attorneys who worked on the State Street Action.

- Four of the seven were paid initially through an agency (which billed the firm directly for their services), *but became payroll employees of the firm in January 2015*, during the pendency of the State Street Action. Three of these put in substantial hours in both the BNY Mellon Action and the State Street Action. Two performed their tasks on the State Street Action while working in Lieff Cabraser's San Francisco offices; two worked remotely in San Francisco. Three remain with the firm as full-time staff attorneys.[130]

- Three of the seven were compensated by an agency throughout their work on the Action. Two devoted substantial amount of time to the BNY Mellon Action. One, working remotely, also recorded hundreds of hours in the State Street Action (including producing sophisticated issue memoranda) and continues to work for the firm on an agency basis. Two worked in Lieff Cabraser's San Francisco office, but contributed only modest hours to the State Street Action for the firm, 24 and 58, respectively.[131]

- The firm incurred overhead expenses with respect to all seven of these attorneys, including: the use of physical office space by four; the use of information technology support for all seven, both in San Francisco and remotely; the use of firm administrative support (e.g., human resources on employment matters or dealing with an agency, accounting services, for payroll or interaction with an agency, and word processing for the submission of time records and the production of memoranda); assistance for all from the firm's litigation support department for training on Catalyst and as needed while performing their tasks; and, supervision of all by firm partners, senior associates and senior staff.[132]

- All seven of these attorneys were covered by the firm's legal malpractice insurance during their tenure on the State Street Action.[133]

- All seven of these lawyers, while on payroll and paid through an agency, were expected to abide by, and were the beneficiaries of, the firm's written rules and practices, including those relating to behavioral conduct.[134]

In his Revised Report, the Master does not meaningfully address any of these facts – the actual relationship between Lieff Cabraser and the agency/contract attorneys who worked on the State Street Action. Instead, the Master offers only his generic opinion that the "role of staff and contract attorney differ greatly in compensation, employment status, benefits, job security, and

[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

firm responsibility," and that "firm does not assume the same financial, administrative, and employment overhead" for agency/contract attorneys as for staff attorneys on payroll.[135]

As described above, although there were obviously "differences" in the relationship between Lieff Cabraser and staff attorneys and agency/contract attorneys in the State Street Action, those differences do not support the Master's conclusion that the agency/contract attorneys' time must be treated as a cost. Indeed, as the facts show, the agency/contract lawyers each had essentially the same responsibilities in the Action; all had quality educational and professional backgrounds; all performed at a junior to mid-level associate level; all required the firm to incur varying degrees of overhead expenses (just as full-time associates and partners have different degrees of overhead requirements); four of the seven became payroll employees of the firm in the midst of the State Street Action, and three remain with the firm today as staff attorneys; one continues to work for the firm through an agency, but has been performing high level work for the firm for years; two of the agency-only attorneys are no longer with the firm, but contributed a very small number of hours to the State Street Action; and, the amount of compensation received by the staff attorneys on payroll and the agency attorneys for the same work was not appreciably different.[136]

One cannot seriously dismiss Lieff Cabraser's agency/contract lawyers in the State Street Action as mere "rented workers." Given the Master's disregard of the actual relationship between Lieff Cabraser and its agency/contract lawyers in the Action, it cannot be said that the he has "waded" more "deeply" into the issue than other courts.

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[135] Revised Report at 21-22; 24.

[136] *See* Response and Objections at 48-49, 86-88.

2. The Master Errs in "Parting Ways" With the Relevant and Controlling Legal Authority.

Even though the unambiguous case law rejects the idea of treating agency/contract attorneys as a cost, even though some of those courts have determined that the market rates for agency/contract lawyers should be lower than comparable permanent lawyers, and even though courts that have considered the issue have found that the lodestar of agency/contract attorneys should be multiplied as part of a cross-check analysis, the Special Master "parts ways with these courts."[137] The Master's wholesale rejection of the case law is based on a combination of a misreading of the relevant decisions and a desire by the Master to forge new ground with his own idiosyncratic personal views.

The Master claims that "only one court has squarely addressed the difference *among* the various types of non-associate or 'contract' positions, such as the staff and contract attorneys utilized in the State Street case," citing *Citigroup, Inc. Bond Litigation*, 988 F.Supp.2d 371, 376-378 (S.D.N.Y. 2013). According to the Master, courts have "routinely focused their discussion on the generic label of 'contract attorneys,' without specifying whether this term included or excluded other non-associate attorneys who may have more permanent employment arrangements."[138] *In fact*, the courts have repeatedly addressed differences between permanent associates, staff attorneys and contract attorneys hired through outside agencies. *See e.g.*, *Tyco*, 535 F.Supp.2d at 272 (observing that "an associate with steady employment" and a "contract attorney whose job ends upon completion of a particular document review project" should be treated similarly for determining their applicable market rates); *Citigroup*, 965 F.Supp.2d at 394 (specifically rejecting treating as a cost attorneys who are "hired largely from outside staffing

[137] Revised Report at 24. *See* Response and Objections at 79-85, 91-93.
[138] Revised Report at 22 and 24.

agencies," who are "hired on a temporary basis to complete specific projects relating to a particular action"); *In re AOL Time Warner Shareholder Derivative Litigation*, No. 02-civ-6302 (CM), 2010 WL363113 at *25 (S.D.N.Y. Feb. 1, 2010) (focusing on the work and judgment exercised by contract attorneys hired from outside agencies and rejecting the argument that those attorneys should be treated as an expense); *City of Potomac General Employees Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276, 280 (S.D.N.Y. 2013) (stating that it is "beyond cavil" that a law firm may seek more for a contract attorney's services that these "services directly cost the law firm"); *In re Petrobras Securities Litigation*, 317 F.Supp.3d 858, 874-876 (S.D.N.Y. 2018) (treating "staff and contract attorneys" similarly for purposes of addressing their appropriate market rates).[139]

According to the Special Master, "[n]one of the cases cited by Lieff discuss the various factors that should be considered in evaluating whether a non-associate attorney should be included on the lodestar but focus exclusively on addressing contract attorneys vis-à-vis their associate counterparts."[140] In fact, all of the relevant cases, including those cited above, identify and discuss the only factors that matter – the nature and quality of the work performed by the attorneys and the prevailing market rates of those attorney services. The fact that these courts do not dwell on the factual distinctions between staff attorneys and agency attorneys proffered by the Master here does not mean that the entire body of case law is flawed. Rather, it shows that the Master's views on the topic are the outlier.

Similarly, the Master complains that the "vast majority of cases commenting on contract attorney rates," do not "discuss the import of having hourly employees on the validity of overall

[139] *See* Response and Objections at 79-85, and 91-93.
[140] Revised Report at 24.

fee that should be granted in a class action case."[141] Again, the Master misses the key point. How an attorney is compensated – through a draw, a salary, or an hourly rate paid by the firm or an agency – does not matter for determining whether the time of an attorney should be included in the lodestar considered by a court in awarding fees in a class action. Again, what matters is the nature and quality of the work performed by the attorney.

As Professor Rubenstein has observed, law firms today enter into a variety of "flexible arrangements with associates and staff attorneys," including, for example, allowing for reduced hours and working remotely. Rubenstein writes: "To the best of my knowledge, private firms nonetheless continue to bill these attorneys at market rates, not as costs. Firms similarly bill summer law students – for whom they generally do not pay healthcare and retirement benefits – to their clients at market rates. These factual questions are complex and involve the court in inquiries irrelevant to the key concern – whether or not legal services are being provided to the client."[142]

3. The Inclusion of Time of Lieff Cabraser's Staff Attorneys Paid Through An Agency as Part of the Firm's (and All Plaintiffs' Counsel's) Lodestar Does Not Pose a Threat to the "Integrity of the Legal Process and Public Confidence in How Attorneys Are Compensated."

Faced with a body of law that explicitly rejects his view that the agency/contract attorneys in the State Street Action should be treated as a cost, the Master maintains, without any citation to case authority or academic literature that the issue "goes directly to the integrity of the legal process and public confidence in how attorneys are compensated."[143] This is utter nonsense. None of the numerous federal courts that have addressed the issue of whether to treat

[141] Report at 24.
[142] Rubenstein Declaration II at 15.
[143] Revised Report at 21.

agency/contract attorneys as a cost or include their time in lodestar at prevailing market rates have ever considered the issue in such an over-the-top way. Literally no authority has ever been suggested that the use of agency/contract attorneys threatens the integrity of the legal process or puts in jeopardy public confidence in how attorneys are compensated. The fact that the *Boston Globe* published an article or two about the fee application in the Action (which even the Master acknowledged contained some erroneous reporting) does *not* make the issue "far reaching and significant," and most certainly does *not* have "ramifications beyond this case."[144] The Master's desire to forge new ground here has led him to make a mountain out of mole-hill.

4. Lieff Cabraser's Use of Agency/Contract Attorneys in the State Street Action Was in No Way Inappropriate.

Left with nothing else, the Master seeks to justify his argument that the agency/contract attorneys should be treated as a cost by attacking plaintiff-side law firms, Customer Class Counsel, and Lieff Cabraser. The Master asserts, again without citation to any legal or other support, that, "Customer Class Counsel, and other similarly situated firms, should not be rewarded for skirting their responsibilities and obligations inherent in a full employment relationship by relying on temporary attorneys to staff its cases."[145] There is no evidence in the extensive record of the Master's investigation, or any other source of information to support the notion, that Lieff Cabraser or any other plaintiff-side firm in the State Street Action has "skirted" any responsibilities or obligations under any principle of law or ethics by utilizing contract/agency attorneys, and they most certainly have not been "rewarded" for such behavior. As the abundance of case law described above and in the firm's Response and Objections illustrates, the inclusion of agency/contract attorneys as part of lodestar is a long-standing,

[144] *Id.*

[145] Revised Report at 22.

normal practice. Doing so is in no way contrary to the law or public policy, and is absolutely not, as the Master disparagingly maintains, a "farce to the court, the class, and the public at large."[146] The Master's insulting statements in this regard are entirely baseless.

The Master claims, without any evidence, that Lieff Cabraser's use of agency/contract attorneys is harmful to those attorneys. This is a particularly galling comment given that the Master has completely ignored the facts of the relationship between Lieff Cabraser and the agency/contract attorneys generally and in the State Street Action specifically. The Master makes the extraordinary comment that the "use of agency/contract attorneys directly harm[s] the attorneys at the center of the scheme." Aside from the obvious fact that there is no "scheme," rather than being harmed, these attorneys, many of whom prefer the flexibility of an agency/contract arrangement, are provided with a job and the resources to be productive and successful.[147] And, even though there is absolutely nothing inappropriate about Lieff Cabraser's use of agency/contract attorneys in the State Street Action, four of the seven such lawyers used by Lieff Cabraser in the Action became full-time staff attorneys during the pendency of the Action. *See* discussion *supra* at Section III.C.1

Finally, citing no legal authority or relevant scholarship, the Master maintains that it "should be goal of law firms, such as Lieff, to fully employ the attorneys they trust to handle

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[146] Revised Report at 22-23.

[147] In support of his peculiar assertion that the use of agency/contract attorneys is a "farce to the court," and a "scheme" the Master cites *Schwann v. FedEx Ground Package System, Inc.*, 2017 WL4169425, at *4 (D. Mass. 2017). This case is completely inapposite here, as it concerns the denial of a motion for summary judgment under the Independent Contractor Law of Massachusetts. The case has to do with an alleged deprivation of benefits enjoyed by employees through their misclassification as independent contractors, and has nothing to do with agency/contract attorneys, prevailing market rates for their services, or class action attorney's fees.

such high level work… rather than profit off of their status as temporary workers."[148] Again, the federal courts have been crystal clear that there is nothing inappropriate about using agency/contract attorneys for document analysis purposes and including their time (at a reasonable hourly rate) in lodestar submissions. *See* discussion *supra* at Section III.C.2. And, to state the obvious, Lieff Cabraser, like all law firms, is in the business of attempting to make a fair "profit." To the extent that any court, including this Court, has a concern that the inclusion of contract/agency attorneys as part of the lodestar used to support a class action attorneys' fee constitutes or could lead a "windfall," courts may limit the attorneys' hourly rates and adjust fee awards when a lodestar multiplier is excessive. In the end, it is not the place of the Master to tie his views on law firm management to the punitive outcome he recommends.

D. Even If The Court Agrees That The Firm's Agency Attorneys Should Be Treated Differently Than The Staff Attorneys On Firm Payroll For Purposes Of The Lodestar Cross-Check, The Master's Recommended Disgorgement/Forfeiture Penalty Should Be Rejected.

In his Report, the Special Master recommends that Lieff Cabraser "disgorge" and "return" to the class the difference between: (a) the total of the firm's agency attorneys' lodestar, multiplied by 1.8, and (b) $50 per hour for the agency lawyers' time ($2,241,098.40) [149] In its Response and Objections, Lieff Cabraser objects to this recommendation by the Special Master because: (1) the Special Master's recommendation is contrary to controlling law in that it miscomprehends or ignores the "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (2) the inclusion of Lieff Cabraser's agency lawyers in the cross-

[148] Revised Report at 23.
[149] Report at 367-68.

check caused no harm to the class; and (3) penalizing Lieff Cabraser for adhering to controlling legal principles and having committed no violation of law or ethics is blatantly unjust.[150]

In its Responses and Objections, Lieff Cabraser also points out that all of the courts that have considered the appropriate hourly rates for agency or "contract" attorneys for cross-check purposes have refused to treat those lawyers' time as a cost, but have in some cases applied a lower hourly rate for the lodestar cross-check. *See e.g., Citigroup,* 965 F. Supp. 2d at 393-399 (because the contract/agency attorneys provided their document review services *after* the settlement of the case, the court reduced the contract/agency lawyers' rates for cross-check purposes); *In re Petrobras Securities Litigation,* 317 F.Supp.3d 858, 875–76 (S.D.N.Y., 2018) (reducing the hourly rates of "staff and contract attorneys" for cross-check purposes in light of the "considerable time spent by these attorneys on low level document review). *See also* Rubenstein Declaration II at 16 (observing that "some courts have treated the question as one of degree not type, adjusting the pertinent hourly rate but rejecting the argument that the contract attorneys must be passed through as a cost"). Indeed, at his request, Lieff Cabraser provided the Master with a schedule showing how reducing the hourly rates of the agency lawyers would have impacted the lodestar multiplier for cross-check purposes in the State Street Action; a schedule and an argument the Master has ignored in his Revised Report.[151]

In its Response and Objections, Lieff Cabraser also describes those cases that have rejected the opinion of the Master that the lodestar of agency/contract attorneys should not be multiplied as part of a lodestar cross-check analysis. *See, e.g.*, *In re Citigroup*, 965 F.Supp.2d at 394-95 (rejecting the argument that a lodestar multiplier cannot be applied to contract attorneys' time); *AOL Time Warner*, 2010 WL 363113 at *26 (rejecting an objection to allowing a

[150] Response and Objections at 77-96.

[151] *See* Heimann Decl., Exhibit A.

multiplier on contract attorney time, concluding: "It is with respect to risk, in particular, that the objection loses its allure. Counsel not only paid for the services of the contract lawyers, but also dedicated the time of their regular personnel to supervision. Because the risk is ultimately financial, counsel's recoupment risk in employing contract attorneys is no less than certain that relating to the salaries paid to their regular employees"); *In re Petrobras Securities Litigation*, 317 F.Supp.3d 858, 875–76 (S.D.N.Y., 2018) (including staff attorney and contract lawyer lodestar in awarding class counsel multiplier). *See also* Rubenstein Declaration II at 17 ("[C]ourts have explicitly rejected the argument that contract attorney time cannot be multiplied" and note 71.

Even if the Court agreed to treat the time of the firm's agency attorneys as a cost, the proper way to address the matter would be to remove those attorneys' lodestar from the aggregate lodestar used in the cross-check of the 25% fee award, and then determine whether the resulting aggregate multiplier of 2.07 (and resulting individual multiplier of 1.99 for Lieff Cabraser) is appropriate.[152] Lieff Cabraser submits that it is. *See* discussion *supra* at Section III.A.[153]

Finally, and perhaps most importantly, in his Revised Report, the Special Master offers *no rationale* to support his position that Lieff Cabraser should be required to disgorge or forfeit the lodestar associated with the agency/contract lawyers, let alone a multiplier of that lodestar. The Master has entirely ignored that portion of the firm's Response and Objections (pages 90-96). This is not surprising given that in his Report, the Master offers no legal or factual rationale

[152] Response and Objections at 68-74, 92-93.
[153] *Id.*

(just opinion) for his punitive disgorgement recommendation.[154] The Master's recommended remedy must be rejected.

E. The Master's Criticism Of Lieff Cabraser's Fee Declaration Was Never Raised During The Master's Investigation, Is Factually Baseless, And Is, By The Master's Own Admission, Insignificant.

The Special Master now, and for the first time in these proceedings, argues a new issue "relating to the accuracy of Lieff's [fee] petition."[155] Seizing on a remark in Thornton's objections to his Report, the Master calls into question "Lieff's representation that attorneys employed by third-party staffing agencies, and included on Lieff's lodestar and in the fee petition, were 'employees' of the firm, as stated in Lieff's declaration supporting the fee petition."[156] It is hard to overstate how false, misleading and disingenuous it is for the Master to have inserted this issue into these proceedings. Tellingly, having raised doubt about the accuracy of representations Lieff Cabraser made to the Court, the Master himself ultimately recommends no remedial or economic penalty against the firm. Even though the Master basically says "never mind" after questioning the firm's veracity, Lieff Cabraser feels obliged to set the record straight.

As explained in its Response and Objections, Lieff Cabraser partner, Daniel P. Chiplock prepared a declaration on behalf of the firm in support of Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Expenses (the "Chiplock Declaration").[157] In paragraph 4 of that Declaration, Mr. Chiplock states:

> The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's currently billing rates. For personnel who are no longer employed by my firm, the lodestar

[154] Report at 367-68.
[155] Revised Report at 3.
[156] *Id*.
[157] *See* Response and Objections at 33-34.; Exhibit 89 to Report, ECF No. 104-17.

> calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule is prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request. Additionally, any personnel who billed fewer than 5 hours in the litigation have not been included in my firm's total.[158]

In questioning the second sentence of paragraph 4 of the Chiplock Declaration, the Master justifies raising the issue now because the Thornton firm mentions it in its objections to the Master's Report: "In its written objections, Thornton points out that the contract attorneys listed on Lieff's fee petition were not employed by Lieff, and, in light of this fact, insinuate that the Chiplock Declaration is not entirely accurate."[159] The Master's paraphrasing of Thornton is misleading. In challenging the Master's criticism of Garret Bradley's fee declaration, Thornton suggests, wrongly, that the Chiplock Declaration, "under the Special Master's hyper-technical reading, also appear[s] to be false. The Lieff affidavit, for instance, lists as Lieff Cabraser 'employees' attorneys who were actually 'contract' or 'agency' attorneys with whom Lieff Cabraser did not have an employer-employee relationship."[160] For the reasons stated below, Thornton's characterization of the second sentence of the fourth paragraph of the Chiplock Declaration, as well as the Master's parroting of Thornton's presentation, is false and misleading.[161]

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[158] Chiplock Declaration, ECF No. 104-17, at 3 and Exhibit A thereto.

[159] Revised Report at 6.

[160] *See* Thornton Law Firm's Objections to the Special Master's Report and Recommendations ("Thornton Objs."), ECF No. 361, at 47-48.

[161] Moreover, notwithstanding Thornton's clumsy effort to absolve itself of responsibility for Garrett Bradley's misstatements, Thornton itself acknowledges that "it seems to be fairly common practice to list contracts attorneys as 'employees' or 'attorneys' of the firm on lodestars, even though such attorneys are technically not employees." Thornton Objs. at 47 n. 31. In other words, Thornton did not view the language used in paragraph four of the Chiplock Declaration as significant or unusual.

The representations in paragraph 4 of the Chiplock Declaration, along with the fact that several of our staff attorneys were hired and paid via agencies during some of the State Street Action was known to the Special Master from the beginning of and throughout his investigation.[162] At no time during the Master's investigation, including in the early informal meetings with the firm, in interrogatories, document requests, or depositions (including the two depositions of Chiplock) did the Master ask a single question or raise any concern about the use of words "employed" or "employment" in the Chiplock Declaration. Neither was the issue addressed at all in the Master's Report and Recommendation. Clearly, the Master did not think this was important.

Contrary to what the Master now states, Lieff Cabraser did *not* represent that attorneys employed by the firm through third-party staffing agencies were "employees" (or "members") of the firm. Rather, the Chiplock Declaration states that the "schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates."[163] Exhibit A then lists all such attorneys and professional support staff-members, and identifies each timekeeper's status (P for partner, A for associate, OC for of counsel, SA for staff attorney, LC for law clerk, PL for paralegal, I for investigator, RA for research analysts/litigation support.[164] Each timekeeper's hourly rate, total hours to date, and total lodestar to date is then listed.[165]

The Chiplock Declaration goes on to provide an explanation for the calculation of certain billable rates: "For personnel who are no longer employed by my firm, the lodestar calculation is

[162] *See* Responses and Objections at 43-48.
[163] Chiplock Declaration, ECF No. 104-17, at 3 and Exhibit A thereto.
[164] *Id.*
[165] *Id.*

based upon the billing rates for such personnel in his or her final year of employment by my firm."[166] These are the only two references to "employment" in the Chiplock Declaration. The clear, real-world purpose of this language is simply to say that for personnel no longer working at the firm or under the firm's direction, the lodestar calculation is based on the billing rates for such personnel in his or her final year with the firm. Nothing here suggests an effort to deceive the Court about who was or was not an "employee" of the firm. Indeed, it is worth noting that obviously neither the partners nor of counsel listed in Exhibit A to the Chiplock Declaration are "employees" of the firm, yet they are included in the same discussion as all of the other timekeepers. Surely the Master does not believe Mr. Chiplock was intending to misrepresent the employment status of those attorneys.

To underscore the absurdity of the Master's questioning the accuracy of paragraph 4 of the Chiplock Declaration, it bears mentioning that as of the date the Declaration was filed, in September 2016, 15 of the staff attorneys listed in Exhibit A were in fact on Lieff Cabraser's payroll, two agency attorneys listed were no longer with the firm, and only one agency attorney remained working for the firm. So the Master's concern seems to be centered on one agency attorney who has worked for the firm continuously since 2014.[167] These facts are all readily available in the record.

The actual facts surrounding paragraph 4 of and Exhibit A to the Chiplock Declaration beg the question why the Master even raised the issue in the first place. The pettiness in raising it is all the more apparent given the way the Master ultimately dismisses the entire issue, stating,

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[166] *Id.*

[167] *See* Response and Objections, Appendices A and B; *see also* Exhibit A to the Decl. of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations ("Fineman Decl."), ECF No. 369-1, at 18-42.

"although perhaps sloppy in its use of loose language to describe the relationship, the statements in Chiplock's Declaration do not, in the Special Master's estimation, rise to the level of out-right, blatant misrepresentations of multiple facts. Accordingly, the Special Master does not recommend discipline for this, and believes that a simple admonishment from the Court to be more careful in the future would suffice."[168] In other words, after implying that the firm may have misled the Court, apparently realizing there is nothing to the issue at all, the Master essentially says, never mind. No action by the Court, including any "admonishment to be more careful in the future," is necessary.

IV. CONCLUSION – THE FINANCIAL IMPACT OF THE SPECIAL MASTER'S INVESTIGATION AND RECOMMENDED PENALTIES AGAINST LIEFF CABRASER ARE UNJUST AND WILDLY DISPROPORTIONATE TO THE FIRM'S CONDUCT.

At pages 64-66 of its Response and Objections, Lieff Cabraser provides the Court with an accounting of the actual and potential costs to the firm resulting from the Special Master's investigation. Since that time, Lieff Cabraser has incurred significant additional expenses associated with the investigation and the Master's advocacy against the firm. Below is an updated summary of the financial impact of the Master's investigation and recommendations on Lieff Cabraser.

Consistent with the firm's fee interest in the State Street Action relative to the other Customer Class Counsel, Lieff Cabraser has borne 24% of the direct costs of the Special Master's investigation.[169] Customer Class Counsel have paid a total of $4,800,000 to fund the

[168] Revised Report at 27.

[169] Response and Objections at 7, 64.

Special Master's investigation, and Lieff Cabraser's 24% share of that total paid is $1,152,000.[170]

In addition to the amount of money it has paid to finance the Special Master's investigation, Lieff Cabraser has also incurred an additional $456,853 in out-of-pocket costs to represent and defend itself during the investigation.[171] And the firm's representation of itself has involved a substantial amount of time from firm partners and Lieff Cabraser support staff. The aggregate lodestar devoted by the firm to the Special Master's investigation and advocacy from February 6, 2017 through the date of this filing, is more than $2,552,669 (calculated at 2018 hourly rates).[172] Therefore, the total cost to the firm resulting from the Master's investigation and advocacy (to date) has been more than $4,161,522. It is worth pausing to note that, incredibly, this amount is actually *more* than the total amount of inadvertently double-counted lodestar submitted by all of the firms which precipitated this investigation.

In addition to that extraordinary figure, the Special Master recommends that Lieff Cabraser disgorge or forfeit an additional $3,593,765, reflecting (i) an equal share of Customer Class Counsel's aggregate inadvertently double-counted lodestar ($1,352,667), plus (ii) the difference between (a) the lodestar attributed (for cross-check purposes) to Lieff Cabraser's "agency" staff attorneys, plus a 1.8 multiplier on that lodestar, and (b) $50 per hour for each hour worked by those "agency" attorneys, or $2,241,098.40.[173]

The firm received $15,116,965.50 in attorneys' fees (reflecting its 24% interest in fees allocated to Customer Class Counsel and 20.3% of the total fee awarded to Plaintiffs' Counsel). Based on its corrected lodestar (i.e., subtracting $868,417.00 in inadvertently double-counted

[170] Heimann Decl., ¶¶ 7-8.
[171] *Id.*
[172] *Id.*
[173] Response and Objections at 65; Revised Report at 5-6.

staff attorney lodestar, resulting in a total lodestar of $8,932,070.50), Lieff Cabraser's *corrected* effective multiplier on its individual fee is 1.69 – substantially less than the aggregate multiplier averaged across all counsel, and indeed less than the 1.8 aggregate lodestar multiplier that the Court *originally found to be reasonable*.[174]

When subtracting from the firm's fee award the $1,152,000 it has paid to date toward the Special Master's investigation, the firm's award is reduced to $13,964,965.50, resulting in a lowered effective multiplier of just 1.56 on the firm's corrected lodestar. And after deducting from the firm's fee award the additional costs and lodestar the firm has spent on the investigation ($3,009,522), Lieff Cabraser's effective fee award is reduced to $10,955,444 (or fee reduction of $4,161,522), for a reduced multiplier of approximately 1.23. If, after all of that, the Special Master's recommendations for the disgorgement or forfeiture of $3,593,765 of Lieff Cabraser's fees is also implemented, the firm's fee award would be further reduced to approximately $7,361,679, for an end multiplier of 0.82 – i.e., a *negative multiplier*, and a reduction of the firm's fee by $7,755,287, or more than half of the firm's original award.

The financial impact of the Special Master's investigation and recommended penalties against Lieff Cabraser are unjust and wildly disproportionate to the firm's conduct. Having found that Lieff Cabraser engaged in no intentional or professional misconduct and violated no rule of law or ethics, the Special Master's proposed penalties against the firm are strictly punitive and must be rejected.

Dated: December 18, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*
Richard M. Heimann (*pro hac vice*)

[174] Response and Objections at 65-66.

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Counsel for Lieff Cabraser Heimann & Bernstein, LLP

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF RICHARD M. HEIMANN IN SUPPORT OF THE RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S PARTIALLY REVISED REPORT AND RECOMMENDATIONS

Richard M. Heimann declares and says:

1. I am a Partner of, and Lead Counsel for, Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this Declaration on behalf of Lieff Cabraser in support of the Response and Objections of Lieff Cabraser Heiman & Bernstein, LLP to the Special Master's Report and Recommendations ("Report").

A. Response to the Special Master's Description of His Steps to Determine If a Global Resolution Was Possible.

2. In his Partially Revised Report and Recommendations ("Revised Report"), the Master states that in late August 2018, he "took steps to determine if a global resolution with all firms was viable."[1] The Master writes that with the Court's approval, he invited "all firms to attend an all-day meeting in Boston to further explore the possibility of a global resolution."[2] The Master then advises the Court that he was "not able to reach an agreement with Lieff… consistent with his understanding of his responsibilities to the Court, and therefore, Lieff's… objections remain outstanding and require a response from the Special Master."[3]

3. In August 2018, I learned that the Special Master was engaged in separate "settlement" or "resolution" discussions with Labaton, Thornton, and ERISA Counsel. On September 6, 2018, the Master informed the Court that the Master had invited all parties to a September 11, 2018 in-person meeting "to continue discussions and pursue a final resolution, if possible."[4] Between the time I learned about the Master's efforts at a "global resolution," and the September 11, 2018, in-person meeting in Boston, Lieff Cabraser had *no* settlement or resolution discussions with the Special Master or his counsel. At no time prior to the September

[1] Revised Report at 2.
[2] *Id*.
[3] *Id*.
[4] ECF No. 463.

11 meeting, did the Master make any offers of resolution of any kind to Lieff Cabraser.

4. The first meeting I (and my Partner, Steven E. Fineman) had with the Master and his counsel concerning potential resolution took place in the Boston office of JAMS on September 11, 2018, and lasted less than 30 minutes. During that encounter, the Master made it clear that his recommended disgorgement/forfeiture penalties concerning the firm's inadvertent double-counting of certain staff attorney lodestar and its use of agency/contract attorneys was non-negotiable. The Master was adamant that any agreed-upon resolution must include payment to the class by counsel of an amount equal to that which he had recommended in his initial Report. For my part, I advised the Master that I viewed his proposed penalties against the firm as factually and legally unsupportable. I also advised the Master that I strongly disagreed with his position that he has a duty or responsibility to the Court to reallocate attorneys' fees paid to Customer Class Counsel, including Lieff Cabraser, to the class.

5. Following the initial short meeting, Mr. Fineman and I had a second brief conversation with the Special Master (without his counsel). During that discussion, I attempted to explain that if one entirely eliminated the lodestar of Lieff Cabraser's agency/contract attorneys, or reducing the hourly rates, would not materially change the aggregate lodestar multiplier (as well as Lieff Cabraser's individual multiplier), measured against the original fee award. At the conclusion of that conversation, the Master requested that the firm calculate and present to him a summary of the impact on the lodestar multiplier if the agency/contract attorney time was reduced to a range of $50 through $250 hour, in $50 increments. We provided the Master with that information on September 13, 2018. The memoranda describing that analysis are attached as Exhibit A. The Master never responded to these memoranda, and neither they nor their content are mentioned in his Revised Report.

6. Since the September 11, 2018 meeting, Lieff Cabraser has had no further discussions with the Special Master concerning resolution.

B. The Firm's Expenses and Lodestar Incurred in Responding to the Special Master's Investigation

7. The firm has spent $1,608,853 in out-of-pocket expenses in this matter since February 6, 2017, during which time it has responded to the Court's inquiries, the Special Master's investigation, and the Special Master's Report, among other things. These costs include the firm's share of the Special Master's fees and expenses, and the firm's expert witness and travel costs, among other case and investigation-related expenditures.

8. As of today's date, Lieff Cabraser has spent at least $2,552,669 in lodestar (at the firm's 2018 rates) since February 6, 2017 on this matter, including but not limited to responding to the Court's inquiries, the Special Master's investigation, and the Special Master's Report.

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

Executed on this 18th day of December, 2018.

/s Richard M. Heimann

Richard M. Heimann
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EXHIBIT A

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
(New York City)

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL:
ATTORNEY WORK PRODUCT

TO: Hon. Gerald Rosen (Ret.) **CLIENT-MATTER NO.:** 3344-0002

FROM: Lieff Cabraser Heimann & Bernstein, LLP

DATE: September 13, 2018

RE: Effect of Agency Attorney Rates on Lodestar Multiplier

You requested that we calculate and present a summary of the impact on the effective lodestar multiplier for LCHB if "agency attorney" time was billed in this matter at $50, $100, $150, $200, or $250 per hour. In the attached memorandum, we have done so, but have also included a summary of the same calculations as applied to the total lodestar for all counsel in the case, since the hours and lodestar contributed by "agency attorneys" factored into the Court's finding that a collective lodestar multiplier of 1.8 for all counsel combined (including ERISA counsel) was reasonable.[1] We do this also because LCHB was not the only firm to include "agency attorney" time in its lodestar—Thornton Law Firm did as well (specifically, attorneys Wintterle, Ten Eyck, Weiss and McClelland were all agency attorneys).[2] This remains true after any inadvertently duplicative staff attorney hours are properly accounted for and removed. As also detailed in the attached memo, 4,779.1 total non-duplicative agency attorney hours were correctly listed by LCHB (2,899.2 agency hours) and Thornton (1,879.9 agency hours). These include the hours for attorneys Weiss and McClelland (agency attorneys who were shared and

[1] *See* Response and Objections by Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations (ECF No. 367) ("Response") at 35 *and* 96 n. 321.
[2] *Id.* at 30, 36-38.

correctly allocated from the get-go by Thornton and LCHB) and Ten Eyck and Wintterle (agency attorneys who were paid exclusively by Thornton, but whom LCHB erroneously included in its initial lodestar report). The Special Master's Report and Recommendations ("Report"), in recommending the disgorgement of fees associated with the employment of agency attorneys, focuses solely on the non-duplicative agency attorney hours reported by LCHB (for Weiss, McClelland, Butman, Bloomfield, Nutting, Leggett and Sturtevant), and ignores the non-duplicative agency attorney hours (for Wintterle, Ten Eyck, Weiss, and McClelland) reported by Thornton.

In presenting these various scenarios, LCHB maintains, as set forth in its Response, that any recommended disgorgement of fees by LCHB based on its employment of "agency attorneys" would be totally erroneous as a matter of law.[3] The same would hold true as to any disgorgement of fees by Thornton on the same grounds (although, as stated above, the Report overlooked the fact that Thornton employed agency attorneys). As stated at length in its Response and in the supporting declaration by Prof. William Rubenstein, and indeed by the Court at the final approval hearing before this investigation even began, Class Counsel's lodestar was used in this case solely as a cross-check to determine if the percentage fee award being contemplated (in this case, just under 25%) was reasonable.[4] As the attached calculations illustrate, even adjusting all of the "agency attorney" time down to as low as $50 per hour (which lacks support given the overwhelming weight of authority and the facts presented here)[5] adjusts the effective lodestar multiplier for all counsel by only a modest amount, and results in an effective lodestar multiplier for LCHB of less than 2, an eminently reasonable (indeed, modest)

[3] Response at 1-7, 34-35, 67-74, 77-85, 90-96.
[4] *Id*. at 34-35, 67-74.
[5] *Id.* at 77-90.

multiplier given the results obtained, risk undertaken, and efforts expended by counsel.[6] Further, as described in LCHB's Response, this multiplier does not take into account the significant costs LCHB has borne for the Special Master's investigation and the attorney time LCHB has expended in that effort, including for discovery related to the Chargois issue for which LCHB bears no responsibility.[7]

[6] *Id.* at 61-66, 93. Indeed, the Special Master cannot disagree that a multiplier in the neighborhood of 2.0 is reasonable, as his own recommendations (if adopted) would have at least one ERISA firm achieve a multiplier of more than 3.0. *Id.* at 66 n. 289.

[7] *Id*. at 64-66.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
(New York City)

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL:
ATTORNEY WORK PRODUCT

TO: Hon. Gerald Rosen (Ret.) **CLIENT-MATTER NO.:** 3344-0002

FROM: Lieff Cabraser Heimann & Bernstein, LLP

DATE: September 13, 2018

RE: State Street – Revised multipliers using different agency attorney rates

Following is an analysis of the effective lodestar multipliers in this matter for LCHB and all other counsel assuming "agency attorneys" were billed at $50/hour, $100/hour, $150/hour, $200/hour, $250/hour, or the full hourly rates that were actually used by class counsel. These calculations assume that the Court's originally-awarded fee of just under 25% of the $300 million settlement amount remains in place.

A. Using originally reported rates for agency attorneys ($415 to $515/hour)

Firm(s)	Fee collected	Lodestar	Effective multiplier
All counsel	$74,541,250.00	$37,265,241.25[1]	2.00
LCHB	$15,116,965.50[2]	$8,932,070.50[3]	1.69

[1] This corrected lodestar number is calculated by removing the inadvertently double-counted hours for certain Staff Attorneys, including agency lawyers Ten Eyck and Wintterle (who were the only agency lawyers for whom time was inadvertently duplicated by LCHB and Thornton).

[2] Based on the actual fees disbursed by Labaton in accordance with counsel's agreements on fee-splitting.

[3] This corrected lodestar number for LCHB is arrived at by subtracting $868,417 in LCHB Staff Attorney lodestar that was duplicative of lodestar that was also included in Thornton Law Firm's lodestar report. $551,719.50 of this amount was attributed to agency attorneys Wintterle and Ten Eyck in LCHB's initial (uncorrected) lodestar report.

B. Assuming $50/hour for agency attorneys

Firm(s)	Fee collected	Adj. Lodestar[4]	Effective multiplier
All counsel	$74,541,250.00	$35,379,906.25	2.11
LCHB	$15,116,965.50	$7,751,442.50	1.95

C. Assuming $100/hour for agency attorneys

Firm(s)	Fee collected	Adj. Lodestar	Effective multiplier
All counsel	$74,541,250.00	$35,618,861.25	2.09
LCHB	$15,116,965.50	$7,896,402.50	1.91

D. Assuming $150/hour for agency attorneys

Firm(s)	Fee collected	Adj. Lodestar	Effective multiplier
All counsel	$74,541,250.00	$35,857,816.25	2.08
LCHB	$15,116,965.50	$8,041,362.50	1.88

[4] The Adjusted Lodestar totals for "All counsel" below are arrived at by applying the various adjusted rates described herein to the 4,779.1 total non-duplicative agency attorney hours that were correctly listed by LCHB (2,899.2 agency hours) and Thornton (1,879.9 agency hours). These include the hours for attorneys Weiss and McClelland (agency attorneys who were shared by Thornton and LCHB) and Ten Eyck and Wintterle (agency attorneys who were paid exclusively by Thornton). The Adjusted Lodestar totals for LCHB on a standalone basis are arrived at by applying the below-listed adjusted rates to the 2,899.2 non-duplicative agency attorney hours correctly listed by LCHB specifically (for attorneys Weiss, McClelland, and Butman, as well as a portion of the hours (predominantly from 2013) worked by attorneys Bloomfield, Nutting, Leggett, and Sturtevant, who by 2015 had transitioned to non-agency status).

E. Assuming $200/hour for agency attorneys

Firm(s)	Fee collected	Adj. Lodestar	Effective multiplier
All counsel	$74,541,250.00	$36,096,771.25	2.07
LCHB	$15,116,965.50	$8,186,322.50	1.85

F. Assuming $250/hour for agency attorneys

Firm(s)	Fee collected	Adj. Lodestar	Effective multiplier
All counsel	$74,541,250.00	$36,335,726.25	2.05
LCHB	$15,116,965.50	$8,331,282.50	1.81

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

MOTION FOR LEAVE TO CALL ADDITIONAL WITNESS AT THE JUNE 24-26 HEARING

Labaton Sucharow LLP, Thornton Law Firm LLP, and Lieff Cabraser Heimann & Bernstein LLP (collectively, "Customer Class Counsel") respectfully move for leave to call Brian T. Fitzpatrick, Professor of Law at Vanderbilt Law School, to testify as an additional witness at the hearing scheduled for June 24-26, 2019 in this matter. *See* ECF Nos. 541, 543. As grounds for this motion, Customer Class Counsel state as follows:

1. Professor Fitzpatrick is an expert on the subject of attorneys' fees in class action cases, and has written extensively on the subject in academic journals and elsewhere.

2. Professor Fitzpatrick is the author of *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010) (the "Fitzpatrick Study"), a complete copy of which was submitted to the Court on September 15, 2016 (*see* ECF No. 104-31) in support of the request for attorneys' fees made on that same date on behalf of all Plaintiffs' Counsel.[1]

3. The Fitzpatrick Study is also cited in the memorandum of law that was submitted on September 15, 2016 by Labaton Sucharow LLP, as Lead Counsel for the Settlement Class, on behalf of all Plaintiffs' Counsel in support of Plaintiffs' Counsel's request for attorneys' fees. ECF No. 103-1 (the "Fee Brief") at 10-11.

4. Among other things, the Court has requested argument as to whether the Fitzpatrick Study was "misrepresented" in the Fee Brief. *See* ECF No. 543 at 2-3.

WHEREFORE, for the reasons set forth herein, Customer Class Counsel respectfully request leave to call Prof. Fitzpatrick as a witness for the hearing scheduled for June 24-26, 2019 in this matter.

[1] "Plaintiffs' Counsel" includes Customer Class Counsel as well as counsel for the ERISA plaintiffs, including but not limited to Keller Rohrback LLP, Zuckerman Spaeder LLP, and McTigue Law LLP.

Dated: June 11, 2019

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339

By: */s/ Richard M. Heimann*
Richard M. Heimann (*pro hac vice*)
Lieff Cabraser Heimann & Bernstein, LLP

(On behalf of Customer Class Counsel)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)

On Tuesday, June 11, 2019, I caused counsel for the other parties and the Special Master in this case to be informed of this motion. State Street, Keller Rohrback LLP, Zuckerman Spaeder LLP, and McTigue Law LLP do not oppose this motion. The Special Master takes no position on this motion.

/s/ Richard M. Heimann
Richard M. Heimann

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on June 11, 2019 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. June 13, 2019

On April 22, 2019, the Competitive Enterprise Institute ("CEI") moved to withdraw, and the Hamilton Lincoln Law Institute ("HamLinc") moved to appear in this case. See Dkt. No. 540. As CEI explained, the Center for Class Action Fairness ("CCAF") moved from CEI to HamLinc.

On May 31, 2019, the court provided a preliminary agenda for the hearing scheduled to begin on June 24, 2019. See Dkt. No. 543. On June 7, CEI moved, on behalf of CCAF, for clarification of the May 31, 2019 Order. See Dkt. No. 545. In essence, CCAF seeks to clarify whether it may participate at the upcoming hearing.

CEI's Motion for Leave to Participate as Guardian ad Litem or Amicus (Dkt. No. 126) remains under advisement. However, the court has permitted CCAF, through CEI, to participate as amicus in the last two hearings in this case, on October 15, 2018, and November 7, 2018. As the court noted during the November 7, 2018 hearing, it has found CCAF's participation to date "very helpful." Nov. 7, 2018 Hr'g Tr. at 92:21 (Dkt. No. 519). Furthermore, CCAF has submitted a memorandum on several of the issues the court intends to address at the upcoming hearing. See Dkt. No. 522.

Finally, on June 11, 2019, Customer Class Counsel moved for leave to call Brian T. Fitzpatrick to testify as a witness at the upcoming hearing. See Dkt. No. 546.

In view of the foregoing, it is hereby ORDERED that:

1. CEI's Motion to Withdraw and HamLinc's Motion to Appear (Docket No. 540) is ALLOWED.

2. CEI's Motion for Clarification (Docket No. 545) is ALLOWED. CCAF, through HamLinc, may participate as amicus in the hearing scheduled to begin on June 24, 2019.

3. Customer Class Counsel shall, by June 17, 2019, at 4:00 p.m., file an affidavit by Fitzpatrick describing his proposed testimony in detail. The court will decide Customer Class Counsel's Motion to Call Additional Witness (Docket No. 546) after reviewing Fitzpatrick's affidavit.

4. The May 31, 2019 Sequestration Order (Docket No. 544) shall apply to Fitzpatrick.

/s/ Mark L. Wolf
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

AFFIDAVIT OF BRIAN T. FITZPATRICK RE MOTION FOR LEAVE TO CALL ADDITIONAL WITNESS AT THE JUNE 24-26 HEARING

1. I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from the University of Notre Dame in 1997 and Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt and New York University have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, the Vanderbilt Law Review, the University of Arizona Law Review, and the NYU Journal of Law & Business. My work has been cited by numerous courts, scholars, and popular media outlets, such as the New York Times, USA Today, and the Wall Street Journal. I am also frequently invited to speak at symposia and other events about class action litigation, such as the ABA National Institutes on Class Actions in 2011, 2015, 2016, and 2017, and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies. In 2015, I was elected to the membership of the American Law Institute.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is still the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to securities

cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 33 from the First Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts.[1]

[1] *See*, *e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Hillson v. Kelly Servs. Inc.*, 2017 WL 3446596, at *4 (E.D. Mich. Aug. 11, 2017); *Good v. W. Virginia-Am. Water Co.*, 2017 WL 2884535, at *23, *27 (S.D.W. Va. July 6, 2017); *McGreevy v. Life Alert Emergency Response, Inc.*, 258 F. Supp. 3d 380, 385 (S.D.N.Y. 2017); *Brown v. Rita's Water Ice Franchise Co. LLC*, 2017 WL 1021025, at *9 (E.D. Pa. Mar. 16, 2017) (same); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 1629349, at *17 (S.D.N.Y. Apr. 24, 2016) (same); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 236 (N.D. Ill. 2016); *Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1246 (D.N.M. 2016); *In re: Cathode Ray Tube (Crt) Antitrust Litig.*, 2016 WL 721680, at *42 (N.D. Cal. Jan. 28, 2016) (same); *In re Pool Products Distribution Mkt. Antitrust Litig.*, 2015 WL 4528880, at *19-20 (E.D. La. July 27, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 2147679, at *2-4 (N.D. Ill. May 6, 2015) (same); *Craftwood Lumber Co. v. Interline Brands, Inc.*, 2015 WL 1399367, at *3-5 (N.D. Ill. Mar. 23, 2015) (same); *In re Capital One Tel. Consumer Prot. Act Litig.*, 2015 WL 605203, at *12 (N.D. Ill. Feb. 12, 2015) (same); *In re Neurontin Marketing and Sales Practices Litigation*, 2014 WL 5810625, at *3 (D. Mass. Nov. 10, 2014) (same); *Tennille v. W. Union Co.*, 2014 WL 5394624, at *4 (D. Colo. Oct. 15, 2014) (same); *In re Colgate-Palmolive Co. ERISA Litig.*, 36 F.Supp.3d 344, 349-51 (S.D.N.Y. 2014) (same); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 991 F.Supp.2d 437, 444-46 & n.8 (E.D.N.Y. 2014) (same); *In re Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation*, 4 F.Supp.3d 94, 111-12 (D.D.C. 2013) (same); *In re Vioxx Products Liability Litigation*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litigation*, 953 F.Supp.2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT*

4. If permitted to appear at the hearing, I will testify to the following:

5. On September 15, 2016, class counsel in this case filed a motion for an award of attorneys' fees. On pages 10 and 11, class counsel cited the above-referenced empirical study and recounted various statistics therefrom. Class counsel concluded that their fee request was "right in line" with my findings.

6. Nothing about class counsel's citations to or characterizations of my study were misleading. The statistics recounted by class counsel were exactly as I set them forth in my study. Although class counsel did not recount every statistic in my study, that does not make their submission misleading. My study is 35 pages long and contains hundreds of statistics. It would have been prolixity not exactitude to cite them all. Instead, class counsel simply submitted a copy of my entire study with their motion.

7. In particular, class counsel did not mislead the Court when they did not recount that I found that some courts awarded smaller fee percentages in bigger settlements. Although not all courts did this, enough did so that I found a statistically significant inverse correlation between settlement size and fee percentage. For example, in cases between $250 million and $500 million (examples of so-called "megafund" settlements), the average (17.8%) and median (19.5%) fee percentages were below the average and median for all cases. But this relationship is very well known and class counsel hardly hid it from the Court: not only did they give the court a copy of my entire study, but they discussed the megafund relationship at length over several other pages in their submission and compared their fee request to a chart of fee awards in other "megafund" settlements.

8. Moreover, the fact that class counsel's fee request is above the average in my $250-500 million range does not mean the request is not in line with my empirical findings. The

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& T Mobility Wireless Data Servs. Sales Tax Litig., 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

average is a statistic that depicts the middle area of a distribution of data. The data was in fact scattered over a broad range—from 0.3% to 25%—because the facts, circumstances, and judicial proclivities vary from case to case. This broad range is captured by another statistic: the standard deviation. In addition to the average and median percentages, I also reported the standard deviation (7.9%) in the $250-500 million range. The fee request here is within one standard deviation of the average. For over 15 years, the convention among class action scholars has been to treat fees within one standard deviation of the average (i.e., "mean") as mainstream fee awards that are presumptively reasonable:

> Our suggestion is that fee requests falling within one standard deviation above or below the mean should be viewed as generally reasonable and approved by the court unless reasons are shown to question the fee. Fee requests falling within one and two standard deviations above or below the mean should be viewed as potentially reasonable but in need of affirmative justification. Fee requests falling more than two standard deviations above or below the mean should be viewed as presumptively unreasonable; attorneys seeking fees above this amount should be required to come forward with compelling reasons to support their request.

Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical L. Studies 27, 74 (2004).

9. All of this is to say that, in light of the broad range over which fee awards are distributed, it is impossible to assess whether any particular fee request is unreasonable without examining the facts and circumstances of the case. This examination here shows that it would not be unreasonable to award the requested fee percentage. To begin with, of the 8 percentage-method fee awards in the $250-500 million range in my study, two were greater than the request here and six were below (including the extreme outlier of 0.3% based on the large potential value

of an injunction and credit-monitoring relief, *Townes v. Trans Union LLC*, No. 4-1488 (D. Del., Sep. 11, 2007)). Thus, the request here is hardly unprecedented. But even more to the point: the facts and circumstances of this case compare quite favorably to the other settlements in the $250-500 million range in my study. In short, my study confirms rather than undermines the notion that the fee requested here is appropriate.

10. My compensation in this matter is $950 per hour.

11. I declare under penalty of perjury that the foregoing is true and correct.

Signed under the penalties of perjury this 17th day of June 2019.

/s/ Brian T. Fitzpatrick
Brian T. Fitzpatrick,
New York, New York

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on June 17, 2019 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

Exhibit 1

BRIAN T. FITZPATRICK
Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-4032
brian.fitzpatrick@law.vanderbilt.edu

ACADEMIC APPOINTMENTS

VANDERBILT UNIVERSITY LAW SCHOOL, *Professor*, 2012 to present
- *FedEx Research Professor*, 2014-2015; *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Complex Litigation, Federal Courts, Comparative Class Actions
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

HARVARD LAW SCHOOL, *Visiting Professor*, Fall 2018
- Classes: Civil Procedure, Litigation Finance

FORDHAM LAW SCHOOL, *Visiting Professor*, Fall 2010
- Classes: Civil Procedure

EDUCATION

HARVARD LAW SCHOOL, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

UNIVERSITY OF NOTRE DAME, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

CLERKSHIPS

HON. ANTONIN SCALIA, Supreme Court of the United States, 2001-2002

HON. DIARMUID O'SCANNLAIN, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

EXPERIENCE

NEW YORK UNIVERSITY SCHOOL OF LAW, Feb. 2006 to June 2007
John M. Olin Fellow

HON. JOHN CORNYN, United States Senate, July 2005 to Jan. 2006
Special Counsel for Supreme Court Nominations

SIDLEY AUSTIN LLP, Washington, DC, 2002 to 2005
Litigation Associate

BOOKS

THE CONSERVATIVE CASE FOR CLASS ACTIONS (University of Chicago Press, forthcoming 2019)

ACADEMIC ARTICLES

Can the Class Action be Made Business Friendly?, 24 N.Z. BUS. L. & Q. 169 (2018)

Can and Should the New Third-Party Litigation Financing Come to Class Actions?, 19 THEORETICAL INQUIRIES IN LAW 109 (2018)

Scalia in the Casebooks, 84 U. CHI. L. REV. 2231 (2017)

The Ideological Consequences of Judicial Selection, 70 VAND. L. REV. 1729 (2017)

Judicial Selection and Ideology, 42 OKLAHOMA CITY UNIV. L. REV. 53 (2017)

Justice Scalia and Class Actions: A Loving Critique, 92 NOTRE DAME L. REV. 1977 (2017)

A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology, 69 VAND. L. REV. 991 (2016)

The Hidden Question in Fisher, 10 NYU J. L. & LIBERTY 168 (2016)

An Empirical Look at Compensation in Consumer Class Actions, 11 NYU J. L. & BUS. 767 (2015) (with Robert Gilbert)

The End of Class Actions?, 57 ARIZ. L. REV. 161 (2015)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

An Empirical Study of Class Action Settlements and their Fee Awards, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043 (2010)

Originalism and Summary Judgment, 71 OHIO ST. L.J. 919 (2010)

The End of Objector Blackmail?, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

The Politics of Merit Selection, 74 MISSOURI L. REV. 675 (2009)

Errors, Omissions, and the Tennessee Plan, 39 U. MEMPHIS L. REV. 85 (2008)

Election by Appointment: The Tennessee Plan Reconsidered, 75 TENN. L. REV. 473 (2008)

Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?, 13 MICH. J. RACE & LAW 277 (2007)

BOOK CHAPTERS

Do Class Actions Deter Wrongdoing? in THE CLASS ACTION EFFECT (Catherine Piché, ed., Éditions Yvon Blais, Montreal, 2018)

Judicial Selection in Illinois in AN ILLINOIS CONSTITUTION FOR THE TWENTY-FIRST CENTURY (Joseph E. Tabor, ed., Illinois Policy Institute, 2017)

Civil Procedure in the Roberts Court in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, 2016)

Is the Future of Affirmative Action Race Neutral? in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, 2016)

ACADEMIC PRESENTATIONS

The Indian Securities Fraud Class Action: Is Class Arbitration the Answer?, Ninth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 14, 2018)

MDL: Uniform Rules v. Best Practices, Miami Law Class Action & Complex Litigation Forum, University of Miami Law School, Miami, Florida (December 7, 2018) (panelist)

Third Party Finance of Attorneys in Traditional and Complex Litigation, George Washington Law School, Washington, D.C. (November 2, 2018) (panelist)

MDL at 50 - The 50th Anniversary of Multidistrict Litigation, New York University Law School, New York, New York (October 10, 2018) (panelist)

The Discovery Tax, Law & Economics Seminar, Harvard Law School, Cambridge, Massachusetts (September 11, 2018)

Empirical Research on Class Actions, Civil Justice Research Initiative, University of California at Berkeley, Berkeley, California (Apr. 9, 2018)

A Political Future for Class Actions in the United States?, The Future of Class Actions Symposium, University of Auckland Law School, Auckland, New Zealand (Mar. 15, 2018)

The Indian Class Actions: How Effective Will They Be?, Eighth Annual Emerging Markets Finance Conference, Mumbai, India (Dec. 19, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 8, 2017) (panelist)

Critical Issues in Complex Litigation, Contemporary Issues in Complex Litigation, Northwestern Law School (Nov. 29, 2017) (panelist)

The Conservative Case for Class Actions, Consumer Class Action Symposium, National Consumer Law Center, Washington, DC (Nov. 19, 2017)

The Conservative Case for Class Actions—A Monumental Debate, ABA National Institute on Class Actions, Washington, DC (Oct. 26, 2017) (panelist)

One-Way Fee Shifting after Summary Judgment, 2017 Meeting of the Midwestern Law and Economics Association, Marquette Law School, Milwaukee, WI (Oct. 20, 2017)

The Conservative Case for Class Actions, Pepperdine Law School Malibu, CA (Oct. 17, 2017)

One-Way Fee Shifting after Summary Judgment, Vanderbilt Law Review Symposium on The Future of Discovery, Vanderbilt Law School, Nashville, TN (Oct. 13, 2017)

The Constitution Revision Commission and Florida's Judiciary, 2017 Annual Florida Bar Convention, Boca Raton, FL (June 22, 2017)

Class Actions After Spokeo v. Robins*: Supreme Court Jurisprudence, Article III Standing, and Practical Implications for the Bench and Practitioners*, Northern District of California Judicial Conference, Napa, CA (Apr. 29, 2017) (panelist)

The Ironic History of Rule 23, Conference on Secrecy, Institute for Law & Economic Policy, Naples, FL (Apr. 21, 2017)

Justice Scalia and Class Actions: A Loving Critique, University of Notre Dame Law School, South Bend, Indiana (Feb. 3, 2017)

Should Third-Party Litigation Financing Be Permitted in Class Actions?, Fifty Years of Class Actions—A Global Perspective, Tel Aviv University, Tel Aviv, Israel (Jan. 4, 2017)

Hot Topics in Class Action and MDL Litigation, University of Miami School of Law, Miami, Florida (Dec. 2, 2016) (panelist)

The Ideological Consequences of Judicial Selection, William J. Brennan Lecture, Oklahoma City University School of Law, Oklahoma, City, Oklahoma (Nov. 10, 2016)

After Fifty Years, What's Class Action's Future, ABA National Institute on Class Actions, Las Vegas, Nevada (Oct. 20, 2016) (panelist)

Where Will Justice Scalia Rank Among the Most Influential Justices, State University of New York at Stony Brook, Long Island, New York (Sep. 17, 2016)

The Ironic History of Rule 23, University of Washington Law School, Seattle, WA (July 14, 2016)

A Respected Judiciary—Balancing Independence and Accountability, 2016 Annual Florida Bar Convention, Orlando, FL (June 16, 2016) (panelist)

What Will and Should Happen to Affirmative Action After Fisher v. Texas, American Association of Law Schools Annual Meeting, New York, NY (January 7, 2016) (panelist)

Litigation Funding: The Basics and Beyond, NYU Center on Civil Justice, NYU Law School, New York, NY (Nov. 20, 2015) (panelist)

Do Class Actions Offer Meaningful Compensation to Class Members, or Do They Simply Rip Off Consumers Twice?, ABA National Institute on Class Actions, New Orleans, LA (Oct. 22, 2015) (panelist)

Arbitration and the End of Class Actions?, Quinnipiac-Yale Dispute Resolution Workshop, Yale Law School, New Haven, CT (Sep. 8, 2015) (panelist)

The Next Steps for Discovery Reform: Requester Pays, Lawyers for Civil Justice Membership Meeting, Washington, DC (May 5, 2015)

Private Attorney General: Good or Bad?, 17th Annual Federalist Society Faculty Conference, Washington, DC (Jan. 3, 2015)

Liberty, Judicial Independence, and Judicial Power, Liberty Fund Conference, Santa Fe, NM (Nov. 13-16, 2014) (participant)

The Economics of Objecting for All the Right Reasons, 14th Annual Consumer Class Action Symposium, Tampa, FL (Nov. 9, 2014)

Compensation in Consumer Class Actions: Data and Reform, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, NY (Nov. 7, 2014)

The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?, Northern District of California Judicial Conference, Napa, CA (Apr. 13, 2014) (panelist)

The End of Class Actions?, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, FL (Apr. 4, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, University of Missouri School of Law, Columbia, MO (Mar. 7, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, George Mason Law School, Arlington, VA (Mar. 6, 2014)

Should Third-Party Litigation Financing Come to Class Actions?, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law, Lexington, VA (Nov. 7-8, 2013)

Is the Future of Affirmative Action Race Neutral?, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School, Ann Arbor, MI (Oct. 11, 2013)

The Mass Tort Bankruptcy: A Pre-History, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School, Nashville, TN (Sep. 28, 2013) (panelist)

Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, FL (Apr. 12, 2013) (panelist)

The End of Class Actions?, Symposium on Class Action Reform, University of Michigan Law School, Ann Arbor, MI (Mar. 16, 2013)

Toward a More Lawyer-Centric Class Action?, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School, New York, NY (Nov. 30, 2012)

The Problem: AT & T as It Is Unfolding, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School, New York, NY (Apr. 26, 2012) (panelist)

Standing under the Statements and Accounts Clause, Conference on Representation without Accountability*,* Fordham Law School Corporate Law Center, New York, NY (Jan. 23, 2012)

The End of Class Actions?, Washington University Law School, St. Louis, MO (Dec. 9, 2011)

Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law, Chicago, IL (Sep. 15-16, 2011) (participant)

Is Summary Judgment Unconstitutional? Some Thoughts About Originalism, Stanford Law School, Palo Alto, CA (Mar. 3, 2011)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Northwestern Law School, Chicago, IL (Feb. 25, 2011)

The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote, University of Iowa Law School, Iowa City, IA (Feb. 3, 2011) (panelist)

The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure, Washington University Law School, St. Louis, MO (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered,* Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School, Cleveland, OH (Sep. 17, 2010)

Do Class Action Lawyers Make Too Little?, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

Originalism and Summary Judgment, Georgetown Law School, Washington, DC (Apr. 5, 2010)

Theorizing Fee Awards in Class Action Litigation, Washington University Law School, St. Louis, MO (Dec. 11, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Conference on Empirical Legal Studies, University of Southern California Law School, Los Angeles, CA (Nov. 20, 2009)

Originalism and Summary Judgment, Symposium on Originalism and the Jury, Ohio State Law School, Columbus, OH (Nov. 17, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School, South Bend, IN (Oct. 10, 2009)

The End of Objector Blackmail?, Stanford-Yale Junior Faculty Forum, Stanford Law School, Palo Alto, CA (May 29, 2009)

An Empirical Study of Class Action Settlements and their Fee Awards, University of Minnesota School of Law, Minneapolis, MN (Mar. 12, 2009)

The Politics of Merit Selection, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School, Columbia, MO (Feb. 27, 2009)

The End of Objector Blackmail?, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law, Chicago, IL (Oct. 9, 2008)

Alternatives To Affirmative Action After The Michigan Civil Rights Initiative, University of Michigan School of Law, Ann Arbor, MI (Apr. 3, 2007) (panelist)

OTHER PUBLICATIONS

9th Circuit Split: What's the math say?, DAILY JOURNAL (Mar. 21, 2017)

Former clerk on Justice Antonin Scalia and his impact on the Supreme Court, THE CONVERSATION (Feb. 24, 2016)

Lessons from Tennessee Supreme Court Retention Election, THE TENNESSEAN (Aug. 20, 2014)

Public Needs Voice in Judicial Process, THE TENNESSEAN (June 28, 2013)

Did the Supreme Court Just Kill the Class Action?, THE QUARTERLY JOURNAL (April 2012)

Let General Assembly Confirm Judicial Selections, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

"Tennessee Plan" Needs Revisions, THE TENNESSEAN (Feb. 3, 2012)

How Does Your State Select Its Judges?, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

On the Merits of Merit Selection, THE ADVOCATE 67 (Winter 2010)

Supreme Court Case Could End Class Action Suits, SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

Kagan is an Intellect Capable of Serving Court, THE TENNESSEAN (Jun. 13, 2010)

Confirmation "Kabuki" Does No Justice, POLITICO (July 20, 2009)

Selection by Governor may be Best Judicial Option, THE TENNESSEAN (Apr. 27, 2009)

Verdict on Tennessee Plan May Require a Jury, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

Tennessee's Plan to Appoint Judges Takes Power Away from the Public, THE TENNESSEAN (Mar. 14, 2008)

Process of Picking Judges Broken, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

Disorder in the Court, LOS ANGELES TIMES (Jul. 11, 2007)

Scalia's Mistake, NATIONAL LAW JOURNAL (Apr. 24, 2006)

GM Backs Its Bottom Line, DETROIT FREE PRESS (Mar. 19, 2003)

Good for GM, Bad for Racial Fairness, LOS ANGELES TIMES (Mar. 18, 2003)

10 Percent Fraud, WASHINGTON TIMES (Nov. 15, 2002)

OTHER PRESENTATIONS

Does the Way We Choose our Judges Affect Case Outcomes?, American Legislative Exchange Council 2018 Annual Meeting, New Orleans, Louisiana (August 10, 2018) (panelist)

Oversight of the Structure of the Federal Courts, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate, Washington, D.C. (July 31, 2018)

Where Will Justice Scalia Rank Among the Most Influential Justices, The Leo Bearman, Sr. American Inn of Court, Memphis, TN (Mar. 21, 2017)

Bringing Justice Closer to the People: Examining Ideas for Restructuring the 9th Circuit, Subcommittee on Courts, Intellectual Property, and the Internet, United States House of Representatives, Washington, D.C. (Mar. 16, 2017)

Supreme Court Review 2016: Current Issues and Cases Update, Nashville Bar Association, Nashville, TN (Sep. 15, 2016) (panelist)

A Respected Judiciary—Balancing Independence and Accountability, Florida Bar Annual Convention, Orlando, FL (June 16, 2016) (panelist)

Future Amendments in the Pipeline: Rule 23, Tennessee Bar Association, Nashville, TN (Dec. 2, 2015)

The New Business of Law: Attorney Outsourcing, Legal Service Companies, and Commercial Litigation Funding, Tennessee Bar Association, Nashville, TN (Nov. 12, 2014)

Hedge Funds + Lawsuits = A Good Idea?, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

Judicial Selection in Historical and National Perspective, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

Life as a Supreme Court Law Clerk and Views on the Health Care Debate, Exchange Club, Nashville, TN (Apr. 3, 2012)

The Tennessee Judicial Selection Process—Shaping Our Future, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

Reexamining the Class Action Practice, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

Judicial Selection in Kansas, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

Judicial Selection and the Tennessee Constitution, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

Judicial Selection in Tennessee, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

Ethical Implications of Tennessee's Judicial Selection Process, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

PROFESSIONAL ASSOCIATIONS

Member, American Law Institute
Referee, Journal of Law, Economics and Organization
Referee, Journal of Empirical Legal Studies

Reviewer, Oxford University Press
Reviewer, Supreme Court Economic Review
Member, American Bar Association
Member, Tennessee Advisory Committee to the U.S. Commission on Civil Rights
Board of Directors, Tennessee Stonewall Bar Association
American Swiss Foundation Young Leaders' Conference, 2012
Bar Admission, District of Columbia

COMMUNITY ACTIVITIES

Board of Directors, Nashville Ballet, 2011-2017; Nashville Talking Library for the Blind, 2008-2009

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. June 20, 2019

On May 31, 2019, the court ordered the participants to be prepared to address at the hearing commencing on June 24, 2019 whether Customer Class Counsel misrepresented a study by Brian T. Fitzpatrick in their memorandum in support of attorneys fees. See Docket No. 543. On June 11, 2019, Customer Class Counsel filed a Motion for Leave to Call Mr. Fitzpatrick as a witness at that hearing (the "Motion"). See Docket No. 546. On June 18, 2019, the Hamilton Lincoln Law Institute filed an amicus brief which, among other things, argues that Mr. Fitzpatrick should not be allowed to testify concerning whether his study was misrepresented. See Docket No. 551-1.

At present, the court views the matter of whether the Fitzpatrick study was misrepresented - meaning whether it was characterized by Customer Class Counsel in a false or misleading manner - to be a question of fact on which Mr. Fitzpatrick's testimony is neither necessary nor appropriate. Mr. Fitzpatrick may be an expert on the reasonableness of attorneys fees in class actions. However, the court did not contemplate receiving additional expert evidence on the reasonableness of the original $75,000,000 fee award in this case, which has been at issue since February 2017. See, e.g., Feb. 6, 2017 Memorandum and Order (Docket No. 117) at 8; Mar. 8, 2017 Memorandum and Order (Docket No. 173) at 3.

In view of the foregoing, the Motion (Docket No. 546) is hereby DENIED without prejudice to possible reconsideration at the June 24, 2019 hearing.

UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs	*	CIVIL ACTION
vs.	*	No. 11-10230-MLW
STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY, AND STATE STREET GLOBAL MARKETS, LLC, Defendants	*	

Related cases: 11-cv-12049-MLW
12-cv-11698-MLW

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING

June 24, 2019

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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CHOATE, HALL & STEWART, LLP, (By Joan A. Lukey, Esq. and Justin J. Wolosz, Esq.), 100-150 Oliver Street, Boston, Massachusetts 02110, on behalf of Labaton Sucharow, LLP

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Mark L. Wolf, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on June 24, 2019.)

THE CLERK: All rise for the Honorable Court. This is civil action 11-10230, Arkansas Teacher Retirement System v. State Street; civil action 11-12049, Arnold Henriquez and others v. State Street; and civil action 12-11698, the Andover Companies v. State Street.

Court is in session. You may be seated.

THE COURT: Good morning. Would counsel please identify themselves for the Court and for the record.

MR. SINNOTT: Good morning, your Honor. Your Honor, my name is William Sinnott. I'm from the firm of Barrett & Singal, and I represent the Special Master, Gerald Rosen, who is present. With me is Attorney Elizabeth McEvoy. Your Honor, also with me is Attorney Matthew McDonnell, and I would request that he be permitted to sit at counsel table. We've loaded the entirety of the record from the R and R and the supplemental R and R, and he's most capable and certainly more capable than myself in being able to locate those documents quickly.

THE COURT: Thank you. That's fine.

MR. SINNOTT: Thank you, your Honor.

MS. LUKEY: Good morning, your Honor. Joan Lukey, and with me my partner Justin Wolosz, from Choate, Hall & Stewart on behalf of Labaton Sucharow.

MR. KELLY: Good morning, your Honor. Brian Kelly, Joshua Sharp of Nixon Peabody on behalf of the Thornton Law Firm.

MR. HEIMANN: Good morning. Richard Heimann together with Dan Chiplock from Leiff Cabraser Heimann & Bernstein, representing the firm.

10:11 MR. McTIGUE: Your Honor, Brian McTigue representing the Henriquez ERISA plaintiffs.

MS. GERBER: Good morning, your Honor. Laura Gerber from Keller Rohrback on behalf of the Andover plaintiffs.

MR. SARKO: Good morning, your Honor. Lynn Sarko on behalf of the Andover ERISA plaintiffs.

MR. KRAVITZ: Good morning, your Honor. Carl Kravitz and Mike Smith from Zuckerman Spaeder, one of the ERISA counsel on behalf on the Henriquez plaintiffs.

MR. BEDNARZ: Good morning, your Honor. Frank Bednarz

10:12 on behalf of the Hamilton Lincoln Law Institute.

THE COURT: Okay. On May 31, I issued a sequestration order relating to the Thornton Law Firm witnesses that I want to hear from in the course of these hearings, but it occurred to me that if Garrett Bradley and/or Michael Thornton were present and wanted to hear the proceed -- view the proceedings

to the extent they don't relate to the testimony I anticipate taking, I think I would make an exception to the sequestration order.

MR. KELLY: Thank you, your Honor, that was our first question. That's good. I can tell the ones who are on the outside who are on the witness list if they want to they can hear oral argument --

THE COURT: Well, I think Mr. Thornton and Mr. Garrett Bradley, if they want to hear the argument. I don't know that the other two -- who is that, Hoffman?

10:13

MR. KELLY: Lesser and Hoffman are on the list. They're all outside, we kept them outside in case the Court wanted the order to apply to oral argument as well.

THE COURT: They could come in.

MR. KELLY: Can I advise them?

THE COURT: One second, we may have others.

MS. LUKEY: We have Mr. Keller and Mr. Belfi outside as well. May they be in for argument, your Honor?

THE COURT: Yes.

10:13

MS. LUKEY: Thank you.

MR. SINNOTT: Your Honor, I'd also like to bring to the Court's attention that retired Judge Garrett Brown is also present in the courtroom.

THE COURT: Okay.

Let me say the following. It's going to be necessary

for each of you to identify yourselves before you speak, and I think I see Mr. Paine in the back. Could you identify yourselves just so --

MR. PAINE: Sure, Bill Paine and Dan Halston from WilmerHale. We represent the defendant State Street.

THE COURT: All right.

As always, I'd like to try to assure we have a clear and common sense where we are and hopefully where we're going.

On August 8, 2016, I preliminarily approved the proposed $300 million settlement in this class action case. I noted that this is a point at which the adversary process usually fails. I was referring to the fact that once a settlement is reached, the plaintiff has no incentive to provide the Court, at least unnecessarily, information that might disrupt the proposed settlement and particularly no incentive to try to help the Court understand how much of the settlement should go to the class and how much should go to the attorneys.

On November 2, 2016, I conducted a hearing. I gave final approval to the proposed settlement. Again, I noted that the adversary process is not working.

I said that I was relying substantially on the attorneys' excellent submissions.

As requested, with regard to attorney's fees and expenses, I awarded $74,541,250 in attorney's fees, and another

$1,257,697 in expenses, which came to about 25 percent of the common fund. I'll probably refer to this as a $75 million award.

I tested the reasonableness of the requested award by measuring it against what the firms representing plaintiffs represented was their lodestar of $41,323,895.

Each of the law firms provided affidavits in support of the fee requests, including information regarding the calculation of what they represented to be their respective lodestars.

I also received an omnibus memorandum in support of the fee request, which I believe was filed by Labaton Sucharow.

On November 10, 2016, David Goldsmith of Labaton sent the Court a letter. It stated that an inquiry from the media had prompted Labaton, the Thornton Law Firm, and Lieff Cabraser to discover that 23 staff attorneys listed as Thornton employees had also been included -- well, listed as Thornton employees and included in its lodestar calculation were also included in the lodestar calculations of Labaton or Lieff.

The correction to remove the double counting reduced the number of hours that counsel said were reasonably worked by about I think 9,000 and the lodestar calculation by about $6 million. Therefore, a$75 million award would represent a multiplier they said of 2 rather than 1.8. Mr. Goldsmith asserted, however, that the $75 million award nevertheless

remained reasonable and should not be altered.

On December 17, 2016, the Boston Globe published an article raising questions regarding the reliability of various representations made in the fee petitions, including many representations relating to the lodestar calculations.

A second Boston Globe article on January 28, 2017, reported that Labaton and the Thornton Law Firm had made campaign contributions to the Plymouth County treasurer, who chaired the Plymouth County pension fund, the Plymouth County pension fund had hired them to file class action lawsuits that reportedly generated $40,000 for the fund and $41 million for the lawyers.

Similarly, the Globe reported that campaign contributions had been made by Thornton and Labaton to the state treasurer, Timothy Cahill, who headed the state pension fund, that Labaton and Thornton were hired to represent the state pension fund and had earned $60 million in fees, 9 of which went to Thornton from Labaton.

On February 6, 2017, I issued an order informing the attorneys of questions and concerns that I had. I proposed appointing retired United States District Judge Gerald Rosen as a special master to investigate the reliability of representations that I relied on in making the $75 million award of attorney's fees and to issue a Report and Recommendation.

I wrote, this is Docket number 117 at 2. After providing plaintiffs' counsel an opportunity to object and be heard, the Court would decide whether the original award of attorney's fees remains reasonable, whether it should be reduced, and, if misconduct has been demonstrated, whether sanctions should be imposed.

After a March 7, 2017 hearing, with the agreement of counsel for the class, I appointed Mr. Rosen as a special master. I ordered that the master shall investigate and prepare a report and recommendation concerning all issues relating to the attorney's fees, expenses, and service awards previously made in this case. The Report and Recommendation shall address at least, A, the accuracy and reliability of the representations made by the parties and their requests for awards of attorney's fees and expenses, including but not limited to whether counsel employed the correct legal standards and had a proper factual basis for what was represented to be the lodestar for each firm; B, the accuracy and reliability of the representations made in the November 10, 2016 letter from David Goldsmith, Esq. of Labaton to the Court, the accuracy and reliability of the representations made by the parties requesting service awards; D, the reasonableness of the amounts of attorney's fees, expenses, and service awards previously awarded and whether any or all of them should be reduced; E, whether any misconduct occurred in connection with such awards,

and if so, whether it should be sanctioned.

I subsequently vacated the original fee award. On May 14 of 2018, the special master submitted a 377-page Report and Recommendation and an executive summary. The special master recommended that the Court find the original fee award of $75 million was reasonable. He also recommended that it be reduced in various ways because of misrepresentations or misconduct by class counsel.

I don't think the Report and Recommendation has a 10:24 bottom line as to what the fee award would be if all of the recommendations were adopted. It appears to be about $69 million. However, I think that is a calculation that I would like the special master to do in the next day or so.

In any event, the special master also recommended a reallocation of some fees that went to what are called customer class counsel, Labaton, Thornton and Lieff, to ERISA counsel.

In addition, there's a recommendation that the Thornton Law Firm and one of its partners, Garrett Bradley, who also was of counsel to Labaton, be sanctioned.

10:25 Litigation ensued regarding the unsealing of certain portions of the special master's report, whether the special master role should be regarded as concluded, which would have precluded him from addressing the objections to his Report and Recommendation, and there was a motion for my disqualification.

All of those issues have been resolved. I received

objections to the Report and Recommendation, and ultimately, a proposed settlement between Labaton and the special master.

As I explained at the -- or at least said at the October 2018 hearing, I continued to question whether it's most appropriate to award $75 million as attorney's fees in this case.

I also continue to have the original questions regarding the reliability of representations made in connection with the fee petition.

10:26 In addition, the special master discovered a $4 million payment from Labaton to Damon Chargois, an individual in Texas who did no work on this case, but who was evidently instrumental in obtaining Arkansas Teachers as a Labaton client, and pursuant to an agreement with Labaton gets 20 percent or up to 20 percent of every Labaton fee in an Arkansas Teachers case.

The Chargois matter may or may not affect the amount of fees that ought to be awarded.

So to try to focus, at least initially, on what I 10:27 regard as the big picture, the most fundamental issues that cut across many individual objections, I issued the May 31 order with my intended agenda for today, and then a June 21 order supplementing it. But, as I said, this is Docket 543, the Court at present intends to hear argument and on some matters testimony concerning some of the issues identified below, which

include questions regarding the appointment of the special master. If the Court proposes to exercise its Rule 53(a)(1) authority to modify the Report and Recommendation with regard to an issue in which the parties have not had notice and an opportunity to be heard, the Court will provide such notice and conduct another hearing.

But the agenda for today's hearing that I had in mind and still have in mind is to hear argument on, essentially on whether the initial fee award of $75 million constituting approximately 25 percent of the common fund is reasonable. I said, among other things, the participants shall be prepared to address whether customer class counsel misrepresented a study in their memorandum in support of attorney's fees, the Fitzpatrick study. I said I would hear argument on whether customer class counsel's reported lodestar, not including double-counted time, is accurate and reasonable. And this would include issues raised or presented by the special master's report, whether contract attorneys should be treated as an expense and not included in the lodestar, whether the reported rates for staff attorneys in customer class fee petitions are reasonable, and whether customer class counsel made errors other than double-counting in the fee petition.

Then I proposed, intend to hear argument and testimony, but maybe testimony and argument as to whether Garrett Bradley intentionally filed a false fee declaration,

10:29

10:30

and, if so, what consequences would be possible, sanctions, fines or other measures were permissible and appropriate. And I pointed out that the Thornton Law Firm shall be prepared to address whether the representations concerning Michael Bradley in the fee declaration were accurate, reliable. I indicated I may want to hear from Michael Bradley, Garrett Bradley, and other Thornton lawyers who worked on the fee declaration, including Michael Thornton, Michael Lesser, and Evan Hoffman.

Jumping ahead to June 21, I would also want to hear argument about the Chargois matter, and the impact, if any, it should have on the total fee award or the amount allocated to Labaton.

And then there are some issues that arose after I last saw you in November. I have some questions about an e-mail I received from Eric Belfi to Christopher Keller of Labaton about a Chargois case that hadn't been brought to my attention earlier and Garrett Brown's phase I report.

So that's generally the way I propose, intend to proceed. But did the parties want to be heard on proceeding in this way, which I think would give me in a coherent manner the information I need to decide the major issues. Or on this agenda.

MR. SINNOTT: Your Honor, just to address an item that you raised earlier, a few moments ago.

We do have those specific numbers to give you

regarding the reductions concerned, and we agree with the Court's lay down of how we should proceed. Obviously we're all ready to be flexible and to address things as they come up. We do have the documents loaded to the extent that we could for all counsel to avail themselves of. But we are prepared to give a brief orientation from the special master's perspective as to where we are and what the important issues -- what the special master's view of the most important issues are as well as to address each of those and to answer the Court's questions.

10:33

MS. LUKEY: Labaton is content with your agenda, your Honor.

I do have one question, Garrett Brown is of course here. Would you like him to remain here for the entire three-day period?

THE COURT: Let me -- I frankly haven't focused on that. I'm going to give you, in a minute, or in a few minutes, the framework, what I think the framework for analysis should be, and the special master focused -- the special master's

10:34

report is extremely helpful, not just for this case, but perhaps more generally.

On the other hand, right now I'm the fiduciary for the class. We're in an equitable proceeding, and the ultimate issue here, which I don't want any of us to lose sight of, is there's a $300 million settlement, what's the most appropriate

amount -- well, what's a reasonable range for a settlement in this case, and where in the range should I make the award, and sort of policing or monitoring Labaton is not directly related to that, although I think it could be one of the considerations that gets taken into account.

So I actually haven't focused on -- I'll have to call him now Mr. Brown's report, but maybe I can do something so he doesn't have to sit here for three days and charge you for that.

10:35 MS. LUKEY: Thank you.

MR. KELLY: Your Honor, on behalf of the Thornton Law Firm, we think the Court's proposed outline and agenda makes sense, and we're obviously prepared to participate.

THE COURT: Thank you.

MR. HEIMANN: We're the same, your Honor.

THE COURT: ERISA class counsel?

MR. SARKO: ERISA clients are happy with the Court's suggestion.

THE COURT: It's my intention -- it's the Hamilton

10:36 Lincoln Institute now?

MR. BEDNARZ: Yes, your Honor.

THE COURT: Can you say your name again?

MR. BEDNARZ: It's Frank Bednarz for Hamilton Lincoln.

THE COURT: It's my intention -- I found what Mr. Frank and you submitted to be helpful, and I intend to --

you're the amicus, you're not an intervenor -- but to let you participate in these proceedings because you have raised some issues that have a different view.

MR. BEDNARZ: I appreciate that.

THE COURT: Okay. So we're going to go on essentially as I've framed it.

Here's my conception of where we are, particularly what the Court's role is.

So the award of attorney's fees is vacated. I intend to decide *de novo* the amount of attorney's fees that should be awarded. This is essentially a proceeding in equity. The 1st Circuit has said the authority to order reimbursement from a common fund has its origins in equity, In Re: Fidelity, 167 F.3d 735, 737.

In addition, as the parties have recognized in the course of these proceedings, the Court is a fiduciary for the class at this point. There are -- all of the relevant circumstances can be considered in making a fee award, but at least some of the traditional criteria that are often cited or stated by the 2nd Circuit in Goldberger, 209 F.3d 43 at 50, District Courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including, one, the time and labor expended by counsel; two, the magnitude and complexities of the litigation; three, the risk of a litigation; four, the quality of the representation;

10:37 10:38

five, the requested fee in relation to the settlement; and six, public policy considerations.

The parties agree that's -- those Goldberger factors are not exclusive, but they're at least among the things that ought to be considered.

Does anybody have a different view?

Apparently not.

And I think Professor Rubenstein, an expert for one of the law firms, I know has written on this, but it's my understanding that I have the authority to -- whatever total of the award that I make, that I have the authority to allocate the fees among the different law firms, putting aside whether I should exercise that authority, and, if so, how I should. Does anybody have a different view concerning the Court's power?

MR. KELLY: We think that's right, your Honor. Again, putting aside whether the Court should do it, we do think the Court has that authority.

MR. SINNOTT: And the special master would concur in that view, your Honor.

THE COURT: It seems to me there's no doubt about that. So that's one of the things I'm going to be thinking about.

Here's my present framework. First, I think the question I want to decide is what's the reasonable range for a fee award in this particular case. And this implicates the

question of whether the fact that this is a so-called mega fund case or a case with a large settlement, over $100 million, should affect what the reasonable range is. The Fitzpatrick study, which has been much -- well, it's been discussed lately in this case, found that at the time it was written the mean average settlement -- or the average award in cases involving settlements of $250 to $400 million was 17.9 percent. So I was using, as encouraged by counsel, 20 to 30 percent when I made the original award. Should I be using something different as a starting point.

10:42

And a lot of the briefing tells me what or focuses on what the awards have been in the 1st Circuit in cases of this size. There haven't been that many of them, but I wonder whether I should be focusing on the 1st Circuit or on a national market.

And then, once I determine what a reasonable range is, I think I would consider a number of the specific issues that prompted the appointment of the special master and that have emerged from his report under public policy considerations,

10:43

including a duty of candor to the Court and have there been violations of -- have there been false or misleading statements made, and, if so, how should that affect where within the reasonable range the award should be made.

There are a whole series of discrete issues there which we could perhaps focus on individually after I hear the

argument on whether the 20 to 30 percent range is the appropriate range for me to be using to begin with or some other range.

And since the one advocate for less than $75 million and for perhaps using a different range is the Hamilton Lincoln Institute -- did I do that right?

MR. BEDNARZ: Hamilton Lincoln Law Institute. I've gotten it wrong, your Honor, quite a bit myself. Ted Frank often chastises me for that.

10:44 THE COURT: Hamilton Lincoln Law Institute.

Do you want to address what would be a reasonable range for fee award in this case, including whether the focus should be on so-called -- as comparator mega fund cases or all cases, and whether I should focus on the 1st Circuit or national practice and experience?

MR. BEDNARZ: Well, your Honor, as we pointed out in our brief filed June 7, we don't believe that there's actually necessarily a disagreement between the 1st Circuit and the other circuits. It is true that the 1st Circuit has had fewer

10:45 mega fund cases come up than, for example, the 9th Circuit that has a very clear preference for a sort of sliding scale approach. And the 1st Circuit doesn't foreclose that in our opinion, your Honor. And given that this is a national case with national staffing, it does seem reasonable to follow the national trends, which is, in a settlement of this size, you

case, cases, or on the whole universe of cases.

MR. HEIMANN: All right, I'll get to that, your Honor, but let me start again with the basics, and that is the question, it seems to me, that the Court ought to be entertaining here is whether or not -- and this is the way your Honor framed the question in the order that you entered, is whether or not the fee that you awarded as a percentage of the fund at 25 percent is and was a reasonable fee.

THE COURT: Okay. And now see that I've done more work since May 31st and my thinking has evolved.

At some point you need to answer my question.

MR. HEIMANN: I'm getting there, your Honor.

I would say, and I recognize what your Honor has just said. The issue is not whether some other fee might also be reasonable, whether that be 17 --

THE COURT: Actually, it is. I'm trying to be as transparent as possible. I have vacated the fee. In my mind, I'm back in 2016. I know much more than I knew in 2016 and in my current view -- and you're welcome to tell me that's the wrong question -- but I'm telling you what the questions are in my mind now, and they may continue to evolve, so you can address it.

So that -- that was it, and it was something -- you know, the master told me that the lawyers did very good work in this case, got a good result. I suppose every mega fund case

involves a lot of money, which is usually, if not always, characterized as a good result. And, you know, the master without that much explanation, unless I overlooked it, said 75 million is reasonable, then it should be reduced and reallocated for these reasons. But I'm back essentially doing this *de novo* and trying to determine, A, what's a reasonable range for a fee in this particular case; and then, B, where within that range should the award be made.

MR. HEIMANN: All right, your Honor. I think the point I'm trying to make, and I recognize your Honor has moved past, if you will, the position that we understood, certainly I understood your Honor was wrestling with, but let me say this. There is no magic number that is reasonable and no other number that is reasonable.

THE COURT: That's my point.

MR. HEIMANN: All right.

THE COURT: That's exactly it. I think -- for the typical case, which is the smaller case, I was educated decades ago to think that -- to understand that the general understanding was 20 to 30 percent is a reasonable range; where within the range do you make the award? But now -- so we're framing the issue in the same way now. So should there be a difference for a case involving as much as $250 million. The Fitzpatrick study looked at that to some extent, apparently Mr. Rubenstein, Professor Rubenstein has. So what's -- should

there be a difference for a mega fund case, what's a reasonable range, and then later we'll get to where within the range that ought to be.

MR. HEIMANN: Let me address that in several different ways. Let's start with the law, good place to start, I think, your Honor. And let's start with 1st Circuit law, if I may.

At the time your Honor -- maybe I shouldn't refer to the time that your Honor made the award originally, but I will.

At the time your Honor made the award, you stated on
11:28 the record that you knew that the range generally applied in the 1st Circuit was between 20 and 30 percent and that the 1st Circuit had established a benchmark, just as the 9th Circuit has, at 25 percent.

THE COURT: I said that?

MR. HEIMANN: You did.

THE COURT: The 1st Circuit said it?

MR. HEIMANN: You did, and the 1st Circuit did say that, it said it in among other cases by Judge Gorton in 2011 --

11:29 THE COURT: You mean judges within the 1st Circuit.

MR. HEIMANN: Yes, sir.

THE COURT: But not the Court of Appeals of the 1st Circuit.

MR. HEIMANN: As far as I can tell, the Court of Appeals have not addressed this issue.

THE COURT: As far as I can tell, they haven't either.

MR. HEIMANN: But the District Courts have, and they've been unanimous in endorsing the range of 20 to 30 percent with the benchmark of 25 percent, regardless of the size of the recovery.

That's the law -- and I can give you the cases that support that.

THE COURT: No, I know, but -- here's the issue. Maybe I've compartmentalized more than it can be, but it relates to the reliability of the representations made to me, for example, concerning the Fitzpatrick study.

Let me see that.

There's mention in the brief that was filed that there's some discussion about whether there should be a different percentage for mega fund cases but then it goes on a couple of pages later and says --

(Discussion off the record.)

THE COURT: As I recall, that -- well, let me get it exactly.

(Discussion off the record.)

MR. HEIMANN: If you're looking for Document Number 103.

(Discussion off the record.)

THE COURT: So on page 9, the memo, 103-1 states -- memo signed by Mr. Sucharow, "Some courts at least in mega fund

cases have lowered the fee award percentage as the size of the settlement increases to avoid giving attorneys a windfall at plaintiff's expense." That's a quote from Judge Saris in the Neurontin case.

And then on page 10, 11 says, Empirical studies also support the requested fee. An in-depth review of all 668 class action settlements in federal courts during 2006 and 2007 found that the mean and median fees awarded in the 444 settlements where the percentage of fund method was used, either with or without a lodestar cross-check, were 25.7 percent and 25 percent and that the mean and median fee as awarded in securities cases, 233 out of 444, were 24.7 and 25 percent, and that the mean and median fee as awarded in consumer cases were 23.5 to 24.6, cites Fitzpatrick, An Empirical Study. The 24.85 percent fee requested is right in line with Professor Fitzpatrick's findings.

But let me see the Fitzpatrick study.

But that didn't tell me that Professor Fitzpatrick had found that for settlements over $250 million the mean was 17.9 percent.

MR. HEIMANN: No, we didn't say that in this brief. What we did was address the mega fund issue directly in this brief, pointed out that some courts have adopted this notion of employing the fact that the case is a mega fund, whatever that means, who argue for a lower fee than in smaller settlements.

We address all of that.

THE COURT: Why didn't you tell me -- let me have the Neurontin decision.

Do you remember the Neurontin decision?

MR. HEIMANN: You just read it. We discussed it. We cited exactly what the Neurontin decision said. The Court -- that case was one in which -- by the way --

THE COURT: No. I think there was maybe an --

(Discussion off the record.)

11:35 THE COURT: In Neurontin, Professor Fitzpatrick filed an affidavit, but --

(Discussion off the record.)

THE COURT: But, in any event, the Fitzpatrick study finds that the mean in cases 250 to 500 million is 17.9 percent, right?

MR. HEIMANN: 17.9 percent of cases where the court orders were entered in 2006 and 2007, so more than ten years ago. And how many data points were there for that field?

THE COURT: Well, excuse me. You must have regarded

11:36 the Fitzpatrick study as relevant and reliable, you cited it to me.

MR. HEIMANN: We cited it, we gave you a copy of it in full.

THE COURT: Among the 731 pages of exhibits.

MR. HEIMANN: Your Honor, look, the Fitzpatrick study,

if we're focused now on the question was it improper somehow for us not to point out specifically the findings of the study with respect to the settlements in the range of 250 to 500, there are a variety of things to say about that. One, eight data points. The study that we relied upon and discussed had several hundred data points.

THE COURT: I'm sorry, which study is that?

MR. HEIMANN: The same Fitzpatrick study.

In other words, if you look at the Fitzpatrick study, if you have it there, you'll see that he analyzed that data in dozens of different ways. Not only just in terms of size but in terms of circuit, in terms of types of case, on and on and on. So there are any number of ways one could cite to the Fitzpatrick study.

The way we cited to it was to take the broadest aspect of the study, the one with the greatest data points that showed for all cases, class action cases settled or resolved during that time period, the mean as being -- and right in the middle of the 20 to 30 percent range.

11:37 Now, can you fault us because we didn't say, Oh, by the way, with respect to settlements between 250 and 500, there were eight of them during that two-year period and the mean was less, it was 17.5. All right, maybe we should have said that, but I hardly think that constitutes a misrepresentation when in the context in the brief we addressed the whole mega fund issue

in depth. And indeed, what we did instead of going to the Fitzpatrick study, we pointed -- we gathered together all of the 1st Circuit cases that were mega fund cases as of that period in time, defined as greater --

THE COURT: Where is that?

MR. HEIMANN: It's set forth right here in the brief, if you will, at page --

(Pause.)

MR. HEIMANN: At page 7, we identified all of the cases that we could find in the 1st Circuit, nine it looks like --

11:38

THE COURT: I thought it was eight.

MR. HEIMANN: It may be -- nine by my count.

THE COURT: All right.

MR. HEIMANN: All of these that are, in terms of size, they range from a high of 3.2 billion to a low of 110 million, many of them in the range that we're talking about, Neurontin was 325, Raytheon was 460, First Data Bank was 350 million. And we analyzed -- or we set forth both the percentage awards and the lodestar multipliers to the extent that they were available.

11:39

Now, your Honor was focusing on the Neurontin case. That's an important one I think to look at if you want a fair comparison. And in the Neurontin, which was 2014, so just a couple of years before your Honor was making the award in this

case, the request was for a fee in excess of 30 percent, and Judge --

THE COURT: Saris.

MR. HEIMANN: Thank you.

-- pointed out, analyzed the factors, all of the relevant factors, not just the comparable mega fund awards, and concluded that a fee of something in excess of 26 or roughly 27 percent, so above the benchmark in the 1st Circuit, was the appropriate fee to award in that case.

11:40 We discussed all of this in the brief. So we were hardly hiding from your Honor this issue with respect to mega funds and what some courts -- and I want to come back to this, by the way -- what some courts had done as of then and even as of now with respect to this mega fund issue. Because it is by no means true that there is a trend of any kind nationwide to treat mega fund cases in a materially different way from all other --

THE COURT: That's something -- hold on just one second.

11:41 (Pause.)

THE COURT: Hold on a second. Mr. Doreau, I'm going to take a break in a minute, a few minutes so you can try to get the electronics working.

(Pause.)

THE COURT: Okay. This is helpful, it's all helpful,

but I mean -- to point this out. This -- there are two questions, essentially, very general questions I asked you. One, should there be a difference in mega fund cases as opposed to the whole universe of cases? Why or why not? And should the focus be on the District Courts in the 1st Circuit or should it be more universal?

And I think, reminding you of those two questions, I'm going to take a break in the hope that --

MR. HEIMANN: I'll get to them?

11:42 THE COURT: No, not in the hope that you'll get to them; you'll get to them. In the hope -- this is brand-new technology. We just spent a lot of money to upgrade things here, and of course it doesn't at the moment work. But we'll take about a ten-minute break, and hopefully you'll be able to put your documents on the presenter and have it work.

Court is in recess.

THE CLERK: All rise.

(Recess taken.)

THE CLERK: All rise.

11:56 Court is now in session. You may be seated.

THE COURT: All right. So I think when we left off we were -- you were addressing my question of whether the market and effect should be defined as mega fund cases or as all cases, and in that context, whether the characterization to me in the memo was misleading concerning the Fitzpatrick study.

MR. HEIMANN: All right, sir, I'll pick up there.

Let me put up the portion of the Fitzpatrick study that we're talking about. This is one of I said multiple ways that he presented the data in the study, and this is Table 11 in which he --

THE COURT: You know what page that's on?

MR. HEIMANN: Yes, it's page 839. The pagination is in the upper right-hand corner of the pages.

THE COURT: Okay.

11:58 MR. HEIMANN: And you can see what he says is that, according to his data, there were eight cases total that -- where the recoveries were between 250 and 500. And let me just remark parenthetically, ours was 300, so ours was at the lower end of this range. And as we've been discussing, he has calculated the mean at 17.8 percent.

But then there's another very significant number in this table, that's the standard deviation. Because we're dealing with such a small dataset, the standard deviation, as Professor Fitzpatrick points out in his declaration or after

11:59 that -- I don't know where we were on that, I don't know whether your Honor is considering or not that at this point.

THE COURT: No.

MR. HEIMANN: All right. Then I'll just do it here myself.

Standard deviation here means that because the mean is

calculated by using different data points, some of which are above, some of which are below the mean, by definition, right, then one has to take into account the lack of power represented by a dataset that is so small. And in this way he calculated the standard deviation as 7.9, which means, in fact, that a 25 percent percentage of the fund award falls within the statistical relevance of his calculation.

THE COURT: But let's do the following -- although this may help with the range. So let's say the average is 17.9. What -- what number is one standard deviation above that?

11:59

MR. HEIMANN: 17.8 plus 7.9, that figures out to be just over 25 I think, if I'm doing my math correctly.

THE COURT: It's 25 -- and what would be one standard deviation below?

MR. HEIMANN: Just do the math backwards, subtract it.

THE COURT: Help me.

MR. HEIMANN: Well, it looks like it would be 10 more or less.

12:00

THE COURT: It seems to me that the Fitzpatrick study might tell me, to the extent it should be relied on, you brought it to my attention, that maybe the right range is 10 to 26 percent with 17.9 percent as the average.

Can you go back to the page before the chart?

MR. HEIMANN: In the study?

THE COURT: Yeah.

MR. HEIMANN: Yes, sir.

THE COURT: In fact, why don't we mark a copy of this. It's also Docket 104-31, the 31st exhibit in the submissions to me.

Do we have an extra copy? We'll mark it as Exhibit B.

(Exhibit B marked for identification.)

THE COURT: So the record will reflect what we're talking about.

12:01 Can you put up the previous page?

MR. HEIMANN: I can, yes, sir. Any particular part?

THE COURT: I don't think that's it.

MR. HEIMANN: No, no, I'm wrong, I've got double-sided pages.

THE COURT: Go all the way down to the bottom, last paragraph. You have to shrink it, I think.

Maybe you need someone younger. It's generational.

MR. HEIMANN: When I was a young prosecutor, I knew how to do this, your Honor.

12:02 Does that work?

THE COURT: Yes, sir.

Read for the record what it says, please, in the last paragraph. To give more meaningful data to courts it must award fees in the largest segments (sic).

MR. HEIMANN: I'm not picking that up.

THE COURT: I'll read it.

MR. HEIMANN: All right.

THE COURT: It says, "It should be noted that the last decile in Table 10 covers an especially wide range of settlements, those from $72.5 million to the Enron settlement of $6.6 billion. To give more meaningful data to courts that must award fees in the largest settlements, Table 11 shows the last decile broken into additional cut points. When both Tables 10 and 11 are examined together, it appears that fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent, and by the time $500 million was reached, they plunged well below 15 percent, with most awards at that level under even 10 percent."

Did I read that right?

MR. HEIMANN: You did.

THE COURT: So the -- the memo submitted with regard to the fee request didn't note that Professor Fitzpatrick said that.

MR. HEIMANN: Or anything else that he said of the many, many ways he analyzed data in his report, that's right.

THE COURT: Which -- actually, what was written is that the 25 percent was -- I just want to get it.

MR. HEIMANN: Do you want me to put this up?

THE COURT: Your memo?

MR. HEIMANN: Yes. I'll take the blame for it among others, your Honor. I don't want to single out --

THE COURT: Well, you didn't write this memo.

MR. HEIMANN: I didn't write the memo.

THE COURT: Did you read it before it was submitted?

MR. HEIMANN: No, sir. I wasn't part of the team that was involved in the subject at the time. I came on later when your Honor did what you did.

THE COURT: Let me see what page I want.

12:05 MR. HEIMANN: I think you're looking for page 11, perhaps.

THE COURT: Yes.

The last line, the 24.85 percent fee requested is right in line with Professor Fitzpatrick's findings.

MR. HEIMANN: Which I submit is absolutely right. It's exactly what he found. We're quoting directly out of the study and we're using the broad range of data which the author obviously thought was the most appropriate data to use from this study given the nature of the study and the lack of data

12:05 for the higher figures. And as I said before, and I'll say again until your Honor tells me to stop, we addressed the mega fund issue in detail in the memorandum. We didn't walk away from it. We walked your Honor through -- and in a minute I'm going to come to the fact that your Honor considered this actually at the hearing. I know your Honor said something

different than that a moment ago, but, in fact, your Honor did consider the mega fund issue at the hearing, you even considered the range of 250 to 500 at the hearing.

THE COURT: Well, it will be helpful to point that out.

MR. HEIMANN: I will.

THE COURT: Let me ask you this, did you -- you just made an argument a couple of minutes ago that -- that is getting to something I intended to get to later but they're related -- that the 25 percent is within the range of reason one should use, one standard deviation, that's what was in the Fitzpatrick affidavit that was proffered recently.

Did you do any -- did you personally do any work in the Bank of New York Mellon case?

MR. HEIMANN: I did.

THE COURT: Did you review the fee application in that case?

MR. HEIMANN: No, I was not involved in that aspect of the case, your Honor. I was involved in taking depositions of the key witnesses.

THE COURT: They bring you out for the major matters.

MR. HEIMANN: Sometimes.

THE COURT: Understandably.

Do you remember that Lieff Cabraser signed the submission there?

MR. HEIMANN: I don't, but doesn't surprise me.

THE COURT: Here, let me give you an excerpt from Document Number 619 in the Bank of New York Mellon case.

We'll mark this as Exhibit C. And I think I've got enough copies for counsel. And you should put it up.

(Exhibit C marked for identification.)

(Pause.)

THE COURT: And I'll tell you that just copied this at the break, had it copied at the break, but this was filed August 17, 2015 by Lieff Cabraser Heimann & Bernstein, and it looks like it might have been signed by Ms. Cabraser. Make sense?

So in this case, the request was for a 25 percent fee award, as in this case, correct?

MR. HEIMANN: Yes, sir, I believe.

THE COURT: It says that here. I've read it, you haven't. Why don't you read it out loud, that first paragraph into the record.

MR. HEIMANN: Sure. Studies of recent class settlements also support the proposed fee. One recent study surveying all class settlements during 2006-2007 found that the mean and median percentages awarded for settlements between $250 million and $500 million were 17.8 percent and 19.5 percent, respectively, with a standard deviation of 7.9 percent, citing the Fitzpatrick study. Other well-known

commentators have opined that, quote, fee requests falling within one standard deviation above or below the mean should be viewed as generally reasonable and approved by the court unless reasons are shown to question the fee, close quote, citing an Eisenberg study from 2004. The 25 percent fee requested here is within one standard deviation of the mean shown in the Fitzpatrick study.

Is that enough, or do you want me to continue?

THE COURT: I think that's what I had in mind.

12:10 Why wasn't that put in the memorandum submitted to me? It tells me what Fitzpatrick's most relevant, I'd say, statement was and explains why the 25 percent is nevertheless reasonable, but it would have put me, the Court, on notice that if I was going to consider the Fitzpatrick study, which is 37 pages long, you know, I should know that this is what he said about cases of 250 million and more, and why 17.9 percent shouldn't be deemed a reasonable percentage, 25 percent should?

MR. HEIMANN: I can't -- I cannot based on personal knowledge explain why the author of the memorandum in this case

12:11 chose to address the mega fund issue in the way that he did, but I understand, and perhaps when Labaton's counsel addresses your Honor, that there has been a fulsome explanation of that thought process provided to the Court in a memorandum pleading filed in this case subsequent to the original fee application, that explains, and my recollection of it in substance is that

it explains that the thinking was that it was more appropriate in the 1st Circuit, given the judicial history of how mega fund awards were treated at that point in time under 1st Circuit law, to provide to the Court a general explanation of the mega fund issue and the cases within the 1st Circuit that had addressed that issue, which I'd like to get to before I'm done here, that reject the mega fund theory.

THE COURT: Yeah, but I -- okay. That's -- I do want you to get to that.

12:12 MR. HEIMANN: I knew you did; I will.

THE COURT: Go ahead.

MR. HEIMANN: Now?

THE COURT: Sure.

MR. HEIMANN: Well, I don't have any further explanation of why we chose when we were writing a brief in another case to deal with that study this way and why in the case before your Honor we didn't.

I can see in retrospect it would have been better, I think, personally, to have provided this kind of information to

12:13 the Court. If we are going to cite the Fitzpatrick study to you in the way that we did, a perfect -- I would argue, perfect way of addressing it would have been the way we addressed it in front of Judge Kaplan -- is that who we were in front of?

In the BNY Mellon. So I can see you marking down my concession, I don't blame you.

But I hardly think it's a misrepresentation, sir.

THE COURT: Many of these cases are securities case, right?

MR. HEIMANN: Yes.

THE COURT: Under securities law a statement that's -- can be misleading, even if it's not literally false, right?

MR. HEIMANN: That's not just in securities cases --

THE COURT: No, in any case. Exactly, something can be misleading.

12:14 MR. HEIMANN: Yes.

THE COURT: And that's one of the things I'm going to consider and resolve, you know, was this a misleading -- for the purposes of this case, was this a misleading characterization of the Fitzpatrick study? Because you look at your chart, I guess I've never had a mega fund case before, you don't have any of mine on there.

MR. HEIMANN: No, but many of the judges in this district have.

THE COURT: I know, I know. And -- anyway, you're 12:14 going to point out that I consider there was a mega fund case.

MR. HEIMANN: I know that you did.

THE COURT: I'll wait for that. But I think it would be -- you can do it in whichever order you want, but you need to get going a bit.

I wanted -- I want you to address whether, you know,

essentially the market, the universe should be defined by mega fund cases or by the whole range of cases in figuring out what -- what the reasonable range is, and then factors to consider that go within that range.

MR. HEIMANN: Let me get there.

Let's start with the proposition that the notion that there should be an inverse relationship between the amount of recovery and the fee is by no means universally accepted. That's point number one. It has been criticized, the whole theory has been criticized roundly by both courts and commentators for a variety of reasons, including that it provides perverse incentives to class counsel to settle too early for too little. We've set this out, and I'll just refer to it briefly, in Professor Rubenstein's declaration, which I'll come back to in a moment.

Moreover, as I said before, the whole idea of mega fund as a separate range from the general range has been rejected time and again in this circuit. And I'm just going to give you two cases for that, if I might. We start with the Lupron case, and that's by Judge Stearns, in which he, addressing the argument, said, first of all, that the benchmark in the 1st Circuit is 25 percent. And then going on to address the argument that this mega fund theory should be applied, he had the following to say, this is at -- I'm not quite sure what page, but I've got it up here now.

He's referring now to a 9th Circuit case --

THE COURT: Page 6.

MR. HEIMANN: Thank you.

He referred to a Vizcaino table, that's a 9th Circuit case, shows either no direct or inverse correlation between the size of the settlement fund and the percentage of the fund awarded supporting the court's conclusion -- and now this is the important point -- that the argument for a reduction of the percentage award as the size of a settlement fund increases reflects neither reality nor sound judicial policy.

12:17

"In the 1st Circuit, as elsewhere, the lodestar approach (reasonable hours spent times reasonable hourly rates, subject to a multiplier or discount for special circumstances, plus reasonable disbursements) can be a check or validation of the appropriateness of the percentage of funds fee, but is not required."

And he goes on in the end to award the fee of 25 percent, the benchmark in this case.

Moving on to the Tyco case, which was an even larger

12:18

settlement -- I don't know if Mr. Franks was the objector in this case or not, but there was an objector who was advancing this very idea that the fund, the award should be reduced because of the size of the recovery --

THE COURT: Hold on a second, let me get it.

MR. HEIMANN: Yes.

(Pause.)

And this is Judge --

THE COURT: Barbadoro.

MR. HEIMANN: Thank you, sir.

A judge that we on the plaintiffs' side respect, by the way.

THE COURT: What's that?

MR. HEIMANN: A judge that we hold in high esteem, your Honor.

12:18 Wrote, and if you're with me --

THE COURT: What page are you on?

MR. HEIMANN: 16.

THE COURT: We must have a different version.

MR. HEIMANN: I've got a WestLaw version.

It looks like in the official reports it would be page 267 perhaps.

THE COURT: Okay.

MR. HEIMANN: And here's what he had to say about it.

"The objector's contention that super mega fund

12:19 cases" -- I believe the settlement here was in excess of a billion dollars, if I'm not mistaken -- "warrant lower percentage of fund awards than smaller cases because they require proportionally less work may well be true as a general matter," citing the Prudential case from the 3rd Circuit.

Skipping down, "However, the generalization on which

the objector's argument depends does not hold in this case. The best measure of the effort required to produce a particular result in a given case is the lodestar."

I also want to make mention, the position that Mr. Frank --

THE COURT: Let's leave Mr. Frank's name out of this so it doesn't sound quite so personal. He doesn't have any personal --

MR. HEIMANN: The objector, *amicus*.

12:20 THE COURT: The *amicus*.

MR. HEIMANN: The *amicus*.

THE COURT: Hold on a second.

(Pause.)

THE COURT: Anyway, go ahead.

MR. HEIMANN: The objector, or excuse me, the *amicus*, argues in this matter in the brief that they filed that the mean from the Fitzpatrick study should by definition be the maximum fee that the Honor could award as reasonable and argues that any award in excess of the mean is by per se unreasonable.

12:21 That's their position.

That very argument was made to Judge Young in a case --

THE COURT: Okay, go ahead, but I'm going to tell you that's not my view, but go ahead. Tell me what Judge Young said.

MR. HEIMANN: I'm glad to hear that.

But Judge Young in Relafen addressed that very -- that's at 21 F.R.D. 52 -- that very argument and rejected it out of hand, finding that it was -- I'm going to put -- this is my excerpt from that opinion; forgive me for not having the actual case in front of me.

Here's where he says, "In support of the objections, the objector cites Eisenberg and concludes that the mean fee percentage that should be awarded in a matter such as this should be no greater than 23.9 percent. This court welcomes citation to these thorough and objective studies; they provide but a starting place. Here the court concludes it would be inappropriate to use a mean -- an average -- categorized according to the size of the settlement fund as the be all and end all of analysis. Rather, this court respectfully notes these authorities but pursues this nuanced analysis looking at the complexity, duration, and type of the case, and the skill and efficiency of the attorneys involved."

In other words, the normal criteria or relevant factors that a court looks to in trying to set upon a reasonable fee.

THE COURT: I think that's the empirical studies I think Judge Young is saying are helpful but they're not the only thing that should be considered. And that makes sense.

Can we go back to Tyco?

MR. HEIMANN: Yes, sir.

(Pause.)

MR. HEIMANN: I should have referred, by the way, to Footnote 15 in the Tyco case. I think it's also informative.

THE COURT: Where he says "settlement size is at best a crude indicator of comparability"?

MR. HEIMANN: Yes, sir.

THE COURT: What about on page 269, public policy considerations?

12:24 "As I have noted, percentage of fund awards generally decrease as the amount of recovery increases." He discusses that.

MR. HEIMANN: I'm looking for that, your Honor. Right here.

THE COURT: It's page -- I'll read it to you.

MR. HEIMANN: I see it now, public policy consideration. I'm sorry, go ahead.

THE COURT: Do you want to put it up?

MR. HEIMANN: I can.

12:24 THE COURT: Please.

"As I have noted, percentage of fund awards generally decrease as the amount of recovery increases. This is because the magnitude of recovery in many instances is due principally to the size of the class and has no direct relationship to the efforts of counsel."

It goes on to say, "For example, if a settlement is induced by groundwork laid by state regulators or other governmental entities, rather than the efforts of plaintiffs' counsel, it would be appropriate to reduce the percentage of the award as the recovery increases."

Do you recall what percentage Judge Barbadoro awarded in Tyco?

MR. HEIMANN: I don't, but I can find it. I believe it was certainly within the range. We've got it in our brief.

12:25 THE COURT: I think it's in the range of 14 percent.

MR. HEIMANN: Well, let me find it.

14.5 percent with a multiplier of 2.7, and a recovery of $3.2 billion.

THE COURT: 14.5 percent.

MR. HEIMANN: With a recovery of 3.2 billion and a multiplier of 2.7. Those are factors you have to include in order to have any reason --

THE COURT: I will at the end. All of this is organic. This appointment of special master was generated in a

12:26 meaningful measure by concerns about the accuracy of the information provided with regard to the lodestar regular rates charged and all of that.

But, anyway, so is there more you'd like to say on whether a mega fund case should be treated like any other case? I think you've said a lot; it's been helpful.

MR. HEIMANN: I said a lot, and I think as I've said, go back to the Rubenstein declaration that makes this same point, there are severe, at least in the minds of many courts and commentators, severe problems with the application of the mega fund theory to large settlements or recoveries. And the reason for the application of the mega fund theory is fairly clear, your Honor just read it actually in that excerpt from the opinion, it's to deal with windfalls to plaintiffs' counsel where the recovery, the amount of the recovery is not primarily
12:27 due to the efforts of counsel, the skill that counsel applied, the risk that counsel undertook, and all of the other factors, but whether simply to the size of the losses generally in question.

But the best way, and I don't say this as universal, but it's certainly the position of most commentators that have commented, the best way of governing that is not to apply the mega fund theory, but rather to look to the lodestar as the cross-check that indicates what effort on the part of counsel was required to bring about the recovery, no matter how large.
12:28 Now -- and I will say -- well, go ahead.

THE COURT: What document number is the Rubenstein declaration?

Or somebody can tell me later.

MR. HEIMANN: There are several of them, so I have to figure out which one it is.

THE COURT: That's -- I know.

So now address more directly why you contend I should look at these eight or nine cases by district judges in the 1st Circuit and not look nationwide since the classes in these cases are nationwide classes, I think.

MR. HEIMANN: First of all, no one has given you a set of appropriately vetted nationwide cases to use as a guidepost. The *amicus* hasn't done that, and we haven't. I suppose we could, but we haven't. What we did instead, I think quite properly, I think for your Honor sitting in the 1st Circuit quite properly, is to look to what the 1st Circuit courts have done.

I'm reminded of a statement that your Honor made at the time of the hearing when you said that your experience and understanding of 1st Circuit law generally was that the range was 20 to 30 percent with a benchmark of 25 percent, and I would argue that under 1st Circuit law, at least at the District Court level, 25 percent is presumptively reasonable. You start from there and you can move up or down depending on the relevant factors.

And that's what, generally speaking, we think the 1st Circuit District Courts have done, and that's what's reflected in the nine or so cases that we cited. And I believe, by the way, that when we filed more recently a brief on this subject during the course of these proceedings, another couple or three

cases had come down since the time that we briefed this matter that were also consistent with what we're talking about.

THE COURT: See, one of the things I'm wrestling with, and of course I don't know what was presented in every other case, although you can see, for example, in Bank of New York Mellon you made the argument that I wish had been made to me here with regard to the Fitzpatrick study, if it was going to have been cited. But Judge Saris, although I don't think in Neurontin she describes what the Fitzpatrick affidavit said,

12:30 she had an affidavit from Mr. Fitzpatrick.

You know, if the issue is not flagged for my colleagues in what's essentially an *ex parte* proceeding, not an adversarial proceeding, then -- it was for Judge Stearns apparently in his case -- it's hard to know what kind of thought was given to the question.

MR. HEIMANN: Well, I suppose one could go back and look at the orders in each case. The ones that I've cited to your Honor, obviously the judge did consider it because they discussed it.

12:31 THE COURT: Okay.

All right. Should we see if any of your colleagues want to be heard on this?

MR. HEIMANN: Not yet, your Honor, I'm not done.

THE COURT: On this threshold issue of mega fund versus universe of cases, 1st Circuit versus -- you want to --

go ahead.

MR. HEIMANN: I want to show you what you did at the time, because, as I said a moment ago, your Honor apparently considered these issues and said so on the record. And if I may, I'm going to go to the transcript now of that hearing. This is the transcript of the November 2, 2016 hearing.

THE COURT: Hold on a second, I've got it here. November 2, 2016.

You can put it up.

12:32 MR. HEIMANN: I'm going to start with page 24.

This is after Mr. Goldsmith has made his opening presentation, including a discussion of the mega fund issue.

THE COURT: Where is the mega fund issue?

MR. HEIMANN: I'm sorry, I don't have the full transcript here.

THE COURT: I do. What page are we on?

MR. HEIMANN: I'm starting with page 24, which is after Mr. Goldsmith's principal presentation has already been made to the Court in support of the fee request.

12:33 If I can begin just before this --

THE COURT: Just stop for a moment, please.

MR. HEIMANN: Yes.

(Pause.)

THE COURT: Where do you think Mr. Goldsmith spoke about the mega fund issue?

MR. HEIMANN: I just don't have it in front of me, but if you look at the --

THE COURT: I am looking at it. I said I thought the allocation was fair. I said now with regard to requests for attorney's fees, the plaintiffs' counsel requests 74 million and 1 million 2 in expenses. I do think it's appropriate in this case to use the percentage of common fund approach in determining the amount of attorney's fees that should be awarded. Again, I studied the submission but I'm interested in 12:34 hearing your argument. And I don't at the moment see any discussion of mega fund cases.

MR. HEIMANN: Well, I'm not sure -- again, I'm at a handicap because I don't have the full transcript in front of me, but I'm looking at page 24. Goldsmith is arguing, he says, "My argument, your Honor, first of all is a fee just below 25 percent we think falls right in line with the fees the courts in this circuit generally award in class action settlements. There are a lot of cases, you know -- there are a lot of cases, you know, in class action settlements, large and small, where 12:34 25 percent fees approximately have been awarded." And then he refers to the Bezdek case, which is a 2015 case from Judge Woodlock. There is also a Chapter 93A case that he refers to, 25 percent, and so goes may be vibrating benchmark of sorts, talking about the 25 percent benchmark.

But then, your Honor, if you will, states, "As we

repeatedly reminisced about, that basically I understand as a guideline 20 to 30 percent was an appropriate range to consider, so 25 percent is in the middle of the range. It actually seemed to me that I've been creeping up lately, or at least some of my colleagues have been awarding more than 30 percent in certain cases, where of course the adversary process is not working. But I've tended to stay in the 20 to 30 percent range." Then if we can go --

THE COURT: Page 25 is the mega fund discussion.

12:36 MR. HEIMANN: Yes, exactly, thank you.

Where Mr. Goldsmith addresses it. As I said, it was already addressed in full in the memorandum, the brief that had been filed, and he talks about having given you in the brief the mega fund cases from the 1st Circuit, and the data that is drawn from those. And he refers to -- refers you to the chart on page 7 of the brief where that is all laid out. And he suggests that this fee falls in the middle of and looks fairly reasonable compared to the others, which I would affirm today as being true.

12:36 And then I want to go to the next page, your Honor -- not in the next page, it's page 35, where your Honor now makes your ruling and explains it, if you will.

So you say you'll decide it orally. The transcript will be the record. You're relying heavily on the submissions, which I know we've said repeatedly. And then --

THE COURT: So what page are you on?

MR. HEIMANN: 35, sir.

THE COURT: Okay.

MR. HEIMANN: Beginning at line 6, where you find the request of 74 million and change reasonable. And then you say, line 12, I have used the percentage of common fund method. I've used the reasonable lodestar to check on that. I've also considered the awards in comparable cases. You observe that the $74 million and change figure is about 24.48 percent, and 12:37 adding in the expenses takes it to just a hair over 25 percent. And then you remark that this is in the 20 to 30 percent range usually awarded by me in class action common fund cases and in many cases with settlements in the 1st Circuit and in many cases where -- this is the point that I want to drive home to your Honor, you may not remember this -- and in many cases where the settlements are in the $250 million to $500 million range.

Coincidentally, and I don't know what was in your Honor's mind where you got that range from, but obviously that 12:38 is the very range that we were talking about earlier from the Fitzpatrick study.

THE COURT: Well, I can tell you, I did not read the Fitzpatrick study.

MR. HEIMANN: So it's just a coincidence that you had the very range in mind when you were making --

THE COURT: I don't think it is the range in the Fitzpatrick study.

MR. HEIMANN: It is the range in the Fitzpatrick study.

THE COURT: Not for cases between 250 and 500 --

MR. HEIMANN: No, no --

THE COURT: Look, trust me, I didn't read the Fitzpatrick study.

MR. HEIMANN: All right.

12:39 THE COURT: This is a case where, as a practical matter, it was very unlikely I would reject the settlement, negotiated, as I recall, with the Department of Justice, the SEC, the Department of Labor; it was all contingent on my approving the settlement. And, you know, in candor, you know, I hadn't dealt with a mega fund case before, I hadn't thought about the differences. I did read the brief. I was told this was right in line with Professor Fitzpatrick's study, and I didn't go to those 38 pages and the 731 pages of exhibits. I basically trusted, I said I was relying substantially on what I 12:39 was given.

MR. HEIMANN: Nevertheless, in your remarks you did compare this settlement to settlements in the 250 to 500 million dollar range. So obviously you were thinking that settlements that were within that range warranted a fee of the sort that you were then ordering.

And I'll go on, if I may, to the very next paragraph where you say, Given the high number that roughly 25 percent award comes to, I've considered whether some reduction is -- reduction from the request, something below -- I think there's a typo there, 25,000, I'm sure you meant 25 percent or said 25 percent and it got mistranscribed. So you said I considered reducing the request something below 25 percent, but you say I found that reduction is not appropriate.

THE COURT: Okay.

12:41 MR. HEIMANN: You ask about the Rubenstein declaration, the Rubenstein declaration that cites this point and which cites it at length to his writings in the Newberg class action treatises, Doc. 532-1.

THE COURT: What is it?

MR. HEIMANN: 532-1, your Honor.

In which he addresses the mega fund theory and tells you, among other things, that it is an inappropriate method of dealing with the issue that it is derived from for a variety of reasons. One, he says it is untethered to the relevant factors 12:41 for the determining of a relevant fee. It provide for perverse incentives for class counsel, as I said earlier. And he explains why the lodestar method is superior to avoid the problem of a windfall recovery.

So, in summary, back to your question about what the appropriate range is, I would say first you should foremost

look to circuit -- 1st Circuit authority in terms of the multiple courts within the 1st Circuit that have entered fee awards in what are arguably mega fund situations, and then consistently started at least with the normal range of 20 to 30 percent and except with the out, out, outlier of a $3.2 billion award generally awarded fees in the range of 25 percent.

And I would suggest that that range, 20 to 30 percent, is the appropriate range given the lack of any definitive authority in this circuit embracing the mega fund theory as the way of dealing with the issues involved with outsized from the norm recoveries.

So there's one other matter, and I don't propose to get into that in depth here, but at some point I would like the opportunity to address the extent -- right now we are talking about what is a reasonable fee without regard to the issues that gave rise --

THE COURT: What's the reasonable range for a fee.

MR. HEIMANN: All right, fair enough.

THE COURT: Is the way I articulate it at the moment.

MR. HEIMANN: All right. I've said in my view under 1st Circuit law the range you should look to is the typical range of 20 to 30 percent. That doesn't mean to say that you might ultimately -- or a judge might ultimately find, based on the lodestar, for example, that a fee is -- recovery is so outsized given the amount of work that went into recovering the

fee that a fee under the 20 percent range would be a reasonable fee in that case. But that is case-specific, and I would suggest, your Honor, that first and foremost you should be looking to the 20 to 30 percent range as an appropriate range.

THE COURT: The discussion we're having now is about the starting point.

MR. HEIMANN: Yes.

THE COURT: And then there are the Goldberger factors, including public policy considerations, which in my current conception relate to issues concerning candor or lack of candor to the Court.

MR. HEIMANN: And with respect to that issue --

THE COURT: No, but we're going to get to that --

MR. HEIMANN: Later.

THE COURT: Not now.

MR. HEIMANN: Fair enough.

THE COURT: Let me see if your colleagues want to be heard on these market definition issues.

MS. LUKEY: If I may, your Honor. Joan Lukey from Labaton. Would be it acceptable if I stay here since I do have a microphone right in front of me?

THE COURT: Yes.

MS. LUKEY: I want to point out something that may have been missed in the process here, particularly since Labaton's name appears first on the brief that we have been

discussing that you suggested might be perceived as misleading even though it is filed over the names of all three customer class counsel.

With regard to the Fitzpatrick study, Professor Fitzpatrick engages in three what I'll call cuts at determining what constitutes a reasonable range of fees. He deals first with -- let me get the order right. He deals with a cut that's determined by circuit; then a cut that's determined by category of case, for example, securities case, consumer case; and then
12:45 a cut determined by the size of recovery, the mega fund issue.

The brief at issue, which was filed in September of 2016 in connection with the original fee award, tracks exactly the same cuts. And that seems to have been missed because you're suggesting that you may have been misled by the last section, which is the size of recovery cut discussion.

So if you look at that brief, what you will find is that the same three cuts are addressed as follows: By circuit, that is, tying to the particular table in Professor Fitzpatrick's article that deals with the circuits --

12:46 THE COURT: I'm sorry, what -- go up on the document presenter and put it up, please, so everybody can see what you're talking about.

MS. LUKEY: Okay.

(Pause.)

MS. LUKEY: I apologize, I may have some underlining

in mine.

THE COURT: That's okay.

(Discussion off the record.)

MS. LUKEY: All right. First let me put up what I was talking about as the topics as they appear in the professor's article.

In his Table 8, he does a cut by topic and talks about the immediate median and mean recoveries if one looks at the class action settlements in that manner. That appears on page

12:47 26 -- the court filing will be 26 to 27, it is page 835 of his article.

THE COURT: Hold on for just one second, please.

(Pause.)

THE COURT: What page?

MS. LUKEY: Page 835 of his article, Table 8, goes with his discussion that relates to the difference among categories of cases in terms of the mean and median settlement amounts and fee awards.

So that's his first breakdown.

12:48 THE COURT: Okay.

MS. LUKEY: His second breakdown on the next page is by circuit, that's his Table 9, and it is page 836, one page later.

Now, referencing these, because in a moment I'm going to flip over to the challenged brief and show you that what was

done in that brief was to track each of these three cuts, and the part that your Honor has been troubled with deals with the third cut, which is the size of recovery chart, not with the earlier two, which are earlier dealt with in the brief.

So this is the circuit, and when you're ready I can turn to his chart.

THE COURT: I'm ready.

MS. LUKEY: The next is Table 11, his final cut, which is going to be harder to -- I'm going to have to take this page out, because it won't fit otherwise.

On his page 839 is Table 11, which is -- I'm sorry, it's actually 10 and 11, deal with awards by settlement size. So that's the mega fund issue when you make your cut by the size of the settlement.

So then we go -- so that's the three cuts that Professor Fitzpatrick uses in the article that we've all been discussing, although he's certainly written other articles.

We then go over to the brief which is at issue, which is the one that was filed by customer class counsel with you in September of 2016, and we have a similar situation. It's multiple pages, but I'll do my best to put them up.

If we do them by category, that appears on pages 5 through 8, and I will at least just put up part of those discussions for you.

So here, customer class counsel are -- wait a minute,

I've got the circuit up by mistake. Hang on.

Well, I might as well go to this one. This is the circuit discussion, it begins on page 5 and goes through page 8, and it deals with that discussion, that cut of Professor Fitzpatrick's article.

We next go to the category discussion, that appears on page 10 and 11, where the discussion switches into one recent common fund settlement is not only of similar size, but also of the same essential subject matter, and then discusses the
12:51 subject matter cut that was discussed, was one of the cuts used.

And then goes into -- that appears on pages 10 and 11 by category. And then we go into the mega fund question, which was actually earlier that is discussed, and again, apologies for the fact that I've got underlining on here, but this is what it is. This is page 9. So it is the second discussion. The discussion begins with three and a half pages on circuit, which was obviously considered most important by customer class counsel to advise the Court on what would be an appropriate
12:52 range, the circuit settlements and fee awards. The next item it goes into is the mega fund issue, which it discusses on 9 going over to 10, so the discussion is there. And the last issue that it discusses in the brief at page 11 starts on page 10, but it's the one that you were concerned about, and I will put 10 up first, that part is a discussion, or at the bottom of

10 going over to 11, there is the discussion of the categories of cases. So you've got circuit first; then you've got size of recovery second, mega fund; and then last in the discussion is the category of cases. And this is where the paragraph appears about which you expressed concerns. So you can see that there is a discussion there where it goes through the types of cases --

THE COURT: Well, it seems to me that there's mega fund discussion on page 9: "Some courts at least in mega fund cases have lowered the fee award percentage as the size of the settlement increases to avoid giving attorneys a windfall at plaintiffs' expense. Other courts have disfavored this practice; however, courts in this circuit resist it."

And then I read the next couple of pages leading up to the discussion of Fitzpatrick as explaining why I should resist it.

MS. LUKEY: Well, the mega fund discussion is not simply on page 9, it actually starts there, as you have noted. And in addition to the part that we just looked at, we've got the discussion of Judge Saris' decision in Harden v. Neurontin, which does include an express discussion of mega funds, and that goes on, onto page 10 at the top. And you can see it there.

But the page 11 part that you are concerned about begins on the bottom of page 10 with empirical studies

supporting the requested fee, and says an in-depth review of all 688 class action settlements in '06 and '07 found the mean and the median to be -- I'm sorry, found that the mean and median fees awarded in the 444 settlements where the POF method was used either with or without lodestar was, and then it quotes the numbers of mean and median fees in securities cases were 24.7 and 25.0, mean and median in consumer cases were 23.5 and 24.6. This technically being a consumer case because it's under 93A but obviously having securities type of factors involved.

12:55

So that paragraph, which begins on the preceding page, is addressing -- is not addressing the mega fund issue, which has been talked about earlier.

Now, I understand what your Honor is saying is that, well, when they talked about the mega fund cases and when they talked about the circuits, they should have been explicit that they were talking about Professor Fitzpatrick. I think actually that is mentioned from time to time in other places, it's cited as one of the sources of their numbers. But when it comes to the point that you have been concerned about, they're clearly not talking about the mega fund issue. They're -- and they're not talking about the circuit issue. They're talking about where this would fall as either a securities or a consumer case and indicate at that point that the requested fee is in line with Professor Fitzpatrick's findings, which is

12:55

absolutely true in regard to the categories of cases, but it's also true overall, it's within the standard deviation.

If one wants to read it technically and parse it very finely, they're not saying it's right in the middle, they're saying it is right in line, and that it is. But, in fairness, this discussion of the brief is not a discussion of the size of recovery median or mean.

THE COURT: I understand the argument.

MS. LUKEY: All right. That is the point I wish to make, your Honor, since you seem to be concerned about whether there was a misrepresentation being made. The brief tracks through and does follow the same cuts that were used by Professor Fitzpatrick. It is unfortunate that your Honor feels that it wasn't sufficiently clear when they transitioned into that last paragraph that they were only talking about non-size of recovery cases, but that's clearly what the language of it does state. And of course, in addition, it is a circumstance where it is within the standard deviation.

I would also point out that Judge Saris 'position in Neurontin addresses this pretty explicitly. She's talking about the mega fund, and she's talking about the cases in this circuit. She notes that Professor Fitzpatrick's article, the very same -- sorry, affidavit, which is dealing with the same article, was very helpful to her in her conclusion not to follow a declining scale, which she does not do, as you saw.

She talks about the fact that other courts have used a declining scale and some courts have rejected that. She then moves on without saying expressly that she's rejecting it, she awards a 28 percent fee against a 33.3 percent ask, and clearly, therefore, is not using the declining scale. That particular settlement was $325 million, as I recall.

And that was what I wished to draw to your attention. There was no intent in this brief, obviously, to mislead. And the paragraph you are looking at is not the discussion that relates to size of recovery and whether there should be a declining scale.

Thank you.

THE COURT: It's 1:00. We're probably going to take a break momentarily, but who else would like to be heard on this issue? And I may offer the Hamilton Lincoln Law Institute a chance to respond.

Do you want to be heard?

MR. KELLY: I just have a brief point, your Honor.

MR. SINNOTT: We would want to be heard as well, your Honor.

MR. KELLY: I'm brief, I have a brief point, your Honor.

THE COURT: All right.

MR. KELLY: And that is this: I would also, like my colleagues, urge you to remain consistent with the District

Courts in this circuit and not follow the 9th Circuit's lead.

And with respect to one of the questions the Court posed as to whether or not your colleagues in this district contemplated this mega fund issue and Professor Fitzpatrick's study, I would point the Court to Judge Saris' opinion in Neurontin. She specifically analyzed this mega fund issue with respect to 250 to 500 million dollar settlements and discussed the Fitzpatrick study and the fact that the median was 17.8. So she was fully aware of it. That was -- it's Docket 430 --

12:59 THE COURT: Actually, I've got the decision. Do you have it?

MR. KELLY: We pulled it up online here, it's page 8 --

MS. LUKEY: I have it if you want to put it up.

MR. KELLY: We have the PACER version, not the reporter version.

THE COURT: Hold on just one second.

(Pause.)

THE COURT: I have it, and I can read it again.

01:00 MR. KELLY: I think I've got it, page 172 -- no, it's 63, 62-63.

THE COURT: I can't hear you.

We're going to lunch and I'll give you a chance to come back.

MR. KELLY: It's 72, Judge.

The only point is, look, at least one of your colleagues in this district did fully consider the Fitzpatrick study at page 172 of that opinion. And in considering it she still awarded 27 percent. So that's why we think the Court's initial instincts in this matter remain correct, and we will get to it later, of course --

THE COURT: Well --

MR. KELLY: I just want to point out that this was not something that was not mentioned in the other District Court opinions that we're urging the Court to follow.

(Pause.)

THE COURT: Okay. It's 1:00. Why don't you come back at 2:15. It may be busy in the cafeteria. And I'll hear from the special master, from Hamilton Lincoln Law Institute, and then I think we can go to some of the more discrete issues regarding -- that were raised in the orders that I issued setting the agenda.

Court is in recess.

THE CLERK: All rise.

(Recess taken.)

THE CLERK: All rise for the honorable Court.

Court is now in session. You may be seated.

THE COURT: I apologize for the delay in resuming, I was rereading some of the pertinent matters.

I think when we left off, the counsel for the special

Here, what's the next letter, please?

MS. LUKEY: C.

THE COURT: I think it's D.

MS. LUKEY: I missed one.

THE COURT: The next one is D.

Here, we'll give you this.

Here is Mr. Chiplock's, that will be D, and we've got Mr. Lesser's, we'll make that E.

(Exhibit D marked for identification.)

(Exhibit E marked for identification.)

MS. LUKEY: Your Honor, are these from BNY or are these from this case?

THE COURT: They're from Mellon.

MS. LUKEY: I wouldn't have seen them. Thank you.

THE COURT: You want to look at paragraph 5 of Exhibit D, paragraph 9 of Exhibit E.

MR. KELLY: I'm sorry, what exhibit is the Lesser declaration?

THE COURT: It's E.

03:35 (Pause.)

THE COURT: So --

MS. LUKEY: I have paragraph 5 from D up on the screen, your Honor.

THE COURT: Right.

So this was Lieff's, Mr. Chiplock's declaration. He

says, "The hourly rates charged by the timekeepers are the firm's regular rates for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters. Based on my knowledge and experience, these rates are also within the range of rates normally and customarily charged in their respective cities by attorneys and paraprofessionals of similar qualifications and experience in cases similar to this litigation, and have been approved in connection with other class action settlements."

03:36 And then the same language is in the Lesser affidavit on behalf of Thornton in paragraph 9.

I appreciate your acknowledging this, is my word, not yours -- well, I appreciate acknowledging whatever you just acknowledged and apologized for. I won't paraphrase it, but, you know, to the extent that it's true that this language shows that in a related case involving two of the three law firms here, clearer -- you know, a clearer description of what was being represented was used was possible. So, what was possible and what was used. So --

03:37 MR. HEIMANN: You want to give me a chance to respond at that to that?

THE COURT: I will. Go ahead.

If Ms. Lukey will cede you some time.

MS. LUKEY: Not my time, but he can step in.

THE COURT: I want to discuss this.

MS. LUKEY: Of course. Shall I sit?

MR. HEIMANN: I'll be brief. So Richard Heimann once again.

Your Honor, as I mentioned, this was the subject of considerable investigation by the special master in his investigation.

He asked us to explain and to demonstrate how the firm, and I'll use firm plural, set their hourly rates for the various lawyers within the firm. And we explained both in 03:38 declaration form and in answer to interrogatory form how those rates were set on an annual basis by the management of the firm for each lawyer in the firm, including so-called staff attorneys, but all lawyers in the firm. And we explained that those hourly rates were used by us in our contingency fee cases when applying for fees, but also were the rates that were used when we represented hourly, actual hourly paying clients, which is what is set forth in the declaration from the BNY Mellon case I think quite clearly.

I disagree to the extent that counsel has conceded 03:39 that the language in the declaration that was submitted in this case is materially different. Different words are used, more words, maybe more precise words were used in the BNY declaration, but the essence, in my view, is the representations are the same.

We said that we establish hourly rates and those

hourly rates are the ones that are regularly charged, and if I recall the language exactly, the words don't follow charged to paying clients, but one could infer that, and that's true, was true as to Lieff Cabraser.

THE COURT: You've told me that before, and I'll eventually ask the special master to confirm or clarify that. But I think it's based on what I know now, but I say all this so I can be corrected if I misunderstand, is basically Labaton and Thornton had no paying clients. And I'll let their lawyers speak for them. I'm not sure you want --

03:40

MR. HEIMANN: I do not want to speak to the practice of other firms.

THE COURT: Okay.

MS. LUKEY: It turns out the overlap is five lawyers. It is Joel Bernstein, Ira Schochet, Jonathan Gardner, David Goldsmith, and Elizabeth Wierzbowski; although, frankly, the rates stated for her in the chart that we were referencing was her trustee rates, so it doesn't help you --

THE COURT: But basically a maximum of five of the roughly I estimated 56 Labaton lawyers were charged to paying clients whatever year we were looking at, 2016. Most of those services were rendered in 2015, and that's our 2015 rates. They list them on the chart in the year in which they were paid, recovered or billed out to the client.

03:40

So you are correct. There are definitely paying

standard language was presented in these declarations unamended, at least with regard to Labaton and Thornton, a judge would reasonably think that the lawyers were representing that this is what -- these are the fees, the rates that the firms charged paying clients for the lawyers listed.

Did the special master develop any view on that?

MR. SINNOTT: Yes, your Honor. And I think in the report we discuss the fact that with Lieff and Labaton, there was a basis, at times imperfect, for their language in this case with respect to the employees and the rates regularly charged.

With The Thornton Law Firm there was absolutely no basis for it. This was not one misstatement, this was a series of misstatements relative -- they didn't have any paying clients, first of all. None of these staff attorneys and contract attorneys that they claimed as their employees were their employees. There were no regular rates charged by The Thornton Law Firm.

So, respectfully, there's just no comparison between Lieff and Labaton on the one hand, who had at least, at a minimum, had an arguable basis for claiming regular rates charged. As Ms. Lukey has pointed out, and Mr. Kelly has pointed out, four out of 71 attorneys. There was no arguable basis, there was no straight-faced, legitimate basis for The Thornton Law Firm to sign onto this declaration. It was just

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S SUBMISSION IN RESPONSE TO THE COURT'S JUNE 28 ORDER [ECF NO. 564]

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By Order dated June 28, 2019 (the "June 28 Order") (ECF No. 564), the Court requested memoranda from counsel and the Special Master concerning the "implications of the June 24, 25, and 26, 2019 hearings." Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser" or "the Firm") submits this memorandum to address three issues of principal concern to the Firm: (i) the reasonableness of the overall attorneys' fee that was previously awarded in this case; (ii) the proper allocation of any new fee award; and (iii) the proper way to treat contract attorneys hired through an agency for purposes of attorney lodestar, and the effect of such treatment on the question of whether the overall attorneys' fee is (or was) reasonable.

For the reasons that follow, Lieff Cabraser submits that (i) the originally-awarded attorneys' fee of approximately 25% of the common fund was entirely reasonable and appropriate, based on the factors outlined in *Goldberger*[1] (as adopted by district courts within the First Circuit) and the circumstances of this case; (ii) the allocation of any new fee award to Lieff Cabraser should take into account certain of the costs blamelessly incurred by the Firm both in this investigation and, prior to that, the original fee allocation to Damon Chargois; (iii) contract attorney time routinely and properly is, and should be, included as attorney lodestar for purposes of a lodestar cross-check, and not treated as a cost item; and (iv) even if contract attorneys are billed at reduced hourly rates or (for argument's sake) eliminated entirely from the collective lodestar, the effect on the lodestar multiplier is so negligible as not to make a difference to the analysis of whether the previously-awarded fee was reasonable.

I. THE REASONABLE RANGE FOR AN AWARD OF ATTORNEYS' FEES FROM THE COMMON FUND IN THIS CASE IS 20 TO 30 PERCENT, AS THE COURT PREVIOUSLY FOUND.

The Court has once again asked for counsel's views regarding the reasonable range of an

[1] *See, e.g.*, *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 170 (D. Mass. 2014) (citing *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)).

award of attorneys' fees from the common fund in this case. At the risk of repeating itself, Lieff Cabraser continues to maintain that under the well-established law within the First Circuit, the reasonable and appropriate range for attorneys' fees is between 20 and 30 percent, with the benchmark of 25 percent being presumptively reasonable. *See, e.g., Bezdek v.Vibram USA Inc*., 79 F. Supp. 3d 324, 349-50 (D. Mass. 2015) (quoting *Latorraca v. Centennial Techs., Inc.,* 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011)).[2] That range, and the appropriate means for dealing with large recoveries in class litigation (the so-called "megafund"), is consistent with the authority within the First Circuit and with the views of academics who have studied and written on the subject.[3]

As counsel argued during the June 24 hearing, all of the issues relating to the appropriate range were thoroughly briefed to the Court in 2016 and discussed in detail at the final approval hearing on November 2, 2016.[4] It is clear from the record of the November 2, 2016 hearing that the Court considered the appropriate range of reasonableness for attorneys' fees, and the impact of the megafund theory on that issue. After consideration of the relevant law, and based on the particular facts and circumstances of this case, the Court made a deliberate decision to adhere to the standard range within the First Circuit as "appropriate" in this case, and not to reduce the

[2] *See also* Customer Class Counsel's Mem. of Law in Support of the Reasonableness of the Attorneys' Fee Award ("December 2018 Fee Brief") at 4-9 (ECF No. 532).

[3] *See* December 2018 Fee Brief at 5-12 (ECF No. 532) (citing, *inter alia*, *Klein v. Bain Capital Partners, LLC*, No. 1:07-cv-12388-WGY (D. Mass. Feb. 11, 2015), ECF No. 1110; *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167 (D. Mass. 2014); *New Eng. Carpenters Health Benefits Fund v. First Databank*, No. 05-11148-PBS, 2009 U.S. Dist. LEXIS 68419 (D. Mass. Aug. 3, 2009); *In re Tyco Int'l, Ltd*., 535 F. Supp. 2d 249 (D.N.H. 2007); *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 U.S. Dist. LEXIS 17456 (D. Mass. Aug. 17, 2005); *see also* Expert Declaration of William B. Rubenstein ("Rubenstein Decl.") at ¶ 7(b) (citing 5 *Newberg on Class Actions* at § 15:80-81) (ECF No. 532-1).

[4] *See* Mem. of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Lead Plaintiffs ("Original Fee Brief") at 3-25 (ECF No. 103-1); Nov. 2, 2016 Hearing Tr. at 22-31, 34-39 (ECF No. 114).

percentage based on the size of the class' recovery:

> I have used the percentage of common fund method. I've used the reasonable lodestar to check on that. I've also considered the awards in comparable cases. The $74,500,000 plus is about—well, is 24.48 percent of the settlement fund. Adding in the litigation expenses brings it to 25.27 percent of the settlement fund. Adding the service award makes it a little higher. This is in the 20-30 percent range usually awarded by me in class action common fund cases and in many cases with settlements in the First Circuit and in many cases where the settlements are a $250,000,000 to $500,000,000 range.
>
> Given the high number that roughly 25 percent award comes to, I've considered whether some reduction is—reduction from the request, something below $25,000 [*sic*] is most appropriate. I find that it is not.

Nov. 2, 2016 Hearing Tr. at 35 (ECF No. 114).

The Court then confirmed the reasonableness of the percentage award by reference to the lodestar and to the lodestar multiplier:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable.

Id. at 36.[5]

While Lieff Cabraser respects that the Court has indicated that it is presently considering this issue anew (*de novo*, as the Court stated), the Firm submits that there are no sound reasons to

[5] This approach to determining the range of reasonableness is also consistent with the law of other federal circuits. For example, the Ninth Circuit does not vary from the 25 percent benchmark in "megafund" cases unless the percentage represents a lodestar multiplier which is excessive. *See Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990) (holding that the "benchmark percentage [of 25 percent] should be adjusted, or replaced by a lodestar calculation, when special circumstances indicate that the percentage recovery would be either too small or too large in light of the hours devoted to the case or other relevant factors"). In that regard, lodestar multipliers up to 4.0 have been held to be reasonable in the megafund context. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052-54 (9th Cir. 2002) (conducting a survey of attorneys' fees in "megafund" cases and finding that in 83% of such cases, a multiplier of between 1.0–4.0 was awarded); *see also In re Cathode Ray Tube Antitrust Litigation*, 2016 WL 4126533 (N.D. Cal. Aug. 3, 2016) (awarding 27.5% fee in settlement of more than $500 million, with a 1.96 multiplier).

depart from the Court's prior rulings with respect to the reasonable range for the fee award in this case.

II. THE COURT SHOULD EXERCISE ITS AUTHORITY TO ALLOCATE THE FEE AWARD AMONG CLASS COUNSEL IN SUCH A MANNER THAT LIEFF CABRASER IS NOT PENALIZED ANY FURTHER THAN THE EXTRAORDINARY UNREIMBURSED COSTS IT HAS ALREADY BORNE, INCLUDING EXPENSES INCURRED THROUGH NO FAULT OF ITS OWN.

Lieff Cabraser is prepared to abide by the prior agreement among all plaintiffs' counsel with respect to the allocation of the approximate 25 percent fee award, should it be reinstated (assuming that the allocation of costs for the Special Master's investigation is dealt with separately).[6] Lieff Cabraser was allocated $15,116,965.50 of the original fee award, by agreement amongst counsel.[7] As the parties' recent filing indicates, absent the approximately $4.1 million payment to Damon Chargois, Lieff Cabraser's fee allocation would have been nearly $1 million greater, or $16,100,910.00.[8] Lieff Cabraser's $15.1 million fee allocation corresponded with an individual lodestar multiplier for the Firm of just 1.69.[9] The individual (corrected) lodestar multipliers for Labaton Sucharow LLP ("Labaton") and Thornton Law Firm LLP ("Thornton"), meanwhile, were 2.05 and 2.49, respectively (based on their corresponding

[6] *See* pp. 6-8, *infra.*

[7] *See* Lieff Cabraser's Response and Objections to the Special Master's Report and Recommendations ("Response and Objections") at 6, 41, 65, 99 (ECF No. 367) *and* Lieff Cabraser Heimann & Bernstein, LLP's Response and Objections to the Special Master's Partially Revised Report and Recommendations ("Revised Response and Objections") at 1, 49 (ECF No. 533).

[8] *See* Exh. A to Customer Class Counsel's Submission in Response to Court's Request Regarding Fee Award Calculation (ECF No. 562-1).

[9] Based on the corrected (de-duplicated) attorney lodestar. *See* Exh. A to the Decl. of Richard M. Heimann in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Partially Revised Report and Recommendations ("Heimann Decl.") (ECF No. 533-1).

fee allocations of $29,604,057.44 and $18,266,333.31).[10] Lieff Cabraser's $15.1 million fee allocation equated to 5 percent of the $300 million class recovery.

Should the Court determine to reduce the overall attorneys' fee award based on the public policy concerns identified by the Court during the June 24-26 hearings, however, Lieff Cabraser believes that the Court should exercise its authority to allocate that award to avoid any reduction of the fees previously allocated to Lieff Cabraser. The Court has indicated that a reduction of fees on public policy grounds might be justified based on misconduct by some counsel, in particular with respect to "dut[ies] of candor." *See* June 26, 2019 Hearing Tr. at 248, 259-60 (ECF No. 566). However, the full record of these proceedings going (quite literally) back to day one—including transcripts of hearings before the Court, the Special Master's investigation, the Special Master's Report and Recommendations ("Report"), and the submissions to the Court by Lieff Cabraser—demonstrates that Lieff Cabraser engaged in no such misconduct.[11] *See, e.g.,* Response and Objections at 61-62, 64, 96-98 (ECF No. 367) (citing Executive Summary at 14-15 (ECF No. 357-1); Report at 352, 363 (ECF No. 357)) (noting that Special Master found, *inter alia*, that Lieff Cabraser's double-counting error was "inadvertent" and the least serious of the three Customer Counsel, and that Lieff Cabraser itself was "misled" as to the role of Damon Chargois and therefore "into agreeing to share in [his] payment"); *see also* Revised Response

[10] *See* Exhibit A to Declaration of Daniel P. Chiplock ("Chiplock Decl."), submitted herewith.

[11] At the very first hearing in which the appointment of the Special Master was considered (on March 7, 2017), Attorney Chiplock informed the Court, in response to Your Honor's direct inquiry, that the representation in his fee declaration concerning the Firm's "regular rates charged"—the language that was of singular concern to the Court and the subject of the *Boston Globe* article dated December 17, 2016 (as specifically mentioned by the Court in its Order dated February 6, 2017 (*see* ECF No. 117, at 6-7))—***was accurate and not misleading as to Lieff Cabraser***. *See* Mar. 7, 2017 Hearing Tr. at 92:14-93:6 (ECF No. 176). Twenty-eight months and $4.8 million later, this essential fact (as to Lieff Cabraser) remains true. *See* Report at 58 n. 44 (ECF No. 357) (declining, after lengthy investigation, to include Lieff Cabraser in any criticism over the "regular rates charged" language).

and Objections at 10-14, 20, 26-28 (ECF No. 533) (same). No reduction in the fee allocation to Lieff Cabraser could be justified on public policy grounds relating to misconduct.

In exercising its authority to allocate fees among counsel, the Court should also take into consideration the substantial costs incurred by Lieff Cabraser as a consequence of the Special Master's investigation and the further proceedings relating to the investigation before this Court. As Lieff Cabraser has previously described in some detail, those costs have materially impacted the fee received by Lieff Cabraser. *See, e.g.,* Response and Objections at 64-66, 96-98 (ECF No. 367) *and* Revised Response and Objections at 48-50 (ECF No. 533) (noting the more than $4 million in unreimbursed costs and attorney time devoted by Lieff Cabraser to the investigation itself). Lieff Cabraser's costs include $1,152,000 paid to the Special Master, approximately $500,000 for experts and other out of pocket expenses, as well as what now totals more than $2.7 million in attorney and professional time expended since February 2017, for a total of approximately $4.4 million.[12] Those unreimbursed costs have effectively reduced Lieff Cabraser's fee from approximately $15.1 million to $10.7 million, a reduction of some 29 percent.

Although not strictly speaking a part of allocation of an attorneys' fee award, Lieff Cabraser also believes that some reallocation should be made to the expenses incurred by Lieff Cabraser with respect to the Special Master's investigation. As the Court will recall, that investigation was materially extended and expanded when the issues related to Damon Chargois, Labaton's putative local counsel, were encountered. In August 2017, or nearly two years ago, the Special Master turned virtually his entire investigation to the issues surrounding the role of

[12] These figures are updated from the lodestar and costs figures supplied in Lieff Cabraser's Revised Responses and Objections (ECF No. 533) and the Heimann Decl. (ECF No. 533-1) submitted on December 18, 2018 (*i.e.,* more than six months ago). *See* Chiplock Decl., ¶¶ 3-4.

Mr. Chargois in the State Street litigation, how Mr. Chargois' involvement in the case was represented to, among others, Lieff Cabraser, and the payment of a substantial sum of money to Mr. Chargois. In the course of that aspect of the investigation, Lieff Cabraser incurred substantial additional costs defending itself against accusations of misconduct by, *inter alia*, the expert witness retained by the Special Master, Stephen Gillers. In the end, Mr. Gillers concluded that Lieff Cabraser had committed *no* misconduct with respect to Mr. Chargois. *See* Response and Objections at 53-54 (ECF No. 367) (citing Ex. 233 to the Report). The Special Master fully exonerated Lieff Cabraser of any possible misconduct with respect to Mr. Chargois, and instead found that Lieff Cabraser *itself* had been misled about the nature of Mr. Chargois' involvement in the case and had thus been "misled into agreeing to share in the Chargois payment." *See* Report at 109-13, 350-52 (ECF No. 357); *id.* at 106, 287-89, 301-02, 331; *see also* Executive Summary at 26 (ECF No. 357-1).

Lieff Cabraser has incurred more than $1,660,000 in unreimbursed costs since the Court's February 6, 2017 Order (ECF No. 117) that first initiated the investigation into the attorneys' fee declarations and subsequent fee award. *See* Chiplock Decl. at ¶ 3. Of that amount, 65 percent (or more than $1,077,000) was incurred *after* the time that the Chargois matters first arose (August 7, 2017), with $673,154 directly devoted to paying the Special Master[13] and, *inter alia*, over $139,000 in expert fees incurred by Lieff Cabraser to (successfully) defend itself from allegations of any wrongdoing as related to Mr. Chargois. *Id.* In addition to this, the Firm expended more than $1.65 million in unreimbursed attorney time on this investigation after August 7, 2017, when the Chargois matters first arose. *Id.* at ¶ 4. Of that

[13] The Special Master's reported costs concerning Chargois-related issues should, if needed, also be readily identifiable in the billings provided by the Special Master to the Court (assuming they are adequately detailed).

amount, at least $650,000 (or roughly 40 percent) was devoted to addressing Chargois-related issues before the Special Master. *Id.* All told, therefore, the Firm expended more than $1.46 million in combined unreimbursed time and expenses on the investigation as related to, or prolonged by, matters concerning Mr. Chargois. *Id.* at ¶¶ 3-4.

We respectfully submit that the Court should take into account these costs unnecessarily incurred by Lieff Cabraser in either the reallocation of attorneys' fees or in the reallocation of expenses of the Special Master's investigation.

III. THE HOURS WORKED BY A SMALL NUMBER OF CONTRACT ATTORNEYS WERE APPROPRIATELY INCLUDED IN THE OVERALL ATTORNEY LODESTAR FOR THIS CASE, AND IN ANY EVENT DO NOT MATERIALLY IMPACT THE LODESTAR MULTIPLIER FOR PURPOSES OF EVALUATING THE REASONABLENESS OF THE FEE AWARDED TO ALL COUNSEL.

"***These (contract attorneys) were all Lieff employees***."[14]

The Court has solicited counsel's position regarding the reasonable billing rate for contract attorneys employed by Lieff Cabraser in this case. In addition, the Court has more broadly allowed counsel to address other issues pertaining to the contract attorneys and the recommendations of the Special Master.

With respect to the appropriate billing rate, in view of the work performed by the contract attorneys, there is no reason to apply a billing rate different from that which the Special Master found to be reasonable for the staff attorneys. *See* Response and Objections at 22-28, 58-60, 77-90 (ECF No. 367); Revised Response and Objections at 28-41 (ECF No. 533).[15] In this regard,

[14] Attorney William Sinnott, June 24 Hearing Tr. at 148 (emphasis added).

[15] For a lengthy and detailed discussion of this topic, the Firm also refers to its previously-filed (1) Response to the Court's Inquiry About Why the Special Master is Correct that the Hourly Rates of the Firm's Staff Attorneys are Reasonable and (2) Response to the Competitive Enterprise Institute's Challenge to the Reasonableness of those Rates ("Hourly Rate Brief") (ECF No. 534).

the Special Master does not question the value of the work performed by the contract attorneys and the billing rate that that work reasonably supports. Instead, his questions go to the technical legal nature of relationship between the contract attorneys and the Lieff Cabraser law firm.

In his report, the Special Master praises the staff and contract attorneys equally regarding their educational backgrounds, experience, and the quality and type of legal work performed by them. The Special Master recognizes that there was no material difference between the staff attorneys and the contract attorneys with respect to any of the factors that relate to the value of their work and the market rates for that work. Indeed, just the contrary:

> In making this observation (about the contract attorneys), there is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary.

Report at 183 (ECF No. 357). As Mr. Sinnott's comment at the hearing quoted at the outset of this section reflects, there was no functional difference at the Firm between staff attorneys paid directly and contract attorneys paid indirectly; they all functioned equally as Lieff Cabraser "employees."[16]

[16] In his remarks at the hearing on June 24, 2019, Mr. Sinnott made several new and novel efforts to distinguish between Lieff Cabraser's staff and contract attorneys. In particular he observed that contract attorneys "can be fired or replaced on a whim," and "they (contract attorneys) are not in the same realm of utility and part of the team as the staff attorneys are." (June 24 Hearing Tr. at 147.) The fact is that staff attorneys are at-will employees, and as such may be fired or replaced at any time with or without cause, or "on a whim" to use Mr. Sinnott's phrase. The other comments are both incorrect and nowhere supported in the Special Master's Report. Mr. Sinnott also claimed that contract attorneys are distinguishable from staff attorneys because the law firms are "not taking a risk with the agency attorneys, the contract attorneys." (*Id.* at 148.) The fact of the matter is that Lieff Cabraser was indeed at risk with respect to contract or agency attorneys just as it was at risk in compensating staff attorneys. The Firm at all times assumed the risk that it would never be reimbursed for the costs of either. Further, any distinctions that can be drawn between staff and contract attorneys as an actual cost to the Firm are "modest—and irrelevant." *See* Declaration of William B. Rubenstein in Support of Lieff Cabraser Heimann & Bernstein, LLP's Response and Objections to the Special Master's Report

In fact the Special Master singled out several of Lieff Cabraser's contract attorneys for particular praise regarding their education, experience and attorney skills. *See, e.g.,* Report at 71 (ECF No. 357) (praising the educational backgrounds of attorneys Leah Nutting (Harvard Law School) and Ryan Sturtevant (University of California – Hastings), both of whom worked as contract attorneys before transitioning to staff attorney status).

As the Court correctly noted at the hearing on June 24, the appropriate way to deal with the deletion of contract attorney time (if, solely for argument's sake, one were to do that) is to reduce the lodestar by the appropriate amount and to recalculate the multiplier based on the reduced lodestar as a cross-check on the fee percentage.[17] As the Court also correctly surmised,

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and Recommendations dated June 20, 2018 ("Rubenstein Declaration II") at ¶ 15 (ECF No. 368).

[17] The Court: So, basically, even though the lawyers were not charged to paying clients, with rare exceptions, you think that the lodestar that I was given is appropriate except with regard to four contract employees?
Mr. Sinnott: Yes, sir.
The Court: Have you recalculated the lodestar base?
Mr. Sinnott: We have.
The Court: And is it in the report?
Mr. Sinnott: I believe it is, Your Honor, but I can give you those specific numbers.
The Court: What is that?
Mr. Sinnott: What we have recommended is that with respect to Lieff Cabraser, for the four contract attorneys that—
(Discussion off the record.)
Mr. Sinnott: But what we have for the total, Your Honor is that $2,241,098.40—
The Court: Is that the lodestar for everybody or for—
Mr. Sinnott: That's just for the contract attorneys, Your Honor. And it's less the actual cost. So if they're treated strictly as an expense and that amount is deducted from the lodestar amount, then that amount would be returned—
The Court: **Wait a second.**
Mr. Sinnott: To the class.
The Court: **So you say that $2,241,000 for contract attorneys should be treated as an expense and taken out of the lodestar.**
Mr. Sinnott: Yes, sir.
The Court: And then what would be the remaining lodestar for Lieff?
Mr. Sinnott: I will get the Court that number. I don't think I had broken it down—
The Court: **But, basically, the lodestar is a check, so it's very important that the**

removing the hours worked by contract attorneys from the lodestar does not materially alter the lodestar multiplier. On an aggregate basis for all plaintiffs' counsel (i.e., Customer Class Counsel as well as ERISA Counsel), deleting the contract attorney lodestar from both Lieff Cabraser's and Thornton's totals results in an increase in the aggregate multiplier based on the approximate 25 percent of the fund award from 2.0 to 2.12 (see Exhibit B to Chiplock Decl.). There is no reason based on this slightly revised lodestar multiplier to question the reasonableness of the fee awarded by the Court, or to reduce the percentage award.

However, the Report of the Special Master does not even acknowledge this approach to address the issue. Instead the Special Master recommends that the Court require Lieff Cabraser to disgorge or forfeit in excess of $2.2 million of the fee received by the firm. *See* Report at 367-68 (ECF No. 357). As we have previously argued, to require Lieff Cabraser to disgorge a portion of its fee as a remedy for having followed established law regarding contract attorneys flies in the face of the purpose of the lodestar as a cross-check, is utterly irrational, and is grotesquely unfair. *See* Response and Objections at 90-96, 98-100 (ECF No. 367); Revised Response and Objections at 41-44 (ECF No. 533).

The Special Master's proposed disgorgement remedy is apparently based on the (false) notion that Lieff Cabraser was paid nearly $2.4 million for the time billed to the case by Lieff Cabraser's contract attorneys:

> The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition a multiplier of 1.8 was added to their hours and rates, yielding a total **award** of

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> **information the Court be given be accurate, but taking the contract attorneys out is probably not going to have a material effect on, say, the multiplier.**
> Mr. Heimann: It will not.

June 24 Hearing Tr. at 149-150 (emphases added).

> $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged and returned to the class.

Report at 367-368 (ECF No. 357).

That proposition is flatly wrong. The lodestar associated with contract attorneys was simply part of the overall lodestar that was employed as a cross-check of the reasonableness of the fee to all plaintiffs' counsel as a percentage of the funds recovered for the class. Lieff Cabraser was no more "awarded" a fee of nearly $2.4 million based on the contract attorneys' billings, let alone those billings times a "multiplier of 1.8," than any of the other plaintiffs' firms. It would make as much sense for this Court to require, for example, ERISA Counsel to disgorge a portion of their fees as it would to require Lieff Cabraser to forfeit a portion of its fees on this basis. *See* Rubenstein Declaration II at ¶¶ 17-22 (ECF No. 368).[18]

Finally the imposition of what in effect is an enormous financial penalty in the form of the forfeiture of a significant portion of the attorneys' fees awarded to Lieff Cabraser is grotesquely unfair. In recording and reporting the time and effort of its contract attorneys as part of the lodestar, Lieff Cabraser was following long established and controlling law universally acknowledged in both this Circuit and throughout the federal courts. *See* Response and Objections at 90-96, 98-100 (ECF No. 367); Revised Response and Objections at 41-44 (ECF No. 533); *see also* Rubenstein Declaration II at ¶¶ 13-16 (ECF No. 368). The imposition of a

[18] For similar reasons the Special Master's recommendation that Lieff Cabraser along with Labaton and Thornton should disgorge or forfeit fees relating to the inadvertent double-counting of lodestar makes no sense. To the extent that the double-counting error resulted in an erroneously inflated total lodestar, that amount should be deducted from the lodestar and the multiplier re-computed using the correct lodestar amount. Response and Objections at 68-74, 91-96 (ECF No. 367); Revised Response and Objections at 5-10, 14-16 (ECF No. 533); Expert Declaration of William B. Rubenstein dated July 31, 2017 ("Rubenstein Declaration I") at ¶¶ 18, 39-46 (ECF No. 369-8); *cf.* Rubenstein Declaration II at ¶¶ 17-21 (ECF No. 368). When done, that results in an increase in the multiplier from 1.8 to 2.0, as recounted in the letter by David Goldsmith to the Court dated November 10, 2016 (ECF No. 116).

forfeiture of some 15 percent of the fee allocated to Lieff Cabraser on this basis, after the fact and without any prior notice, is plainly unfair and without justification.[19] This is particularly so when one adds to this (i) the approximately $4.4 million in unreimbursed time and expenses the Firm has incurred to date on the investigation and (ii) the Special Master's additional proposed "disgorgement" remedy for the double-counting error (which for Lieff Cabraser, the Special Master computes (inaccurately) at one-third – or $1,352,667). Adding all of these unreimbursed expenditures and proposed "remedies" together would reduce Lieff Cabraser's effective fee by nearly $8 million, or from $15.1 million to $7.1 million, for a reduction of more than 50 percent and a negative multiplier on Lieff Cabraser's corrected lodestar (even if all contract attorney lodestar was eliminated).[20]

Dated: July 17, 2019

Respectfully submitted,

By: */s/ Richard M. Heimann*

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Counsel for Lieff Cabraser Heimann & Bernstein, LLP

[19] The $2.24 million to be forfeited per the Special Master's proposal amounts to roughly 15 percent of the $15.1 million received by the firm as its portion of the Court-awarded attorneys' fees.

[20] *See* Chiplock Decl. at ¶¶ 3-5; Revised Response and Objections at 48-50 (ECF No. 533).

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will thereby be served on this date upon counsel of record for each party identified on the Notice of Electronic Filing.

July 17, 2019

/s/ Richard M. Heimann
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

DECLARATION OF DANIEL P. CHIPLOCK IN SUPPORT OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S SUBMISSION IN RESPONSE TO THE COURT'S JUNE 28 ORDER

Daniel P. Chiplock declares and says:

1. I am a Partner of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser" or the "Firm"). I submit this Declaration in support of Lieff Cabraser's Submission in Response to the Court's June 28 Order.

2. Attached as Exhibit A is a chart showing the original fee allocations, the corrected lodestar totals, and the corresponding lodestar multipliers for the three Customer Class Counsel firms in this matter.[1] I calculated the corrected lodestar totals by removing lodestar for any attorney hours for which Thornton Law Firm LLP ("Thornton") bore payment responsibility that were inadvertently included in the totals for Labaton Sucharow LLP ("Labaton") or Lieff Cabraser. This resulted in $2,914,636 in lodestar being subtracted from Labaton's prior total (including $80,300 in lodestar that Labaton later acknowledged was inadvertently included in its original total), and $868,417 from Lieff Cabraser's prior total. This calculation presumes that (i) Thornton bore either complete or partial payment responsibility for the following seventeen Staff Attorneys that were originally also listed in Labaton's lodestar report: D. Alper, E. Bishop, N. Cameron, M. Daniels, S. Dolben, D. Fouchong, J. Grant, I. Herrick, D. Hong, C. Orji, D. Packman, A. Powell, A. Rosenbaum, J. Saad, B. Schulman, A. Vaidya, and R. Yamada; (ii) Thornton bore complete payment responsibility for the following two Staff Attorneys originally also listed on Lieff Cabraser's lodestar report: A. Ten Eyck and R. Wintterle; and (iii) Thornton bore partial payment responsibility for at least some hours worked by the following two Staff Attorneys also listed on Lieff Cabraser's lodestar report: C. Jordan and J. Zaul. *See* Letter from David Goldsmith to the Court, filed November 10, 2016 (the "Goldsmith letter") (ECF No.

[1] ERISA Counsel and Damon Chargois, Esq. were separately originally allocated $11,553,893.75 in fees.

116).[2]

3. The firm has incurred at least $1,660,563 in unreimbursed out-of-pocket expenses in this matter since February 6, 2017, during which time it has responded to the Court's inquiries, the Special Master's investigation, and the Special Master's Report and Recommendations (and subsequent revisions), among other things. These costs include the Firm's share ($1,152,000) of the Special Master's fees and expenses, of which $673,154 was paid after matters concerning Damon Chargois, Esq. came to light on August 7, 2017.[3] The Firm also expended $139,104 in expert fees to successfully defend itself from allegations of any wrongdoing as related to Mr. Chargois, which included costs associated with the experts' reports and depositions completed by Prof. William Rubenstein of Harvard Law School and attorney Timothy J. Dacey of Goulston & Storrs PC.

4. As of today's date, Lieff Cabraser has expended more than $2.7 million in unreimbursed attorney time (at the firm's 2019 rates) since February 6, 2017 on this matter, including but not limited to responding to the Court's inquiries, the Special Master's investigation, and the Special Master's Report and Recommendations. More than $1.65 million of that unreimbursed attorney time (or roughly 60 percent) was expended after August 7, 2017, when the Chargois matters first arose. Of that amount, approximately $650,000 in unreimbursed attorney time (largely occurring between August 7, 2017 and April 30, 2018) was devoted at least in part, if not completely, to addressing issues related to Chargois and implications arising

[2] The Goldsmith letter approached the de-duplication issue slightly differently, by removing any duplicated time that was recorded at a higher hourly rate than another firm's, regardless of which firm had actually paid for the labor in question. That approach results in a slightly lower corrected total lodestar, which was done for the purpose of demonstrating that the resulting effect on the lodestar multiplier would be modest even with that harsher form of correction.

[3] The Firm has incurred more than $1,077,000 in total unreimbursed expenses since the time that the Chargois matters first arose (August 7, 2017).

therefrom before the Special Master. This included, *inter alia*, additional discovery and attorney depositions called for by the Special Master from August through October 2017, as well as expert discovery and depositions (as well as a hearing before the Special Master) in the February through April 2018 timeframe. Detailed time records (some of which contains attorney work product) are available for inspection at the Court's request.

5. Attached as Exhibit B is a chart showing that, on an aggregate basis for all plaintiffs' counsel (i.e., Customer Class Counsel as well as ERISA Counsel), deleting the contract attorney lodestar from both Lieff Cabraser's and Thornton's totals results in an increase in the aggregate multiplier based on the approximate 25 percent of the fund award from 2.0 to 2.12. The Adjusted Lodestar ("Adj. Lodestar") for "All counsel" was arrived at by reducing the hourly rate for the 4,779.1 total non-duplicative contract (or "agency") attorney hours that were correctly listed by Lieff Cabraser (2,899.2 agency hours) and Thornton (1,879.9 agency hours) to $0. These non-duplicative agency hours included hours worked throughout the case by attorneys V. Weiss and A. McClelland (agency attorneys who were shared by Thornton and Lieff Cabraser) and A. Ten Eyck and R. Wintterle (agency attorneys who were paid by Thornton but hosted and/or trained by Lieff Cabraser), as well as some hours (predominantly from 2013) worked for Lieff Cabraser by attorneys J. Bloomfield, L. Nutting, J. Leggett, and R. Sturtevant, each of whom transitioned to staff attorney status by early 2015.[4] A description of the staff and agency attorneys who worked for Lieff Cabraser, with bios and timelines, may be found at pp. 24-30 of Lieff Cabraser's Response and Objections to the Special Master's Report and Recommendations, and Appendices A and B thereto (ECF Nos. 367, 367-1, 367-2).

[4] Another Lieff Cabraser agency attorney, J. Butman, worked only 24 hours on the case, and her hours are included in the 4,779.1 described in this paragraph.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on this 17th day of July, 2019.

/s Daniel P. Chiplock
Daniel P. Chiplock
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EXHIBIT A

Corrected Lodestar			
Firm(s)	**Fee collected**	**Corrected Lodestar**	**Effective multiplier**
Labaton Sucharow LLP	$29,604,057.44	$14,454,269.50	2.05
Thornton Law Firm LLP	$18,266,333.31	$7,460,139.00	2.49
Lieff Cabraser Heimann & Bernstein LLP	$15,116,965.50	$8,932,070.50	1.69
TOTAL	**$62,987,356.25**	**$30,846,479.00**	**2.04**

EXHIBIT B

Assuming Agency Attorney Hours Were Excluded From The Total Lodestar Entirely (i.e., if agency attorneys were treated as a cost item)			
Firm(s)	**Fee collected**	**Adj. Lodestar**	**Effective multiplier**
All counsel	$74,541,250.00	$35,140,951.25	2.12
LCHB	$15,116,965.50	$7,606,482.50	1.99

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. December 26, 2019

On December 26, 2019, the court approved reasonable requests for fees and expenses of the Master and his counsel for April, June, July, August, and November 2019.[1] The total amount approved exceeds the amount being held by the United States District Court to compensate the Master and those he employs.

Therefore, it is hereby ORDERED that Labaton Sucharow LLP shall, pursuant to paragraphs 13 and 14 of the March 8, 2019 Order (Docket No. 173), pay to the Clerk of the United States District Court for the District of Massachusetts an additional $50,000, by January 6, 2020.

UNITED STATES DISTRICT JUDGE

[1] The Master did not submit bills for fees or expenses for September or October 2019.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. October 16, 2018

For the reasons stated in court on October 15, 2018, it is hereby ORDERED that:

1. Michael Canty, Esq., of Labaton Sucharow LLP ("Labaton") shall, by October 18, 2018, submit an affidavit describing how many of Labaton's fee division arrangements Labaton has reviewed, and how many of those arrangements Labaton has revised, in Labaton's efforts "to ensure that all such arrangements comply with applicable ethics requirements." Docket No. 485-1 ¶4(o).

2. Eric Belfi, Esq., and Christopher Keller, Esq., of Labaton shall each, by October 25, 2018, submit an affidavit addressing whether Labaton has or had any agreement(s) to share fees, whether or not memorialized in written contracts, with Damon Chargois, Esq. and/or Tim Herron, Esq. concerning clients or potential clients in addition to Arkansas Teachers Retirement System, and whether Labaton has or had written or unwritten agreements to share fees with anyone else solely for assistance in obtaining clients for Labaton.

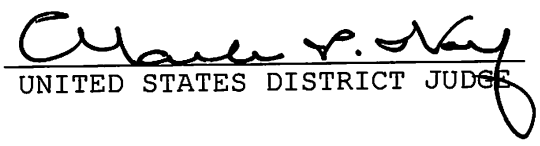
3. The Master, Labaton, and ERISA Counsel shall, by October 25, 2018, submit memoranda in support of the Proposed Partial Resolution of Issues (Docket No. 485). Responses by Lieff Cabraser Heimann & Bernstein, LLP ("Lieff"), Thornton Law Firm LLP ("Thornton"), and, if it wishes, the Competitive Enterprise Institute shall be filed by November 1, 2018.

4. Labaton shall, by October 25, 2018, pay an additional $1,000,000 to the Clerk of the United States District Court for the District of Massachusetts to further fund payment of past and future fees and expenses of the Special Master. Thornton shall reimburse Labaton $290,000, and Lieff shall reimburse Labaton $240,000. The court may later amend this allocation. See Fed. R. Civ. P. 53(g)(3).

5. The Master, Lieff, and Thornton shall, by October 25, 2018, confer and report whether they have agreed to reduce the objections to which the Master must respond and the court must decide, and identify the remaining objections. The Master shall report how much time he requests to respond to such objections.

6. A hearing to address pending issues and to schedule future events shall be held on November 7, 2018, at 10:00 a.m. Eric Belfi, Esq., Christopher Keller, Esq., and Judge James Holderman shall attend. Each shall be prepared to discuss the cover memorandum to the Special Master's First Submission of Documents to Supplement the Record (Docket No. 423).

7. The Master and the law firms that participated shall order a copy of the transcript of the October 15, 2018 hearing on an expedited basis.



UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to FED. R. APP. P. 4(a)(1)(A), Lieff Cabraser Heimann & Bernstein, LLP, in its capacity as additional Counsel for the Settlement Class in the above-captioned actions (the "Actions"), hereby appeals to the United States Court of Appeals for the First Circuit from: the Court's February 27, 2020 Memorandum and Order [Docket No. 590] and Exhibit A [Docket No. 590-1] which, *inter alia*, (i) awarded and allocated settlement counsel's fees and expenses out of the common settlement fund in the Actions; and (ii) found a violation of FED. R. CIV. P. 11(b); and any preceding, related, or underlying orders, rulings, findings, and conclusions.

Dated: March 26, 2020

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on March 26, 2020 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, 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, Defendant.	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

SUBMISSION OF LABATON SUCHAROW LLP
IN RESPONSE TO THE COURT'S JUNE 28, 2019 ORDER

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I. Introduction.

Labaton Sucharow LLP ("Labaton") submits this memorandum in response to the Court's June 28, 2019 Order (ECF No. 564), and in light of the June 24-26 hearing. Labaton offers this submission as a summary and to emphasize several points for the Court's consideration.

First, the reasonable percentage range for the fee award is 20–30% of the common fund, and the reasonable award should be 25%, as this Court previously decided. Even leaving aside the lack of supporting authority within this Circuit, a "sliding scale" approach as urged by the Hamilton Lincoln Law Institute ("HLLI") [1] is ill-suited to this case, both in light of the enormous amount of work counsel performed in achieving the excellent result for the class and because counsel have submitted a lodestar confirming that a 25% fee award is reasonable. *See* § II, *infra.*[2]

Second, public policy supports a fee award of 25%, because counsels' relentless work – which entailed significant risk for the firms – delivered an excellent result for the class and a tangible benefit for the broader marketplace. *See* § III, *infra.*

Third, counsel did not misrepresent the Fitzpatrick Study. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010). The Court should reject this baseless and unfair accusation. *See* § IV, *infra.*

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[1] As used herein, "HLLI" refers to the Hamilton Lincoln Law Institute and the prior amicus, the Competitive Enterprise Institute's Center for Class Action Fairness.

[2] For a more detailed discussion in support of the 25% fee award, Labaton respectfully refers the Court to its prior briefing, which is fully incorporated by reference herein. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) ("Initial Fee Brief"); Customer Class Counsels' Memorandum of Law in Support of the Reasonableness of the Attorney's Fee Award (ECF No. 532) ("2018 Fee Brief").

Fourth, under the circumstances of this case, the Court should decline to exercise its discretion to determine its own allocation of the fee award. Instead, it should respect the firms' agreed-upon allocation, for which they bargained and which takes into account their respective contributions to the case and other relevant considerations. *See* § V, *infra.*

Finally, Labaton complied with all ethical duties applicable to this case. *See* § VI, *infra.*[3]

II. 20-30% of the Common Fund is the Reasonable Fee Award Range.

A. Courts Within the First Circuit Have Endorsed a Range of 20-30%, and Have Not Applied the Sliding Scale Approach.

Consistent with this Court's practice – and case law from district courts within the First Circuit generally – the reasonable percentage range for the fee award in this case is 20–30% of the common fund. And, in particular, 25% is the most reasonable fee award. *See generally* Initial Fee Brief (ECF No. 103-1); 2018 Fee Brief (ECF No. 532); *see also* November 2, 2016 Hr'g Tr. (ECF No. 114) at 24 ("[B]asically I understood as a guideline 20 to 30 percent was an appropriate range to consider, so 25 percent is in the middle of the range . . . I've tended to stay in that 20 to 30 percent range"); *Latorraca v. Centennial Techs., Inc.*, 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011) ("Courts in this circuit generally award attorneys' fees in the range of 20–30%, with 25% as 'the benchmark.'") (collecting cases); *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324, 349-50 (D. Mass. 2015) (same), *aff'd Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 (1st Cir. 2015); Decl. of Brian T. Fitzpatrick, *Klein v. Bain Capital Partners, LLC*, No. 1:07-cv-12388-WGY, ECF No. 1060 (D. Mass. Nov. 12, 2014) (located on this Court's docket at ECF No. 532-2) (the "Fitzpatrick *Bain* Declaration") at ¶ 15 ("In the 27 settlements in my study from the First

[3] Further analysis of Labaton's ethical conduct may be found in Labaton's Objections (ECF No. 434), Supplemental Objections (ECF No. 379), and Second Supplemental Objections (ECF No. 452) to the Special Master's Report and Recommendations (ECF No. 357) (the "R&R"), which are fully incorporated by reference here.

Circuit where the percentage-of-the-fund method was used, the most common percentages were 25% and 33%, with over forty percent of awards between 30% and 35%. The mean was 27% and the median 25% (with a standard deviation of 6.0%).").

Notwithstanding the consistent authority that counsel have cited in support of this conclusion, HLLI argues for a lower percentage based on a "sliding scale."[4] HLLI is incorrect, and its assertion finds no support within First Circuit case law. Instead, courts in this Circuit have rejected the notion that a fee award should be mechanically reduced based on the size of the fund. *See In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 267 (D.N.H. 2007) (rejecting sliding scale argument); *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 171-73 (D. Mass. 2014) (reducing requested 33-1/3% of $325 million common fund to 28% of fund, representing a 3.32 lodestar multiplier); *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 U.S. Dist. LEXIS 17456, at *20-21 (D. Mass. Aug. 17, 2005) (rejecting sliding scale argument); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 189 (D. Mass. 1998) (granting request for 4.5% of $165 million common fund representing an 8.9 lodestar multiplier).[5]

B. This Court Should Not Apply the Sliding Scale Approach.

Even if the sliding scale approach were endorsed by courts in the First Circuit, which it is not, application of the sliding scale would be misplaced in this case.

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[4] The so-called "sliding scale" and "mega-fund" approaches, while distinct in some respects, are "functionally the same." William B. Rubenstein, 5 *Newberg on Class Actions* § 15:81 at 300 (5th ed. 2015) ("*Newberg on Class Actions*"). The "sliding scale" approach refers to an inverse relationship between the size of the common fund and the fee award. The "mega-fund" approach represents the same concept, but applies only where the fund reaches a certain size. *See id.*, § 15:80 at 299 ("The former is a hill, the latter a cliff."). For simplicity, the general argument that the fee award should be reduced based on the size of the fund is referred to here as the "sliding scale" approach.

[5] The court in *Conley* described the multiplier as 8.9, but that figure may be incorrect, as $7,500,000 (the attorneys' fees sought) divided by $826,775 (the lodestar) is 9.07.

First, it would make little sense for the Court to implement the sliding scale approach in circumstances where lodestar reports have been submitted and fully vetted by the Court-appointed Master. The benefit offered by the sliding scale approach, if any, is efficiency. It serves as a "rough justice" tool that may help to avoid a windfall fee award and obviates the time and burden imposed by a lodestar cross-check. *See, e.g.*, *Newberg on Class Actions* § 15:80 at 296 ("The sliding scale method therefore became the answer to the windfall problem: it held out the promise of addressing windfalls without the need for a lodestar cross-check."). Otherwise stated, the sliding scale approach was conceived as a substitute for the lodestar cross-check, and was largely born of practicality, rather than greater merit. *See id.*; *see also id.* § 15:81 at 303.[6]

By material contrast, the lodestar cross-check offers a tailored and fact-based measurement, an important quality given the idiosyncrasies inherent in class action settlements. *See, e.g.*, June 17, 2019 Fitzpatrick Aff. (ECF No. 550) at ¶ 9 ("[I]n light of the broad range over which fee awards are distributed, it is impossible to assess whether any particular fee request is unreasonable without examining the facts and circumstances of the case."). Rather than relying on "intuition," the lodestar indicates the actual amount of work required to generate the

[6] "But therein lies the rub: to use the multiplier as a measuring stick of a windfall, a court would have to undertake a lodestar cross-check, yet most courts that embrace the mega-fund concept do so precisely to avoid a lodestar cross-check. Why? In the triumph of the percentage method over the past 25 years, one of the strongest arguments in support of that method is that it relieves counsel of the work of submitting, and a court the work of reviewing, a lodestar. But without a lodestar cross-check, a straight percentage award has no measuring stick by which to assess whether a particular percentage is or is not a windfall. Because courts are wary of high fee awards generally, the mega-fund concept substitutes for the lodestar cross-check/multiplier idea by implanting in the midst of a straight percentage analysis a method for ensuring against what seem like extraordinary fee awards – simply cut the award as the fund increases. Given that the examples offered above show the lack of a perfect correlation between fund size and windfall, the mega-fund concept is, as noted, rough justice. But if courts are to adopt a straight percentage approach without ever looking at a lodestar, the mega-fund concept supplies some governance mechanism on highly multiplied fee awards, while saving everyone the trouble of a lodestar review."

Newberg on Class Actions § 15:81 at 303.

settlement fund. *See* June 24, 2019 Hr'g Tr. (ECF No. 560) at 21 (HLLI: "The intuition behind a sliding scale is that it doesn't take ten times as much work to get a $300 million settlement as it does to get a $30 million settlement . . . .").

Consideration of the work required to achieve a settlement is crucial, because the life cycle and progression of class actions can vary so extensively. In some instances, a settlement might be achieved early in the case. In other instances, the same monetary settlement might be achieved only after extensive document discovery or other proceedings, over the course of which plaintiffs' counsel gradually convince a defendant that the risk of loss at trial is sufficient to warrant such an offer. A sliding scale approach would not distinguish between the two; a lodestar cross-check would. *Newberg on Class Actions* § 15:80 at 296 ("[S]ome high fund cases involve significant risks, require enormous investments of money and time, and may appropriately trigger a healthy percentage award; conversely, a relatively small fund . . . secured with a few months' work, may not truly entitle class counsel to a mean 25% award"); *id.* § 15:81 at 302-303 (explaining the same limitation with respect to the mega-fund concept). Thus, the lodestar is a far more accurate and meaningful indicator of whether a certain fee percentage would result in a windfall. *Tyco*, 535 F. Supp. 2d at 267-70 ("The best measure of the effort required to produce a particular result in a given case is the lodestar."); *Newberg on Class Actions* § 15:81 at 303 ("Given that a high multiplier is the best measuring stick of a windfall, courts ought to use the high multiplier to police windfalls, regardless of the size of the fund, rather than use the size of the fund as a policing mechanism."); *id*. at 305 ("[T]he multiplier itself is the best measuring stick for determining when the windfall occurs").

In this case, the Court has the benefit of a lodestar that has now been extensively vetted. Of course, the initial submission contained regrettable mistakes. However, at this juncture –

after intensive investigation, discovery, and argument – the lodestar has been audited and determined to be accurate and reliable. *See* R&R at 365 ("The Special Master recommends that, with the relatively minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar petitions were submitted to the Court are reasonable and accurate . . . ."); *id.* at 209-10 (in the aggregate, class counsel expended a reasonable amount of time on the case); *Id.* at 219 n.173 ("[T]he Special Master reviewed voluminous documentation produced by the firms in support of their respective lodestar figures [and] confirmed that the total hours and lodestar calculations were, in fact, accurate."). As such, the work required to create and scrutinize the lodestar is already done. Respectfully, the Court should make use of this valuable tool. There is no reason to ignore the more accurate lodestar and resulting multiplier cross-check by resorting to the less accurate sliding scale proxy.[7]

Second, and relatedly, the premise underpinning the sliding scale approach is absent here. The rationale behind the sliding scale is the assumption that creating a large fund tends to require proportionally less work. *See, e.g.*, *Tyco*, 535 F. Supp. 2d at 267 (*citing In re Prudential Ins. Co. Am. Sale Practice Litig. Agent Actions*, 148 F.3d 283, 339 (3d Cir. 1998)). This premise, of course, would mean that when the fee award is commensurate with the work performed (even if there is a relatively large fund), there is no reason to apply a sliding scale. *See id.* ("However, the generalization on which the objectors' argument depends does not hold in this case."); *In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 80-82 (D. Mass. 2005) ("Here the court concludes it

[7] HLLI has argued that counsels' lodestar should be reduced. *E.g.*, ECF No. 545 at 7. This Court should reject any such assertion. HLLI's argument largely consists of unsupported surmise. *See id.* at 7-8 (uncited speculation about hypothetical "Big Law" firms and clients). And, where HLLI does (attempt to) rely upon facts, it gets them wrong. *See id.* at 8-9 (arguing based on the wrong date). On the other hand, the Special Master's investigation and factfinding with respect to counsels' lodestar was extensive. *See generally* R&R.

would be inappropriate to use a mean – an *average* – categorized according to the size of the settlement fund as the be all and end all of analysis. Rather, this Court respectfully notes these authorities but pursues this nuanced analysis looking at the complexity, duration, and type of the case, and the skill and efficiency of the attorneys involved."); *In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *20-21 (concluding that "the argument for a reduction of the percentage award as the size of a settlement fund increases reflects neither reality nor sound judicial policy").

The relatively modest multiplier in this case makes clear that a 25% fee award will not result in a windfall. In fact, the 2.0 multiplier is well below the average for cases with large funds. *See, e.g.*, Dec. 18, 2018 Decl. of William Rubenstein at ¶ 7(c) (ECF No. 532-1) ("[E]mpirical studies show that Class Counsel's maximal 2.07 multiplier is well below the average multiplier in large fund cases . . . ."); *see also Newberg on Class Actions* § 15:89 at 348-49, tbl.2 (showing that lodestar multipliers typically increase with the size of the fund); Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 274 tbl.15 (2010) (mean lodestar multiplier for common funds over $175.5 million was 3.18); Theodore Eisenberg, Geoffrey Miller, *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 967 tbl.13 (2017) (mean lodestar multiplier for common funds over $67.5 million was 2.72, with a standard deviation of 3.59); Fitzpatrick *Bain* Declaration at ¶ 26 (ECF No. 532-2) ("[W]hen I limited the settlements in my study to only those above $100 million (with data ascertainable in 24 of those settlements), I found that the mean and median lodestar multipliers that resulted more than doubled to 3.34 and 2.74, respectively"). Decisions within the First Circuit are consistent. Of comparable published cases (funds above $100 million), the 2.0 lodestar multiplier falls at the low end of the spectrum. *See* 2018 Fee Brief (ECF No. 532) at 5-8. In fact, either 2.00 or 2.07 would represent the third

lowest lodestar multiplier among those cases (and HLLI's proposed 1.34 would be *the lowest*). *Id.*

In short, the 2.0 lodestar multiplier is relatively small for a settlement of this size, and demonstrates – as a matter of fact, rather than supposition – that the common fund did not require proportionally less work to create. The 25% fee award was, and is, reasonable. *See* July 31, 2017 Rubenstein Decl. (ECF No. 368) at Ex. A, p. 30, ¶ 39 (the lodestar multiplier serves as "the measuring stick of the reasonableness of counsel's fee").[8]

The sliding scale approach might be useful if the goal were to avoid the work of a lodestar. Here, the Court already has a vetted lodestar. The purpose of the sliding scale approach is to attempt to weed out windfalls. Here, the multiplier confirms that there is no windfall. Simply stated, the sliding scale approach has no place in this case. Respectfully, the Court should adhere to its original conclusion that 20–30% is a reasonable fee award range, and that 25% is a reasonable fee award.

[8] During the June 24, 2019 hearing, the Court stated: "it seems to me that the Fitzpatrick study might tell me, to the extent it should be relied on . . . that maybe the right range is 10 to 26 percent with 17.9 percent as the average." *See* June 24, 2019 Hr'g Tr. at 50. Respectfully, such an approach would be flawed. First, the eight cases included in that calculation in the Fitzpatrick Study include an "extreme outlier" fee award of 0.3%. *See* June 17, 2019 Fitzpatrick Aff. (ECF No. 550) at ¶ 9. Second, adopting this percentage as the reasonable range here would fail to take into account the lodestar multiplier, which (as explained above) serves as a litmus test for reasonableness. As Prof. Fitzpatrick has noted, "when I limited the settlements in my study to only those above $100 million (with data ascertainable in 24 of those settlements), I found that the mean and median lodestar multipliers that resulted more than doubled to 3.34 and 2.74, respectively." *See* Fitzpatrick *Bain* Declaration at ¶ 26 (ECF No. 532-2). The lodestar demonstrates that the range mentioned by the Court is too low. For instance, the low end of the range (10%) would result in a $30 million fee award – *i.e.*, a 0.81 multiplier – which would be decidedly *un*reasonable given the level of risk that Plaintiffs' counsel undertook and the level of effort required to reach this resolution, which has been universally acknowledged as an excellent result for the class.

III. Public Policy Supports the 25% Fee Award.

The Court has indicated that, once it determines a reasonable range for the fee award, it may decide whether to adjust the award within that range based upon public policy considerations. *See* June 24, 2019 Hr'g Tr. (ECF No. 560) at 18. Labaton acknowledges that, particularly after having vacated the prior fee award, the Court has discretion to consider counsels' conduct under this factor, even in the absence of a formal finding of misconduct or imposition of a formal sanction. Nevertheless, Labaton respectfully submits that public policy considerations support the Court's original 25% award, and counsel against any further adjustment.[9]

The Court's consideration of public policy must account for the public benefits generated by class counsels' efforts. Counsel achieved an excellent result for the class, which includes (among others) a number of pension funds that secure the retirement of public employees. Accordingly, in a tangible way, counsels' efforts benefited many members of the public.

And, by filing the first indirect FX class action in any court – and then successfully litigating and mediating it to an outstanding result – class counsel helped to create a deterrent against improper foreign exchange practices that did not previously exist. *See* R&R at 12. To curb these marketplace abuses against custodial clients provides a significant public benefit, and supports the Court's original fee award on public policy grounds. *See Neurontin*, 58 F. Supp. 3d

[9] In light of the Court's discussion during the recent hearings, Labaton focuses this portion of its submission on the public policy considerations regarding the fee award. To the extent the Court is looking to consider further the other factors that Courts in this circuit generally consider, Labaton respectfully refers the Court to counsels' prior submissions, which explain at length why those remaining factors also support the 25% fee award. *See* Initial Fee Brief (ECF No. 103-1) at 5-24; 2018 Fee Brief (ECF No. 532) at 16-21. The Initial Fee Brief relied upon the formulation used by district courts in this circuit, which is comparable to the approach described in *Goldberger v. Integrated Res.,* 209 F.3d 43, 50 (2d Cir. 2000). *See* Initial Fee Brief (ECF No. 103-1) at 4-5 (quoting *Medoff v. CVS Caremark Corp.*, No. 09-cv-554-JNL, 2016 WL 632238, at *8 (D.R.I. Feb. 17, 2016)).

171 (public policy "militate[d] in favor of a considerable fee award, as lawsuits which help curtail fraudulent drug marketing provide a valuable service in helping to safeguard the health and welfare of the general public"); *Lupron*, 2005 U.S. Dist. LEXIS 17456, at *23 ("The public interest is also served by the defendants' disgorgement of proceeds of predatory marketplace behavior."); *cf. Feeney v. Dell*, 454 Mass. 192, 200 (2009) ("Here, expressions of three branches of Massachusetts government indicate that the public policy of the Commonwealth strongly favors G. L. c. 93A class actions.").

Moreover, the case counsel successfully brought was challenging and risky, and counsel funded the entire litigation and bore all of the risk:

> In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent.

November 2, 2016 Hr'g Tr. (ECF No. 114) at 36; *see also, e.g.*, 2018 Fee Brief (ECF No. 532) at 16-21 (discussing risks of litigation); R&R at 6 ("Given the risks, complexities, and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by skilled and dedicated plaintiffs' counsel, was an excellent result for the class."); *id.* at 29-34. Against that backdrop, "public policy favors granting counsel an award reflecting that effort," because "[w]ithout a fee that reflects the risk and effort involved in this litigation, future plaintiffs' attorneys might hesitate to be similarly aggressive and persistent when faced with a similarly complicated, risky case and similarly intransigent defendants." *Tyco*, 535 F. Supp. 2d

at 270 (awarding 14.5% of the $3.2 billion fund, which resulted in a lodestar multiplier of approximately 2.7).[10]

Understandably, the Court is concerned about certain aspects of counsels' conduct in this case.[11] If the Court is considering whether public policy requires a downward adjustment of the fee award in order to deter misconduct in class action cases, Labaton respectfully submits that the well-publicized course of this case – including the Master's exhaustive investigation, which this Court ordered (and Customer Class Counsel funded) – represents a sufficient (and educational) deterrent to the class action community. *See, e.g.*, Matthew Goldstein, *Law Firm's Fee Settlement Could Shake Up Securities Class Actions*, N.Y. TIMES (Oct. 10, 2018). Indeed, class counsels' substantial resources devoted to this investigation and litigation, together with Customer Class Counsels' funding of the Special Master, in effect already represents a *de facto* reduction of the fee award.[12]

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[10] The 25% fee award in the *BONY Mellon* litigation provides further public policy support for a 25% fee award here, because the two cases involved many of the same attorneys and similar subject matter. *See* 2018 Fee Brief (ECF No. 532) at 8; *Long v. HSBC USA Inc.*, 14-cv-6233, 2016 U.S. Dist. LEXIS 124199, at *44 (S.D.N.Y. Sept. 13, 2016) ("Public policy also favors consistency with respect to fee awards; in the absence of countervailing factors such as differences in the qualifications of counsel or the complexity of the issues, there should not be wide disparities in the fee awards to the same firm (or attorneys with similar qualifications) in different litigations involving similar legal and factual issues."). Although HLLI has suggested that this case was "easier" than *BONY Mellon* because the Plaintiffs did not take depositions (June 24, 2019 Hr'g Tr. (ECF No. 560) at 100-102), such a statement is extremely misleading. When this case was placed on an alternate track at the Court's suggestion, the parties understood that document discovery would occur, and that the Court expected the parties to be move quickly (and not start from scratch with discovery) if negotiations broke down. *Id.* at 107. Accordingly, Plaintiffs' counsel had to proceed with the work they did, because it was necessary for use in the negotiations, and so that Plaintiffs would not be caught flat-footed if the case moved back onto a more traditional litigation track.

[11] Labaton's conduct under the applicable professional rules is addressed in Section VI, *infra*.

[12] Customer Class Counsel has thus far paid $4.8 million to fund the work of the Special Master and those assisting him, of which Labaton has paid approximately $2.25 million. In addition, Labaton has incurred an additional $3.2 million in out-of-pocket defense costs.

In sum, any consideration of counsels' conduct must be weighed alongside the extraordinary benefits to the public – public pension plans, public employees, and the marketplace – that counsel delivered. Considering all the public policy implications, the scales remain balanced at a 25% fee award and 2.0 lodestar multiplier.

IV. Customer Class Counsel Did Not Misrepresent the Fitzpatrick Study.

HLLI has repeatedly accused Customer Class Counsel of misrepresenting the Fitzpatrick Study. HLLI's assertion is baseless.

In their memorandum of law in support of their fee request (ECF No. 103-1), Customer Class Counsel focused the initial discussion on settlements of "comparable size" (above $100 million) within the First Circuit. *Id.* at 6-8. Then, Customer Class Counsel explained:

> Some courts, at least in megafund cases, have "lower[ed] the fee award percentage as the size of the settlement increases to avoid giving attorneys a windfall at the plaintiffs' expense." Other courts have disfavored this practice, however, and courts in this Circuit resist it. In *Lupron*, for example, the court adopted the Ninth Circuit's conclusion that "the argument for a reduction of the percentage award as the size of a settlement fund increases reflects neither reality nor sound judicial policy," and granted the requested 25% fee and expense award. In *In re Relafen Antitrust Litigation*, the court granted the requested fee of 33-1/3% of $67 million in class recovery, finding that despite "several cases that suggest that the standard percentage is generally lower as the common fund increases . . ., the requested fee is not out of proportion with large class actions." In *Neurontin*, Chief Judge Saris reduced fees and expenses from the requested 33-1/3% of the $325 million settlement fund to 28%. That was based, however, on an empirical study of class action fee awards (discussed below), not the declining percentage principle, which "[s]ome courts have rejected[.]"

Id. at 9 (citations omitted). In other words, Customer Class Counsel were upfront that: (1) large settlements within the First Circuit provide one appropriate frame of reference; and (2) some courts apply a "declining percentage principle." *See id.*[13]

[13] During the June 24, 2019 hearing, the Court suggested that Customer Class Counsel should have taken the same approach as the fee brief submitted in the *BONY Mellon* case. *See* June 24, 2019 Hr'g Tr. (ECF No. 560) at 56. Labaton was not involved in that case. And, importantly, although supporting materials in that case contained more detail about a possible sliding scale

Then – one page later, and in light of that context – Customer Class Counsel discussed the Fitzpatrick Study. *Id.* at 10. Importantly, having explained that some courts apply the sliding scale approach in large cases, Customer Class Counsel made clear that, with respect to the Fitzpatrick Study, they were discussing "all 688 class action settlements in federal courts during 2006 and 2007." *Id.* Otherwise stated, Customer Class Counsel presented a straightforward and accurate description of a particular aspect of the Fitzpatrick Study. *See* June 17, 2019 Fitzpatrick Aff. (ECF No. 550) at ¶ 6 (the "statistics recounted by class counsel were exactly as I set them forth in my study. Although class counsel did not recount every statistic in my study, that does not make their submission misleading.").

Customer Class Counsel again focused on cases with large funds during the hearing on November 2, 2016. After the Court explained that it tends "to stay in that 20 to 30 percent range," counsel oriented the discussion toward cases with large settlements. *See* Nov. 2, 2016 Hr'g Tr. (ECF No. 114) at 24-25 ("So one thing we presented in our brief, Your Honor, to get a little bit more to the point, is we compared the fee that we're requesting here with the fees in every class action settlement in the First Circuit of $100 million or more. There are some cases that refer to class action settlements of $100 million or more as mega fund settlements."). The Court then expressly referenced fees in cases with large settlements. *See id.* at 35-36 ("This is in the 20 to 30 percent range usually awarded by me in class action common fund cases and in many cases with settlements in the First Circuit and in many cases where the settlements are a $250 million to $500 million range."). Finally, the Court explained that it had considered

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approach, the brief itself did not raise the issue squarely with the Court. *Compare* ECF No. 103-1 *with* Hearing Ex. C (*In re Bank of N.Y. Mellon Corp. Forex Transactions Litigation*, 12-MD-2335, ECF No. 619 (S.D.N.Y.)).

reducing the percentage based on the high fee award, but ultimately declined to do so, in part because the lodestar multiplier was reasonable. *See id.*

In short, in both their briefing and during the final settlement hearing, class counsel discussed large settlements, including the notion that fee awards in cases with large funds are sometimes treated differently. They did not "hide the ball." And, based on its comments, the Court also appeared focused on fee awards in cases with larger funds.

HLLI claims that the brief should have explained to the Court that (i) one of the many ways in which the Fitzpatrick Study sliced up the overall figures was in a table, which had a separate line for the eight settlements identified between $250 and $500 million; and (ii) if limited to these eight settlements, the mean percentage would be smaller. The argument is not only misplaced, it is extremely unfair for HLLI to suggest that the absence of HLLI's preferred language constituted a "misrepresentation." The brief at issue distills dozens of sources and principles of law, and strives to treat each one fairly in the presentation. There are an infinite number of ways in which an author could have fairly described the Fitzpatrick Study (which was attached in full to the brief). There is simply no basis to say that not highlighting this one figure based on a small sample size (8 of 444 cases) with data scattered over a broad range (from a .3% award to a 25% award) was wrong, much less misleading. Nor is there any evidence whatsoever to support any suggestion that the presentation was intended to be deceptive.

Finally, in any event, the 25% fee request is within one standard deviation of the mean found by Prof. Fitzpatrick even if the Court does use his figure based on the eight cases in the $250-500 million range. *See* June 17, 2019 Fitzpatrick Aff. (ECF No. 550) at ¶ 8. Accordingly, although the requested 25% was higher than the mean found by Prof. Fitzpatrick's study in that specific figure, it was nonetheless "in line" with this finding. *See id.* at ¶ 9 ("[O]f the 8

percentage-method fee awards in the $250-500 million range in my study, two were greater than the request here and six were below (including the extreme outlier of 0.3% based on the large potential value of an injunction and credit-monitoring relief) . . . But even more to the point: the facts and circumstances of this case compare quite favorably to the other settlements in the $250-500 million range in my study.") (citation omitted).

Simply put, the presentation of the Fitzpatrick study in the fee petition was not misleading, was not untrue, and there is no indication that there was any intent to deceive.

V. The Court Should Decline To Exercise Its Discretion To Allocate the Fee Award.

A. The Court Should Enforce Counsel's Fee-Sharing Agreements.

Respectfully, in light of counsels' negotiated fee-sharing agreements, the Court should decline to allocate the fee award. Because class counsel have agreed upon a fee distribution, "there is no need for formal judicial involvement." *See Newberg on Class Actions* § 15:23 at 52; *see also In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155, 183 (D. Mass. 2015) (recognizing that, although a court is not required "blindly to follow" fee-sharing agreements among counsel, they "may be respected or treated as presumptively reasonable in a district court's allocation of attorneys' fees"); *Longden v. Sunderman*, 979 F.2d 1095, 1101 (5th Cir. 1992) ("The district court acted well within its discretion in awarding an aggregate sum to the Susman Attorneys that was based on their collective efforts, leaving apportionment of that sum up to the Susman Attorneys themselves."); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533 n.15 (3d Cir. 2004) (declining to "deviate from the accepted practice of allowing counsel to apportion fees amongst themselves"); *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d 985, 1006 (N.D. Ohio 2016) ("Courts routinely permit counsel to divide common benefit fees among themselves."); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297,

357 (N.D. Ga. 1993) ("Ideally, allocation is a private matter to be handled among class counsel.").

Courts often defer to an allocation of the fee award that is determined by lead counsel or a designated group of attorneys. *See, e.g.*, *In re Indigo Sec. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998) ("The Court sees no reason why it should not, as it has done in the past, award attorney fees and costs to all class counsel, to be distributed among the participating counsel based on their respective contributions to the litigation, according to the discretion of lead counsel."). Counsels' allocation in this case should be afforded even more deference, because it is the result of negotiated agreements, rather than a unilateral distribution by lead counsel. Under these circumstances, the Court should allow counsel to implement their agreed-to allocation. *See, e.g.*, *LandAmerica 1031 Exch. Servs. v. Chandler*, MDL No. 2054, 2012 U.S. Dist. LEXIS 159630, at *21 (D.S.C. Nov. 7, 2012) (declining to allocate award because "firms have entered into an agreement apportioning the fee award among themselves."); *In re Copley Pharm., Inc.*, 50 F. Supp. 2d 1141, 1148 (D. Wyo. 1999) ("Having this policy in mind, it had been the Court's hope that class counsel could decide the allocation themselves. Accordingly, per the standard practice in complex litigation, the Court first encouraged class counsel to stipulate to an allocation, subject to approval by this Court.").[14]

[14] HLLI may argue that the Court cannot defer to counsels' agreed-to fee allocation. The Court should reject this argument, as other courts have done. *See In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d at 1006 ("CCAF is wrong."); *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 316 F.R.D. 240, 253 (E.D. Wis. 2016) ("However, I also note that the authority on which Frank relies to support the proposition that class counsel may not privately divide a fee is inapposite."), *rev'd on other grounds*, 869 F.3d 551, 557 (7th Cir. 2017).

B. If The Court Does Allocate Fees, It Should Allocate Them According to the Agreed-Upon Percentages.

Alternatively, even if the Court does choose to exercise its discretion and consider what amounts of fees should be allocated to which firm (*see Newberg on Class Actions* § 15:23 at 52), the Court should nevertheless maintain the original agreed-to percentages among the firms.

Any allocation by the Court should be driven by the "actual contributions each firm made." *See Volkswagen*, 89 F. Supp. 3d at 183; *see also In re FPI/Agretech Sec. Litig.*, 105 F.3d 469, 473 (9th Cir. 1997) ("[A] court may reject a fee allocation agreement where it finds that the agreement rewards an attorney in disproportion to the benefits that attorney conferred upon the class – even if the allocation in fact has no impact on the class."). The agreed-to fee percentages were tied to the firms' respective contributions and, as to the allocation between Customer Class Counsel and ERISA counsel,[15] to the relative trading losses of the class members on whose behalf they were acting. The Court should implement those allocations.

Nothing about Labaton's conduct justifies departing from this agreed-to percentage. With respect to the payment to Chargois & Herron, Labaton's conduct complied with the applicable ethical and procedural rules. *See* § VI, *infra*. Even if this were not the case, however, the Court should not reduce Labaton's fee award, much less do so to increase the allocation to other counsel. Although Lieff and Thornton have said that they did not know the full details of Labaton's agreement, all three Customer Class Counsel firms were aware of the $4.1 million fee shared with Chargois (*see* ECF No. 446-9); aware that no disclosure of that sharing was made

[15] Under the proposed accommodation to ERISA counsel in the Special Master's Supplement to His Report and Recommendations and Proposed Partial Resolution of Issues for the Court's Consideration (ECF No. 485), as a part of a global settlement, Labaton agreed to pay to ERISA counsel $2.75 million in resolution of the Special Master's recommended $3.4 million payment.

(appropriately in Labaton's belief) to the Court, the class, or ERISA counsel[16]; and aware that Chargois entered no appearance, submitted no lodestar report, participated in none of the mediations or hearings, produced no work product and certainly did not engage in work that would approach the value of $4.1 million.

Nor should the Court reduce Labaton's portion of the fee based on the costs of the Master's investigation. The investigation began with the lodestar double-counting error, which was a mistake shared at least equally by all of the Customer Class Counsel firms. *See* R&R at 364. Labaton has already paid 47% of the cost of the Special Master's investigation based on its share of Customer Class Counsel's portion of the fee award. When the investigation moved into the fee sharing stage, it involved, not only the Chargois Agreement, but also disclosure of the Chargois & Herron payment (which involved all three Customer Class Counsel) and the treatment of contract attorneys by the other two Customer Class Counsel firms.[17] For this phase, too, Labaton has already paid 47% of the costs, although Labaton employed no contract attorneys. *See* Special Master's Response to Objections to Lieff to Sharing Responsibility with Labaton for Payment of an Additional $750,000 (ECF No. 486) at 5 ("Although Labaton has, to date, carried a substantial portion of the case for Customer Class Counsel, Lieff Cabraser and Thornton have each contributed significantly to the Master's workload and to the concomitant costs of the investigation."). Equity does not dictate that Labaton's fee should be reduced any lower than 47% of the fee shared by Customer Class Counsel, particularly given the Firm's

[16] The ERISA firms apparently shared the view, which Labaton believes is correct, that disclosure of fee-sharing agreements among counsel is not routinely required. *See* ECF No. 401-34 at 1 (L. Sarko: "We need to be careful about this as the DOL had asked if there were any agreements on fees between counsel. I would never answer their question. And then they seem to forget about it.").

[17] Labaton employed non-partnership track Staff Attorneys, but no contract attorneys. Lieff and Thornton employed contract attorneys.

crucial role as lead counsel in this risky case that brought an "excellent result for the class" (*see* R&R at 6), and in light of the fact that Labaton continues to do work on behalf of the class, administering the settlement.

Finally, the Court has indicated concern with language in the fee declarations submitted by Customer Class Counsel and ERISA counsel concerning the "regular rates charged." This language – which should have been clearer – does not warrant reducing Labaton's award in comparison to the other two Customer Class Firms. While Thornton is a pure contingency firm, Labaton is a predominantly contingency firm that does some billable client work. *See* ECF No. 510-2 (identifying hourly billable work Labaton has performed); ECF 104-15 (Labaton's lodestar). Despite the lack of precision, Labaton's lodestar used real rates that Labaton sets annually. As Labaton's extensive documentary and deposition evidence during the investigation demonstrated, Labaton regularly undertakes a robust and systematic process for determining its billing rates, which reflect the prevailing rates in the legal community. *See* R&R at 65-66; *see also United States v. One Star Class Sloop Sailboat*, 546 F.3d 26, 40 (1st Cir. 2008). Although hourly work is infrequent and Labaton cannot show that every timekeeper in its lodestar submission billed time to hourly clients, it has shown that on those occasions when it has hourly clients, it uses its billing rates.[18] In other words, the rates are real. Lieff is similarly situated to Labaton in this regard. *See* June 24, 2019 Hr'g Tr. (ECF No. 560) at 123.

[18] As explained during the hearing (June 24, 2019 Hr'g Tr. at 117-18), in some cases hourly work in 2016 involved a project that began in 2015, so the 2015 rate was used. This explains the slight difference between the hourly rates listed in Labaton's interrogatory response (ECF No. 510-2 at 23-25) and its lodestar submission (ECF No. 104-15 at 7-9).

The Court need not and should not exercise its discretion to allocate the fee award. However, Labaton respectfully requests that, if the Court decides otherwise, it select the allocations to which counsel agreed.

VI. Labaton Complied With The Applicable Rules of Professional Conduct and the Federal Rules of Civil Procedure.

Labaton reiterates, as it states in the proposed partial resolution, that its conduct in this case did not meet emerging best practices with respect to disclosure of the Chargois Agreement to the client and to the class, nor did it satisfy that which Professor Rubenstein has suggested would be the appropriate practice with regard to disclosure of the agreement to the Court. *See* June 26, 2019 Hr'g Tr. (ECF No. 566) at 235.[19] Labaton strives to be at the forefront of best practices and emerging best practices in the practice of law. Regrettably, Labaton fell short, for which it again expresses its deep regret.

Nevertheless, Labaton complied with the rules of ethical conduct applicable to this case, *i.e.*, the Massachusetts Rules of Professional Conduct ("MRPC"). Labaton secured its client's written consent to pay a referral fee, both prospectively and retroactively. As such, Labaton complied with the ethical rule governing the division of fees between attorneys, MRPC 1.5(e). The rule about which the Court expressly inquired at the June 26, 2019 hearing, MRPC 7.2(b), does not apply to this case. However, even if MRPC 7.2(b) could be found to apply, Labaton's compliance with MRPC 1.5(e) precludes a finding that the Firm violated Rule 7.2(b).

[19] *See Newberg on Class Actions* § 15:12 at 36 (explaining that Courts have not construed Rule 23(e) to require disclosure of fee agreements among counsel, but that "settling parties *should* also readily provide them under Rule 23(e) in any case.") (emphasis added); *see also* ECF No. 368 (June 20, 2018 Rubenstein Declaration) at ¶ 10 ("No court has ever read Rule 23(e)(3) to apply to fee allocation agreements, to the best of my knowledge.").

The Court noted at the June 26 hearing, "[a]t the moment, since I didn't issue a [Rule] 54 order, and I will in every other class action case I have in the future, I'm not inclined to find that there was a violation of Rule 23." June 26, 2019 Hr'g Tr. (ECF No. 566) at 235. Labaton respectfully suggests that the Court's inclination is entirely correct. Labaton did not violate the Federal Rules of Civil Procedure, which are on-point and preclude any finding of misconduct.

A. The Chargois Agreement Met the Existing Requirements of the Massachusetts Rules of Professional Conduct.

1. Labaton Complied with MRPC 1.5(e).[20]

In February 2011, when ATRS engaged Labaton specifically for the *State Street* litigation, MRCP 1.5(e) ("Former Rule 1.5(e)")[21] provided that a "division of a fee between lawyers who are not in the same firm may be made only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable." ECF No. 401-227 at 2.

Labaton complied with Former Rule 1.5(e). In the engagement letter for the *State Street* case, ATRS agreed that Labaton could allocate a portion of its fees to "local or liaison counsel" or as "referral fees." ECF No. 401-137 at 2. Accordingly, ATRS consented to the Chargois Agreement, as five highly-credentialed experts opined. *See, e.g.*, Green Rep. (ECF No. 401-248) at 19-20 ("Particularly in the context of a retention letter setting forth the parties' respective

[20] *See* Labaton's Objections (ECF No. 434) at 25-37 and Labaton's Second Supplemental Objections (ECF No. 452) at 14-15 for a more complete exposition of this argument. Similar footnotes are included below, in order to direct the Court to Labaton's prior submissions.

[21] As used herein, "Former Rule 1.5(e)" refers to the version of MRPC 1.5(e) in effect in February 2011 when ATRS engaged Labaton in connection with this litigation; "Current Rule 1.5(e)" refers to the version of MRPC 1.5(e) in effect now. Where the distinction is not material to the discussion, this submission will simply refer to "Rule 1.5(e)."

rights and responsibilities, it seems reasonably plain to me that the sentence in question in fact memorializes ARTRS's permission.").[22]

In addition, because ATRS consented to Labaton's payment of a referral fee in writing (*i.e.*, the parties' engagement letter), Labaton also complied with the written consent requirement described in the Supreme Judicial Court's *Saggese* opinion, which was decided in 2005. *See Saggese v. Kelley*, 445 Mass. 434, 443 (2005) (explaining that Rule 1.5(e) would be construed prospectively to require that an attorney disclose "the fee-sharing agreement to the client before the referral is made" and that the attorney "secures the client's consent *in writing*.").[23]

Neither Former Rule 1.5(e) nor its current iteration requires the disclosure of the details of the fee-sharing agreement (*e.g.*, the percentage of the referral fee). *See* Former Rule 1.5(e); *see also* Current Rule 1.5(e), cmt. 7A ("The Massachusetts rule does not require disclosure of the

[22] Labaton retained five experts during proceedings before the Master: Profs. Peter Joy, Bruce Green, and W. Bradley Wendel; Hal Lieberman, who has worked for the Massachusetts Office of Bar Counsel and a similar New York disciplinary body; and the late Camille F. Sarrouf, whose distinguished career included a term as President of the Massachusetts Bar Association. Each agreed that Labaton fulfilled its ethical obligations with respect to the Chargois Agreement. *See* Joy Rep. (ECF No. 401-249) at 27 ("Labaton's engagement letter with ARTRS for the State Street Litigation met the requirements of Mass. R. Prof. C. 1.5(e) as it existed at the time of the engagement letter."); Lieberman Rep. (ECF No. 401-250) at 16 ("Labaton obtained ARTRS' consent to divide its fees with Chargois, and therefore complied with Rule 1.5(e), as it then existed."); Wendel Rep. (ECF No. 401-251) at 14 ("In my opinion, the negotiations between Labaton and the ARTRS and the written consent provided by Clark [ATRS' Chief Counsel] and Hopkins satisfy the requirements of Mass. RPC 1.5(e) and the interpretation placed on the rule by the *Saggese* court."); Sarrouf 3/21/18 Dep. (ECF No. 401-263) at 106:5-107:5.

[23] *Saggese*'*s* written consent requirement was not codified in the MRPC until March 15, 2011, after ATRS engaged Labaton for this case. Labaton's search of a Massachusetts Board of Bar Overseers database did not uncover decisions citing *Saggese*, thus the BBO appears not to have used it as a basis for discipline between its issuance (2005) and the 2011 amendment of Rule 1.5(e). Mr. Lieberman's experience is consistent. *See* Lieberman Dep. (ECF No. 401-230) at 120:2-7 ("I have never seen a disciplinary case for a lawyer where the court has disciplined a lawyer based on a ruling of a court as opposed to a violation of a Rule of Professional Conduct . . .").

fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer."). [24]

In any event, even if the Chargois Agreement did not comply with Former Rule 1.5(e), ATRS through its then-Executive Director George Hopkins ratified the fee division, essentially for the purpose of putting to rest the Master's concern that the engagement letter constituted insufficient consent. *See* March 15, 2018 Hopkins Decl. (ECF No. 401-129) at 3-4. Under governing Massachusetts law, a client's ratification is sufficient consent. *Saggese*, 445 Mass. at 442 ("Ratification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate."). [25] Accordingly, regardless of whether Labaton initially complied with Former Rule 1.5(e), it subsequently obtained its client's consent – as even Prof. Gillers, the Master's expert, concedes. *See* March 20, 2018 Gillers Dep. (ECF No. 401-264) at 106:18-22 ("Q: Sir, does the ratification declaration that you have seen now from Mr. Hopkins constitute consent on behalf of Arkansas Teacher Retirement System to the fee referral to Chargois & Herron? A: On behalf of Arkansas alone." [26]); *see also* June 28, 2018 Joy Decl. (ECF No. 435-19) at 7 ("Even if the Court were to adopt the Special Master's unique interpretation of Mass. R. Prof. C. 1.5(e) as it existed at the time of the retention agreement between Labaton and ATRS, Hopkins' ratification would have been adequate consent to the fee sharing agreement . . . .").

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[24] Comment 7A to Current Rule 1.5(e) indicates that the client's interest in additional information does matter. That is of particular note here where ATRS Executive Director George Hopkins testified before the Master (ECF No. 401-11 at 68:23-69:3), and swore in his declaration, that he did not wish to know the details of any fee sharing arrangements. *See* March 15, 2018 Hopkins Decl. (ECF No. 401-129).

[25] In *Saggese*, the client ratified her attorneys' agreement to pay a 33% referral fee two years after the referral was made (and after the referring attorney had received payments). *Id.* at 436-40.

[26] Mr. Hopkins did not purport to ratify for the absent class members, or for the separately represented ERISA plaintiffs.

Saggese is thus dispositive: Had there been any noncompliance with Former Rule 1.5, which there was not, the ratification by Labaton's direct client negated the import.[27]

In short, Labaton complied with Former Rule 1.5(e). Its sophisticated client consented in writing to the payment of referral fees resulting from the *State Street* matter, and the client then ratified the payment after full disclosure of all pertinent facts. *See* ECF No. 401-129.

2. The Chargois Agreement Is Encompassed in Rule 1.5(e).[28]

Both the Master and the Court have questioned whether the payment to Chargois & Herron can be characterized as a "referral fee." *See* R&R at 272-73; June 26, 2019 Hr'g Tr. (ECF No. 566) at 233. But, however the Chargois Agreement is labelled, it falls within the ambit of Former Rule 1.5(e) and Current Rule 1.5(e), because it involves a "division of a fee between lawyers who are not in the same firm." *See* Former Rule 1.5(e); Current Rule 1.5(e). Rule 1.5(e) is not limited to "referral fees" per se. The Firm agreed to divide its fee with Chargois, a lawyer in a different firm who has acted as traditional local counsel in other cases and was expected at the outset to have a role in ATRS cases. *See* Testimony of Eric Belfi and Chris Keller, June 26, 2019 Hr'g Tr. at 10-17, 19-20, 52, 80-82, 86-96 (ECF No. 566). Therefore, Rule 1.5(e) applies.

In any event, the Chargois Agreement fits the Massachusetts Bar's conception of a referral fee, despite the facts that (1) the agreement was not matter-specific and (2) as it turned out, Chargois' role was limited to facilitating an introduction between ATRS and Labaton. *See*

[27] Little heed has been paid to ATRS' ratification thus far. *See* R&R at 257 n. 206. The Master's expert, Prof. Gillers, also brushed aside the ratification, while appearing to suggest that *Saggese's* rule may not apply in class action cases. ECF No. 401-237 at 76 n. 83. This is illogical. If Rule 1.5(e) applies to Labaton's relationship with ATRS in this context, which it does, *Saggese's* holding regarding ratification of agreements subject to the rule must also apply. In any event, ATRS' ratification, at the very least, mitigates any purported misconduct by Labaton.

[28] *See* Labaton's Objections (ECF No. 434) at 32-41.

Lieberman Dep. (ECF No. 401-230) at 44:12-14 ("I think this is a referral fee, and it happens all the time, common."); March 24, 2018 Sarrouf Dep. at 233:3 (referencing the "fee referral in this case"), 241:23 ("Those were referral fees.") (attached to the Transmittal Declaration of Justin J. Wolosz, filed herewith, as Exhibit 1).

The Court has inquired whether, if the Court considers the payment here to be akin to a "finder's fee," it cannot be characterized as a referral fee. A 2012 decision by the Massachusetts Court of Appeals is instructive with respect to the Court's question. *See Vita v. Berman, DeValerio & Pease, LLP*, 81 Mass. App. Ct. 748, 749-50 and n.4 (2012). In *Vita*, the court repeatedly described as a "referral fee" an arrangement in which a criminal defense lawyer used his "many contacts in the financial securities field" to refer "potential class action plaintiffs" to a securities litigation law firm. *Id*. (citing *Saggese*). As here, "[o]nce a referral was made," the defense attorney "did not participate further in the litigation." *Id.* at 750. Notably, the defense attorney referred at least one potential plaintiff "at the request" of a partner at the securities firm. *Id.* at 750. The Court of Appeals characterized this arrangement as a "referral" throughout its opinion. *E.g.*, *id.* ("In February, 1998, at the request of BDP partner Jeffrey Block, Vita *referred* Robert Hillger as a potential plaintiff for a class action suit against Phillip Services Corporation") (emphasis added). This Massachusetts appellate authority indicates that, in the Commonwealth, a fee paid by a lawyer to another lawyer for facilitating a connection with a potential client is a payment for a "referral." *See id.*[29] Hence, such a payment should be considered a "referral fee."

Moreover, from a policy perspective, the fundamental principle animating the Massachusetts Bar's embrace of "bare" referral fees was realized in this case, because ATRS had

[29] Curiously, despite the Master's assertion that the payment to Chargois & Herron was not a referral fee, the Master describes the payment in *Vita* – which involved a referral "at the request" of the class action firm – as an "unpaid referral fee." R&R at 296.

the opportunity to retain highly-skilled attorneys who delivered "an excellent result for the class." *See* R&R at 6; *see also* Lieberman Rep. (ECF No. 401-250) at 18 ("As a matter of good policy and the public interest, it is well recognized that the bar should encourage fee sharing relationships that serve the client by helping to ensure that cases, especially litigation matters, like this one, are handled by the best, most experienced lawyer in the particular area of the law."); June 14, 2017 Hopkins Dep. (ECF No. 401-3) at 100:8-10 (opining that he does not "think another law firm could have gotten the outcome [Labaton] did.").

3. Rule 7.2(b) Does Not Apply.[30]

Because Labaton complied with Former Rule 1.5(e), its actions would also constitute compliance with Mass. R. Prof. C. 7.2(b) ("Rule 7.2(b)") (providing that a lawyer may "pay fees permitted by Rule 1.5(e)"). However, even if Labaton had failed to comply with Former Rule 1.5(e), which is not the case, Labaton did not violate Rule 7.2(b).

Rule 1.5(e) governs a fee division between lawyers. Accordingly, non-compliance with Rule 1.5(e) is a violation of Rule 1.5(e) – not a violation of Rule 1.5(e) *and* Rule 7.2(b). Nothing in the text of Rule 1.5(e) – nor in the Supreme Judicial Court decision construing it – suggests that a violation of Rule 1.5(e) constitutes a violation of Rule 7.2(b). *See Saggese*, 445 Mass. at 440-41 (with respect to an undisclosed fee division, explaining that either Rule 1.5(e) or its prior iteration, DR 2-107, "*governed the conduct of the lawyers*," and not mentioning Rule 7.2(b) or any other rule of professional conduct) (emphasis added).

In fact, the two rules cover different types of conduct: "advertising" (Rule 7.2) and "division of fee" (Rule 1.5(e)). The Chargois Agreement involves a division of Labaton's fee, and thus fits squarely and exclusively within Rule 1.5(e). *See O'Connell v. Shalala*, 79 F.3d 170,

[30] *See* Labaton's Objections (ECF No. 434) at 37-41.

176 (1st Cir. 1996) ("[A] court engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language") (internal citations omitted); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (explaining that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotations omitted).

The historic enforcement of the ethics rules reflects this common-sense interpretation. *E.g.*, Lieberman Rep. (ECF No. 401-250) at 17 ("I am not aware of any such bootstrapped interpretation or application of Rule 7.2 in *any* jurisdiction . . ."). If a violation of Rule 1.5(e) resulted in a violation of Rule 7.2(b), any decision in which an attorney has been found to have violated Rule 1.5(e) would necessarily include a consequent finding that the attorney violated Rule 7.2(b). *See, e.g.*, Joy Rep. (ECF No. 401-249) at 18-19 ("If in 2016, or any time before 2016, ethics authorities in Massachusetts viewed sharing fees in violation of Mass. R. Prof. C. 1.5(e) as a violation of Mass. R. Prof. C. 7.2(b) (previously Mass. R. Prof. C. 7.2(c)), then, in my opinion, I would have expected the Admonition to discuss a violation of Mass. R. Prof. 7.2(b)."). But, "Massachusetts state courts, Massachusetts disciplinary authorities, and the United States District Court for Massachusetts have never considered a fee division between law firms based on a flawed or imperfect division of fee arrangement between law firms and a client under Mass. R. Prof. C. 1.5(e) to be a violation of Mass. R. Prof. C. 7.2[b]." *Id.* at 16. The Master's research is in accord. R&R at 337 (explaining that "apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer for paying another lawyer under Rule 7.2(b)").[31]

[31] Prof. Gillers has argued that *Daynard v. Ness, Motely, Loadholt, Richardson & Poole, P.A.*, 188 F. Supp. 2d 115, 130 (D. Mass. 2002) stands for the proposition that an imperfect fee division would trigger Rule 7.2(b). *See* March 20, 2018 Gillers. Dep. (ECF No. 401-264) at 84:22-86:18.

Against that backdrop, deciding that Labaton violated Rule 7.2(b) apparently would break new ground under (at least) Massachusetts law. *See, e.g.*, *id.* at 273 ("What does give us some pause before recommending redress for a violation of Rule 7.2(b) is the fact that, apparently, no bar disciplinary authority or Court has ever imposed discipline upon an attorney for a violation of this Rule by paying another attorney."). Such a finding would also be inconsistent with fundamental principles of notice and due process. *See* R&R at 337-338 ("[b]ecause this appears to be an issue of first impression and not one of which the profession might have been well-advised in advance, it would not be appropriate to impose professional discipline in these circumstances. Accordingly, no professional discipline or sanctions is warranted here and none is recommended."). Particularly in light of the lack of notice of this new interpretation and lack of authority for applying Rule 7.2(b) in this manner the Court should not find a violation of Rule 7.2(b) in these circumstances. *See, e.g.*, Joy Rep. (ECF No. 401-249) at 16-19; *Saggese*, 445 Mass. at 440-41 (Rule 1.5(e) "governed" undisclosed fee-splitting arrangement).

B. Labaton's Nondisclosure of the Chargois Agreement to the Court Did Not Violate The Federal Rules of Civil Procedure.

1. The Federal Rules of Civil Procedure Did Not Require the Disclosure to the Court of Fee Allocation Agreements.[32]

As the Court noted at the June 26 hearing, "[a]t the moment, since I didn't issue a [Rule] 54 order, and I will in every other class action case I have in the future, I'm not inclined to find

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But, this case does not support Prof. Gillers' position. *See Daynard*, 188 F. Supp. 2d at 124 n.5 (not mentioning Rule 7.2(b), despite analyzing both Rule 1.5(e) and its New York equivalent). Prof. Gillers' reliance on *Holstein v. Grossman*, 246 Ill. App. 3d 719 (1993), is similarly inapposite. That decision extensively discusses fee-splitting agreements under Ill. Sup. Ct. R. 2-107, but does not mention Model Rule of Professional Conduct 7.2(b) or its Illinois analogue. *Id.*

[32] *See* Labaton's Objections (ECF No. 434) at 43-59.

that there was a violation of Rule 23." June 26, 2019 Hr'g Tr. (ECF No. 566) at 235. Labaton respectfully suggests that the Court's inclination is well founded. The Firm did not violate the Federal Rules of Civil Procedure, which are on-point and preclude any finding of misconduct.[33] As with counsels' other fee-sharing agreements relating to this case,[34] Labaton's nondisclosure of the Chargois Agreement did not violate the applicable rules of professional conduct or the governing Federal Rules of Civil Procedure.

2. Labaton Did Not Violate A Duty of Candor to the Court.[35]

In the context of determining where a party's award should fall in the appropriate range of a reasonable fee, the Court noted that "candor to the court is an important public policy consideration," and that the Court "might find a series of failures by various counsel in their duty of candor to the court and where that ought to influence the award within the reasonable range." June 26, 2019 Hr'g Tr. (ECF No. 566) at 248, 259-60.

In Labaton's case, the issue of candor to the Court centers on the failure to disclose the Chargois Arrangement. But, as discussed above, this failure did not violate the Federal Rules of Civil Procedure, which do not require disclosure of fee-sharing agreements. *See, e.g.*,

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[33] The Advisory Notes (among other authorities) support this conclusion. *See* Fed. R. Civ. P. 54, 1993 Notes of Advisory Committee, ¶ 8 ("*If directed by the court*, the moving party is also required to disclose any fee agreement, including those between . . . attorneys sharing a fee to be awarded . . . .") (emphasis added); *see also* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:11 (5th ed. 2016) ("The third prong of Rule 54(d)(2)'s motion requirement – concerning disclosure of fee agreements – is discretionary with the court."); Rubenstein Rep. (ECF No. 401-242) at 5 ("Rule 23(h) and Rule 54 are therefore clear in mandating the submission of fee agreements – including those concerning the allocation of fees among counsel – only upon court order."); *see also* June 20, 2018 Rubenstein Decl. (ECF No. 368) at 6 ("No court has ever read Rule 23(e)(3) to apply to fee allocation agreements, to the best of my knowledge.").

[34] The various class firms had several fee-sharing agreements in connection with this case (both with ancillary firms and amongst each other).

[35] *See* Labaton's Objections (ECF No. 434) at 59-69.

Rubenstein Dep. (ECF No. 401-243) at 126:20-22 ("I think that lawyers have the right to rely on the rules, and the rule is the Court can ask for the fee agreements if they want."); *id.* at 198:6-10 ("[Y]ou know, the law is clear here, and the lawyers have every reason to rely on the clearness, the clarity of the law. Rule 23 and Rule 54 could not be more clear . . . .").

In fairness, Labaton's duties should be assessed against the regular practice in this District, where courts rarely order the disclosure of fee-sharing agreements (despite the permissibility of "bare" referral fees in Massachusetts). *See* Rubenstein Rep. (ECF No. 401-242) at 6 (explaining that, as of March 2018, in 127 recent class action settlements, the court did not order the disclosure of fee-sharing agreements in a single one).

And, across jurisdictions, courts are frequently unaware of the full slate of attorneys who worked on a case (and, by extension, the attorneys who may share in the fee award). *Id.* at 10-11 ("[I]n nearly 40% of class action cases, courts are not provided the names of lawyers who worked on the case and who might, on that ground, be in line to receive a portion of the award . . . . [T]he class action experts who drafted Rule 23(h) were well aware that a class action case encompasses cast and crew – and they nonetheless chose the default embodied in Rule 54: that fee allocation agreements need not be disclosed absent judicial request, that the judge must ask for the playbill."). Otherwise stated, neither the procedural rules nor regular practice indicates that agreements to share a class action fee award must be disclosed.

Imposition of a penalty is unduly harsh if it is imposed for violation of an unsourced duty of candor where no rule of professional conduct has been violated, and where conduct has been consistent with the Federal Rules of Civil Procedure and with local practice. And, while the terminology is gentler, reduction of a Firm's fee award for a perceived violation of the duty of

candor is nonetheless penal in nature. Labaton therefore respectfully urges that no such reduction based on a duty of candor should be imposed.[36]

Similarly, Labaton cannot be found to have violated MRPC 3.3(a) or 8.4(c), which govern disclosure obligations. "For there to be an ethical duty for Labaton to disclose to the Court its fee sharing agreement with Chargois & Herron under Mass. R. Prof. C. 3.3(a) or 8.4(c), the ethical duty would have to be based on Labaton *knowingly* engaging in impermissible conduct." Joy Rep. (ECF No. 401-249) at 43. The circumstances here do not support any conclusion that Labaton "knowingly" violated any duty of candor.

In fact, the opposite is true. At the time that Labaton filed its fee petition: the Federal Rules of Civil Procedure did not require disclosure; this District's local rules did not require disclosure; the Court did not have a standing order requiring disclosure; the Court had not ordered disclosure in this case; and no judge in the District of Massachusetts had ordered disclosure of fee agreements in well over a hundred class action cases since 2011 (*see* Rubenstein Rep. (ECF No. 401-242) at 6).

Considering the totality of the circumstances, it was justifiable for Labaton to believe that it was not required to disclose the Chargois Agreement to the Court.[37] As Professor Rubenstein explained, "there is nothing that the lawyers did here that was unusual." Rubenstein Dep. (ECF

[36] While Labaton recognizes that Rule 11 can be one basis upon which violations of the duty of candor may be based, Labaton has never briefed Rule 11 for the Court because the Master did not recommend such a finding against Labaton. If the Court has any thought of entering such a finding, Labaton respectfully requests the opportunity to brief the issue fully and to be heard, as the Court suggested would occur if new issues arose. *See* May 31, 2019 Order at 2 (ECF No. 543).

[37] In addition, the Court did not indicate that counsels' fee-sharing agreements were material to its decision making. Instead, the Court focused on the total fee award, without inquiring into how fees would be divided even among Customer Class Counsel – an approach that was within the Court's discretion and typical in local class action practice. Nov. 2, 2016 Hr'g Tr. (ECF No. 114) at 22-38; *see also* Rubenstein Rep. (ECF No. 401-242) at 6.

No. 401-243) at 104:5-6. Labaton should not be found to have committed an ethical violation based on a random, unclear, or ambiguous interpretation of a rule. *See In re Discipline of an Atty.*, 442 Mass. 660, 668 (2004) ("Due process requires that attorneys, like anyone else, not be subject to laws and rules of potential random application or unclear meaning."); *see also* Joy Rep. (ECF No. 401-249) at 52 ("Courts and ethics authorities do not impose sanctions on or discipline a lawyer or law firm when a legal or ethical duty is unclear.").

Although the best practice may have been for Labaton to make a fulsome disclosure to the Court regarding the Chargois Agreement, its nondisclosure of the agreement did not violate any ethical or procedural rule, nor did it violate a duty of candor.

C. Ethical Rules and Best Practices.

This case concerns two distinct concepts: (1) the rules to which lawyers *must* adhere; and (2) the conduct to which lawyers *should* aspire and strive. The first concerns a threshold, codified in rules such as the MRPC and Rule 11, that represents the line between ethical conduct and sanctionable misconduct. These rules establish the "floor" of permissible behavior. As discussed above, Labaton complied with the applicable rules, and did not engage in unethical misconduct. *See* Special Master's Supplement to his Report and Recommendations and Proposed Partial Resolution of Issues for the Court's Consideration (ECF No. 485) at 5 ("The Special Master finds, however, that the payment itself to Chargois did not violate the rules of professional misconduct or constitute intentional misconduct.").

The second category concerns the spectrum of acceptable behavior above the "floor," ranging from the permissible, on the one hand, to best practices to which every attorney should aspire, on the other. *See* Mass. R. Prof. C., Preamble § 1 ("A lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the

quality of justice."). As the Firm has stated, Labaton's actions fell short of emerging best practices.

Looking forward, Labaton has learned much from this process, and it has made significant internal changes in an effort to ensure that its conduct will comply with best practices. *See, e.g.*, ECF No. 485 at 6-8. This effort has included significant revision of Labaton's practices and policies regarding referral arrangements. *See* Labaton's Memorandum in Support of Proposed Partial Resolution of Issues (ECF No. 510). Additionally, following an extensive historical review of the practices of Labaton Sucharow, Retired Judge Brown concluded that the fee arrangement with Chargois & Herron was "unique and aberrational." Labaton Sucharow's Amended Phase I Report of the Honorable Garrett E. Brown, Jr. (Ret.) (ECF No. 539-1) at 1. Labaton understands that, as a fiduciary for the class, the Court's focus is on Labaton's conduct in this specific case, rather than the reforms. Nevertheless, Labaton respectfully submits that its sincere and meaningful efforts to improve merit consideration by the Court.

VII. Conclusion.

For the foregoing reasons, Labaton respectfully requests that the Court: (1) restore its Order of a 25% fee award, particularly in light of the $4.8 million Customer Class Counsel have paid to fund the Special Master's investigation, and the additional $3.2 million Labaton has incurred in defense costs; (2) reject HLLI's baseless assertion that the Fitzpatrick Study was misrepresented; (3) decline to allocate the fee award among counsel; and (4) conclude that Labaton complied with all applicable ethical duties.

Dated: July 17, 2019

Respectfully submitted,

By: */s/ Joan A. Lukey*

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on July 17, 2019.

/s/ Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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

MOTION BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP FOR LEAVE TO FILE RESPONSE TO THE SUBMISSION OF LABATON SUCHAROW LLP IN RESPONSE TO THE COURT'S JUNE 28, 2019 ORDER

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully seeks leave to file a short response to a new contention made by Labaton Sucharow LLP ("Labaton"), in its most recent filing, regarding Lieff Cabraser's purported "aware[ness]" of the "value" of the work performed (or not performed) by Damon Chargois, Esq. in the above-captioned matter. Although opposition memoranda are ordinarily allowed as a matter of course under the Local Rules, the Court made clear at the June 26, 2019 hearing that it did not anticipate responses to be filed to any of the July 17, 2019 submissions, as it did not expect "new" arguments to be raised as to which the parties had not yet had an opportunity to be heard. *See* Hearing Tr., June 26, 2019, at 252:7-10 (ECF No. 566). The Court accordingly stated that the parties should seek leave to respond to any argument(s) raised in the July 17, 2019 submissions that they consider to be new. *Id*. Because the Submission of Labaton Sucharow, LLP in Response to the Court's June 28, 2019 Order ("Labaton's Submission") includes a new contention to which Lieff Cabraser has not had an opportunity to respond, a responsive brief is appropriate. *Cf. Klein v. MHM Corr. Servs*., C.A. No. 08-11814-MLW, 2010 WL 3245291, *2 (D. Mass. Aug. 16, 2010) (Wolf, *J*.) (permitting surreply in order to respond to new arguments).

Specifically, in its response to Labaton's Submission, Lieff Cabraser anticipates addressing Labaton's new contention, contravened by the record in this matter, that Lieff Cabraser was "aware" that Mr. Chargois "produced no work product and certainly did not engage in work that would approach the value of $4.1 million" in this matter. *See* Labaton's Submission at 18 (ECF No. 579).

Lieff Cabraser believes its response will assist the Court in its analysis of the issues raised in the June 24-26, 2019 hearings, and the instant motion is not interposed for delay or improper purpose. Labaton has not assented to this motion, as it would do so only on condition

that Lieff Cabraser assent to Labaton's further response in support of Labaton's new contention, which Lieff Cabraser has declined to do.

A proposed response is attached hereto as Exhibit A. Should the Court grant Lieff Cabraser leave to file, Lieff Cabraser proposes to file its response on the day following the Court's grant.

WHEREFORE, Lieff Cabraser respectfully seeks leave to file a response to Labaton's submission.

Dated: July 30, 2019

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)

On Monday, July 29, 2019, I caused counsel for the other parties or amici and the Special Master in this case to be informed of this motion. Counsel for Thornton Law LLP, Keller Rohrback LLP, and Zuckerman Spaeder LLP do not oppose this motion. The Special Master, counsel for McTigue Law LLP, State Street, and the Center for Class Action Fairness take no position on this motion. Counsel for Labaton Sucharow LLP would assent to this motion only on condition that Lieff Cabraser assent to Labaton Sucharow LLP's further response on the issue, which Lieff Cabraser declines to do.

/s/ Richard M. Heimann
Richard M. Heimann

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on July 30, 2019 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

[PROPOSED] RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SUBMISSION OF LABATON SUCHAROW LLP IN RESPONSE TO THE COURT'S JUNE 28, 2019 ORDER

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this brief response to a new contention contained in the Submission of Labaton Sucharow, LLP in Response to the Court's June 28, 2019 Order ("Labaton's Submission"), filed July 17, 2019 (ECF No. 579).

In its submission, Labaton contends the following regarding Lieff Cabraser's purported "aware[ness]" of certain facts concerning Damon Chargois, Esq., a lawyer who putatively served as local counsel for Labaton and the client in this matter:

> Although Lieff and Thornton have said that they did not know the full details of Labaton's agreement, all three Customer Class Counsel firms were aware of the $4.1 million fee shared with Chargois (*see* ECF No. 446-9); aware that no disclosure of that sharing was made (appropriately in Labaton's belief) to the Court, the class, or ERISA counsel; and aware that Chargois entered no appearance, submitted no lodestar report, participated in none of the mediations or hearings, produced no work product and certainly did not engage in work that would approach the value of $4.1 million.[1]

Lieff Cabraser submits that these statements, taken together, are misleading as to Lieff Cabraser's "aware[ness]" of facts surrounding Mr. Chargois, and that the last of them—a brand new contention—is completely belied by the record and the Special Master's findings.

It is true that Lieff Cabraser was aware that Mr. Chargois did not make a formal appearance in this case, that his lodestar was not included in the fee petition, and that he did not personally participate in the mediation sessions or at Court hearings. But none of that provided, as Labaton implies, any cause for Lieff Cabraser to suspect that Mr. Chargois was not serving as local counsel for Labaton and the client (Arkansas Teacher Retirement System ("ATRS")) as

[1] Labaton's Submission at 17-18 (ECF No. 579).

Lieff Cabraser was repeatedly assured[2] was the fact. As the testimony of Labaton's own attorneys in this matter attests, it was Labaton's regular practice *not* to cause local counsel (such as Mr. Chargois was represented to be) to appear as counsel of record, or to include their time in lodestar submissions, even where such local counsel performed the work expected of them. *See* Hearing Tr., June 26, 2019 (testimony by Chris Keller) at 67-68, 73-74 (ECF No. 566). Hence there was no reason for Lieff Cabraser to suspect from these facts that anything was amiss regarding Mr. Chargois' repeatedly-described role and putative service as "local counsel."

Further, Labaton's contention that Lieff Cabraser knew that Mr. Chargois "certainly did not engage in work that would approach the value of $4.1 million" is false and directly contradicted by the record, including the testimony of Labaton's own attorneys. At his deposition in 2017, Mr. Keller explained repeatedly that "local counsel" (such as Mr. Chargois was consistently reputed to be to Lieff Cabraser) who are routinely paid up to 20% of Labaton's fee (i) are "very important" and provide real value to Labaton's representation to clients outside of New York; (ii) are expected to do the "heavy lifting" and to be "substantively involved" on the client-facing side; and (iii) are expected to perform "hand-holding" for the client on unpleasant or laborious tasks such as document production, among other things, in exchange for that fee. *See, e.g.,* Deposition of Chris Keller, Oct. 13, 2017, at 43-46, 107-09, 112-14, 230-232 (attached as Ex. 80 to the Special Master's Report and Recommendations) (ECF No. 401-79).[3]

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[2] *See* Exhibit N to the Decl. of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations ("Fineman Decl.") (ECF No. 369-14) (summarizing, *inter alia*, all communications where Lieff Cabraser was copied or participated in this matter, and in which Mr. Chargois was referenced, where he was consistently identified by Labaton or Garrett Bradley as "local counsel"—not merely referring counsel or some similarly less-substantive title). Portions of this previously-filed exhibit are being re-submitted as Exhibit 1 to this brief.

[3] Additional testimony from this same deposition by Mr. Keller similarly spoke to these issues but was either (i) not included in the excerpts that were filed (at ECF No. 401) as exhibits

The kind of role ordinarily played by local counsel, as described above, is entirely consistent with Lieff Cabraser's experience—as amply described in the record (including testimony by Lieff Cabraser's own attorneys in the case). Indeed, the subject of Mr. Chargois's role in the case and Lieff Cabraser's understanding of that role was the subject of extensive inquiry by the Special Master. In response to specific inquiries on this subject by the Special Master, Lieff Cabraser submitted sworn declarations by its attorneys (Robert L. Lieff and Daniel P. Chiplock), along with excerpts of their testimony. *See* Exhibit 1, attached.[4] Among other things, these attorneys testified that it was not at all unusual in Lieff Cabraser's experience for local counsel to earn a small percentage fee (often 5 percent) for performing the client-facing tasks typically expected of local counsel, such as those described by Mr. Keller. *See id.* (specifically, Declaration of Robert L. Lieff at ¶¶ 2-4 and Declaration of Daniel P. Chiplock at ¶¶ 6-11). Mr. Chargois, consistent with Lieff Cabraser's typical experience with local counsel who are actually serving as local counsel, was paid roughly 5.5 percent of the total attorneys' fees in this case.[5]

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to the Special Master's Report and Recommendations, or (ii) redacted because it was not specifically referenced by the Special Master in his Report and Recommendations. To eliminate the need for filing additional documents under seal, we do not reference that other testimony in this brief, but are prepared to submit it if it would be helpful to the Court.

[4] As stated above, Exhibit 1 contains portions of materials that were previously filed as Exhibit N to the Fineman Decl. (ECF No. 369-14).

[5] Lieff Cabraser anticipates that Labaton may seek to justify its contention that Lieff Cabraser must have been "aware" that Mr. Chargois "certainly did not engage in work that would approach the value of $4.1 million" by estimating the number of hours Mr. Chargois would have had to work to justify a payment of that size if his payment were calculated on a straight lodestar (or lodestar times multiplier) basis. But that would be a red herring, because that is simply not how local counsel fees are determined when (as here) they are agreed to and calculated simply as a percentage of the overall fees awarded. *See, e.g.,* Exhibit 1 (Declaration of Daniel P. Chiplock at ¶¶ 10-11). And that, according to the testimony, is entirely consistent with how Labaton has routinely paid its local counsel in other cases. As their own attorneys testified at the June 24-26, 2019 hearings, Labaton has routinely paid local counsel a percentage of Labaton's fee, without submitting local counsel's lodestar to the court in question (or, it would

As the above makes clear, Labaton, according to Mr. Keller, has the highest expectations as to the amount of involvement and interaction between local counsel and the client, including doing all of the "heavy lifting" with respect to the client's role in any given case, handling everything from the client's perspective, including responsibility for document review and production. *Id.* It was on that basis, according to Mr. Keller, that Labaton agreed to pay up to 20 percent of their attorney fees to their local counsel—including (at the outset of their relationship with him) Mr. Chargois. *Id.* at 43-46. Mr. Keller reiterated all of this in his testimony at the hearing on June 26, 2019.[6] And that is how, to Lieff Cabraser, Mr. Chargois' role in the case was consistently represented: *i.e.*, "the local attorney in this matter who has played an important role."[7] This description (among others) was characterized by the Special Master as "materially misleading"[8] to Lieff Cabraser who, as Robert Lieff indicated, relied on

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seem, keeping track of their lodestar). The number of hours worked by local counsel simply did not matter, so long as the local counsel performed the tasks and functions expected of them by Labaton. And that, according to Labaton's testimony, is what made the Chargois situation so vexing to Labaton—Chargois was not doing any of the things expected of a local counsel who gets paid 20 percent of Labaton's fee. *See generally* Hearing Tr., June 26, 2019, at 66-68, 86-88, 97-99 (ECF No. 566). That fact, of course, was unknown to Lieff Cabraser when it agreed to Labaton's proposal that Mr. Chargois' fee be taken "off the top" of the overall fee award to all counsel (resulting in the other Customer Class Counsel jointly shouldering Labaton's obligation to Mr. Chargois).

[6] *See* Hearing Tr., June 26, 2019, at 66-68 (Mr. Keller describing typical local counsel as "handl[ing] all legal work in the environment close to the client," without submitting their lodestar), 86-88 (describing the expectations Labaton initially had for Mr. Chargois for him to act as local counsel), 97-99 (describing Labaton's efforts, by 2015, to negotiate a lower fee for Mr. Chargois in light of his not performing the work (unbeknownst to Lieff Cabraser) that was expected of a local counsel). (ECF No. 566).

[7] *See* Ex. 157 to Special Master's Report & Recommendations (July 8, 2016 email from G. Bradley to R. Lieff, M. Thornton, L. Sucharow, D. Chiplock, C. Keller, E. Belfi, and D. Chargois) (ECF No. 401-156).

[8] *See* Special Master's Report and Recommendations at 109-113, 301-303, 326, 331, 350-351 (summarizing and attaching relevant testimony, communications, and emails on the matter of Lieff Cabraser's knowledge of Mr. Chargois' role in the litigation, and describing Labaton's statements to Lieff Cabraser on the subject of Damon Chargois as "materially misleading.") (ECF Nos. 357 and 401).

Labaton as lead counsel for having "review[ed] the work done by. . . and contributions of local counsel" to ensure that the "fee allocation to Chargois was fair and reasonable and fully supported by his contribution to the case."[9] Indeed, the Special Master found, "when [Labaton] sought to have Lieff . . . share in the obligation to Chargois by splitting equally the $4.1 million payment to him, they told them only a portion of the story, leading them to believe that Chargois was local counsel *and performing work of value in the case*."[10] (emphasis added). At no time during the investigation by the Special Master did Labaton suggest that Lieff Cabraser did not believe that Mr. Chargois had performed the work ordinarily expected of a local counsel. Nor, prior to the investigation, did Labaton as lead counsel suggest to Lieff Cabraser that the $4.1 million it recommended be paid to Chargois was in any sense unjustified based on his work and value as local counsel.

It is accordingly false that Lieff Cabraser was aware, or had any reason to suspect, that Mr. Chargois "certainly did not engage in work that would approach the value of $4.1 million" as Labaton now contends. The record, including the testimony by Labaton's own attorneys in this matter, proves otherwise.

Dated: July 30, 2019

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*

Richard M. Heimann (*pro hac vice*)
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[9] *See* Exhibit 1 (Decl. of Robert L. Lieff at ¶¶ 5-6).

[10] Special Master's Report and Recommendations at 331 (ECF No. 357).

Steven E. Fineman
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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on July 30, 2019 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, 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, Plaintiff, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO MARCH 25, 2018 REQUEST BY SPECIAL MASTER

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully provides this response to the Special Master's request dated March 25, 2018, for "any evidence . . . identif[ied] in the record, or evidence . . . not currently in the record" relating to Lieff Cabraser's "state of mind" as to the issue of Damon Chargois's ("Chargois") role in the State Street litigation prior to September 2017, when details concerning his arrangement with Labaton Sucharow LLP ("Labaton") first came to light. This response is accompanied by sworn declarations by both Robert L. Lieff and Daniel P. Chiplock (the latter of which attaches pertinent emails and documents, including Lieff Cabraser's prior Supplemental Submission, dated November 3, 2017, discussing many of the same issues).

Both Mr. Lieff and Mr. Chiplock were questioned at their depositions about Chargois and what they understood regarding his involvement in the State Street case prior to September 2017. Both testified that they understood that Chargois was local counsel for the Arkansas Fund and for Labaton as lead counsel. Although neither directly communicated with Chargois, they were informed that he had played an important role in the litigation and they assumed he had provided legal services that were of value to the client and therefore to the class. They were familiar with the role of local counsel in cases like State Street, and understood that Chargois's role was similar to that of the Ohio funds' local counsel in the BNY Mellon litigation. Neither thought, or had reason to believe, that fees of 4 to 5.5 percent to local counsel were unreasonable in view of what they had been told and what they understood about Chargois's role in the case. The testimony at deposition included the following:

	Robert Lieff	**pages**
Q	And did he (Chargois) fit the description of what you think of as a "local counsel" based on what you knew about him?	58-59

A 2013-15? It was so represented, yes, by Garrett Bradley that he was local counsel, and it sounded like he was taking care of the situation in Arkansas as typically a local counsel would do. So that was my understanding.

Q Did you have any concerns about—beyond the financial aspect which appears to you to be non-problematic—that there might be other issues, ethical issues or client issues or class issues that the ERISA attorneys might suffer? 60-61
A Again, it's hard to answer this without reference to the timeframe. Back in the early days when I first heard about it, as I now know it was April 2013 I believe, and then again 2015, I didn't think too much about it because we had a very similar situation in the companion—I call it the companion but in the Bank of New York we had local counsel in Ohio dealing with the fund. I thought this was local counsel in Arkansas dealing with the fund.

Q Special Master: And the Labaton folks at no time told you anything more about the larger context of the relationship with Mr. Chargois? 66
A No.

Q Special Master: What was your understanding of what the relationship was between Mr. Chargois and Labaton? 67
A I thought he was local counsel for Labaton in this particular case. I assumed dealing with the Arkansas Fund because that's what local counsel will do. That was my understanding.

Q Special Master: We don't know how to characterize this, and we are asking all the witnesses in their experience if they know how to characterize it. Mr. Sucharow did characterize it as a forwarding fee arrangement. 78-80
A I saw that. I would say, first of all, we have to be talking about class actions only.
Q Special Master: Yes.
A That's what we are talking about. And in the context of class actions there is no such thing as a referral lawyer. You cannot refer a class action and be compensated. It just—it's not the way it works . . . Likewise, forwarding fee. I don't know what that means. But if it is a referral fee, there is no such thing in class actions.

Local counsel there definitely is, and there is no question about the use of local counsel, but you choose local counsel in each of your cases. Now that does not mean that if it is not the same counsel—I know, for example, we have represented funds in Ohio, and we have a law firm in Columbus, Ohio chosen by the attorney general, Mike DeWine, of Ohio, and he wants them to be our local counsel, and they work, and they get paid, and we get time records.

Q Special Master: But what was the basis of your firm's agreement to share in the payment then? 92-93

A Lead counsel said to the other two class firms that we have a local counsel in Arkansas helping us in Arkansas—later saying I think they were doing a good job or something—and that we have to compensate them for what they have done.
Q Special Master: And based on that—
A —I agreed
Q Special Master: —you agreed.
A Very common to do this, yeah.

Q Special Master: Did 5.5 percent seem to be a large number for a local counsel of 75 million dollars? 93-94
A I would have to look up, for example, what our local counsel in the Bank of New York case got, what percentage. I do not remember. But it does not seem on the face of it to be unusual. I think perhaps our local counsel got something similar to that, but I would have too look it up.
Q Special Master: Would it depend on how much work the local counsel did? Among other factors.
A Yes. In the Bank of New York case it was easy because we had their time records. And **we were lead counsel**. **When I am lead counsel, I look at this differently than when I am not lead counsel.** [Emphasis supplied].

Daniel Chiplock

Q Did you recall any conversation aside from the name Damon Chargois that referenced a referring attorney? 101-103
A No. And with respect to Mr. Chargois, he was never characterized to me as a referring attorney.
Q Special Master: How was he characterized to you?
A Local counsel. He was always described to me as—when I say "always" I mean there were maybe 5 or 6 emails during the life of this case on this issue that I can recall. He was always described as local counsel.
Q And what does that mean to you that someone is local counsel?
A Well, it can mean a few things. I can tell you what I thought it must have meant here. What I assumed when I was told local counsel—and I think there was another email from Garrett that said he played an important role in the case. So it was—it is not at all atypical in cases like this for an institutional plaintiff, especially a pension fund, to want there to be like a hometown lawyer or a local counsel who is close to them, who is involved in the case somehow. I can give you an example. In the BNY Mellon case we represented Ohio pension plans. The Ohio AG selected an Ohio counsel to work with us, we had no—we had no input into that. And that was their choice. They wanted to have what they called a local counsel, even though the case was pending in New York, to interface with them, to give them comfort, to respond to questions and maybe do, you know, one—run some things down on the local side on the client-facing side, you know, while we as national counsel are involved in the main part of the litigation. So we had local counsel in the BNY Mellon case who actually did a fair amount of interaction with the Ohio AG's office.

Q Do you recall what the payment terms were for Mr. Chargois? 106
A Ultimately?
Q Both historically and ultimately in State Street?
A Well, I think initially how it was characterized to us was that he was local counsel and that he was entitled to twenty percent of Labaton's fee, and the proposal by Garrett was that it instead be taken off the top of whatever the total fee turns out to be. So those were the terms as they were described in 2013 and then in 2015 and then again in 2016 I think. And then ultimately he was paid five and a half percent of the total fee.

Q Special Master: At 2015 when you became cognizant that there was going to be a fee—a payment to Mr. Chargois—were you advised by anyone at Labaton of the history with Mr. Chargois—Labaton's history with Mr. Chargois? 109-110
A No. What was always represented to us—at least the communications that I am copied on and that I took part in—were that he was a local counsel, and sometimes he is described as local counsel for Arkansas or Arkansas local counsel. And sometimes he is described as local counsel for Labaton.
Q Special Master: And what did you take that to mean?
A As I said earlier, I assumed—you know, between those representations and between this representation here (indicating) that he performed some kind of an important role, that he was some type of local counsel of the type that I described a little while ago.

Q But, in any event, you do recall being informed as to the arrangement, even though it was not solid or completely defined, between Labaton and consequently by the customer class firms and Mr. Chargois. 115-116
A I recall his—the description of him that was offered in that email which was I think the—the words they used were that he assisted Labaton in matters pertaining to Arkansas.
Q And did you interpret that description of he assisted as meaning he took an actual active role in those cases?
A I actually assumed that, yes. That it was some kind of a role, some kind of an assistance offered by a local counsel. And for that assumption I based it on my own experience, my own recent experience in the BNY Mellon case.

Dated: April 5, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	)	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	)	No. 11-cv-12049 MLW
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 ROBERT L. LIEFF

Robert L. Lieff, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am Of Counsel to the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration to further elaborate on my prior testimony concerning my understanding and belief as to the role of "local counsel" in the State Street litigation and the attorney's fees allocated to local counsel.

2. During my deposition I was asked about the size of the fee for Mr. Chargois, local counsel to Labaton and to the Arkansas Fund.

> Q. Special Master: did 5.5% seem to be a large number for a local counsel of seventy-five million dollars?
>
> A. I would have to look up, for example, what our local counsel in the Bank of New York case got, what percentage. I do not remember. But it does not seem on the face of it to be unusual. I think perhaps our local counsel got something similar to that, but I would have to look it up.
>
> Q. Special Master: Would it depend on how much work the local counsel did? Among other factors.
>
> A. Yes. In the Bank of New York case it was easy because we had their time records. And we were lead counsel. When I am lead counsel I look at this differently than when I am not lead counsel. (93:14-94:9)

3. I have now confirmed that my recollection regarding the magnitude of the fee to our local counsel in the BNY Mellon case was correct. The court in the BNY Mellon case awarded fees to our local counsel of $3,154,291, or just slightly less than 4% of the total attorney fees awarded in the case.

4. I would have been aware of the fee request in the BNY Mellon case and the amount we were requesting for local counsel by no later than mid-2015 and of the actual award by the court as of September 2015. So I would clearly have had that in mind contemporaneously with the discussions in 2015 and again in 2016 regarding the fee allocation for local counsel in the State Street case.

5. In my answer to the Special Master's question, I remarked that I look at these types of matters, fee allocations among class counsel, differently when I am lead counsel. When Lieff Cabraser is lead counsel in class litigation we assume responsibility for assessing the contributions of subordinate counsel in connection with allocation of fees among counsel and with respect to fee requests. As lead counsel we do our best to make sure that fees are fairly allocated according to the value of the contributions to the class and that no fee allocation or fee request is unreasonable, either because it is too large or too small. Invariably we also share the information regarding fee allocation or fee requests with the court-appointed class representative(s) to obtain their approval of the allocation or request.

6. The Labaton firm has extensive experience in class litigation, particularly in the securities field. They have served as lead or co-lead counsel in scores of class action cases. I had every reason to believe, and did believe, that they had engaged in the process of reviewing the work done by local counsel and the contributions of local counsel, and that they and their client, the Arkansas Fund, were of the view that the fee allocation to Chargois was fair and reasonable and fully supported by his contribution to the case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2018.

Robert L. Lieff

1533142.1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	)	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	)	No. 11-cv-12049 MLW
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DECLARATION OF DANIEL P. CHIPLOCK

Daniel P. Chiplock, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am a partner with the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration to further elaborate on my prior testimony concerning my understanding and belief, at all times prior to September 2017, as to Chargois & Herron LLP's role as reputed "local counsel" in the State Street litigation, and the basis for that understanding and belief.

2. For my declaration, to avoid repetition, I specifically refer to and incorporate the Response by Lieff Cabraser Heimann & Bernstein LLP to [the] Special Master's September 7, 2017 Request for Supplemental Submission, dated November 3, 2017 ("the Supplemental Submission")[1], and the citations to the record therein.[2]

3. As detailed in the Supplemental Submission and my prior deposition testimony dated September 8, 2017 ("Sept. 8 Deposition"), in the few communications where Lieff Cabraser attorneys were copied or participated that concerned Damon Chargois, he was consistently referred to by attorneys outside of Lieff Cabraser as "local counsel" for Labaton Sucharow LLP ("Labaton") and/or the client, the Arkansas Teacher Retirement System ("ATRS").[3] *See* Exhibits A and B.

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[1] The Supplemental Submission is attached hereto as Exhibit A, for ease of reference.

[2] All emails referenced in the Supplemental Submission, in addition to several others relevant to the issue of Lieff Cabraser's mindset, are attached collectively as Exhibit B.

[3] The Ethical Report for Special Master Gerald E. Rosen by Prof. Stephen Gillers ("Ethical Report"), dated February 23, 2018, refers to an "original cost-sharing agreement" mentioning Mr. Chargois that purportedly was "circulated—but never executed—among Customer Class Counsel in 2011," but Lieff Cabraser has no record of its attorneys ever having received this document. *See* Ethical Report, p. 42 and n. 47. Indeed, the testimony cited in n. 47 of the Ethical Report appears to confirm that this document was not "circulated . . . among Customer Class Counsel" but instead was a draft that was circulated solely between Christopher Keller (of Labaton) and Garrett Bradley (of Thornton Law Firm). The first mention that Lieff Cabraser can find of Mr. Chargois in any communication involving Lieff Cabraser is the April 2013 email string described in paragraph 2 of the Supplemental Submission.

4. Lieff Cabraser's attorneys referred to Mr. Chargois in kind as "local counsel" in the handful of communications they exchanged with co-counsel about Mr. Chargois and in internal Lieff Cabraser communications. Co-counsel never corrected Lieff Cabraser's attorneys, nor suggested to Lieff Cabraser's attorneys that Mr. Chargois was anything other than "local counsel." *See* Exhibit B.

5. Lieff Cabraser was not lead counsel in the State Street litigation, and had no direct client relationship with ATRS. Indeed, the Lieff Cabraser attorneys did not interact with George Hopkins (the chief representative for ATRS in the litigation) at all during the State Street litigation, outside of the mediation sessions that Mr. Hopkins personally attended. Lieff Cabraser's attorneys also never spoke with Mr. Chargois to my knowledge, and had no interactions with him outside of a few group emails. For its understanding of Mr. Chargois' role and function in the State Street litigation, Lieff Cabraser accordingly relied on the representations by Labaton, who was lead counsel, and Mr. Garrett Bradley, who prior to the conclusion of the State Street litigation was Of Counsel to Labaton, and on Mr. Chargois' confirmations by email (copied to both Bob Lieff and myself) of his role as local counsel and his important role in the case. (For the latter, *see* Chargois' emails of April 25, 2013 [LBS025771] *and* July 8, 2016 [LCHB-0053544-45], contained in Exhibit B).

6. During the life of the State Street litigation, Lieff Cabraser had no visibility into any work being performed by Mr. Chargois. But this was not unusual for a local counsel working in tandem with a lead counsel, in my recent experience. In the BNY Mellon litigation (where Lieff Cabraser did serve as lead counsel), Lieff Cabraser worked with an Ohio-based local counsel for its Ohio-based public pension fund clients. That local counsel (who was selected by the Ohio Attorney General) communicated directly and virtually exclusively with Lieff Cabraser insofar as his work assignments were concerned. His work was focused primarily

on assisting Lieff Cabraser in guiding the Ohio pension fund clients through their responses to defendants' discovery requests, as well as helping to defend their depositions. This was but one distinct part of a very large and complex litigation effort (which involved taking more than 100 depositions overall, including scores of depositions of defendants and third parties all over the globe), which involved many law firms. Throughout this, the Ohio local counsel's principal focus remained serving the Ohio public pension funds' individual discovery and litigation needs (with some document review assignments as well). As such, he and his firm had very little (if any) contact with Lieff Cabraser's co-lead counsel in that case (Kessler Topaz Meltzer & Check LLP), and virtually none with the other law firms who were not serving in a co-lead capacity (which would have been analogous to Lieff Cabraser's position in the State Street litigation).

7. The total attorneys' fees awarded in the BNY Mellon litigation were $83,750,000, which equated to 25% of the $335 million settlement fund in that case. Ohio local counsel was ultimately awarded approximately 4% of the total fees by the court in that case, which was certainly within the range of fees commonly paid or awarded (in Lieff Cabraser's experience) to local counsel who have performed services for the class representatives or lead counsel and thus to the class as a whole.

8. The $335 million settlement in the BNY Mellon litigation was reached in principle by March 2015, and preliminarily approved in late April 2015. Notice to the class was sent shortly thereafter, and by then it was understood and communicated to class members that counsel would apply for approximately a 25% attorneys' fee. By the time the final settlement approval and fee petitions were filed in August 2015, the level of fee we would be requesting for Ohio local counsel in the BNY Mellon case was established – approximately 4%.

9. Accordingly, at about the same time that I was being apprised by co-counsel of Mr. Chargois' role as "local counsel" in the State Street litigation, and the contours of his fee

interest were being discussed, I was in the process of finalizing and requesting a proposed fee allocation in the BNY Mellon litigation that included a fee percentage for local counsel that was not substantially different from what was being discussed for Mr. Chargois. That proposed fee percentage did not strike me as outside of the norm for a local counsel such as Mr. Chargois had been described to me. Nor did I view it as unusual that I was not privy to the specific work Mr. Chargois had performed as local counsel; as stated above, the various non-lead counsel in BNY Mellon, to my knowledge, had little or no substantive direct contact with Ohio local counsel in that case.

10. Based on lead counsel's descriptions, I understood during the State Street litigation that ATRS was gathering and producing a fairly substantial number of documents in response to defendant's requests. All told, according to lead counsel, ATRS produced more than 73,000 pages of documents,[4] an undertaking in which Lieff Cabraser was not directly involved. I also understood that prior to Lieff Cabraser being engaged as additional counsel for the proposed class, ATRS had spent substantial time investigating, with the assistance of its counsel, the underlying allegations against State Street (which were first made public by the October 2009 unsealing of a whistleblower lawsuit in California) before finally filing a lawsuit in 2011, and that this time period included one or more meetings with State Street representatives (none of which included my firm). It was my belief, informed both by (i) co-counsel's descriptions of Mr. Chargois as "local counsel" who was "assisting" Labaton in matters pertaining to ATRS and had performed "an important role" in the litigation, and (ii) my firm's recent experience in BNY Mellon, that Mr. Chargois had actually assisted and played an important role in these efforts. It was also my belief, for the same reasons, that Mr. Chargois' involvement in these efforts (and in

[4] *See* Decl. of Lawrence A. Sucharow, ¶ 97, Dkt. No. 104 (filed 9/15/16).

the litigation overall) was at ATRS' behest, and certainly (at a minimum) with its complete knowledge and consent. I assumed that ATRS and lead counsel in the State Street litigation regarded the proposed fee percentage for Mr. Chargois to be reasonable and justified by his value to the client, and therefore to the class, based on their knowledge of his work and contributions.

11. My belief during the 2015-2016 timeframe as to the apparent reasonableness of Mr. Chargois' fee interest as "local counsel" was further informed by historical experience at my firm. Over the years, for instance, Lieff Cabraser has been asked to serve as local counsel in a number of securities class actions. In some other types of class actions, including cases involving consumer protection statutes such as the Telephone Consumer Protection Act of 1991 ("TCPA"), Lieff Cabraser has requested counsel in the forum jurisdiction to act as our local counsel. In both circumstances, the local counsel (whether it is us or another firm) has often been offered the option of a fee arrangement predicated on lodestar or based on a percentage. When on a percentage basis, the fee has typically ranged from a low of 5% to a high of 10% of the total fees awarded in class cases. In the two most recent securities class cases in which Lieff Cabraser agreed to serve as local counsel, for instance, the fee share upon which Lieff Cabraser agreed at the outset with putative lead class counsel was 10% of the total fees awarded. While these cases have involved local counsel in the forum court, in contrast with Mr. Chargois' situation in the State Street litigation, this history comprises another baseline for commonly accepted percentage fee arrangements, in my experience, for local counsel in class litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2018.

Daniel P. Chiplock

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J. June 25, 2020

In the February 27, 2020 Memorandum and Order the court directed the Master to consult Customer Class Counsel,[1] ERISA Counsel,[2] and the Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF") concerning specified issues relating to the implementation of that Order and to report to the court concerning those discussions. Dkt. No. 590 at 155-56 (the "February 27, 2020 Order"). The Master has done so. See Dkt. Nos. 599, 606, 607. Lieff (Dkt. Nos. 595, 600, 603), Labaton and Thornton (Dkt. No. 595), and CCAF (Dkt. Nos. 592, 592-1, 610) have also addressed some of the relevant issues.

In the February 27, 2020 Order the court stated that CCAF's submissions and arguments at hearings were often very helpful and that it would consider ordering that CCAF be compensated for its work if it had the authority to do so. See Dkt. No. 590 at 12 & n.3. CCAF has moved for an extension of time to file a motion for attorneys' fees under Federal Rule of Civil Procedure 54(d). See Dkt. Nos. 592, 592-1. CCAF has also renewed its request to be appointed guardian ad litem for the class in order to represent its interests in opposing Lieff's appeal concerning the amount it

[1] "Customer Class Counsel" are Labaton Sucharow LLP ("Labaton"), The Thornton Law Firm ("Thornton"), and Lieff Cabraser Heimann & Bernstein LLP ("Lieff").

[2] "ERISA Counsel" are McTigue Law LLP, Zuckerman Spaeder LLP, and Keller Rohrbach LLP.

was awarded in the February 27, 2020 Order and related issues. See Dkt. Nos. 592-1, 610. Customer Class Counsel oppose CCAF's request for an extension of time to move for an award of attorneys' fees. See Dkt. No. 595. They have previously opposed CCAF's requests to be appointed guardian ad litem for the class. The court assumes that they continue to do so.

The court finds that there is good cause to grant CCAF's motion for an extension of time to file a motion for an award of attorneys' fees. CCAF's work in this case may not be concluded. Among other things, the court may still appoint CCAF as guardian ad litem to represent the interests of the class as an adversary in Lieff's appeal. In addition, it is possible that the First Circuit will, in any event, allow CCAF to participate in the appeal as amicus curiae. The court finds that it is most appropriate to wait to decide whether it has the authority to make an award of attorneys' fees to CCAF and, if so, whether to do so until CCAF's role is finally determined and concluded. Among other things, reserving judgment will assure that the court has all of the information necessary to decide how much to award to CCAF if it finds that an award is permissible and appropriate.

The Master has made a recommendation concerning the distribution of the remaining settlement funds owed to the class and the redistribution of funds previously awarded to Customer Class Counsel in accordance with the February 27, 2020 Order, see

Dkt. No. 599, and has proposed modifications to his original recommendation, see Dkt. No. 606. The Master proposes that three partial payments be made on a certain schedule, and that Labaton be allowed to continue to serve as Lead Counsel for the limited purpose of issues relating to the administration and distribution of the settlement fund. There are no objections to the general method of distribution that the Master proposes. See Dkt. Nos. 599, 606. In any event, the court finds that the Master's proposal is reasonable in principle. However, due to the passage of time, the Master may now wish to propose that the first distribution be made later than July 31, 2020 and, if necessary, to modify the proposed dates for the second and third distributions as well.

Lieff does not object to paying into the existing escrow fund for the class the $1,139,457 that is at issue in its appeal. See Dkt. Nos. 600, 603. The court now finds that is appropriate.

The Master recommends that the $1,139,457 to be escrowed be evenly distributed in the second and third distributions. Dkt. No. 599 at 5; Dkt. No. 606 at 4. The Master also recommends that, if Lieff prevails on appeal, Labaton and Thornton, rather than the class, be ordered to bear the cost of the $1,139,457 that would be returned to Lieff. Id. Lieff asserts that charging Labaton and Thornton may not be appropriate or feasible if the funds have been distributed to the class before it prevails on appeal. See Dkt. No. 600.

The court finds that it is most appropriate to defer the distribution of Lieff's escrowed funds until the third distribution. If Lieff's appeal is denied, the issues regarding the $1,139,457 will be moot. If Lieff's appeal is not decided 45 days before the third distribution is scheduled to be made, the Master, Lieff, and the other Customer Class Counsel should seek guidance from the court concerning the funds escrowed by Lieff.

In response to the court's request, the Master states that the court must provide the class notice of the February 27, 2020 Order and an opportunity to object to the $60,000,000 fee award. See Dkt. No. 599 at 6-7. The Master reports that several counsel agree that the class should be given notice and an opportunity to object to the February 27, 2020 Order. Id. at 6, n.15. CCAF also agrees that such notice should be given to the class. See Dkt. No. 610 at 1-4. However, Lieff contends that another notice is neither required nor appropriate because the settlement class will receive an additional benefit as a result of the February 27, 2020 Order. See Dkt. No. 600 at 1-2 (citing David F. Herr, Annotated Manual for Complex Litigation §21.61 (4th ed. 2019) and cases for the proposition that new notice is necessary only if there is a substantial change that is adverse to the interests of the class).

Regardless of whether notice to the class of the February 27, 2020 Order is required, the court finds that it is most appropriate to provide it. As noted in the February 27, 2020 Order, in a March

31, 2017 Order (Dkt. No. 192), the court stated that it would provide class members notice of the Master's Report and Recommendation, and an opportunity to object and comment on it. See Dkt. No. 590 at 155. As it was uncertain whether and to what extent the Master's contested recommended resolution would be adopted, the court deferred giving that notice. It is now timely to do so. Contrary to Lieff's suggestion, notice may not be a meaningless gesture. As the court wrote in the February 27, 2020 Order:

> As [the February 27, 2020 Order] provides more than an additional $14,000,000 to the class, if notice is given there may be no objection to it. However, in view of the fact that the award of 20% of the common fund is above the median and mean for settlements between $100,000,000 and $500,000,000 reported in [Brian T. Fitzpatrick's "An Empirical Study of Class Action Settlements and Their Fee Awards," 7 J. Empirical Legal Stud. 811 (2010)], it is possible that, in view of the court's findings, an objector may assert that the award is too generous.

Dkt. No. 590 at 155, n.32.

The Master has submitted a proposed form of notice. See Dkt. No. 606-3. It must now be revised to provide a new description of the plan of distribution consistent with this Memorandum and Order and any revised schedule for payments that the Master may now propose, to provide class members 45 days to object, and to provide for a hearing, by videoconference if necessary, 14 days after that date.

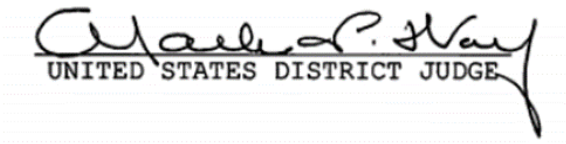
In view of the foregoing, it is hereby ORDERED that:

1. CCAF's Motion for an Extension of Time to File Motion for Attorneys' Fees Award (Dkt. No. 592-1) is ALLOWED.

2. By July 7, 2020, the Master shall confer with Customer Class Counsel and ERISA counsel, and submit:

a. A motion for approval of the plan for distribution he proposes and, in an editable word-processing format, a proposed Order for the distribution of the remainder of the settlement fund that is consistent with this Memorandum and Order; and

b. A proposed notice to the class, in an editable word-processing format, that is consistent with this Memorandum and Order and the Master's proposed plan of distribution.



United States Court of Appeals
For the First Circuit

No. 20-1365

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN,

Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC,

Defendants.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP,

Interested Party - Appellant,

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER RORHBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP,

Interested Parties - Appellees.

ORDER OF COURT

Entered: July 7, 2020

This is an appeal from the February 27, 2020 Memorandum and Order of the district court concerning the conduct of certain law firms and modifying the previously-approved award of attorney fees. Upon review, it appears that this court may not have jurisdiction to consider the appeal because the order in question may not be final. 28 U.S.C. § 1291. Accordingly, the parties to the appeal are ordered to show cause within thirty days of the date of this order why this appeal should not be dismissed for lack of jurisdiction. The briefing schedule is stayed pending this court's receipt of responses.

By the Court:

Maria R. Hamilton, Clerk

cc:
Brian T. Kelly
Beth E. Bookwalter
Joan A. Lukey
Catherine M. Campbell
William Henry Paine
Michael A. Lesser
David J. Goldsmith
Renee J. Bushey
Garrett James Bradley
Daniel W. Halston
William F. Sinnott
Stuart M. Glass
Justin Joseph Wolosz
Daniel P. Chiplock
Steven E. Fineman
Joshua Charles Honig Sharp
Michael R. Smith
Lynn Lincoln Sarko
Anna St. John
Jonathan D. Selbin
Richard M. Heimann
Evan R. Hoffman
Robert L. Lieff
Laura R. Gerber
Theodore H. Frank
Carl S. Kravitz
J. Brian McTigue
James A. Moore
Elizabeth J. McEvoy
Samuel Issacharoff

United States Court of Appeals
For the First Circuit

No. 20-1365

ARKANSAS TEACHER RETIREMENT SYSTEM, on Behalf of Itself and All Others Similarly Situated; JAMES PEHOUSHEK-STANGELAND; ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN,

Plaintiffs,

v.

STATE STREET CORPORATION; STATE STREET BANK AND TRUST COMPANY; STATE STREET GLOBAL MARKETS, LLC,

Defendants.

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP,

Interested Party - Appellant,

LABATON SUCHAROW LLP; THORNTON LAW FIRM LLP; KELLER RORHBACK L.L.P.; MCTIGUE LAW LLP; ZUCKERMAN SPAEDER LLP,

Interested Parties - Appellees.

Before

Torruella, Lynch and Thompson,
Circuit Judges.

JUDGMENT

Entered: September 3, 2020

Appellant Lieff Cabraser Heimann & Bernstein, LLP, seeks review of the district court's February 27 Memorandum and Order in which the court reduced a previously approved fee award, while contemplating further proceedings. It appearing that the order lacked finality, this court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction. Lieff has responded, explaining that, at the time the order issued, it believed that the order was final, despite the fact that the order expressly contemplated further proceedings. Nonetheless, Lieff

appears to agree that the jurisdictional question is ambiguous. And, we note that the district court appears to have simultaneously treated its order as both final and non-final; that is, the court sought to retain counsel to file a brief in this court in support of its order and at the same time has issued several post-fee orders, the cumulative effect of which may well be to alter the fee ruling. In light of the latter point and having reviewed the record and Lieff's submission, we dismiss the appeal without prejudice for lack of an appealable order. See Garcia-Rubiera v. Fortuno, 727 F.3d 102, 116 (1st Cir. 2013) ("[a] ruling on attorneys' fees is definitive 'where a dollar-specific order for attorneys' fees has been entered and further action on the main case will not require revisiting that order.'" (Citing In re Nineteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 609 n.10 (1st Cir. 1992))).

By the Court:

Maria R. Hamilton, Clerk

cc:
Brian T. Kelly
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Joan A. Lukey
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David J. Goldsmith
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J. Brian McTigue
James A. Moore
Elizabeth J. McEvoy
Samuel Issacharoff

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

NOTICE OF APPEAL

PLEASE TAKE NOTICE that pursuant to FED. R. APP. P. 4(a)(1)(A), Lieff Cabraser Heimann & Bernstein, LLP, in its capacity as additional Counsel for the Settlement Class in the above-captioned actions (the "Actions"), hereby appeals to the United States Court of Appeals for the First Circuit from: the Court's January 19, 2021 Final Judgment Concerning Attorneys' Fees and Service Awards [Docket No. 663]; and any preceding, related, or underlying orders, rulings, findings, and conclusions including (1) the Court's February 27, 2020 Memorandum and Order [Docket No. 590] and Exhibit A [Docket No. 590-1] and (2) the Court's January 19, 2021 Memorandum and Order [Docket No. 662] and Exhibit 1 [Docket No. 662-1].

Dated: January 26, 2021

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on January 26, 2021 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM IN SUPPORT OF
MOTION OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
FOR PARTIAL STAY OF EXECUTION ON JUDGMENT, PENDING APPEAL

2111050.10

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Rules

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser" or "the Firm") respectfully submits this memorandum of law in support of its motion for a partial stay, pending appeal, of execution on the Final Judgment Concerning Attorneys' Fees and Service Awards entered by the Court on January 19, 2021 (the "Final Judgment," ECF No. 663) and the accompanying Memorandum and Order and Second Revised Payment Plan (the "Second Revised Plan") entered on the same date (ECF Nos. 662 and 662-1) (collectively, the "Fee Order").

INTRODUCTION

Lieff Cabraser seeks a stay, pending appeal, of the Fee Order insofar as it directs Lieff Cabraser to make payments that are to be distributed to the Class and others without waiting for Lieff Cabraser's appeal to be decided by the First Circuit. As discussed below, Lieff Cabraser will be irreparably injured by full and immediate execution of the Order absent a stay, because funds will not be recoverable from the Class once they have been distributed, effectively mooting Lieff Cabraser's appeal. As detailed in the brief filed in support of its previous appeal (which Lieff Cabraser intends to re-file in large substance), Lieff Cabraser's appeal presents more than a substantial case on the merits, involving serious legal questions.

No appellee came forward in response to Lieff Cabraser's prior appeal. There is therefore no known appellee who would be harmed by the requested stay. Further, any potential harm to any other interested party (including the Class) is minimal to non-existent. This much is evidenced by the Court's own previous order concerning Class distributions, which specifically provided for Lieff Cabraser's escrowed funds to be withheld from the first proposed distribution to the Class, and contemplated withholding those funds from the second proposed distribution as well, provided Lieff Cabraser's appeal was still pending. The Court's concerns about the cost-effectiveness of distributing Lieff Cabraser's escrowed funds to the Class after an appeal has been adjudicated can be allayed under the realities of this case. The complete distribution of all

settlement funds will likely take years, and there will be re-allocations and additional distributions to class members independent of the issues presently before this Court. In short, it is highly unlikely that Lieff Cabraser's escrowed funds would be all that is left to distribute to the Class once Lieff Cabraser's appeal has been decided. And even if they were, the balance of equities would still strongly favor holding the funds in escrow while the appeal is pending.

Only with the Second Payment Plan has a new potential "harm" to an interested party materialized (and, though not material to the instant motion, from the appeal itself)—namely, a reduced total distribution, and by extension a reduced fee award (in the amount of $569,728.50), to ERISA Counsel.[1] However, this "harm" from staying distributions of Lieff Cabraser's funds under the Second Payment Plan to ERISA Counsel (split among three law firms) will be only temporary if Lieff Cabraser does not prevail in its appeal. Whereas if Lieff Cabraser does prevail, and the distribution of its funds is not stayed in the interim, Lieff Cabraser will be left without a clear remedy as to the funds distributed to ERISA Counsel, and without any remedy at all as to those distributed to the Class. The balance of equities thus clearly favors granting the stay requested by Lieff Cabraser pending resolution of its appeal.

Lieff Cabraser's request for a stay pending appeal thus readily satisfies the factors traditionally considered in this circuit (and by this Court specifically) on such motions, and should be granted.

[1] "ERISA Counsel" refers to Keller Rohrback, LLP, Zuckerman Spaeder LLP, and McTigue Law LLP.

SUMMARY BACKGROUND

On January 19, 2021, the Court entered the Fee Order, which mandates that Lieff Cabraser deposit a total of $1,139,457[2] into escrow for payment, along with payments to be made by Labaton Sucharow LLP ("Labaton") and the Thornton Law Firm, LLP ("TLF"),[3] to the Class and to ERISA Counsel. Contrary to the Court's prior order, the Fee Order mandates (absent a stay) the payments made by Lieff Cabraser be fully distributed to the Class and to ERISA Counsel notwithstanding the pendency of the appeal by Lieff Cabraser that could result in a reversal of the Court's findings as to, and any financial penalties imposed on, Lieff Cabraser from the Court's 2020 Fee Order.[4] Lieff Cabraser has previously stated, and the Court has acknowledged, its intention to appeal the 2020 Fee Order on essentially the same grounds it asserted previously.[5]

The Fee Order differs in material part from the payment and distribution schedule approved by the Court six months ago, which provided that any escrowed payment made by Lieff Cabraser not be distributed as part of the first distribution to the Class and ERISA Counsel in January 2021, in light of Lieff Cabraser's (then-pending) appeal.[6] The Prior Payment Plan

[2] According to the Fee Order, Lieff Cabraser's total is to be split into two payments of $569,728.50 each, to be made on January 27 and either March 3 or March 30, 2021, respectively. *See* Mem. and Order, ECF No. 662, at 20 *and* Second Payment Plan, ECF No. 662-1, at 4. Lieff Cabraser respectfully requests clarification from the Court as to whether the date for the second escrow payment is intended to be March 3 or March 30, 2021.

[3] Lieff Cabraser, Labaton and TLF are referred to collectively herein as "Customer Class Counsel."

[4] The "2020 Fee Order" refers to the February 27, 2020 Memorandum and Order [ECF No. 590] and Exhibit A [ECF No. 590-1].

[5] *See* Memorandum and Order, January 19, 2021 [ECF No. 662] at 21-22. Lieff Cabraser filed its new Notice of Appeal on January 26, 2021. *See* ECF No. 664.

[6] *See* Memorandum and Order, July 9, 2020 [ECF No. 619] *and* Exhibit 2 attached thereto [ECF No. 619-2] (the "Prior Payment Plan") at 3 (specifically withholding Lieff Cabraser's first escrowed payment of $569,728.50 from the contemplated January 15, 2021 distribution of funds to the Class and to ERISA Counsel).

also required the parties to seek "guidance from the Court" concerning Lieff Cabraser's escrowed funds forty-five days before the second distribution to the Class and ERISA Counsel was to be made.[7] Under the terms of the Prior Payment Plan, the deadline for seeking such guidance would have fallen on March 16, 2021, with the second scheduled distribution taking place on April 30, 2021.[8] The Prior Payment Plan did not presuppose the inclusion of Lieff Cabraser's escrowed funds in the second distribution, either, stating only that the Class would receive "at least" those funds that had been deposited by the other (non-appealing) Class Counsel, assuming Lieff Cabraser's appeal was still pending, with ERISA Counsel's payment not being affected one way or the other.[9]

As stated above, the Prior Payment Plan was entered while the 2020 Fee Order was under appeal. The first Notice of Appeal, filed on March 26, 2020 (ECF No. 596), stated that Lieff Cabraser was appealing the 2020 Fee Order, which, *inter alia*, "(i) awarded and allocated settlement counsel's fees and expenses out of the common settlement fund in the Actions; and (ii) found a violation of FED. R. CIV. P. 11(b)." *See* ECF No. 596.

Specifically, Lieff Cabraser's prior appeal challenged the Court's findings that the Firm (i) "violated Federal Rule of Civil Procedure 11(b) by agreeing to be a signatory" to a fee memorandum which, in the Court's opinion, misleadingly cited a study on class action settlements (the "Fitzpatrick study"); (ii) made "false and misleading representations concerning [its] regular hourly rates" in its fee declaration; and (iii) "contribut[ed]" through "inaction and acquiescence" to co-counsel's "misconduct" concerning sharing attorneys' fees with a putative

[7] *Id.*
[8] Prior Payment Plan at 4.
[9] *Id.*

local counsel, Damon Chargois.[10] Although the Court had maintained in the 2020 Fee Order that it was "not imposing sanctions or denying attorneys' fees,"[11] the Court nonetheless imposed "a reduction of about $1,140,000" in Lieff Cabraser's final fee to address, in its view, the firm's "deficiencies."[12]

This Court has had the benefit of having access to Lieff Cabraser's arguments on appeal from the prior appeal of its earlier order. In its Brief on appeal, Lieff Cabraser explained that it was not appealing the amount of the total fee awarded by the Court *except* to the extent that the fee had been reduced to reflect findings of misconduct or "deficiencies" by Lieff Cabraser. Accordingly, Lieff Cabraser argued that the $60 million attorneys' fee awarded in the 2020 Fee Order should be adjusted to remove any reduction in the fees awarded to Lieff Cabraser:

> This is a narrow appeal concerning specific findings and orders regarding Lieff. There is no challenge to the overall reduction in the fees awarded, ***except as to the penalty assessed against Lieff,***[13] nor to the findings concerning other attorneys in the case. Based on the procedural and substantive failings of the court, as discussed below, Lieff appeals 1) the finding that it violated Rule 11(b); 2) the categorization of its submissions as improper; and 3) the imposition of a $1,138,917 million penalty for its "deficiencies."

Brief at 33.

And again later in the Brief, Lieff Cabraser argued:

> Although Lieff does not challenge the reduced overall fee order to 20 percent of the class recovery, ***except to the extent necessary to offset the penalty assessed against Lieff***, the underlying findings highlight the court's legal error.

Brief at 55.

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[10] *See Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Appellant's Br. (June 9, 2020) (the "Brief") at 25-31.
[11] Brief at 31 (citing 2020 Fee Order at 127).
[12] *Id.* (citing 2020 Fee Order at 149).
[13] All emphases herein are supplied.

Finally, in its "Prayer for Relief," Lieff Cabraser specifically requested that the Court of Appeals "[v]acate the portion of the order requiring payment of $1,138,917 by Lieff ***and order the fee reduction to be adjusted accordingly***." *Id.* at 62.

On June 25, 2020, nearly three months after Lieff Cabraser filed its appeal and two weeks after it filed its Brief, the Court concluded that a supplemental notice to the class of the 2020 Fee Order, regardless of whether it was legally required, was "most appropriate," and ordered the parties to confer and prepare that notice.[14] On July 9, 2020, the Court approved the Prior Payment Plan, which approved the distribution of Lieff Cabraser's escrowed funds only after the conclusion of Lieff's appeal and the resolution of any objections prompted by the supplemental notice to the class.[15]

On July 7, 2020, prompted by the Court's order mandating a supplemental notice to the Class, the First Circuit entered an order to show cause questioning the finality of the 2020 Fee Order, requesting a response from Lieff Cabraser within thirty days.[16] Meanwhile, the deadline for filing responsive briefs in opposition to Lieff Cabraser's appeal passed on July 8, 2020, with no party opposing or filing a brief.

On July 10, the Court ordered that the supplemental notice (as modified by the Court with roughly 24 hours' notice) be distributed to the Class "as promptly as possible."[17] The supplemental notice was sent to the Class on July 24, 2020, with a deadline for any objections on September 8, 2020.[18]

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[14] *See* Memorandum and Order, June 25, 2020 [ECF No. 613] at 5.
[15] *See* n. 6, *supra.*
[16] *See Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Order of Court (July 7, 2020) (the "Show Cause Order").
[17] *See* Order, July 10, 2020 [ECF No. 623] at 2.
[18] *See* Special Master's Response to Court's July 10, 2020 Order [ECF No. 624] at 2-3.

On August 3, 2020, in response to the Show Cause Order, Lieff Cabraser filed a memorandum with the First Circuit explaining, *inter alia*, that at the time of the filing of the first Notice of Appeal it had no choice but to treat the 2020 Fee Order as final or risk losing the right to appeal entirely.[19] The Firm stated that in light of subsequent events, however, it did not object to dismissal of the appeal without prejudice. *Id.* On September 3, 2020, the First Circuit entered judgment dismissing the appeal without prejudice for lack of an appealable order.[20]

The supplemental notice dated July 24, 2020 generated no objections from the Class. On September 17, 2020, the Special Master submitted a proposed Revised Payment Plan for the Court's consideration.[21] Notably, the Revised Payment Plan removed the provisions from the Prior Payment Plan that had allowed for Lieff Cabraser's funds to be held in escrow pending its appeal. In support of these revisions, the Special Master did not assert that the Prior Payment Plan had prejudiced any interested party or the Class. Instead, the Special Master simply asserted that Lieff Cabraser could "petition the Court for relief" if its renewed appeal is successful after its funds are distributed, and that "[s]uch relief should not be re-captured from monies paid to the class members."[22] Implicit in the Special Master's assertion was that Lieff Cabraser would have to petition the Court for payment from—in effect, additional penalties against—other Customer Class Counsel in the event its renewed appeal were successful, notwithstanding whatever mandate might issue from the First Circuit.

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[19] *See Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Interested Party-Appellant's Response to Court Order of July 7, 2020 (Aug. 3, 2020) at 1-2.
[20] *Lieff Cabraser Heimann & Bernstein, LLC v. Labaton Sucharow, LLP, et al.*, 20-ap-1365 (1st Cir.), Judgment (September 3, 2020).
[21] *See* Special Master's Response to the Court's September 14, 2020 Order [ECF No. 636].
[22] *Id.* at 3.

On September 19, 2020, Lieff Cabraser responded to the Special Master's proposed Revised Payment Plan, and requested that the Court enter final judgment on the attorneys' fee question forthwith so that it could proceed with its renewed appeal "on the grounds it ha[d] previously asserted."[23] The Firm argued that altering the Prior Payment Plan as the Special Master had proposed might directly interfere with the First Circuit's mandate, given the express relief previously sought by Lieff Cabraser, and which was going to be sought in its renewed appeal.[24] Lieff Cabraser further argued that no salient facts had changed since the Court had approved the Prior Payment Plan to indicate that the Class could not readily be paid (as the Prior Payment Plan contemplated)[25] any funds owed to them out of Lieff Cabraser's escrowed contributions, should Lieff Cabraser's appeal be unsuccessful.[26]

At a hearing shortly thereafter on September 22, 2020, Lieff Cabraser again indicated its intent to immediately appeal the 2020 Fee Order once it became final, and that it would be raising the same issues raised in its prior appeal—including that a reversal of the 2020 Fee Order should result simply in a reversion of Lieff Cabraser's escrowed funds back to Lieff Cabraser

[23] *See* Response by Lieff Cabraser Heimann & Bernstein, LLP to the Court's September 14, 2020 Order and the Special Master's Proposed Revised Payment Plan Submitted in Response Thereto [ECF No. 638].
[24] *Id.* at 2.
[25] Two of the ERISA Counsel filed a response in support of the Special Master's Revised Payment Plan—and, specifically, the removal of the provision for Lieff Cabraser's funds to be held in escrow while its appeal is pending. *See* Keller Rohrback LLP and Zuckerman Spaeder LLP's Response to the Court's September 14, 2020 Order and the Special Master's Proposed Revised Payment Plan [ECF No. 639] at 2. As stated above, however, the Prior Payment Plan provided for no less of a guaranteed payment of the total amounts mandated by the Fee Order to ERISA Counsel than the Revised Payment Plan did. Only with the Second Revised Plan has the Court now introduced, for the first time, the potentiality for reduced payments to ERISA Counsel resulting from Lieff Cabraser's appeal.
[26] ECF No. 638 at 3.

(and therefore slightly smaller distributions to the Class, as contemplated by the Prior Payment Plan), and not in additional penalties against any other law firm.[27]

On September 29, 2020, the Court declined to enter judgment, and instead ordered the parties to brief HLLI's[28] motion for attorneys' fees.[29] The Court ordered that briefing on HLLI's motion be completed within a month, and stated that Lieff Cabraser "should be prepared to appeal and move for a stay pending appeal soon after HLLI's request for attorneys' fees is decided."[30] The Court further stated its view that Lieff Cabraser had "appealed the award to it of $15,233,397, which is $1,139,457 less than the amount it received as a result of the original . . . fee award," but that "[n]either [Lieff Cabraser] nor any other counsel appealed the $60,000,000 [fee] award" to all counsel.[31]

On October 5, 2020, Lieff Cabraser responded to the Court's September 29, 2020 Order to reiterate that, contrary to the Court's description of Lieff Cabraser's appeal, the Firm did in fact appeal from the $60 million fee award and that reversal of any financial penalties imposed by the 2020 Fee Order on Lieff Cabraser should come at the expense of the Class (as contemplated by the Prior Payment Plan), not in additional penalties against other Customer Class Counsel.[32] Lieff Cabraser provided excerpts from its Brief, as well as its request for relief from the First Circuit, reflecting that it had explicitly made this argument previously on appeal.[33]

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[27] *See* Hearing Tr., Sept. 22, 2020 [ECF No. 642] at 13-15, 34-35.
[28] "HLLI" stands for the Hamilton Lincoln Law Institute, which is not a party to these proceedings.
[29] *See* Memorandum and Order, Sept. 29, 2020 [ECF No. 646].
[30] *Id.* at 4.
[31] *Id.* at 2.
[32] *See* Response by Lieff Cabraser Heimann & Bernstein, LLP to the Court's September 29, 2020 Order [ECF No. 648].
[33] *Id.* at 2-4.

In accordance with the Court's order, HLLI's motions for attorneys' fees and for appointment as guardian *ad litem* were fully briefed by October 27, 2020. On December 30, 2020, Labaton and Thornton filed a notice with the Court indicating that, as HLLI's motions had not been decided and no final judgment and order had been entered, no schedule for deposits or distributions to the Class had yet taken effect.[34] On January 4, 2021, the Court entered an order acknowledging that it had not yet ruled on HLLI's motions or entered final judgment, and that Customer Class Counsel accordingly need not deposit funds into escrow by January 4, 2021 as had been contemplated by the Revised Payment Plan.[35] The Court stated, instead, that counsel should be "prepared to make the first payment into escrow on January 11, 2021, or soon after."[36]

The Fee Order giving rise to this motion to stay was subsequently entered on January 19, 2021. In that order, the Court again changed course from the Prior Payment Plan and Revised Payment Plan by mandating without prior notice to the parties that ERISA Counsel share the cost of success of the appeal by Lieff Cabraser by reducing the distributions to and the fee awarded to ERISA Counsel in the 2020 Fee Order. *See* Second Revised Plan [ECF 662-1] at 3, 4 (showing reduced distributions to ERISA Counsel "if Lieff excluded").[37] Meanwhile, the Final Judgment, entered the same day, sets forth the same fee awards to all counsel that were made in the 2020 Fee Order. *See* ECF No. 663.

ARGUMENT

The factors regulating a motion to stay pending appeal include:

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[34] *See* Notice of Labaton Sucharow LLP and The Thornton Law Firm LLP Relating to September 29, 2020 Memorandum and Order [ECF No. 655].
[35] *See* Order, Jan. 4, 2021 [ECF No. 657] at 2.
[36] *Id.*
[37] With the Second Payment Plan, the Court has now ordered that ERISA Counsel receive $569,728.50 less in payments should Lieff Cabraser's appeal succeed (with the Class also receiving $569,728.50 less). *See* ECF No. 662-1 at 3, 4. This change is not mentioned in the Memorandum and Order of January 19, 2021. *See* ECF No. 662.

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

SEC v. BioChemics, Inc., 435 F. Supp. 3d 281, 296 (D. Mass. 2020) (Wolf, J.) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *Common Cause Rhode Island v. Gorbea*, 970 F.3d 11, 14 (1st Cir. 2020).

As this Court has previously noted, the first prong of the test "has not been interpreted or applied literally, even by the Courts of Appeals." Rather, it has been held that:

> on motions for stay pending appeal the movant need not always show a 'probability of success' on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show the balance of the equities weighs heavily in favor of granting the stay.

Id. (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981)). As this Court further described,

> [w]hen the request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather . . . *the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear*.

Id.; *see also Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144, 150 (D. Mass.) (Wolf, J.).

The circumstances here readily satisfy the criteria for staying the Fee Order pending appeal. First, with respect to the "balance of equities," the First Circuit has stated:

> Where . . . the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.

Providence Journal Co. v. Fed. Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979); *cf. Gorbea*, 970 F.3d at 15 (denying motion to stay pending appeal where, *inter alia*, appellant failed to establish "significant likelihood of irreparable harm" absent a stay).

That is precisely the situation presented here. Under the Fee Order, absent a stay, Lieff Cabraser's escrowed funds will be distributed to the Class before the First Circuit can rule on the Firm's appeal from the Court's decision to penalize Lieff Cabraser. Recovering those funds from the Class, once distributed, will be impossible—effectively mooting the appeal.

Courts have held that it is in the public interest to issue stays where it is unlikely that an appellee will be able to recover funds in the event of a reversal. *See, e.g.*, *Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 252 (N.D.N.Y. 2002) (finding that public interest favors stay where there is risk that monetary judgment will be spent by plaintiff and that plaintiff "may not be able to repay any funds that they spent during the pendency of the appeal"). This is also true where specific performance is ordered for a financial transaction. *See Miller v. LeSea Broadcasting, Inc.*, 927 F. Supp. 1148, 1152 (E.D. Wis. 1996) (staying judgment requiring defendant to sell television station to plaintiff because "it could be difficult, if not impossible, to undo the sale if [defendant] is forced to complete the sale of Channel 5 to [plaintiff] and if the appeal is subsequently resolved in favor of [defendant].").

Meanwhile, any "harm" to other interested parties—namely, the Class and ERISA Counsel—from staying the Fee Order pending appeal would be slight to non-existent. As for the Class, the Court's own previously-ordered payment plan, entered just six months ago, specifically contemplated that Lieff Cabraser's funds could be withheld from distribution to the Class while its appeal was pending, while providing for all other funds to be distributed without delay. Nothing changed between then and now to make it "harmful" for the Class to wait for Lieff Cabraser's appeal to run its course other than the argument, recently raised by HLLI, that a

substantial percentage of eligible Class members may receive no share of the distribution of Lieff Cabraser's escrowed funds if it is stayed.[38]

This argument misapprehends how the distributions process works in complex class actions involving large settlement funds such as this one, as evidenced by the claims administrator in this case. In short, complete settlement distributions—especially those involving settlement funds in the hundreds of millions of dollars—commonly take years, not months. Out of the first round of distributions to class members, there will be uncashed checks and declined payments. The claims administrator will then spend time (usually, multiple months) chasing down recipients of uncashed or declined payments to determine whether new payments should be re-issued to those recipients,[39] using new addresses or identifying information (for example), or whether declined payments should revert to the settlement fund to be re-allocated and distributed to class members that negotiated their payments. Then there will be new distributions to reflect that re-allocation. This is an iterative process that typically goes through several cycles until the settlement fund is completely exhausted or reaches the point (often, where the remaining fund consists of just several thousands of dollars) that future distributions are no longer worth more than the cost of processing. It is not uncommon for the entire process to take two to three years (as it did in the comparable *BNY Mellon* litigation),[40]

[38] *See* Hearing Tr., Sept. 22, 2020 [ECF No. 642] at 22:11-16.

[39] *See, e.g.*, Decl. of Eric J. Miller on Behalf of A.B. Data, Ltd. in Support of Motion for Authorization to Distribute to Eligible ERISA and Public & Other Class Members [ECF No. 629] at ¶ 27 ("Based on A.B. Data's experience with similarly sized class action settlements, settlement reserves are commonly used and an additional distribution of remaining funds due to uncashed and returned checks is a virtual certainty.").

[40] In the *BNY Mellon* litigation, involving a comparably sized settlement fund benefiting a similar population of public funds, ERISA plans, and registered investment companies, three years elapsed between the first class settlement distribution and the date counsel finally moved to make a *cy pres* distribution of the remainder after having exhausted all efforts at distributing to the class. *See In re Bank of New York Mellon Corp. Forex Transactions Litig.*, No. 12-md-2335-

(continued . . .)

with reserves set aside along the way to cover any contingencies.[41] It is thus highly improbable that Lieff Cabraser's escrowed funds will be the only funds left to distribute to the Class once Lieff Cabraser's appeal is resolved (in the event Lieff Cabraser does not prevail). Instead, it is far more probable that Lieff Cabraser's escrowed funds will simply be included along with the other remaining funds to be distributed to participating class members during the process's ordinary lifespan.

HLLI's contention that it would be *per se* cost ineffective and harmful to the Class to stay distribution of Lieff Cabraser's escrowed funds to the Class pending Lieff Cabraser's appeal, accordingly, assumes facts contradicted by ordinary experience with large settlement funds such as this one.[42] Further, assuming solely for the sake of argument that Lieff Cabraser's escrowed funds *were* the only funds left to distribute once its appeal is resolved, it would be entirely speculative at this point to assume how many Class members' estimated payments from that distribution would be *de minimis* (*i.e.*, less than $10) and thus subject to reallocation (given, as stated above, the number of participating class members is likely to fluctuate). Even so, the possibility that some of those payments may hypothetically prove to be *de minimis* can hardly be used to tip the balance of equities in favor of effectively mooting Lieff Cabraser's appeal by distributing more than $1.1 million that the Firm cannot get back. Apart from the fact that the

(. . . continued)
LAK-JLC (S.D.N.Y.), Decl. of Ed Barrero in Support of Lead Plaintiffs' Motion for Order Authorizing Authorizing Cy Pres Distribution of Residual Settlement Proceeds, April 29, 2020 [ECF No. 681-1] at ¶¶ 3-8 (attached hereto as Exhibit A).

[41] *See e.g. id.* at ¶ 27(b)(v) (stating that "A.B. Data will distribute to eligible ERISA and Public & Other Class Members, described in subparagraph 27(b)(iv) above, 95% of their Distribution Amounts, with the remaining 5% [or more than $6.4 million] to be set aside and held in reserve (the "Reserves") to address any contingencies that may arise.") *and* ¶ 28 ("Additional re-distributions, after deduction of A.B. Data's fees and costs, any Taxes or Tax Expenses owed, the costs of preparing appropriate tax returns, and any escrow fees, may occur thereafter until it would not be economically feasible to continue.").

[42] *See* n. 39, 41, *supra.*

failure by some previously participating class members to receive a supplemental sub-$10 payment is, by definition, easily outweighed in severity by the loss of more than $1.1 million by the Firm, it is not as if otherwise *de minimis* payments never get paid out in some capacity—they just get reallocated to class members whose remaining payments are not calculated to be *de minimis*.[43]

In sum, no pertinent facts changed between the entry of the Prior Payment Plan on July 9, 2020 and the Fee Order on January 19, 2021 to prompt the removal of the provisions for escrowing Lieff Cabraser's funds, pending its appeal. It was not considered infeasible, or a hardship of any kind, under the Prior Payment Plan for the Class to receive Lieff Cabraser's escrowed funds at a later date, in the event Lieff Cabraser's appeal was unsuccessful. Nor does the newly-added risk for non-payment of some additional fees to ERISA Counsel tip the balance of equities in favor of immediate execution of the final order and judgment. Because all class counsel fees are recovered from the overall recovery of the class, there is no justification for making the ERISA Counsel the guarantors of a fixed class recovery.

Additionally, as this Court is well aware from having had the benefit of the briefing in the earlier appeal, Lieff Cabraser's appeal presents more than a "substantial case on the merits" involving a "serious legal question." *BioChemics*, 435 F. Supp. 3d at 296; *see also Canterbury Liquors & Pantry*, 999 F. Supp. at 150 ("the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear."). Among other things, Lieff Cabraser argued in its appeal (and will argue again) that several of the

[43] *See, e.g.,* ECF No. 629 at ¶ 27(b)(iv) ("After excluding Recognized Claims of less than $10.00, A.B. Data will recalculate the pro rata shares of the ERISA and Public & Other Settlement Allocations for eligible ERISA and Public & Other Class Members. This pro rata share is the Settlement Class Member's "ERISA Distribution Amount" or "Public & Other Distribution Amount.").

findings in the Fee Order were legally insufficient under the due process notice protections of Federal Rule of Civil Procedure 11(c)(3). *See* Brief at 35-36. Every other Circuit to consider the notice provision of Rule 11(c)(3) has required district courts to adhere strictly to those notice requirements. *See* Brief at 42-43 (citing Second, Fourth, Ninth, and Eleventh Circuit cases addressing Rule 11(c)(3)). As Lieff Cabraser points out, this issue has not directly been addressed by the First Circuit, although the Circuit has noted that "judges must be especially careful where they are both prosecutor and judge…" *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 40 (1st Cir. 2005). The limited number of decisions from other circuits and the novelty of the issue in the First Circuit weigh in favor of granting a stay. *See Canterbury Liquors & Pantry*, 999 F. Supp. at 150 (limited and contradictory Court of Appeals decisions on regulatory scheme presents "sufficiently serious legal issues"); *Boston Taxi Owners Ass'n v. City of Boston*, 187 F. Supp. 3d 339, 342 (D. Mass. 2016) ("While the Commissioner has not convinced the Court that he is likely to succeed in his appeal with respect to qualified immunity, the constitutional issue in this case is neither elementary nor well-established.").

The appeal also presents a substantial case on the merits with respect to the Court's finding of "serious misconduct." As the First Circuit has held, Rule 11 proceedings can "devastate…professional reputations." *Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 86 (1st Cir. 2017). The important professional stakes related to Rule 11, coupled with the financial penalties from the Fee Order, raise the sort of serious questions that courts have found sufficient to satisfy this prong of the standard. *See Hilton v. Kerry*, 2013 WL 6244162, at *2 (D. Mass. Dec. 2, 2013) ("the issue of extradition of seriously mentally ill citizens is certainly a serious and difficult one that has yet to be directly addressed by the higher courts"); *Exxon Corp v. Esso Worker's Union, Inc.*, 963 F. Supp. 58, 60 (D. Mass. 1997) (Wolf, J.) (serious question presented

related to reinstating truck driver who failed drug test); *Nevada v. United States Dep't of Labor*, 2018 WL 2020674, at *2 (E.D. Tex. May 1, 2018) (serious questions warranted stay where plaintiff and her counsel were held in contempt of court's injunction and faced sanctions).

CONCLUSION

For the foregoing reasons, Lieff Cabraser's request for a partial stay of the Fee Order, pending appeal, should be granted.

Dated: January 27, 2021

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE BANK OF NEW YORK MELLON CORP. FOREX TRANSACTIONS LITIGATION	No. 12-MD-2335 (LAK) (JLC)
THIS DOCUMENT RELATES TO:	
Southeastern Pennsylvania Transportation Authority v. The Bank of New York Mellon Corporation, et al.	No. 12-CV-3066 (LAK) (JLC)
International Union of Operating Engineers, Stationary Engineers Local 39 Pension Trust Fund v. The Bank of New York Mellon Corporation, et al.	No. 12-CV-3067 (LAK) (JLC)
Ohio Police & Fire Pension Fund, et al. v. The Bank of New York Mellon Corporation, et al.	No. 12-CV-3470 (LAK) (JLC)
Carver, et al. v. The Bank of New York Mellon, et al.	No. 12-CV-9248 (LAK) (JLC)
Fletcher v. The Bank of New York Mellon, et al.	No. 14-CV-5496 (LAK) (JLC)

DECLARATION OF ED BARRERO IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR ORDER AUTHORIZING *CY PRES* DISTRIBUTION OF RESIDUAL SETTLEMENT PROCEEDS

I, ED BARRERO, declare and state as follows:

1. I am a Senior Project Manager for Epiq Class Action & Claims Solutions, Inc. ("Epiq"). On June 15, 2018, Epiq acquired The Garden City Group, Inc., *i.e.*, the administrator retained to serve as the Claims Administrator in the above-captioned litigation ("Litigation").[1]

[1] All terms with initial capitalization not otherwise defined herein shall have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated March 19, 2015 (ECF No. 583-1).

Prior to the acquisition, I was a Senior Project Manager for The Garden City Group, Inc.[2] I have personal knowledge of the facts stated herein.

THE INITIAL DISTRIBUTION OF THE NET SETTLEMENT PROCEEDS

2. By Order Approving Distribution Plan for the Net Settlement Proceeds and Request for Reimbursement of Litigation Expense entered February 29, 2016 (ECF No. 672) ("Distribution Order"), the Court approved distribution of the Net Settlement Proceeds to Settlement Class Members in accordance with the Court-approved Plan of Allocation and Distribution Plan.[3] The Net Settlement Proceeds consisted of the Net Settlement Fund (*i.e.*, the $335,000,000 obtained from the settlement reached by Lead Plaintiffs and Defendants in the Litigation plus interest and after deduction of Court-approved fees and expenses), as well as $155,000,000 obtained pursuant to a settlement that BNYM reached with the New York Attorney General and $14,000,000 obtained pursuant to a settlement that BNYM reached with the United States Department of Labor.

3. Pursuant to the Distribution Order, commencing on April 25, 2016, Epiq conducted the Initial Distribution, distributing a total of $375,312,224.16 to Settlement Class Members. In the Initial Distribution, Settlement Class Members whose payments calculated to more than $0.00 but less than $1,000.00 were paid their full Distribution Amount ("Claims Paid in Full"), and Settlement Class Members whose payments calculated to $1,000.00 or more were paid 90% of their full Distribution Amount, with the remaining aggregate 10% set aside and held in reserve to address any contingencies ("Reserve").

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[2] The Garden City Group, Inc. and Epiq will both be referred to herein as Epiq.

[3] The proposed Distribution Plan was set forth in the Affidavit of Stephen J. Cirami in Support of Motion for Approval of Distribution Plan for the Net Settlement Proceeds filed with the Court on January 13, 2016 (ECF No. 669).

POST-INITIAL DISTRIBUTION OUTREACH AND ADDITIONAL DISTRIBUTIONS

4. Following the Initial Distribution, Epiq monitored the status of Settlement Class Member checks. Epiq made reasonable and diligent attempts to locate Settlement Class Members whose distribution checks remained uncashed or were returned as undelivered by the United States Postal Service. Every Settlement Class Member with an uncashed or undeliverable check over $1,000.00 received personalized emails and/or phone calls in an attempt to get their check cashed and checks were reissued as appropriate.

5. After the completion of such outreach and in accordance with the Distribution Order, the Net Settlement Proceeds remaining following the Initial Distribution (including from the Reserve and the funds for all void stale-dated checks), and after deducting Epiq's estimated costs for conducting a re-distribution, any taxes owed, the costs of preparing appropriate tax returns, and any escrow fees, was redistributed commencing on January 25, 2017 to Settlement Class Members who (i) were not Claims Paid in Full; and (ii) cashed their Initial Distribution check ("Second Distribution"). Epiq distributed a total of $52,288,534.11 in the Second Distribution.

6. Following the Second Distribution, Epiq again made reasonable and diligent efforts to have Settlement Class Members cash their outstanding distribution checks and checks were reissued as appropriate. After such efforts, Epiq and Lead Settlement Counsel determined that a re-distribution of the remaining Net Settlement Proceeds (*i.e.*, those funds remaining by reason of uncashed checks, returned funds, or otherwise) would be cost effective. Accordingly, a further distribution of the remaining Net Settlement Proceeds (*i.e.*, $1,456,227.67) to Settlement Class Members was conducted commencing on February 7, 2018 ("Third Distribution").

7. Since the Third Distribution, Epiq in conjunction with Lead Settlement Counsel have made every effort to have Settlement Class Members cash their outstanding distribution

checks. Every Settlement Class Member with an uncashed or undeliverable check received personalized emails and/or phone calls in an attempt to get their check cashed and checks were reissued as appropriate. All remaining outstanding checks have since been made void. The balance of the Net Settlement Proceeds at the time the checks were made void was $37,265.61.

EPIQ'S FEES AND EXPENSES

8. From October 1, 2017 through August 31, 2019, Epiq incurred an additional $28,294.51 in fees and expenses in connection with conducting additional distributions of the Net Settlement Proceeds. This amount included the fees incurred due to the substantial time involved in locating Settlement Class Members with uncashed checks and handling requests for the reissuance of checks. In accordance with the Distribution Order, Lead Settlement Counsel approved and authorized payment of Epiq's additional fees and expenses. Following the deduction of such fees and expenses, and after payment of $2,500.00 to Miller Kaplan for preparing and filing the final tax return for this matter, the balance of the Net Settlement Proceeds is $6,471.10.

***CY PRES* DISTRIBUTION**

9. Epiq believes that it has used reasonable and diligent efforts to distribute the Net Settlement Proceeds, and also believes that additional outreach efforts to Settlement Class Members with uncashed checks would not be effective. In addition, it is Epiq's assessment that it would not be cost effective to conduct a further redistribution of the remaining Net Settlement Proceeds of $6,471.10.

10. Accordingly, Epiq supports Lead Settlement Counsel's motion to contribute the remaining $6,471.10 to an appropriate *cy pres* recipient(s) in accordance with page 6 of the Distribution Order which states that, "…once Lead Settlement Counsel determine that further re-distribution of any balance remaining is no longer cost effective or efficient, Lead Settlement

Counsel shall seek an order from the Court: (i) approving the recommendation that any further re-distribution is not cost effective or efficient; and (ii) ordering the contribution of the balance of the Net Settlement Proceeds to one or more nonsectarian, not-for-profit, 501(c)(3) organizations that are independent of Lead Settlement Counsel so that Lead Settlement Counsel do not derive a direct or indirect benefit from the selection of such organization as of the recipient of a charitable contribution; . . ."

CONCLUSION

11. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed in Lake Success, New York on April 27, 2020.

ED BARRERO

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on January 27, 2021 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J. March 12, 2021

TABLE OF CONTENTS

I. SUMMARY

In this class action, the court initially awarded attorneys' fees in the amount of $75,000,000, which was 25% of the $300,000,000 common fund. However, Class Counsel – Labaton Sucharow LLP ("Labaton"), The Thornton Law Firm ("Thornton"), and Lieff Cabraser Heimann & Bernstein, LLP ("Lieff") – soon reported that they had inadvertently overstated their collective lodestar, which the court used to test the reasonableness of their $75,000,000 fee request, by more than 9300 hours and $4,000,000. A subsequent Boston Globe article raised additional serious questions concerning the reliability of representations that had been made in that request.

Therefore, the court vacated the $75,000,000 fee award, and appointed a Master to investigate the matter and to make recommendations regarding the new fee award the court would make. In his investigation, the Master discovered that Labaton had, in violation of the Massachusetts Rules of Professional Conduct, made a $4,100,000 referral fee to a lawyer who did no work on this case, but had used political influence to obtain plaintiff and class representative Arkansas Teacher Retirement System ("Arkansas Teacher") as a client for Labaton. Lieff contributed $1,000,000 to that payment.

The Master filed a lengthy Report and Recommendations (the "Report"). He recommended that the court again award $75,000,000

in fees, but order that Labaton, Thornton, and Lieff "disgorge" about $10,000,000 to be distributed to the class they represented and to counsel for a separate class of ERISA pension plans ("ERISA Counsel"). Numerous objections to the Report were filed.

In June 2019, the court held hearings to decide de novo the objections and the amount to award in attorneys' fees. Among other traditional considerations, the court informed counsel that it would consider, as a public policy factor, whether false or misleading statements had been made by Class Counsel when advocating for the initial $75,000,000 fee award and, if so, where within the reasonable range the award should be made. At those hearings, Richard Heimann of Lieff argued for all Class Counsel that the court should again award $75,000,000, but did not contest the court's authority to take any misconduct of counsel into account in deciding the amount to award.

On February 27, 2020, the court issued a 162-page Memorandum and Order explaining its decision to make a new award of $60,000,000 in attorneys' fees (the "February 27, 2020 Order"). It wrote that:

> On closer scrutiny, the court has decided that even absent the serious, repeated misconduct of Labaton and Thornton, an award of less than 25% of the common fund would be most appropriate. However, for the reasons described in detail in this Memorandum, in this equitable proceeding it is permissible and appropriate to take that misconduct into account in awarding and allocating attorneys' fees.

Feb. 27, 2020 Order (Dkt No. 590) at 28; see also id. at 126 (emphasis added). Although the court found that Lieff's performance was "deficient" in certain respects, see id. at 148, those deficiencies were not material to the court's decision to award $60,000,000. In addition, in deciding to award $60,000,000, the court wrote that it was:

> Neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct. It [was], however, considering such misconduct in deciding where within the reasonable range to make a total fee award and how to allocate the total award among counsel.

Id. at 86.

The court allocated about $10,000,000 to ERISA Counsel. See id. at 146. It then allocated about $15,000,000 to Lieff. See id. at 148-149. This was $2,500,000 more than the Master recommended that Lieff be awarded, but about $1,140,000 less than Lieff had received from the original fee award. See id. at 162. Lieff is appealing the exercise of the court's inherent equitable authority in deciding to award $60,000,000 in attorneys' fees and its allocation from that award to Lieff. See Notice of Appeal, Dkt. No. 644.

The court awarded Labaton about $9,000,000 less than it recovered from the original fee award and Thornton about $6,000,000 less. See Feb. 27, 2020 Order at 162. Labaton and Thornton are not appealing either the new fee award or the amount of it allocated to each.

The court ordered Labaton, Thornton, and Lieff to escrow the funds to be redistributed. See Dkt. Nos. 662, 679. It also ordered a schedule for the escrowed funds to be transferred to the settlement administrator for distribution in two installments to ERISA Counsel and the class. See Dkt. Nos. 662-1, 679-1. Lieff has made the required escrow. However, it has moved for a stay of the distribution of its escrowed funds pending a decision on its appeal. See Dkt. Nos. 662-1, 679-1. Labaton and Thornton support Lieff's request for a stay. See Dkt. Nos. 674, 675. The Master and Center for Class Action Fairness ("CCAF") as amicus oppose it. See Dkt. Nos. 676-677. For the reasons explained in this Memorandum, Lieff's motion for a stay is being denied.

Deciding a motion for a stay requires an exercise of the court's equitable discretion. See Common Cause Rhode Island v. Gorbea, 970 F.3d 11, 15-16 (1st Cir. 2020). As the First Circuit has written:

> [I]n cases involving stays of actions pending appeal, we are guided by consideration of four factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. [Nken v. Holder, 129 S.Ct. 1749, 1761 (2009)] (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).
>
> The first two factors are the most critical. Both require a showing of more than mere possibility. Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be

> likely absent an injunction. Winter v. Natural Res. Def. Council, Inc., 129 S.Ct. 365, 375-76 (2008).

Respect Maine PAC v. McKee, 622 F.3d 13, 15 (2010); see also Common Cause Rhode Island, 970 F.3d at 14 (same).

Lieff has stated that it intends to raise the same issues in the pending appeal that it raised in the brief it filed in the First Circuit before its initial appeal was dismissed without prejudice. Lieff has not made the essential strong showing that it is likely to prevail on any of those issues.

The factual findings Lieff challenges are each supported by substantial evidence that is cited in the 162-page February 27, 2020 Order. The heart of Lieff's argument is that the court sanctioned it for violating Federal Rule of Civil Procedure 11(b) without giving it the notice required by Rule 11(c)(3). However, the court expressly stated that it was not imposing sanctions. Rather, having vacated the original fee award, the court took into account the proven misconduct of Labaton and Thornton in deciding to make a new fee award of $60,000,000. Neither Lieff nor any other firm argued to this court that it would be impermissible for it to take this approach. Lieff has not made a strong showing that it is likely to prove that the court abused its discretion in doing so, awarding $60,000,000, and allocating $15,000,000 to Lieff.

In addition, even assuming without suggesting that awarding Lieff less than it originally received was a "sanction," Lieff has not made a strong showing that it is likely to prove that it was a Rule 11 sanction. As the Supreme Court in Chambers v. NASCO, Inc., 501 U.S. 32 (1991), and the 1993 Advisory Committee Note to Rule 11 explain, Rule 11 is not the exclusive basis for imposing sanctions. A court may exercise its inherent powers to impose a sanction if it provides notice and an opportunity to be heard, both of which Lieff received in this case.

Lieff has also not made the required strong showing that it will be irreparably harmed if a stay is not granted. If Lieff prevails on appeal, it intends to ask the First Circuit to reduce the amount provided to the class, rather than require that Labaton and Thornton reimburse it. However, Lieff itself asserts that it is common in cases involving hundreds of millions of dollars for the distribution of a settlement fund to take two or three years. Therefore, it has not made a strong showing that there will not be $1,140,000 available if it prevails on appeal and the First Circuit orders that the award to the class be reduced by that amount.

More significantly, if Lieff prevails on appeal, Labaton and Thornton should be ordered to reimburse it. Contrary to Lieff's contention, the court would not have ordered $61,140,000 in attorneys' fees if it had not found deficiencies in Lieff's performance. The repeated, egregious misconduct of Labaton and

Thornton alone caused the court to decide that it was most appropriate to award $60,000,000. If the court had allocated an additional $1,140,000 to Lieff, it would have reduced the awards to Labaton and Thornton by that amount. Therefore, it is likely that Labaton and Thornton will be required to bear the cost if Lieff prevails on appeal and there is no reason to find that they will be unable to do so. [1]

In view of the failure of Lieff to make a strong showing of both the likelihood of success and irreparable harm, its request for a stay must be denied. However, the balance of hardship also favors denying a stay. Lieff will not be irreparably harmed in the absence of a stay. However, if a stay is granted, at a minimum distributions to the class will be further delayed and, if Lieff's escrowed funds are not distributed with Labaton and Thornton's, some class members may have claims too small to receive anything

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[1] As more fully explained infra, Lieff's conduct was not material to the court's decision to award $60,000,000 in attorneys' fees and if Lieff prevails on appeal Labaton and Thornton should be required to reimburse it rather than the class. If the court had anticipated Lieff's claim on appeal that the award to it should be increased by $1,140,000, and that cost should be imposed on the class, rather than Labaton and Thornton, the court would have ordered Labaton and Thornton to escrow that amount pending a decision on Lieff's appeal. The court understands that the pendency of the appeal deprives it of the authority to issue such an order now. See Fed. R. Civ. P. 62.1(a). However, if the First Circuit remands this case for that limited purpose, the court will do so. See Fed. R. Civ. P. 62(c).

from the distribution of Lieff's funds alone. Moreover, ERISA Counsel have been working on this case since 2011 and should not have to wait longer to be fully compensated.

Finally, the public interest weighs against granting a stay. Lieff chose to join Labaton and Thornton as Class Counsel in this case. The three firms remain allied, as Labaton and Thornton support Lieff's motion for a stay and Lieff does not seek compensation from them if it prevails on appeal. The deficiencies in Lieff's performance all related to the egregious misconduct of Labaton and Thornton. It might be expected that Lieff would now seek to distance itself from Labaton and Thornton, and to advocate that they should compensate Lieff if it prevails on appeal. Instead, Lieff insists that the class should bear that cost.

As Lieff has not made a strong showing that it is likely to prevail on appeal or that it will be irreparably harmed if a stay is not granted, it would be abuse of this court's discretion to grant a stay. However, if the court had the discretion to do so, it would not be in the public interest to grant a stay and thus abet the perception that Lieff could benefit from an exercise of the court's equitable authority while seeking to advance the economic interests of Labaton and Thornton at the expense of the class it was appointed to represent.

Therefore, Lieff's Motion to stay pending appeal is being denied. However, in order to provide the First Circuit an ample opportunity to consider Lieff's possible appeal of this decision, the court will not order the distribution of Lieff's escrowed funds until at least 14 days after the First Circuit decides that appeal. To facilitate planning, Lieff is being ordered to report, by March 22, 2021, whether it intends to appeal this decision denying a stay.

II. PERTINENT HISTORY

The history of this matter is summarized at the beginning of the February 27, 2020 Order, and described fully in that decision. See Dkt. No. 590 at 3-31. Facts most pertinent to Lieff's Motion to Stay include the following.

This case alleging fraud by State Street Bank and Trust Company ("State Street") with regard to commissions on foreign exchange transactions was brought as a putative class action in 2011. See Complaint (Dkt. No. 1). At the outset of the case, as requested by the three firms in a memorandum "Respectfully Submitted" by each of them, the court appointed Labaton as Interim Lead Counsel, Thornton as Liaison Counsel, and Lieff as additional counsel for plaintiff and a proposed class of customers of State Street. See Dkt. Nos. 8, 28. In their memorandum in support of their request for appointment the three firms characterized themselves as "Plaintiffs' Counsel." See, e.g., Dkt. No. 8 at 4,

5, 9. Throughout this litigation, Labaton, Thornton, and Lieff acted as single unit, characterizing themselves collectively as "Customer Class Counsel," and the names of each firm, and of attorneys for each firm, were typed on the signature pages of submissions to the court on behalf of the class they represented.[2]

In 2016, the parties moved for approval of a $300,000,000 settlement and for an award of attorneys' fees to all plaintiffs' counsel of about twenty-five percent of that common fund - approximately $75,000,000. At August 8 and November 2, 2016 hearings, the court stated that because the adversary system was not then operating, it was relying heavily on the representations of plaintiffs' counsel. See Feb. 27, 2020 Order at 40, 46; Aug. 8, 2016 Tr. (Dkt. No. 93) at 41; Nov. 2, 2016 Tr. (Dkt. No. 114) at 35.

A memorandum in support of the request for an award of $75,000,000 as attorneys' fees was "Respectfully Submitted" by

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[2] The Order appointing Labaton, Thornton and Lieff stated that Labaton would have "sole authority" for plaintiffs over, among other things, "briefing and argument of all motions." Dkt. No. 28 at 5. This did not prohibit filings from being jointly submitted by all three firms or prohibit Lieff from arguing motions on behalf of all three firms. As explained below, in June 2019, Mr. Heimann of Lieff argued for all three firms that the characterization of a study of attorneys' fees awards by Professor Brian Fitzpatrick (the "Fitzpatrick Study") in the memorandum in support of the request for an award of $75,000,000 of attorneys' fees was not misleading and that the court should again award $75,000,000.

Labaton, Thornton, and Lieff, and named attorneys in each firm, including Lieff. See Dkt. No. 103-1 at 28-29. On the signature line "/s/ Lawrence A. Sucharow" was typed. Lieff reviewed the memorandum before it was filed. See Feb. 27, 2020 Order at 125; Lieff's Obj. to Master's Report (Dkt. No. 367) at 33. Lieff also reviewed and suggested revisions to Sucharow's 48-page declaration attesting to the accuracy of each firm's fee declarations (Dkt. No. 104), and authorized Labaton to represent that Lieff was one of the firms making that submission. See Feb. 27, 2020 Order at 125. 32 exhibits, comprising 731 pages, were filed with Sucharow's declaration. See Dkt. No. 104. Several volumes of records in support of the fee request were filed as well. The Fitzpatrick Study was Exhibit 31, at pages 682 to 718 of the Exhibits. See Dkt. No. 104-31.

At the November 2, 2016 hearing, the court approved the proposed $300,000,000 settlement. See Nov. 2, 2016 Tr. at 35:6 - 37:3. As indicated earlier, with regard to attorneys' fees, the court stated that it was "relying heavily on [counsel's] submissions and what [had] been said" at the hearing. Id. at 35:4-6 (emphasis added). The court stated that it had "used the percentage of common fund method" and the lodestar cross-check, and found counsels' request to be reasonable. Id. at 35:6-36:18. Therefore, the court awarded $75,000,000 in attorneys' fees.

However, "the evolution of events [after] November 2, 2016 demonstrated that the court's assumptions in awarding fees were incorrect in material respects. Many of the representations made to the court in support of the request for attorneys' fees by Labaton and Thornton, and to a lesser extent by Lieff, were untrue." Feb. 27, 2020 Order at 9.

Inquiries by the media prompted Labaton to inform the court that Labaton, Thornton, and Lieff had inadvertently inflated their collective lodestar by more than 9300 hours and more than $4,000,000. Id. The lodestar had been inflated because "Thornton, Labaton, and Lieff had entered into an unusual arrangement that allowed Thornton to pay for staff and contract attorneys employed by Labaton and Lieff, and to claim them on its lodestar for the purpose of allocating among themselves attorneys' fees awarded by the court." Feb. 27, 2020 Order at 90. "Thornton demanded this arrangement because as [Thornton partner] Garrett Bradley wrote his partners, it was 'the best way to jack up the loadstar,' [sic] and thus give Thornton a claim to a larger percentage of the foreseeable future fee award to be shared with Lieff and Labaton." Id. (quoting Feb. 6, 2015 email from Bradley). Lieff evidently agreed to this arrangement because Thornton brought Lieff into this case, and "Lieff [] wanted to maintain a good relationship with Garrett Bradley and Thornton to enhance the likelihood that they would bring Lieff into future lucrative cases. . . ." Id. at

91. The hours worked by 23 temporary "staff attorneys" had been included in the lodestar reports of more than one firm. Id. at 46-7. In some instances, different billing rates had been attributed to the same attorneys by different firms. Id. at 47.

A subsequent Boston Globe article raised additional questions about the reliability of representations made concerning the regular hourly rates counsel used to calculate the lodestar. See id. at 10, 47-48. For example, in a sworn declaration Garrett Bradley represented that his brother Michael was employed by Thornton and that the regular rate charged for his services was $500 an hour. Id. at 48. However, the article reported without contradiction that "'Michael Bradley . . . normally works alone [and] often mak[es] $53 an hour as a court-appointed defender in the Quincy District Court.'" Id. (quoting Dec. 17, 2016 Boston Globe article, Dkt. No. 117, Ex. B).[3]

A second Boston Globe article raised additional questions concerning whether campaign contributions by Labaton and Thornton attorneys, and political influence exercised by Garrett Bradley,

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[3] In the February 27 Order, the court found that Michael Bradley was not employed by Thornton, did not regularly charge $500 an hour for his services, and, indeed, had never charged that much. See Feb. 27, 2020 Order at 55, 89-90. Garrett Bradley's many false statements under oath, made in a declaration he did not read before signing, constituted misconduct that contributed to the court's decision not to award more than $60,000,000 in attorneys' fees. See id. at 127-129.

who was also the Assistant Majority Leader of the Massachusetts House of Representatives, had been used to obtain the Massachusetts Plymouth County Pension fund and the state pension funds as plaintiffs in class actions in which Labaton and Thornton received more than $100,000,000 in attorneys' fees while the pension funds received only a total of about $720,000. See id. at 48-52.

These issues prompted the court to appoint, with the consent of the parties, Retired United States District Judge Gerald Rosen as a Special Master. See Mar. 8, 2017 Order (Dkt. No. 173). The court also vacated the $75,000,000 fee award. See Dkt. No. 331.

The Master's investigation became protracted when he discovered that Labaton had paid $4,100,000, constituting about 5.5% of the $75,000,000 fee award, to Damon Chargois. Id. at 59. Thornton and Lieff subsidized this payment. Id. at 27, 117-118. Chargois was a Texas lawyer, who had done no work on this case. Id. at 59. However, in 2007, he and his partner in Arkansas, Tim Herron, had been instrumental in obtaining Arkansas Teacher as a client for Labaton. Id. In return, Labaton agreed to provide Chargois 20% of any fee it received from representing Arkansas Teacher in a class action. Id. at 61. As Chargois explained in a message to Labaton:

> Our deal with Labaton is straightforward - we got you ATRS as a client (after considerable favors, political activity, money spent and time dedicated in Arkansas) and Labaton would use ATRS to seek [L]ead [C]ounsel appointments in institutional investor fraud and

> misrepresentation cases. Where Labaton is successful in getting appointed [L]ead [C]ounsel and obtains a settlement or judgment award, we split Labaton's attorney fee award 80/20. Period.

Id. (quoting Email from Chargois to Eric Belfi (Oct. 18, 2014), R. & R. Ex. 177 (Dkt. No. 401-176).

The payment to Chargois was an impermissible referral fee, made by Labaton in violation of Massachusetts Rule of Professional Conduct 7.2(c). Id. at 108-23.[4] That payment was not disclosed to Arkansas Teacher, ERISA Counsel, or the court. Id. at 24. The failure to disclose it to Arkansas Teacher and ERISA counsel was also a violation of Massachusetts Rules of Professional Conduct. Id. at 107-17. "Lieff knew or should have known Chargois did not do any work on this case and should have at least suspected that the payment was improper." Id. at 24; see also id. at 118. Nevertheless, Lieff agreed to contribute $1,000,000 of the fee it would have otherwise received to the payment to Chargois. Id. at 118. It did not encourage Labaton to disclose the payment to Arkansas Teacher, ERISA counsel, or the court. Id. at 123.

In May 2018, the Master filed his 377-page Report and Recommendations, and an Executive Summary of it. See Dkt. Nos.

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[4] Garret Bradley helped Labaton persuade Chargois to accept less than 20% of the more than $31,000,000 Labaton received from the original $75,000,000 fee award. See Feb. 27, 2020 Order at 23-24.

224, 224-1 (the "Report"). In his Report the Master found the original $75,000,000 fee award to be reasonable. See Feb. 27, 2020 Order at 63. However, he recommended that Labaton, Thornton and Lieff be ordered to "disgorge" approximately $10,000,000. See id. at 63. If adopted, the Master's recommendations would have reduced Labaton's compensation from about $32,000,000 to about $26,000,000; Thornton's compensation from about $20,000,000 to about $17,000,000; and Lieff's compensation from about $16,000,000 to about $13,000,000. See id. at 14. The Master also recommended that additional payments be made to ERISA Counsel in part to compensate them for the cost of participating in the proceedings after the original fee award that were prompted by the conduct of Class Counsel. See id. In addition, the Master recommended that some of the funds "disgorged" by Class Counsel go to the class. See id.

The Master also recommended that sanctions in the amount of $400,000 to $1,000,000 be imposed on Thornton pursuant to Federal Rule of Civil Procedure 11 because of sworn statements the Master found to be knowingly false. See Report at 364-65. He also recommended that Garrett Bradley be referred to the Massachusetts Board of Bar Overseers for disciplinary action for violating Rule 3.3 of the Massachusetts Rules of Professional Conduct. See Report at 364-65.

Numerous objections to the Report were filed. Among other things, Thornton argued that sanctions could not be imposed on it pursuant to Rule 11 because the claims between State Street and the class had been settled, judgment on them had been entered, and Rule 11(c)(3) provides that a monetary sanction cannot be imposed unless the court issued a show-cause order before settlement. See Dkt. No. 446-1 at 66-67.

The court scheduled hearings to commence June 24, 2019 on the objections to the Master's Report. See May 31, 2019 Order (Dkt. No. 543). In its Order, the court explained that rather than addressing the many discrete objections to the Report, it intended to hear argument on certain matters relevant to whether it should again award $75,000,000 as attorneys' fees or a different amount. Id.

One of those questions, whether the description of the Fitzpatrick Study in the 2016 memorandum in support of the request for attorneys' fees was false or misleading, had not been addressed in the Master's Report. Therefore, the court gave the parties notice that it intended to hear argument on this question and consider it in deciding the amount of attorneys' fees to award. Id. More specifically, on May 31, 2019, the court wrote:

> At present, the court intends to proceed as follows at the hearing commencing on June 24, 2019:
>
> (1) Hear argument on whether the initial fee award of $74,541,250, constituting approximately 25% of the

> common fund, is reasonable. Among other things, the participants shall be prepared to address whether Customer Class Counsel misrepresented a study in their memorandum in support of attorneys' fees. See Dkt. No. 103-1 at 18 of 36 (citing Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical Legal Stud. 811 (2010)).

Id. at 2-3.

The issue of whether Class Counsel had misrepresented the Fitzpatrick Study in the memorandum in support of the motion for attorneys' fees was first raised by CCAF on February 17, 2017, when it moved to be appointed amicus or guardian ad litem for the class. See Dkt. No. 126-1 at 11; see also Dkt. No. 125-2 at 3. CCAF then asserted that Class Counsel "asking for 24.85% while misrepresenting the Fitzpatrick report as class counsel did [was] . . . abusive and objectionable." Dkt. No. 125-2 at 3. Following the Master's Report, in advocating for a new fee award of no more than 17% of the common fund, CCAF explained why it was "disappointed that the Special Master did not question Class Counsel about their misrepresentation of [the] Fitzpatrick [Study]." See Dkt. No. 522 at 2-4, 22-24.

As the court ultimately concluded in the February 27, 2020 Order:

> In the memorandum in support of the request for a $75,000,000 award, signed by Sucharow for Labaton, and also represented to have been signed by partners of Thornton and Lieff, Labaton provided a misleading description of a prominent study by Brian Fitzpatrick. See Brian T. Fitzpatrick, "An Empirical Study of Class Action Settlements and Their Fee Awards," 7 J. Empirical

> Legal Stud. 811 (2010) (the "Fitzpatrick Study"). Labaton accurately reported that Fitzpatrick had found that the mean and median fees awarded in 444 common fund settlements were 25.7% and 25%. Sucharow argued that, therefore, "[t]he 24.85% fee requested [in this case] is right in line with Professor Fitzpatrick's findings." Dkt. No. 103-1, at 17-18 of 36.
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> However, Sucharow did not disclose other findings from the Fitzpatrick Study that undermined his argument, as was required by the Massachusetts ethical rules that deem applications for attorneys' fees to be ex parte proceedings in which lawyers must disclose all material facts even if some of them are adverse to the attorneys' interests. See Mass. R. Prof. C. 3.3 cmt. 14A.[5] More specifically, Sucharow did not disclose that Fitzpatrick had written that: "fee percentage is strongly and inversely associated with settlement size . . . ; [when] a settlement size of $100 million was reached . . . fee percentages plunged well below 20 percent." Fitzpatrick Study, supra, at 837-38. Nor did Sucharow reference Fitzpatrick's finding that in settlements between $250,000,000 and $500,000,000, the mean fee award was 17.8% and the median award was 19.5%. See id. at 839. It was, therefore, misleading for Sucharow to assert that the 25% award being requested in this case was "right in line with Professor Fitzpatrick's findings."

Dkt. No. 590 at 20-22; see also id. at 104-107 (emphasis added).[6]

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[5] The Massachusetts Rules of Professional Conduct deem a petition to approve the settlement of a class action to be an ex parte proceeding. See Mass. R. Prof. C. 3.3 cmt. 14A; Feb. 27, 2020 Order at 5, 121.

[6] The court wrote that the memorandum was represented to have been signed by Lieff, as well as Labaton and Thornton. Lieff argues in its original June 29, 2020 Appellate Brief that only Sucharow's name is on the signature line. See Lieff's June 9, 2020 Appellate Brief at 52. However, the memorandum states that it was also "Respectfully Submitted" by Lieff and identified lawyers of the firm. See Dkt. No. 103-1 at 28-29. As explained in footnote 13 below, if the court had imposed a Rule 11 sanction on Lieff - which it did not - for the purposes of the appeal it

In a footnote to the foregoing summary concerning the finding that the characterization of the Fitzpatrick Study was misleading, the court wrote:

> A table in the Fitzpatrick Study reported that for settlements between $250,000,000 and $500,000,000, there was a standard deviation of 7.9%. Id. at 839. However, Sucharow did not mention this fact either. If Sucharow had disclosed this finding, he could have argued that a 25% award would be within the range of the standard deviation and, therefore, reasonable. The court would have then assessed the merit of that argument.

Id. at 22.

As the court also wrote:

> Labaton filed the Fitzpatrick Study with its voluminous submission in support of the request for attorneys' fees. It was Exhibit 31 of 32 exhibits to Sucharow's declaration. See Dkt. No. 104-31. The court could have read the 36-page study at the time it made the original fee award. However, there were 778 pages of exhibits, in addition to the lengthy declarations and memoranda. It is unreasonable to expect that the court would scrutinize hundreds of pages of exhibits to determine the veracity of every representation made by counsel. Rather, as the court stated at the final approval hearing on November 2, 2016, it relied "heavily" on counsel's submissions and statements at hearing, Nov. 2, 2016 Tr. at 35 (Dkt. No. 114), on the assumption that counsel were satisfying their duty of candor to the court. Once again, the court now finds that trust was misplaced.

Id. at 106-07.

The court reached its conclusion that the description of the Fitzpatrick Study was misleading after giving Lieff and its co-

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would not be material whether Lieff signed the Memorandum or only joined in submitting it.

counsel notice of the issue and its possible implications for the new fee award the court would make, an opportunity to argue the issue, and an opportunity to brief it after that argument.

At the beginning of the June 24, 2019 hearing, the court explained that it wanted to determine what a reasonable range would be for a new award of attorneys' fees and consider the conventional factors for determining the most appropriate award, including public policy considerations. See Jun. 24, 2019 Tr. (Dkt. No. 560) at 18-19. The court explained that, under public policy considerations, it intended to consider whether false and misleading statements had been made, and, if so, how that should affect where within the reasonable range the award should be made. Id. at 18; see also id. at 76. The characterization of the Fitzpatrick Study was identified as one possible false and misleading statement. Id. at 12, 18.

Mr. Heimann of Lieff stated that he had been "nominated" to speak for Class Counsel - Labaton, Thornton, and Lieff - on "topic number one," the reasonableness of the 25% fee award. Id. at 19. This included the issue of whether the Fitzpatrick Study had been misrepresented in the memorandum in support of the request for $75,000,000 in attorneys' fees. Mr. Heimann did not argue that Lieff was not jointly responsible for the reliability of the statements in the memorandum. Rather he repeatedly referenced

what "we" - meaning Labaton, Thornton, and Lieff - said in the brief. See, e.g., id. at 43:21-22; 44:22; 45:20; 47:10.

With regard to the Fitzpatrick Study, Mr. Heimann stated:

> [C]an you fault us because we didn't say, oh by the way, [] to settlements between 250 and 500, there were eight of them in that two-year period and the mean was 17.5[%]. All right, maybe we should have said that, but I hardly think that constitutes a misrepresentation when in the context of the brief we addressed the whole megafund issue in depth.

Id. at 45-6 (emphasis added). The court later pointed out that Lieff had submitted a memorandum in another class action, referred to as BONY Mellon, which accurately disclosed that the Fitzpatrick Study found that the mean and median range for settlements between $250,000,000 and $500,000,000 were 17.8% and 19.5% respectively, with a standard deviation of 7.9%. Id. at 55. Mr. Heimann responded, "I can see in retrospect it would have been better . . . to have provided this kind of information to the court." Id. at 57. Mr. Heimann then noted that the court was "marking down my concession," and added, "I don't blame you." Id.

On June 26, 2019, the court stated that it was its "present intention to write a decision that says" that 20 to 30% is a reasonable range and then consider, among other things, public policy factors in deciding how much to award in attorneys' fees. June 26, 2019 Tr. (Dkt. No. 566) at 247. The court asked Mr. Heimann to brief that issue. Id. Mr. Heimann responded that he would do so. Id. at 248.

In its post-hearing memorandum, Lieff did not contend that the court could not properly award less than $75,000,000 if it found that representations made to the court in seeking attorneys' fees were not reliable. See Docket No. 577 at 8 of 17. Rather, it sought to distinguish itself from Labaton and Thornton, writing that "[s]hould the Court determine to reduce the overall attorneys' fee award based on the public policy concerns identified by the Court during the June 24-26 hearings," the court should "exercise its authority to allocate that award to avoid any reduction of the fees previously allocated to Lieff []." Id.

III. THE FEBRUARY 27, 2020 ORDER

As explained earlier, the court had vacated the original $75,000,000 fee award. See Dkt. No. 331. Therefore, in the February 27, 2020 Order, it decided de novo all of the objections to the Report, including to the Master's findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 53(f)(3) & (4). See Feb. 27, 2020 Order at 77. It then decided de novo the most appropriate amount of attorneys' fees to award and exercised its authority to allocate the award between counsel. Id. As the court wrote, "[i]t [was] also, in effect, modifying [the Master's] Report" as authorized by Federal Rule of Civil Procedure 53(f)(1). Id.

In making the new fee award, the court was exercising its inherent equitable authority and acting as a fiduciary for the

class. See Feb. 27, 2020 Order at 27-28, 33-35, 77-79 (citing In re Fid./Micron Sec. Litig., 167 F.3d 735, 737 (1st Cir. 1999) and other cases). The court used the framework it had explained at the June 2019 hearings. It first determined that frequently an appropriate award is found to be in the 20 to 30% range, but it is usually less if the common fund is more than $250,000,000. Id. at 6, 79, 143-144. The court's starting benchmark was a 25% award, $75,000,000. Id. at 79. It then considered the customary factors[7] and whether the unique circumstances of this case demonstrated that a higher or lower award would be most reasonable. Id. at 80-86. Among other things, as a public policy factor, the court considered the need to assure the integrity of judicial proceedings and, therefore, whether any counsel seeking compensation had violated their duties of candor to the court. Id. at 6-7, 84-126.

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[7] The framework that the court used is well-known and was advocated for by Class Counsel. See Memorandum in Support (Dkt. No. 103-1) at 4-5. Factors that judges customarily consider when awarding attorneys' fees, and employed by the court in this case, are:

> (1) the size of the fund and the number of persons benefitted; (2) the skill, experience, and efficiency of the attorneys involved; (3) the complexity and duration of the litigation; (4) the risks of the litigation; (5) the amount of time devoted to the case by counsel; (6) awards in similar cases; and (7) public policy considerations.

In re Neurontin Mktg. & Sales Practices Litig., 58 F. Supp. 3d 167, 170 (D. Mass. 2014).

As the court stated in summarizing its decision to award attorneys' fees of $60,000,000, representing 20% of the common fund:

> On closer scrutiny, the court has decided that even absent the serious, repeated misconduct of Labaton and Thornton, an award of less than 25% of the common fund would be most appropriate. However, for the reasons described in detail in this Memorandum, in this equitable proceeding it is permissible and appropriate to take that misconduct into account in awarding and allocating attorneys' fees.

Id. at 28; see also id. at 126 (emphasis added).

As the court later explained:

> In this case, Labaton and Thornton repeatedly demonstrated a cavalier indifference to their duty to provide the court with the accurate and complete information necessary to make a properly informed decision concerning the most appropriate amount to award in attorneys' fees. Rather than satisfy the elevated duty of candor that exists in what the Massachusetts Rules of Professional Conduct treat as an ex parte proceeding, see Mass. R. Prof. C. 3.3 cmt. 14A, Labaton and Thornton disregarded even the most basic duties of counsel in any case.
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> For example only, as described earlier, Garrett Bradley: did not read his declaration before signing it under oath; made false representations concerning what were purportedly the regular hourly rates charged for lawyers claimed to have been employed by Thornton; did not correct his false statements after he read his declaration; authorized the submission by Labaton of a memorandum said to be signed by him, among others, that included a false and misleading description of the Fitzpatrick Study; and collaborated with Labaton to conceal its agreement to pay Chargois $4,100,000 from ATRS, the ERISA Plans and their counsel, and thus from the court and the public.
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> Similarly, again for example only, Sucharow: submitted a sworn declaration that falsely represented that

> Bradley's declaration, among others, was accurate; falsely represented that certain hourly rates were regularly charged by Labaton for its attorneys; failed to make a reasonable inquiry before providing the court with a lodestar that was erroneously inflated by 9300 hours and more than $4,000,000; provided a false and misleading description of the Fitzpatrick Study; and with others at Labaton and Garrett Bradley, improperly concealed Labaton's obligation to pay Chargois more than $4,000,000 concerning this case. See R. & R. at 311; Sucharow Dep. Tr. at 18-19, R. & R. Ex. 38 (Dkt. No. 401-37).
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> . . . .
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> The repeated, egregious misconduct of counsel for Labaton and Thornton in this case should not be ignored in the award of attorneys' fees. See In re Agent Orange Prod. Liab. Litig., 818 F.2d 216, 222 (2d Cir. 1987); Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 542 (1st Cir. 2015); Culebras Enters. Corp. v. Rivera-Rios, 846 F.2d 94, 97 (1st Cir. 1988). That misconduct contributes to the court's conclusion that it is most appropriate to award counsel 20% of the common fund, $60,000,000.

Id. at 127-29 (emphasis added).

The court also characterized Lieff's performance as "deficient" in certain respects, including with regard to the misleading description of the Fitzpatrick Study, rather than as "misconduct." See, e.g., id. at 123-25. As the court summarized in allocating more than $15,000,000 to Lieff:

> Lieff was deficient in its performance as counsel in this case. As explained earlier, Lieff was a signatory to the false and misleading memorandum filed in support of the request for attorneys' fees (Dkt. No. 103-1) that it had read and edited. Thus, Lieff contributed to the misrepresenting of the number of hours worked by more than 9,000 and to providing a misleading description of the Fitzpatrick Study. In addition, by using the template provided by Labaton, Lieff made false and misleading representations concerning the regular hourly

> rates charged for the attorneys who worked on this case. The failure of Lieff to probe the reasons for what should have been viewed as a suspicious payment of $4,100,000 by Labaton to Chargois before agreeing to underwrite $1,000,000 of that payment facilitated Labaton's violation of the Massachusetts Rules of Professional Conduct 7.2(c), 1.5(e), 1.4(a)(1) and (b) by failing to disclose the Chargois payment to ERISA Counsel and their clients. These deficiencies in Lieff's conduct justify reducing the original fee award to Lieff by about $1,140,000.

Id. at 148-49.

However, by the foregoing description of the "repeated, egregious misconduct" of Labaton and Thornton the court intended to make clear that the performance of Lieff was not material to its decision to make an award of $60,000,000. In view of the court's findings concerning the misconduct of Labaton and Thornton, it would have awarded $60,000,000 even if it had not also found Lieff's performance to be "deficient" in certain respects.

In reaching its decision to award $60,000,000, the court did not sanction Labaton, Thornton, or Lieff and, in any event, did not impose a Federal Rule of Civil Procedure 11 sanction. The court did make certain references to Rule 11. For example, it wrote that:

> As explained below, the court now finds that Class Counsel, particularly Labaton and Thornton, made submissions in support of their request for $75,000,000 in attorneys' fees that were replete with false and misleading statements. Labaton and Thornton each violated their obligations, under Federal Rule of Civil Procedure 11, to make reasonable inquiries to assure

> that their representations were reliable and to correct them when they realized that they were not. Their conduct violated the Massachusetts Rules of Professional Conduct as well.

Id. at 86-87 (emphasis added). The court also stated once -- and only once -- that "Lieff violated Federal Rule of Civil Procedure 11(b) by agreeing to be a signatory to a misleading submission to the court." See id. at 125.

However, as the court expressly stated in making the new award of $60,000,000, it was:

> Neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct. It [was], however, considering such misconduct in deciding where within the reasonable range to make a total fee award and how to allocate the total award among counsel.

Id. at 86. The court later reiterated this, stating:

> While the court is not imposing sanctions or denying attorneys' fees, it is taking into account the proven misconduct of certain counsel in deciding where within the reasonable range to award such fees.

Id. at 127.

In adopting this approach, the court did not accept the Master's recommendation that Rule 11 sanctions be imposed on Thornton. While not the purpose for adopting the framework utilized, the court's approach obviated the need to decide the merit of Thornton's argument that Rule 11 sanctions could not be imposed because the settlement of the case had been previously approved by the court.

After deciding to award attorneys' fees in the amount of $60,000,000, the court awarded ERISA Counsel the fees and expenses they received under the original vacated fee award plus the fees and expenses they subsequently incurred - a total of about $10,000,000. See id. at 146.

It then considered Lieff's conduct in allocating the remaining $49,871,510 among Labaton, Thornton, and Lieff, see id. at 148-151. With regard to Lieff, the court wrote:

> The court now deems it most appropriate to award Lieff $15,233,397.53, comprised of $14,961.453 as fees and $271,944.5 as expenses. This is a reduction of about $1,140,000 and provides Lieff 30% of the new award to Customer Class Counsel.

Id. at 148.

The award to Lieff was $2,448,678 more than the Master had recommended. See Feb. 27, 2020 Order, Ex. A at 162. It was only 7% less than Lieff received from the original, vacated fee award pursuant to its agreement with Labaton and Thornton, despite the fact that the new award was 20% less than the original award. See id. The court's award to Lieff was also a higher percentage of the award to Class Counsel than Lieff received pursuant to its agreement with Labaton and Thornton from the original $75,000,000 fee award. See id.

Nevertheless, Lieff asserts that the court imposed on it a Rule 11 sanction and did so without following the required procedure; that the court would have awarded a total of $61,140,000

but for the alleged improper Rule 11 sanction; and that the class, rather than Labaton and Thornton, should compensate it for the court's alleged error.

IV. ORDERS CONCERNING DISTRIBUTIONS TO ERISA COUNSEL AND THE CLASS

As directed in the February 27, 2020 Order, on April 7, 2020, the Master proposed a schedule for distribution of the funds to be returned by Labaton, Thornton, and Lieff and escrowed. See Dkt. No. 599-2. Under the Master's proposed plan, Lieff's funds would have been distributed to ERISA Counsel and the class with Labaton's and Thornton's funds in September 2020 and March 2021. Id. Lieff objected, arguing that its funds should not be distributed before its then pending appeal was decided. See Dkt. No. 600.

On June 25, 2020, the court issued a Memorandum and Order that addressed the proposed distribution schedule. See Dkt. No. 613. It directed the Special Master to file an updated schedule to account for the passage of time since his initial recommendation. See id. at 3-4. The court also wrote that "it is most appropriate to defer the distribution of Lieff's escrowed funds until the [second supplemental] distribution," and that "if Lieff's appeal is not decided 45 days before the [second supplemental distribution] is scheduled to be made, the Master, Lieff, and the other Customer Class Counsel should seek guidance

from the court concerning the funds escrowed by Lieff." See id. at 5.

Therefore, contrary to Lieff's current contention, the court did not previously decide that Lieff's escrowed funds should not be distributed before its appeal was decided. Rather, as the court explained at a September 22, 2020 hearing, the court had "anticipated that the appeal would be resolved before [the second supplemental] distribution on about April 30, 2021, and the schedule I ordered provided for a hearing 45 days before April 30, 2021 if the appeal was not resolved." Sept. 22, 2020 Tr. (Dkt. No. 642) at 7:5-8. In essence, the court had reserved judgment on whether or not to require that Lieff's escrowed funds be included in the second supplemental distribution scheduled for April 30, 2021.

On September 3, 2020, the First Circuit dismissed Lieff's appeal without prejudice because the February 27, 2020 Order was deemed not to be final. See Case No. 20-1365, Judgment (Dkt. No. 8). Following argument on September 22, 2020, the court ordered briefing on CCAF's motion for attorneys' fees for serving as amicus in this case. See Dkt. No. 646. A decision on that motion would render the fee award final and subject to appeal. At the September 22, 2020 hearing, the court stated that it was inclined to order distribution of Lieff's escrowed funds with Labaton's and

Thornton's unless the standards for a stay pending appeal were met. See Sept. 22, 2020 Tr. at 18:13-17.

After further briefing on both issues, on January 19, 2021 the court awarded $60,690 as attorneys' fees to CCAF. See Jan. 19, 2021 Order (Dkt. No. 662) at 5-20, 24. It also ordered that Lieff's escrowed $1,140,000 be distributed with those of Labaton and Thornton unless Lieff obtained a stay pending appeal. Id. at 20-22, 24. The court further stated that it would order the first distribution of Lieff's funds 14 days after the First Circuit decided its request for a stay if that request was denied.[8] Id. at 24. Final judgment then entered. See Dkt. No. 663.

Lieff filed a notice of appeal, see Dkt. No. 664, and the pending motion for a stay of the distribution of its funds pending appeal, see Dkt. No. 667. Thornton and Labaton, still working in tandem with Lieff, support Lieff's request for a stay. See Dkt. Nos. 674, 675. CCAF and the Master oppose it. See Dkt. Nos. 676, 677.

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[8] Pursuant to a March 1, 2021 Order, unless the First Circuit grants a stay the Labaton, Thornton, and Lieff escrowed funds are scheduled to be provided to the settlement administrator for distribution to ERISA Counsel and the class 14 days after the final decision on Lieff's request for a stay, and again on April 30, 2021. See Dkt. No. 679; see also Second Revised Payment Plan (Dkt No. 679-1).

V. STANDARDS FOR ISSUANCE OF A STAY PENDING APPEAL

Deciding a motion for a stay pending appeal requires an exercise of the court's equitable discretion. See Common Cause Rhode Island, 970 F.3d at 15-16. The Supreme Court has stated that the standards for the issuance of a stay pending appeal "are generally the same" for a district court and for a court of appeals. Hilton, 481 U.S. at 776. The party requesting the stay bears the burden of showing that it is justified. See Nken, 129 S.Ct. at 1761; Respect Maine PAC, 622 F.3d at 15.

As the First Circuit has stated:

> [I]n cases involving stays of actions pending appeal, we are guided by consideration of four factors: (1) whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. [Nken, 129 S.Ct. at] 1761 (quoting [Hilton, 481 U.S. at 776]).
>
> The first two factors are the most critical. Both require a showing of more than mere possibility. Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be likely absent an injunction. [Winter, 129 S.Ct. at 375-76].

Respect Maine PAC, 622 F.3d at 15; see also Common Cause Rhode Island, 970 F.3d at 14.

With regard to the required strong showing of success on the merits, the court understands that "the moving party need not persuade the court that it is likely to be reversed on

appeal." Canterbury Liquors & Pantry v. Sullivan, 999 F. Supp. 144, 150 (D. Mass. 1998) (Wolf, J.). Rather, it has been held that the moving party must "present a substantial case on the merits when a serious legal question is involved. . . . " Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981). As this court wrote in 1998, this means that the movant must establish that "the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." Canterbury Liquors & Pantry, 999 F. Supp. at 150. However, as Nken, 129 S.Ct. at 1761, Common Cause Rhode Island, 970 F.3d at 14, and Respect Maine PAC, 622 F.3d at 15, have since clarified and emphasized, the movant must demonstrate more than a mere possibility of prevailing on any such issue.

"Irreparable harm" generally means harm that cannot be compensated by the payment of money. See, e.g., Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996). "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." Sampson v. Murray, 415 U.S. 61, 90 (1974); see also Borey v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 934 F.2d 30, 34 (2d Cir. 1991). ("[W]hen a party can be fully compensated for financial loss by a money judgment," there is not the threat of irreparable harm).

VI. ANALYSIS

As explained below, Lieff has failed to make the required strong showing that it is likely to succeed on the merits of its appeal. Nor has Lieff made the necessary strong showing of irreparable harm. Although the failure to make a strong showing of success and of irreparable harm is fatal to Lieff's request, the balance of hardships and the public interest also weigh in favor of not granting a stay.

A. The Likelihood of Success on the Merits

Lieff has stated that it intends to raise the same issues in the pending appeal that it raised in its original appellate brief. See Sept. 22, 2020 Tr. (Dkt. No. 642) at 15; Mem. In Support of Mot. To Stay (Dkt. No. 668) at 3. As explained in its submissions in support of its Motion to Stay, in essence Lieff intends to challenge all of the findings in the February 27, 2020 Order regarding deficiencies in its conduct. See Lieff's Reply in Support of Motion to Stay (the "Reply") (Dkt. No. 678) at 2. It will argue that these findings are both unsupported by the factual record and violated the due process requirements of Rules 11(b) and 11(c)(3) of the Federal Rules of Civil Procedure. See id.

With respect to the court's factual findings, Lieff will argue that the record does not show that it engaged in any serious misconduct. See Lieff's June 9, 2020 Appellate Brief at 44. It contends that the sole basis for the court's statement that Lieff

violated Rule 11 was the alleged misrepresentation of the Fitzpatrick Study made in support of the original fee memorandum. See Lieff's June 9, 2020 Appellate Brief at 47. However, Lieff argues that the fee memorandum was not misleading because it contained all of the relevant information regarding the Fitzpatrick Study. See Lieff's June 9, 2020 Appellate Brief at 48-49. Further, Lieff argues that its fee declaration was accurate with respect to its billing rates, see Lieff's June 9, 2020 Appellate Brief at 56, as the Master found in his report, see Reply at 3. Moreover, Lieff notes that the Master concluded that Lieff was misled with regard to the $4,100,000 referral fee to Chargois in violation of the Massachusetts Rules of Professional Conduct, to which Lieff contributed $1,000,000. See Reply at 3.

Lieff also contends that, to the extent that these findings are overturned on appeal, the reduction of the fee from 25 percent to 20 percent was erroneous. See Reply at 6. In view of this error, Lieff claims that an award of $61,140,000 should be made, and an additional $1,140,000 allocated to Lieff at the expense of the class rather than charged to Labaton and Thornton. See Reply at 7.[9]

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[9] This issue is addressed in the discussion of irreparable harm below.

With regard to Lieff's challenges to the court's factual findings in the February 27, 2020 Order, Rule 52 of the Federal Rules of Civil Procedure states that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). "The clearly erroneous standard 'plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently.'" Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1080 (1st Cir. 1995) (quoting Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564, 573 (1985)). Rather, "[a] finding that is plausible in light of the full record—even if another is equally or more so—must govern." Cooper v. Harris, 137 S.Ct. 1455, 1465 (2017) (cleaned up).

The 162-page February 27, 2020 Order describes in detail the facts on which the court relied and cites to the evidence in the record that supports those facts. There are many pages addressing the reasons for the court's finding that the characterization of the Fitzpatrick Study, which is the primary focus of Lieff's arguments, was misleading, and describing the facts on which its

reasoning relied. See Feb. 27, 2020 Order at 26-27, 42-43, 104-07. For example, Class Counsel's Memorandum in Support of the request for an award of 25% of the common fund -- $75,000,000 -- stated that the fee requested "is right in line with Professor Fitzpatrick's findings." Id. at 104 (quoting Dkt. No. 103-1 at 17-18 of 36). As explained earlier, in the Memorandum that was represented to have been submitted by Lieff, as well as Labaton and Thornton, see Dkt. No. 103-1 at 28-29:

> Labaton accurately reported the figures in the Fitzpatrick Study that supported the request for an award of 25% of the $300,000,000 common fund. However, Labaton omitted other findings from the Fitzpatrick Study that undermined the argument that an award of 25% of the common fund was appropriate. In particular, as indicated earlier, Fitzpatrick had concluded that "fee percentage is strongly and inversely associated with settlement size among all cases, among securities cases, and among all nonsecurities cases." Fitzpatrick Study, supra, at 837. Fitzpatrick explained that "fee percentages tended to drift lower at a fairly slow pace until a settlement size of $100 million was reached, at which point the fee percentages plunged well below 20 percent . . . ." Id. at 838. In settlements between $250,000,000 and $500,000,000, Fitzpatrick found a mean of 17.8% and a median of 19.5%. See id. at 839. Labaton did not mention these important findings. The court now recognizes that a table in the Fitzpatrick Study indicated there was for settlements between $250,000,000 and $500,000,000 a standard deviation in awards of 7.9%. Id. at 839. However, Labaton did not mention this fact either.
>
> As intended, Labaton's memorandum communicated to the court that Fitzpatrick had found that the mean and median awards for comparable, megafund cases were in the range of 25% of the common fund, and that a $75,000,000 award in this case would be "right in line with Professor Fitzpatrick's findings." Dkt. No. 103-1, at 18 of 36. This statement was false and misleading.

Feb. 27, 2020 Order at 105-06. Lieff has not made a strong showing that the court was clearly erroneous in finding the facts on which it relied or in its factual finding that the characterization of the Fitzpatrick Study was misleading.

In addition, Lieff has not made a strong showing that the court was clearly erroneous in finding that it was "deficient" in using the template provided by Labaton to claim that the rates used in its declaration to calculate Lieff's lodestar were "regularly charged" by the firm for its attorneys' services. See Feb. 27, 2020 Order at 123-24. On March 7, 2017, Mr. Heimann informed the court that Lieff "did not intend to represent by that declaration" that it had clients that actually paid those rates. See Mar. 7, 2017 Tr. (Dkt. No. 176) at 93:12-14; Feb. 27, 2020 Order at 124. Rather, he said, Lieff had "only a handful of paying clients over the years." Id. 93:16-17. The court deemed this statement to be credible. Therefore, Lieff has not made a strong showing that there was not sufficient factual support for the court's finding that the rates employed to calculate its lodestar were not "regularly charged" by Lieff.[10]

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[10] Lieff argues that the Master did not fault its characterization of its billing rates. However, the court was not required to agree with the Master. See, e.g., Stauble v. Warrob, Inc., 977 F.2d 690, 697 (1st Cir. 1992) (criticizing court that "adopted [a] master's report without a hearing, without any stated

The heart of Lieff's legal argument is that the court sanctioned it for violating Federal Rule of Civil Procedure 11(b) without giving the notice required by Rule 11(c)(3). See, e.g., Lieff's June 9, 2020 Appellate Brief at 2. Lieff has not made a strong showing that it will prevail on this claim.

Most significantly, as the court wrote in the February 27, 2020 Order, it did not "sanction" Lieff, Thornton, or Labaton. See Feb. 27, 2020 Order at 86, 127. As noted earlier, the court expressly stated in making the new award of $60,000,000, that it was:

> Neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct. It [was], however, considering such misconduct in deciding where within the reasonable range to make a total fee award and how to allocate the total award among counsel.

Id. at 86. The court later reiterated this, stating:

> While the court is not imposing sanctions or denying attorneys' fees, it is taking into account the proven misconduct of certain counsel in deciding where within the reasonable range to award such fees.

Id. at 127. As explained earlier, those "certain counsel" were Labaton and Thornton, not Lieff.

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analysis of the evidence, and without any discussion of the master's legal conclusions"). As explained earlier, the February 27, 2020 Order in effect modified the Master's Report, pursuant to Rule 53(f)(1), concerning issues of which Lieff had notice and an opportunity to be heard. See Feb. 27, 2020 Order at 77. The question of whether Lieff's billing rates were accurately described was one such issue.

The court did state that Lieff's performance was "deficient" in several respects, and with regard to the memorandum in support of the request for an award of $75,000,000 of attorneys' fees, wrote one time that Lieff did not meet the standard required by Rule 11. Id. at 125. However, the mere mention of the Rule 11 standards does not in this case constitute the imposition of a sanction, let alone a Rule 11 sanction. Rather, as the First Circuit has written, "[b]earing the burden of a judge's unflattering remarks traditionally has been among the rigors associated with trial practice" and "a jurist's derogatory comments . . ., without more, do not constitute a sanction." In re Williams, 156 F.3d 86, 92 (1st Cir. 1998).[11] "Words alone may suffice if they are expressly identified as a reprimand." Id. However, the court did not state that it was reprimanding Lieff and, indeed, did not.

The court did award Lieff $1,140,000 less than Lieff received from the original $75,000,000 award as a result of its agreement with Labaton and Thornton. However, this was not a "sanction." Rather, as explained earlier, the court had vacated the original

[11] To the extent that Lieff may be asking the First Circuit to reverse this court's language concerning its conduct, as the First Circuit has written, "federal courts of appeals have no roving writ to review [] a district court's word choices." Sexual Minorities Uganda v. Lively, 899 F.3d 24, 28 (1st Cir. 2018).

$75,000,000 and was deciding de novo what amount to award would be reasonable and most appropriate. It found that "[e]ven absent the misconduct of Labaton, Thornton, and a lesser extent Lieff . . . the court would not now award $75,000,000 in attorneys' fees" because the case had settled based on informal discovery, no motions had been litigated, and the risks that counsel would not be awarded any fees was greatly diminished after the settlement of the comparable BONY Mellon case. See Feb. 27, 2020 Order at 126-27.

The court then wrote:

> Public policy considerations prompt the court to conclude that it is most appropriate to award 20% of the common fund -- $60,000,000 -- in attorneys' fees. Again, as the Second Circuit has written, "in fulfilling [its role as protector of the class], courts should look to the various codes of ethics as guidelines for judging the conduct of counsel." Agent Orange, 818 F.2d at 222. It is equally appropriate to consider whether counsel have violated Federal Rule of Civil Procedure 11 in seeking attorneys' fees. This is, in part, because "'the district court has the duty and responsibility to supervise the conduct of attorneys who appear before it, and . . . [d]enial of attorneys' fees may be a proper sanction' for attorney misconduct." Travers, 808 F.3d at 542 (quoting Culebras Enters., 846 F.2d at 97). While the court is not imposing sanctions or denying attorneys' fees, it is taking into account the proven misconduct of certain counsel in deciding where within the reasonable range to award such fees.

Id. at 127 (emphasis added).[12]

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[12] The court could have also cited First State Ins. Grp. v. Nationwide Mut. Ins. Co., 402 F.3d 43, 44 (1st Cir. 2005), in which

The court then went on to discuss the "cavalier indifference" of Labaton and Thornton - not Lieff - "to their duty to provide the court with the accurate and complete information necessary to make a properly informed decision concerning the most appropriate amount to award in attorneys' fees." Id.

Lieff did not argue to this court that it could not take into account lack of candor to the court or violations of ethical rules in making a new award of attorneys' fees. Nor did it argue to this court that Lieff did not share responsibility with Labaton and Thornton for the reliability of the representations in the memorandum in support of its request for attorneys' fees that the three firms jointly "respectfully submitted."[13] Indeed, as

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the First Circuit affirmed a decision not to award any attorneys' fees to a firm that had made a grossly excessive request.

[13] In its original June 9, 2020 Appellate Brief, at 53, Lieff argued for the first time that it could not be held responsible under Rule 11 for any misrepresentations in the jointly submitted memorandum because only Lawrence Sucharow was represented as having signed it. In support of this argument Lieff quoted several, non-consecutive sentences of the 1993 Advisory Committee Note to Rule 11. More specifically, Lieff wrote in its brief:

> The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation . . . . When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual

explained earlier, at the June 2019 hearings Mr. Heimann of Lieff argued on behalf of all three firms that the memorandum contained no misrepresentations and that the court should again award $75,000,000 in attorneys' fees. Similarly, in its post-hearing memorandum, Lieff did not contend that the court could not properly award less than $75,000,000 if it found a lack of candor by counsel. See Dkt. No. 577 at 8 of 17. Rather, Lieff only argued that if the court "determine[d] to reduce the overall attorneys' fee award based on the public policy concerns identified by the Court during the June 24-26 hearings," "the Court should exercise its authority to allocate that award to avoid any reduction of the fees previously allocated to Lieff Cabraser." Id.

To the extent that Lieff relies on new arguments on appeal, its claim to have made a strong showing of likelihood of success is undermined because it is "'axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal.'" Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 678 (1st Cir.

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circumstances, instead of the person actually making the presentation to the court.

Lieff's June 9, 2020 Appellate Brief at 52-3. However, one of the sentences Lieff did not quote would be important in this case if the court had imposed a Rule 11 sanction: "The revision [to Rule 11] permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation." 1993 A.C. Note (emphasis added).

1995) (quoting Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979); see also Whitehaven S.F., LLC v. Spangler, 2014 WL 5510860, at *2 (S.D.N.Y. Oct. 31, 2014); Frye v. Lagerstrom, 2018 WL 4935805, at *2, n.2 (S.D.N.Y. Oct. 10, 2018); Aptim Corp. v. McCall, 2017 WL 5177942, at *2 (E.D. La. Nov. 8, 2017); In re Yan Sui, 2013 WL 12453688, at *3 (C.D. Cal. Oct. 25, 2013).

In any event, even assuming, without suggesting, that the fact that Lieff received less under the new award than under the vacated original award could be found to be a sanction, Lieff has not made a strong showing that it is likely to prevail on its contention that it was a Rule 11 sanction.

The Advisory Committee Notes to the 1993 Amendment to Rule 11 of the Federal Rules of Civil Procedure state, in part, that:

> Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. §1927. See Chambers v. NASCO, 501 U.S. 32 (1991). Chambers cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11--notice, opportunity to respond, and findings--should ordinarily be employed when imposing a sanction under the court's inherent powers.

1993 A.C. No.; see also, John's Insulation, Inc. v. L. Addison and Associates, Inc., 156 F.3d 101, 108 (1st Cir. 1998) ("the rules of

civil procedure do not completely describe and limit the power of district courts," including the "inherent powers to sanction parties for litigation abuses").

In Chambers, the Supreme Court reaffirmed that a district court has inherent powers to sanction misconduct which "can be invoked even if procedural rules exist which sanction the same conduct." Chambers, 501 U.S. at 49. More specifically, it held that "Rule 11 does not repeal or modify existing authority of federal courts to deal with abuses . . . under the court's inherent power." Chambers, 501 U.S. at 48-49 (quoting Zaldivar v. Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986)).

Applying these principles, the Court concluded that a "federal court [is not] forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules." Chambers, 501 U.S. at 50. The Court warned that "[a] court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process, both in determining that the requisite bad faith exists and in assessing fees." Id. Nevertheless, "if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." Id. For example, where "all of a litigant's conduct is deemed sanctionable, requiring a court first to apply Rules and statutes containing sanctioning provisions to discrete

occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." Id. at 51.

As explained earlier, in the instant case, Thornton had objected to the Master's recommendation that it be sanctioned pursuant to Rule 11, contending that because the court had not, pursuant to Rule 11(c)(5), issued a show cause order before approving the settlement of the underlying case it lacked the authority to impose a Rule 11 sanction. See Dkt. No. 361 at 66. Therefore, it was not clear that the court had the power to impose a sanction on Thornton, Labaton, or perhaps Lieff, pursuant to Rule 11.[14] Moreover, in view of the many misrepresentations of Thornton and Labaton, imposing sanctions for discrete occurrences and calibrating the penalties for each would not have been efficient or, indeed, feasible. In any event, without regard to whether it had the authority to impose Rule 11 sanctions, having vacated the original $75,000,000 fee award, the court found it

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[14] The court notes that if Thornton were correct in asserting that approval of the settlement made it too late to impose Rule 11 sanctions and Lieff were right that violations of Rule 11 cannot be taken into account when the court exercises its inherent equitable power to make a new fee award after vacating an initial award because of misconduct, there could be no economic consequence for such misconduct. However, Lieff's contention, at least, is not correct.

most appropriate to decide de novo what amount to award after considering the customary factors rather than adopting the complicated framework for making a new fee award recommended by the Master.

Moreover, even assuming, without suggesting, that the court sanctioned Lieff, it did so as permitted by Chambers and contemplated by the 1993 Advisory Committee Note. As explained earlier, the court was exercising its inherent, equitable authority to award attorneys' fees in a common fund case. See Feb. 27, 2020 Order at 33, 142-143. The court gave Lieff and other counsel notice of the relevant issues before and at the June 2019 hearings, including the question of the reliability of the characterization of the Fitzpatrick Study that the Master had not addressed. The court heard argument by Lieff, among others, at those hearings and considered Lieff's post-hearing memorandum. The court also made detailed findings in the February 27, 2020 Order. Therefore, even if the lesser award to Lieff is found to be a sanction, Lieff has not made a strong showing that it was a Rule 11 sanction or that it was denied due process before any sanction was imposed.

Although Lieff does not say so clearly, it is challenging the court's exercise of its inherent equitable authority in finding that an award of $60,000,000 in attorneys' fees was reasonable and most appropriate. Rather, it argues, in effect, that the court

should have awarded attorneys' fees in the amount of $61,140,000, and would have but for its allegedly factually unfounded findings that Lieff's performance was deficient in certain respects.

The First Circuit will "review this court's exercise of its inherent powers only for abuse of discretion." John's Insulation, Inc., 156 F.3d at 108; see also First State Ins. Grp., 402 F.3d at 44 ("after reviewing the record, we conclude that the district court did not abuse its discretion by finding Nationwide's fee request to be so excessive as to merit outright denial of any fee"). Lieff has not made a strong showing that the court abused its discretion by allocating Lieff less than it received from the original award.

As explained earlier, a party "must show a strong likelihood of success" to obtain a stay pending appeal. Respect Maine PAC, 622 F.3d at 154 (emphasis added). As Lieff has not made this essential showing, its request must be denied. See Nken, 129 S.Ct. at 1761. Nevertheless, the court is addressing the other Hilton/Nken factors.

B. Irreparable Harm

The court has ordered that the $1,140,000 that Lieff has been ordered to pay into escrow be transferred to the settlement fund administrator for distribution to ERISA counsel and the class 14 days after a final decision if Lieff's request for a stay pending appeal is denied. See Dkt. No. 662; see also Dkt. No. 679-1.

Lieff claims that it will be irreparably harmed absent a stay because if it prevails on appeal it will be unable to recover the funds distributed to the class. See Dkt. No. 668 at 12. Lieff has not made the strong showing that it will be irreparably harmed that is also required to justify a stay. Cf. Common Cause Rhode Island, 970 F.3d at 14; Respect Maine PAC, 622 F.3d at 15.

If Lieff prevails on appeal, it intends to ask the First Circuit to order recovery from the class. See Reply at 7-8. In seeking the stay, Lieff itself has asserted that "complete settlement distributions - especially those involving settlement funds in the hundreds of millions of dollars - commonly take years not months . . . . It is not uncommon for the entire process to take two or three years (as it did in the comparable BNY Mellon litigation)." Mem. in Support of Mot. to Stay (Dkt. No. 668) at 13. Accordingly, Lieff has not made a strong showing that funds transferred to the Administrator for distribution to the class will not be available for reimbursement if Lieff prevails on appeal.

More significantly, however, Lieff will not be irreparably harmed if a stay is not granted because if Lieff prevails on its appeal Labaton and Thornton should be ordered to pay Lieff the $1,140,000 it is seeking. Lieff repeatedly asserts that it is not seeking reimbursement from its co-Class Counsel, Labaton and Thornton. See Dkt. No. 668 at 11; see also Dkt. No. 678 at 7. Lieff implicitly contends that but for deficiencies in Lieff's

conduct that the court found it would have awarded attorneys' fees in the amount of $61,140,000, rather than $60,000,000. As explained earlier, this is incorrect. In view of the repeated, egregious misconduct of Labaton and Thornton, the deficiencies in Lieff's performance were not material to the court's decision to award $60,000,000.

As also explained earlier, after awarding $60,000,000 in attorneys' fees, the court decided to allocate to "ERISA Counsel the fees and expenses they received under the original, vacated fee award, plus the fees and expenses ERISA Counsel incurred after that award." Feb. 27, 2020 Order at 146. That left about $50,000,000 to be allocated among Labaton, Thornton, and Lieff. If Lieff had not been allocated $1,140,000 less than it received from the original $75,000,000 award, the awards to Labaton and Thornton would have been reduced by that amount. Therefore, those two solvent firms, which have now been awarded more than $35,000,000 in this case, should be required to reimburse Lieff if it prevails on appeal. As indicated earlier, see n.1, supra, if the First Circuit remands this case for the limited purpose of assuring that Labaton and Thornton will, if necessary, be able to reimburse Lieff, the court will order each to escrow an appropriate amount for this purpose. See Fed. R. Civ. P. 62.1(a).

In view of the foregoing, Lieff's request for a stay must also be denied because it has not made the required strong showing

of irreparable harm needed to justify a stay. See Common Cause Rhode Island, 970 F.3d at 14; Respect Maine PAC, 622 F.3d at 15.

C. The Balance of Hardship and the Public Interest

As Lieff has failed to satisfy either of the first two, essential factors, the remaining factors are not material to deciding whether a stay should be granted. See Nken, 129 S.Ct. at 1761; see also S.S. Body Armor I, Inc. v. Carter Ledyard & Milburn LLP, 927 F.3d 763, 775 (3rd Cir. 2019) ("[I]f the movant does not make the requisite showings on either of these [first] two factors, . . . the stay should be denied without further analysis") (quoting In re Revel AC, Inc., 802 F.3d 558, 571 (3d Cir. 2015)). Nevertheless, the court finds that the balance of hardship and the public interest weigh against granting a stay.

Lieff argues that "[n]o appellee came forward in response to [its] prior appeal," and "[t]here is therefore no known appellee who would be harmed by the requested stay." See Dkt. No. 668 at 4. This contention ignores the fact that the class, which Labaton, Thornton, and Lieff were appointed to represent, are now without counsel. That is why the court, as fiduciary for the class, asked the First Circuit to invite it to retain counsel in connection with Lieff's original appeal, see Dkt. No. 611, and will soon do so again in a separate order.

As Lieff will be asking the First Circuit to reduce the common fund by $1,140,000, the class will be harmed if Lieff prevails on

appeal. It will also be harmed if a stay is issued. At a minimum, distribution of funds which class members would have received years ago but for the conduct of Class Counsel addressed in the February 27, 2020 Order will be further delayed. Moreover, as explained by CCAF, there is reason to be concerned that if Lieff's escrowed funds are not distributed with those of Labaton and Thornton, some class members may have remaining claims too small to pay, and not receive what is owed them by Lieff. See CCAF's Response (Dkt. No. 676) at 10-11.

In addition, a stay would delay the distribution of $570,000 of Lieff's escrowed funds to ERISA Counsel. See Dkt. No. 662-1; see also Dkt. No. 679-1. They have been working on this case since 2011. They were required to do substantial additional work as a result of the Master's investigation and proceedings prompted by the conduct of Class Counsel. They deserve to be fully compensated now and would be harmed by a stay.

The public interest also weighs against granting the stay. As noted earlier, like an award of attorneys' fees from a common fund, a stay pending appeal is an "exercise of [a court's] equitable discretion." Common Cause Rhode Island, 970 F.3d at 16.

Lieff chose to join Labaton and Thornton as Class Counsel in this case. The three firms remain allied, as Labaton and Thornton support Lieff's motion for a stay and Lieff does not seek compensation from them if it prevails on appeal. The deficiencies

in Lieff's performance all related to the egregious misconduct of Labaton and Thornton. It might be expected that Lieff would now seek to distance itself from Labaton and Thornton, and to advocate that they should compensate Lieff if it prevails on appeal. Instead, Lieff insists that the class should bear that cost.

As Lieff has not made a strong showing that it is likely to prevail on appeal or that it will be irreparably harmed if a stay is not granted, it would be abuse of this court's discretion to grant a stay. However, if the court had the discretion to do so, it would not be in the public interest to grant a stay and thus abet the perception that Lieff could benefit from an exercise of the court's equitable authority while seeking to advance the economic interests of Labaton and Thornton at the expense of the class it was appointed to represent.

VII. ORDER

In view of the foregoing, it is hereby ORDERED that the Motion of Lieff Cabraser Heimann & Bernstein, LLP for a Partial Stay of Execution on Judgment, Pending Appeal (Dkt. No. 667) is DENIED. However, the court will not order distribution of the funds escrowed by Lieff until at least 14 days after the First Circuit decides any appeal of this decision by Lieff. Lieff shall, by March 22, 2021, state whether it intends to appeal this denial of its request for a stay.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE COURT'S MARCH 12, 2021 ORDER [ECF NO. 680]

As directed by the Court, Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this response to the Court's March 12, 2021 Memorandum and Order [ECF No. 680] denying Lieff Cabraser's motion for a partial stay of execution on judgment pending appeal (the "March 12 Order") to advise that Lieff Cabraser will not be appealing the March 12 Order. Lieff Cabraser will otherwise be proceeding with its appeal.

Dated: March 18, 2021

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on March 18, 2021 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Richard M. Heimann
Richard M. Heimann

CERTIFICATE OF FILING AND SERVICE

I, Robyn Cocho, hereby certify that on May 14, 2021 the foregoing document was filed through the CM/ECF system and served electronically on all registered users, in addition paper copies have been sent via U.S. Priority Mail to the individuals listed below:

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