
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

BRIEF FOR INTERESTED PARTY-APPELLANT

SAMUEL ISSACHAROFF
40 Washington Square South
New York, New York 10012
(212) 998-6580
si13@nyu.edu

Counsel for Interested Party-Appellant
Lieff Cabraser Heimann &
Bernstein, LLP

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Lieff Cabraser Heimann & Bernstein, LLP is a private law firm that is not publicly traded, and no entity owns more than 10% of any stock in Appellant.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION..... 1

STATEMENT OF ISSUES PRESENTED..... 2

INTRODUCTION 5

STATEMENT OF THE CASE..... 7

 I. The State Street Action. 7

 A. Initiation. 7

 B. Settlement and Attorneys’ Fees. 8

 C. The Boston Globe Article. 10

 D. The Special Master..... 11

 E. The District Court’s Orders and Hearings Regarding
 the Master’s Report..... 16

 F. Findings Against Lieff. 23

 G. Appeals..... 31

 H. One More Order. 32

STANDARD OF REVIEW 33

SUMMARY OF ARGUMENT 33

ARGUMENT 34

 I. The District Court Failed to Follow Rule 11(c)(3). 34

 A. Failure to issue a show-cause order violates due
 process..... 36

B.	A court acting without benefit of an adversarial process risks violating due process.....	39
II.	No Finding Below Satisfies This Court’s Requirement of “Serious Misconduct.”	43
A.	The fee memorandum did not mislead.	44
III.	The District Court Improperly Held a Non-Signatory Strictly Liable Under Rule 11(b).....	50
IV.	Lieff’s Fee Declaration Was Accurate.....	55
	PRAYER FOR RELIEF	60
	CONCLUSION.....	60
	CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT	61

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Citibank Glob. Mkts., Inc. v. Rodriguez Santana</i> , 573 F.3d 17 (1st Cir. 2009).....	passim
<i>Clark v. United Parcel Serv.</i> , 460 F.3d 1004 (8th Cir. 2006)	35, 37
<i>Cohen v. Beneficial Indus. Loan Corp.</i> , 337 U.S. 541 (1949).....	31
<i>Donaldson v. Clark</i> , 819 F.2d 1551 (11th Cir. 1987)	35
<i>Eldridge v. Gordon Brothers Grp., L.L.C.</i> , 863 F.3d 66 (1st Cir. 2017).....	5, 7, 41, 43
<i>Goodyear Tire & Rubber Co. v. Haeger</i> , 137 S. Ct. 1178 (2017).....	54
<i>Hunter v. Earthgrains Co. Bakery</i> , 281 F.3d 144 (4th Cir. 2002)	41
<i>In re 60 E. 80th St. Equities, Inc.</i> , 218 F.3d 109 (2d Cir. 2000)	35
<i>In re Bank of N.Y. Mellon Corp. Forex Trans. Litig.</i> , No. 12-md-02335-LAC-JLC (S.D.N.Y).....	26, 28
<i>In re Bees</i> , 562 F.3d 284 (4th Cir. 2009)	41
<i>In re Lupron Mkt’g & Sales Practices Litig</i> , MDL No. 1430, Master File No. 1:01-cv-10861-RGS (D. Mass.)	57

In re Neurontin Mkt’g & Sales Practices Litig.,
 MDL No. 1629, Master File No. 1:04-cv-10981-PBS (D. Mass.).....57

In re Neurontin Mktg. & Sales Practices Litig.,
 58 F. Supp. 3d 167 (D. Mass. 2014)..... 25, 45

In re New England Compounding Pharmacy, Inc., Products Liability Litig.,
 1:13-md-2419-FDS (D. Mass.).....57

In re Pennie & Edmonds LLP,
 323 F.3d 86 (2d Cir. 2003)42

In re Tutu Wells Contamination Litig.,
 120 F.3d 368 (3d Cir. 1997) 35, 37, 39

Johnson v. Waddell & Reed, Inc.,
 74 F.3d 147 (7th Cir. 1996).....34

Kenyon Int’l Emergency Servs., Inc. v. Malcolm,
 No. 12-20306, 2013 WL 2489928 (5th Cir. May 14, 2013)35

McDonald v. Emory Healthcare Eye Ctr.,
 391 F. App’x 851 (11th Cir. 2010).....42

Mercer v. Mitchell,
 908 F.2d 763 (11th Cir. 1990)35

Muhammad v. Walmart Stores E., L.P.,
 732 F.3d 104 (2d Cir. 2013)42

Pavelic & LeFlore v. Marvel Entm’t Grp.,
 493 U.S. 120 (1989)..... 7, 35, 52

Peaje Invs. LLC v. García–Padilla,
 845 F.3d 505 (1st Cir. 2017).....35

Polar Int'l Brokerage Corp. v. Reeve,
 120 F. Supp. 2d 267 (S.D.N.Y. 2000),
aff'd in part, dismissed in part sub nom. Corroon v. Reeve,
 258 F.3d 86 (2d Cir. 2001)53

Ramashwar v. Espinoza,
 No. 05 CIV. 2021 (AJP), 2006 WL 36752 (S.D.N.Y. Jan. 6, 2006).....53

Religious Tech. Ctr. v. Gerbode,
 No. CV 93-2226 AWT, 1994 WL 228607 (C.D. Cal. May 2, 1994).....53

Rentz v. Dynasty Apparel Indus., Inc.,
 556 F.3d 389 (6th Cir. 2009)53

Revellino & Byczek, LLP v. Port Auth. of New York & New Jersey
 (PANYNJ),
 682 F. App'x 73 (2d Cir. 2017)35

S.E.C. v. Hyatt,
 621 F.3d 687 (7th Cir. 2010)35

Schlaifer Nance & Co. v. Estate of Warhol,
 194 F.3d 323 (2d Cir. 1999)37

Tejero v. Portfolio Recovery Assocs., L.L.C.,
 955 F.3d 453 (5th Cir. 2020)34

United Nat'l Ins. Co. v. R&D Latex Corp.,
 242 F.3d 1102 (9th Cir. 2001)41

United States v. Mass. Inst. of Tech.,
 129 F.3d 681 (1st Cir. 1997).....33

United States v. Melot,
 768 F.3d 1082 (10th Cir. 2014) 35, 38

Young v. City of Providence ex rel. Napolitano,
 404 F.3d 33 (1st Cir. 2005)..... passim

Rules

Fed. R. App. P. 34(a)(2)(B) & (C)..... viii

Fed.R.Civ.P. 11 passim

Fed.R.Civ.P. 11 advisory committee’s note (1993)..... 42, 52

Fed.R.Civ.P. 11(b) passim

Fed.R.Civ.P. 11(b)(3).....44

Fed.R.Civ.P. 11(c)(1)..... passim

Fed.R.Civ.P. 11(c)(3)..... passim

Fed.R.Civ.P. 23(g)(3).....8

Fed.R.Civ.P. 53(f)(1)19

ORAL ARGUMENT REQUESTED

Pursuant to Fed. R. App. P. 34(a)(2)(B) & (C), Appellant suggests that oral argument would be helpful to the disposition of this matter. As set forth below, there are two issues of first impression before this Court concerning the procedure and substance of Rule 11 of the Federal Rules of Civil Procedure. Because of the extensive fact record and these novel issues of law, this Court might be aided by oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332(a) and (d). The court below entered an apparently final order awarding and allocating attorneys' fees on February 27, 2020 and a notice of appeal was filed timely on March 26, 2020. The district court, however, continued to issue orders, making the initial resolution unclear. To date, the district court has issued 21 orders since its apparent final order, most of them non-ministerial. On September 3, 2020, this Court dismissed the appeal without prejudice for lack of an appealable order. The court below entered a second final order awarding and allocating attorneys' fees on January 19, 2021. Appellant filed its second notice of appeal on January 26, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

As evident in the district court's order of March 12, 2021, the district court reiterated its findings under Fed.R.Civ.P. 11. Such findings are appealable. *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 38 (1st Cir. 2005).

STATEMENT OF ISSUES PRESENTED

This is an appeal from portions of the district court's orders awarding attorneys' fees in the underlying litigation. This is the only appeal taken from these orders and it concerns only the claimed improper conduct of Lieff Cabraser Heimann & Bernstein, LLP, ("Lieff") and the finding of a violation of Federal Rule of Civil Procedure 11(b). There is no appeal taken from the total award of fees except to the reduced fee award to Lieff as a form of punishment for claimed improprieties.

To be clear, this litigation has already lasted too long. The merits were resolved five years ago and the secondary considerations are becoming a *Jarndyce v. Jarndyce* proceeding of their own, complete with dozens of additional rulings and a four-year, \$5 million special master investigation. Appellant here challenges only the lower court's improper treatment of Lieff and not any of the merits rulings. Accordingly, the class should be paid its settlement proceeds with no further delay.

Appellant seeks to reverse the procedural and substantive errors below in finding Lieff to have violated Rule 11, to have made misrepresentations in its fee declaration, and to have facilitated co-counsel's violation of the Massachusetts Rules of Professional Conduct. That is the entirety of this appeal. If this Court accepts this argument, Lieff seeks to have its fee penalty reinstated from any

unclaimed funds after the class is paid in full. This means that if all the funds are distributed and claimed, then there will be no further recovery for Lieff, even if this Court agrees that the lower court acted improperly. Lieff does not seek any readjustment of fees awarded to anyone else, including the Hamilton Lincoln Law Institute (“HLLI”).

There are five issues presented, two of which are matters of first impression in this Court:

1. May a district court on its own initiative find that lawyers violated Rule 11(b) without following the notice requirements of Rule 11(c)(3)?
2. In the context of a percentage of the fund fee award, may a court find a violation of Rule 11(b) based on a fee memorandum that accurately presents the entire comparable fee history in this Circuit?
3. In the context of a class action where one law firm is designated lead counsel with exclusive authority to file pleadings, may a court apply Rule 11(b) to hold non-lead counsel who do not sign the allegedly offending brief to have violated Rule 11 without following the requirements of Rule 11(c)(1)?
4. May a court find improper conduct based upon a fee declaration that accurately states that the hourly rates listed in the underlying litigation were consistent with those (a) used for court awards in comparable class actions and (b) paid to Appellant by fee-paying clients?

5. May a court penalize a firm for not probing what it understood to be a standard contractual arrangement co-counsel had made with its local counsel?

INTRODUCTION

This appeal concerns the procedures and substance of Rule 11 when invoked *sua sponte* by the court below. The normal deference afforded to the procedural decisions of a trial court cannot be mechanically applied in the context of Rule 11, particularly when the moving party below is the court itself. Instead, this Court has emphasized the need for exacting appellate scrutiny because of the potential for sanctions to “devastate ... professional reputations.” *Eldridge v. Gordon Brothers Grp., L.L.C.*, 863 F.3d 66, 86 (1st Cir. 2017). When sanctions are court-initiated: “judges must be especially careful where they are both prosecutor and judge; but careful appellate review is the answer to this concern, whether the charge is negligence or deliberate dishonesty and whether it is contempt or a Rule 11 violation.” *Young*, 404 F.3d at 40.

This appeal challenges the findings that Lief Cabraser Heimann & Bernstein, LLP (“Lief”) violated Rule 11(b), and that the firm engaged in misconduct warranting forfeiture of a portion of the firm’s fee award. The matter arose from a claim that the defendant, State Street, had defrauded its custodial customers in foreign exchange transactions, resulting in a \$300 million settlement which elicited no opt outs or objections from any class member.

The tortuous process below began when a newspaper challenged the calculation of the fees awarded to Class Counsel. The court responded by

appointing a Special Master who found that Liefv had not engaged in any willful misconduct or violated Rule 11.

Rejecting the Master's findings, the court found that Liefv (i) violated Rule 11(b) by misrepresenting an academic study concerning fee award ranges; (ii) misrepresented the firm's hourly rates and fee history in its fee declaration; and (iii) failed to question sufficiently the role and activities of a putative local counsel.

Key to this appeal is the failure of the court to follow the "show cause" requirements of Rule 11(c)(3) and the procedural protections of Rule 11(c)(1). Other Circuits have ruled that Rule 11(c)(3), which governs court-initiated sanctions, raises due process concerns when a court fails to set out the precise issues to be considered. As set out below, the court's *sua sponte* Rule 11 proceedings would clearly fail the requirements of the Second, Sixth, Seventh, Tenth, and Eleventh Circuits for the use of Rule 11(c)(3). They should in this Court as well.

These procedural failures are all the more glaring in light of the conduct actually found to be violative of Rule 11. Rule 11 provides no safe harbor for judge-led inquiries, reflecting that "no safe harbor was needed *because* judges would act only in the face of *serious misconduct*." *Young*, 404 F.3d at 40 (emphasis added). A fee petition that accurately states the controlling law of the Circuit and provides all necessary evidence of fees in this and other jurisdictions

cannot serve as the basis of a Rule 11 violation. Yet, this is the putative misconduct found to be “deficient,” and under this Circuit’s law this must fail as a predicate for any Rule 11 finding or punishment.

Finally, essential to Rule 11 is the signature requirement of Rule 11(b). *See Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123–25 (1989) (providing textual signature requirement for sanctions). The underlying case was a class action in which the district court had designated lead counsel, not Lieff, as the only ones able to file pleadings on behalf of the class. Clearly, “Rule 11 is not a strict liability provision—a filer must, at the very least, be culpably careless to get whacked with a sanctions order.” *Eldridge*, 863 F.3d at 88 (references omitted). Because Lieff was not a signatory, the notice and ability to respond provisions of Rule 11(c)(1) require determining whether the sanction “should be imposed on such persons ... instead of the person actually making the presentation to the court.”¹ No such inquiry was made here. This is independent grounds for reversal.

STATEMENT OF THE CASE

I. THE STATE STREET ACTION.

A. Initiation.

On February 10, 2011, Lieff, Thornton Law Firm LLP (“Thornton”), and

¹ *Id.*

Labaton Sucharow LLP (“Labaton”)² filed a class action complaint alleging that State Street overcharged institutional investors on foreign currency exchange products.³ Other attorneys filed additional claims under the Employee Retirement Income Security Act.⁴ Labaton was appointed interim Lead Counsel under Rule 23(g)(3), giving Labaton “sole authority” over “the initiation, response, scheduling, briefing and argument of all motions.”⁵ Thornton was appointed as liaison counsel and Lieff as “additional counsel” for the plaintiff class.⁶

B. Settlement and Attorneys’ Fees.

After years of litigation, the parties reached a settlement-in-principle for \$300 million on June 30, 2015.⁷ On August 11, 2016, the court preliminarily approved the settlement; ; appointed Labaton as Lead Counsel for the preliminarily-certified settlement class; approved the class notice; set procedures for objections to the settlement and/or attorneys’ fee request; set procedures for opt-outs; and set a date for the final approval hearing.⁸

At the final fairness hearing, the court found no dispute that “either the question of class certification or the question of whether the settlement is fair,

² Collectively, “Class Counsel.”

³ Appendix 36 [hereinafter A].

⁴ Collectively, “ERISA Counsel.”

⁵ Addendum 201 [hereinafter Add].

⁶ Add199; A241.

⁷ A165.

⁸ A95–105.

reasonable and adequate is a close question. I think the answer to both is yes.”⁹

Given the class composition of sophisticated institutional investors, the court found that the “settlement of \$300 million is fair, reasonable and adequate,” and noted “that no class member has objected, no class member has opted out.”¹⁰

The court approved the requested fees and expenses¹¹ and held 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.”¹² The court specifically stated:

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 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.¹³

The court also performed a lodestar cross-check, stating: “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

⁹ A266.

¹⁰ A266–67.

¹¹ A283.

¹² A270–71.

¹³ A283.

settlement, uncertain.”¹⁴ The court then held that it had “analyzed the factors considered within the First Circuit,” and 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.”¹⁵

C. The Boston Globe Article.

The current dispute was triggered by a Boston Globe investigation that questioned the appearance of certain attorneys on more than one of Class Counsel’s lodestar reports.¹⁶ The bulk of the apparent duplication was between 17 shared staff attorneys whose total hours were inadvertently listed on both Labaton and Thornton’s lodestar reports, not implicating Lieff.¹⁷ The remainder was the result of Lieff having assigned some lawyers to work under Thornton for a short duration on the case.¹⁸ Lieff promptly identified four such attorneys whose lodestar figures were partially duplicated on both its and Thornton’s fee submissions.¹⁹ Lieff had not seen the Thornton submission before it was filed with the court.²⁰ Lieff’s internal review revealed that two attorneys’ partially duplicated hours were due to a bookkeeping error, and the other two’s hours resulted from a

¹⁴ A284.

¹⁵ Add207 at ¶ 6, ¶ 6(a).

¹⁶ A832–34; A1083.

¹⁷ A289.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ A994–96; A1075–76.

mistake in the attorneys' training.²¹ Lieff partner Daniel Chiplock instructed Lieff's accounting department to remove all of the erroneously recorded hours from Lieff's timekeeping records.²²

On November 10, 2016, Class Counsel informed the court 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."²³ 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 76,790.8 hours."²⁴ The court did not respond. Five weeks later, on December 17, 2016, the Boston Globe published its account of the issue, in which it additionally raised (for the first time) questions about the hourly rates attributed to staff attorneys who worked on the case.²⁵

D. The Special Master.

1. The Appointment of the Special Master.

On February 6, 2017, the court proposed appointing 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

²¹ A832–34; A1060–63.

²² *Id.*

²³ A289.

²⁴ A290.

²⁵ A314–17.

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."²⁶ The court appointed former Judge Gerald E. Rosen under Rule 53 and directed him to address:

(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., Fed. R. Civ. P. 11(b)(3) & (c); Massachusetts Supreme Judicial Court Rule of Professional Conduct 3.3(a)(1) & (3).²⁷

The court ordered that Class Counsel pay \$2 million for the investigation,²⁸ to which subsequent orders added \$2.85 million.²⁹

2. The Investigation.

Over the next eighteen months, the Master's investigation led to document production of 200,000 pages, 34 witness interviews, and 63 depositions.³⁰ Lieff had nine representatives deposed (some of them, twice), spent hundreds of hours

²⁶ A293–94.

²⁷ A331–32.

²⁸ A335.

²⁹ A345–51; A352–58; A1320–21; A1322–24.

³⁰ A739.

responding to the Master’s dozens of interrogatories, submitted multiple briefs and factual summaries, and incurred expenses exceeding \$1.6 million, plus \$2.7 million in unreimbursed professional time in addressing the investigation.³¹

3. The Inadvertent Double-Counting.

The resulting 431-page Master’s report found that the double-counting of attorneys’ hours was, as Class Counsel had reported at the outset, “inadvertent” and did not rise to the level of sanctionable misconduct.³² The Master noted that Lieff and Labaton’s agreement to “loan” attorneys to Thornton resulted in confusion among the firms in how to bill those attorneys’ time.³³ The “compartmentalization” of Labaton’s litigation practice resulted in the Labaton partner responsible for compiling the various firms’ lodestar reports not being aware of the arrangement among the firms.³⁴ Lieff, meanwhile, “never saw the lodestar reports of Thornton or Labaton” prior to filing.³⁵ Notwithstanding the error being “inadvertent,” the Master recommended “disgorgement” of \$4,058,000 in double-counted time, even though the original fee award was based on a

³¹ A839-853; A860-62; A937; A1181-83; A1315–16.

³² A750.

³³ A858.

³⁴ A581.

³⁵ A749.

percentage of the class recovery and the effect of the error on counsel's reported lodestar multiplier was negligible.³⁶

4. Thornton.

The Master also concluded that Thornton partner Garrett Bradley's declaration contained multiple misrepresentations that violated Rule 11 and state ethical rules, and recommended sanctions.³⁷ Nothing here affected Lieff.³⁸

5. Chargois.

Further, the Master concluded that "[t]he 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."³⁹ Chargois had an undisclosed⁴⁰ arrangement with Labaton that would pay Chargois "a maximum 20% of any attorneys' fees received by Labaton in any litigation involving an institutional investor for whom Chargois had facilitated the introduction."⁴¹ Critically, "the relationship with, and financial obligation to, Chargois was Labaton's alone."⁴²

³⁶ A722.

³⁷ A587–603.

³⁸ A583–603.

³⁹ A604.

⁴⁰ A605.

⁴¹ A450.

⁴² A605.

Thus, “[t]he responsibility for not disclosing Chargois ... must fall squarely on Labaton.”⁴³ The Master did not recommend any financial penalty or adverse action against Lieff in connection with Chargois. To the contrary, the Master found that Lieff (a) was repeatedly misinformed by co-counsel as to Chargois’s actual role, (b) reasonably believed based on co-counsel’s assurances and its own experience that Chargois had performed the role routinely expected of a “local counsel” justifying the modest percentage fee paid to him, and (c) was affirmatively “misled” into contributing to Chargois’ fee payment.⁴⁴

6. Lieff.

Finally, the Master addressed whether the fee declaration submitted by Daniel Chiplock of Lieff correctly represented the rates the firm charged for its staff and contract attorneys and whether it accurately described the firm’s fee history.⁴⁵ Using language drafted by Labaton, as Lead Counsel, the declaration stated that “the hourly rates for the attorneys and proposed support staff in my firm included in [the lodestar report] are the same as my firm’s regular rates charged for their services, which have been accepted in other complex class actions.”⁴⁶ This yielded 20,458.5 hours worked for a total lodestar of \$9,800,487.50 before the

⁴³ *Id.*

⁴⁴ A468-473, A710.

⁴⁵ A499–547.

⁴⁶ A194

correction for the double-counted hours.⁴⁷ The Master concluded that the work performed by all Loeff attorneys was reasonably undertaken and that the firm's billing rates "are generally reasonable."⁴⁸ The only change the Master would have made would be to treat contract attorneys as a cost item rather than as part of the firm's aggregate lodestar.⁴⁹

Finally, the Master investigated Chiplock's representation that the rates claimed for Loeff's attorneys and staff were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." The Master did not object to this language, based on evidence produced by Loeff showing that its attorneys and staff did in fact work on both an hourly and a contingent-fee basis.⁵⁰ Accordingly, the Master found no misrepresentation of Loeff's rates and billing practices and recommended no action against the firm, other than reclassifying contract-attorney time as an expense.⁵¹

E. The District Court's Orders and Hearings Regarding the Master's Report.

Over the next year, the court entertained responses and objections to the Master's report. During this time, the court ordered Class Counsel to continue to

⁴⁷ *Id.*

⁴⁸ A538.

⁴⁹ A541–47.

⁵⁰ A416 n.44; A998–1010.

⁵¹ A720–29.

compensate the Master, raising the total cost to nearly \$5 million, with Lieff responsible for almost a quarter of that.⁵²

1. May 2019 Orders.

On May 17, 2019, the district court entered an order setting a hearing date for June 24-26, 2019, to address objections to the Master’s report and “other pending issues.”⁵³ On May 31, 2019, the court clarified that “[r]ather than addressing the discrete objections” the parties had raised in response to the Special Master’s report, the court would “hear argument, and on some matters testimony, concerning the issues identified below”⁵⁴

The court’s agenda listed five issues, two of which were relevant to Lieff. First, “whether the initial fee award of \$74,541,250, constituting approximately 25% of the common fund, is reasonable.” “Among other things,” the court stated, “the participants shall be prepared to address whether Customer Class Counsel misrepresented a study in their memorandum in support of attorneys’ fees”—namely, the study of class action fee awards by Vanderbilt law professor Brian Fitzpatrick.⁵⁵

⁵² A1320–21; A1322–24. There has never been any accounting for the Special Master charges. An initial request two years ago was deferred. ECF 445. Pending before the court below is a second motion for such an accounting. ECF 686-687. To date, the court has not addressed this motion.

⁵³ Add209-10.

⁵⁴ Add212.

⁵⁵ Add212-13.

This was the first time that the court raised the Fitzpatrick study, following a November 20, 2018, nonparty filing by the Competitive Enterprise Institute’s Center for Class Action Fairness (“CCAF” – now HLLI).

Second, the court indicated it would hear argument on whether “contract attorneys should be treated as an expense and, therefore, not be included in the lodestar; Class Counsel reported reasonable rates for staff attorneys in their fee petition; and Class Counsel made errors other than double-counting time in their fee petitions.”⁵⁶ Other than the Fitzpatrick study, these issues had all been addressed in the course of the Master’s investigation.

Lastly, the court raised two additional issues not relevant to Lieff. First, “whether Garrett Bradley, Esq. intentionally filed a false fee declaration and, if so, what consequences ... are permissible and appropriate.”⁵⁷ Second, the court ordered testimony from two Labaton attorneys pertaining to Chargois.⁵⁸ Neither of these issues mentioned Lieff, and Lieff was not ordered to address either.

The court’s order did not direct Class Counsel to address additional matters from the Master’s investigation, including the double-counted hours. Nor did the court direct Lieff to address the Chargois matter or to defend either the fee memorandum or the Chiplock Declaration under Rule 11 or Massachusetts’s

⁵⁶ Add213.

⁵⁷ *Id.*

⁵⁸ Add213.

ethical code. With respect to issues addressed in the Master’s investigation but not included on the court’s agenda, the court stated:

If the court proposes to exercise its Rule 53(a)(1)⁵⁹ authority to modify the [Master’s] Report and Recommendations with regard to an issue on which the parties have not had notice and an opportunity to be heard, the court will provide such notice and conduct another hearing.⁶⁰

In response to the court’s order raising the Fitzpatrick study for the first time, Class Counsel sought leave to call Fitzpatrick as a witness at the June hearing.⁶¹ At the court’s direction, Class Counsel filed an affidavit from Fitzpatrick stating that “[n]othing about class counsel’s citations to or characterizations of my study [in their fee application] were misleading. The statistics recounted by class counsel were exactly as I set them forth in my study.”⁶² However, the court denied the motion, finding the “matter of whether the Fitzpatrick study was misrepresented ... to be a question of fact on which Mr. Fitzpatrick’s testimony is neither necessary nor appropriate.”⁶³

⁵⁹ The court’s reference to Rule 53(a)(1) should likely have been Rule 53(f)(1), which concerns “action on [a] master’s order, report, or recommendations.” Among other things, Rule 53(f)(1) requires a court to “give the parties notice and an opportunity to be heard” before taking action under the Rule.

⁶⁰ Add212. Again, Rule 53(f)(1) separately required that Lief be given notice and an opportunity to be heard before the court reversed or modified the Master’s findings as to Lief regarding the Chiplock Declaration and Chargois.

⁶¹ A1196–98.

⁶² A1206.

⁶³ A1222.

2. June 21, 2019 Order.

On June 21, 2019, the court ordered to parties at the June 24-26 hearing to address “the impact, if any, that the Chargois matter should have on the total fee award and/or the amount to be allocated to Labaton Sucharow LLP”; “whether the court should exercise its authority to allocate fees awarded and, if so, how”; and a procedure “for identifying and resolving additional matters” related to the Master’s report.⁶⁴ As in its previous order, the court did not reference Rule 11 or raise the possibility that it would make Rule 11 findings.⁶⁵

3. June Hearing.

On June 24-26, 2019, the court heard argument on the issues identified in its previous two orders.⁶⁶ Lief was primarily directed to address the reasonableness of Lead Counsel’s fee memorandum, including its representation of the Fitzpatrick study.⁶⁷

Lief first showed that the fee memorandum did not omit any of Fitzpatrick’s findings.⁶⁸ As the court recognized, the entire, 37-page Fitzpatrick

⁶⁴ Add216.

⁶⁵ *Id.*

⁶⁶ A1224–95.

⁶⁷ *Id.*

⁶⁸ A1243–90.

study had been submitted as an exhibit to the fee memorandum.⁶⁹ The court stated, however, that it had not read the study when it approved the original fee award.⁷⁰

Lieff also argued that the memorandum was not only accurate, but was consistent with the court's standard practice of awarding fees in class actions. Indeed, the court had specifically noted that the fees requested fell "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 . . . the settlements are in the \$250 million to \$500 million range.*"⁷¹ Lieff further reminded the court that it had previously observed that, given the "high number that roughly 25 percent award comes to," it had "considered whether some reduction" was warranted, but found that such a reduction was "not appropriate."⁷²

The court also heard argument concerning representations made in plaintiffs' fee declarations. The court acknowledged having been "told" that Lieff in fact had paying clients to whom it had "charged" for its services, a matter which was explored in great detail in the Master's investigation.⁷³ The court did not, however, seek any testimony from Lieff on this subject. Instead, the court focused on

⁶⁹ A1248.

⁷⁰ A1276–77.

⁷¹ *Id.* (emphasis added); A283.

⁷² A1278; A283.

⁷³ A1294.

Thornton and Labaton, gathering hours of testimony on this and other subjects.⁷⁴ Likewise, the court did not direct Lieff to defend its conduct under Rule 11. Nor did the court direct Lieff to address its role in the Chargois matter.

4. Post-Hearing Order.

On June 28, 2019, the court ordered counsel and the Master to submit memoranda “on the implications of the June 24, 25, and 26, 2019 hearings.”⁷⁵

Specifically to be addressed were:

(a) the reasonable percentage of an award of attorneys’ fees from the common fund in this case; (b) whether the court should exercise its authority to allocate the fee award among class counsel and how the fee award should be allocated; (c) a reasonable billing rate for contract attorneys; and (d) whether Labaton violated Massachusetts Rule of Professional Conduct 7.2.⁷⁶

This order, unlike the earlier ones, did invoke the possibility of sanctions, but not with respect to Lieff. As a result, Lieff’s post-hearing briefing did not address either Rule 11 or the Massachusetts Rules of Professional Conduct, because neither had been broached as to Lieff.⁷⁷ In a post-hearing submission, co-counsel alleged for the first time, contrary to the Special Master’s findings and the evidence on which he relied, that Lieff was aware that Chargois “produced no work product” and “did not engage in work that would approach the value of \$4.1

⁷⁴ See generally ECF 560, 565, 566.

⁷⁵ Add218.

⁷⁶ *Id.*

⁷⁷ A1296–1319.

million.”⁷⁸ In response, Lieff sought leave to file a proposed memorandum on its role in the Chargois matter presenting the evidence upon which the Master had relied when deciding that Lieff had actually been misled with respect to Chargois.⁷⁹ The court did not accept the proposed filing, leaving it without the evidence substantiating the Master’s findings.

F. Findings Against Lieff.

Seven months later, the court made three adverse findings with respect to Lieff.⁸⁰ First, the court found that the firm violated Rule 11(b) by signing the fee memorandum.⁸¹ Second, the court found the Chiplock Declaration “made false and misleading representations concerning [Lieff’s] regular hourly rates”⁸² Third, the court found that Lieff “by its inaction and acquiescence contribute[d] to” the Chargois issue, and in so doing “facilitated Labaton’s violation of the Massachusetts Rules of Professional Conduct.”⁸³ As consequence for these deficiencies, the court ordered Lieff to forfeit “about \$1,140,000.”⁸⁴

⁷⁸ A1349.

⁷⁹ A1366-92.

⁸⁰ Add1.

⁸¹ Add125.

⁸² Add149.

⁸³ Add123. *See also* Add149.

⁸⁴ Add149.

1. Fitzpatrick.

First, the court found that Lieff violated Rule 11(b) “by agreeing to be a signatory to a misleading submission to the court”—i.e., the fee memorandum.⁸⁵ Specifically, the court found that the memorandum was “intended” to “communicate[] 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 ...”⁸⁶ This representation thus met the standard for sanctions under Rule 11 because Fitzpatrick had found 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%.”⁸⁷

The court found intentional misconduct based on a single line in the fee memorandum that stated that “[t]he 24.85% fee requested is right in line with Professor Fitzpatrick’s findings.”⁸⁸ As the court noted, however, the Fitzpatrick study found that “for settlements between \$250,000,000 and \$500,000,000, there was a standard deviation of 7.9%.”⁸⁹ The court acknowledged that this meant that Plaintiffs’ Counsel’s fee request of 25% was within one standard deviation of the mean and median awards analyzed in Fitzpatrick’s study, but the court did not

⁸⁵ Add125.

⁸⁶ Add106.

⁸⁷ Add105–06.

⁸⁸ Add106.

⁸⁹ Add22 n.8.

examine the significance of this finding.⁹⁰ Similarly, the court did not address the findings it made earlier in its memorandum that Lead Counsel had provided the court with the complete Fitzpatrick study with the fee memorandum, and that the memorandum had repeatedly cited to specific portions of a previous court decision discussing the Fitzpatrick study's findings,⁹¹ including the inverse relationship between the settlement size and the percentage fee awarded.⁹²

Although the court noted Labaton's lead role in drafting the memorandum, the court found Lieff to violate Rule 11(b) because it "authorized Labaton to represent on the signature page that the misleading memorandum in support of the request for attorneys' fees was signed by Lieff attorneys"⁹³ The court offered no authority for that finding. The court further noted that "Lieff reviewed that memorandum" but "did not attempt to correct its purported misleading characterization of" the Fitzpatrick study.⁹⁴ The court did not acknowledge its order appointing Labaton as Lead Counsel, with the exclusive power to submit and sign pleadings.⁹⁵ Moreover, the court did not address that it had not raised the

⁹⁰ *Id.*

⁹¹ *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172–73 (D. Mass. 2014).

⁹² Add106.

⁹³ Add125.

⁹⁴ *Id.*

⁹⁵ Add169.

Fitzpatrick study in the context of Rule 11 in its previous orders or ordered the parties to defend their conduct under Rule 11 at the June hearings.

2. The Chiplock Declaration.

Per the court, the Chiplock Declaration was “deficient” because it “claim[ed] that the rates attributed to the attorneys it employed and those it engaged as contract attorneys were *regularly charged* for their services.”⁹⁶ In fact, the Chiplock Declaration does not use the words “regularly charged” anywhere; it instead only refers to the firm’s “regular rates.”⁹⁷ The court nonetheless faulted Lieff for not using the same language it had used in a declaration the firm had submitted in *BoNY Mellon*,⁹⁸ a previous, similar class action.⁹⁹ As the court noted, Lieff’s earlier declaration stated: “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.”¹⁰⁰ The court wrote that, “[t]o the extent that was true, Lieff should in this case have revised [Labaton’s] template to use the same language accurately describing the rates attributed to its lawyers.”¹⁰¹

⁹⁶ Add123–25 (emphasis added).

⁹⁷ A194.

⁹⁸ *In re Bank of N.Y. Mellon Corp. Forex Trans. Litig.*, No. 12-md-02335-LAC-JLC (S.D.N.Y.).

⁹⁹ Add124.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

The court did not make specific findings explaining how the Chiplock Declaration was misleading or deficient. Indeed, the court did not evaluate the declaration under Rule 11 or any other substantive standard of conduct. Nor did it address three other critical facts: (i) the Master had found the declaration to state accurately both the fees awarded to the firm in comparable cases and the firm’s payment history in cases with fee-paying clients; (ii) the court had not ordered Lieff to address the declaration’s wording, or to defend its accuracy under Rule 11 in its prior orders; and (iii) the court had previously only asked whether Lieff had “*ever* charged attorneys” at the listed rates listed in the Chiplock Declaration, and had itself recognized that the firm did indeed have clients that paid the stated rates.¹⁰²

3. **Chargois.**

Finally, the court faulted Lieff for inadequately investigating Labaton’s fee arrangement with Chargois.¹⁰³ Consistent with the Master’s findings, the court found that “in contrast to . . . Thornton, Lieff was not accurately or completely informed of the reasons Labaton was paying Chargois.”¹⁰⁴ Notwithstanding Lieff’s lack of knowledge, the court found that “the fact that Chargois was being paid \$4,100,000 – which the court infers was a very large amount to pay to a local

¹⁰² *Id.*; A342 (emphasis added).

¹⁰³ Add123, 149.

¹⁰⁴ Add123.

counsel who had done no work that was visible to [Lieff] – should have prompted questions to Labaton that, if honestly answered, would have provided Lieff material information.”¹⁰⁵ As a result, the court found that Lieff “by its inaction and acquiescence contribute[d] to the occurrence of [Labaton and Thornton’s] misconduct concerning Chargois,”¹⁰⁶ and “facilitated Labaton’s violation of the Massachusetts Rules of Professional Conduct.”¹⁰⁷

As with the Chiplock Declaration, the court did not acknowledge that it was making its findings without having allowed Lieff to be heard on this issue. No order setting the court’s hearings directed Lieff to provide any defense regarding Chargois. Moreover, the memorandum did not address the record evidence that had been relied on by the Master and was presented again in Lieff’s proposed (and denied) response to the court. The Master’s proceedings established that: (a) local counsel in contingent fee class actions routinely receive a fee percentage;¹⁰⁸ (b) Lieff’s experience, including in *BoNY Mellon*, reasonably indicated nothing exceptional about paying for a percentage for the work Chargois was represented to have performed;¹⁰⁹ (c) Labaton customarily paid up to 20 percent to local

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Add149.

¹⁰⁸ *See generally* A1011–33.

¹⁰⁹ *Id.* In *BoNY Mellon*, Lieff paid local counsel a comparable percentage fee to that paid to Chargois in *State Street*. A1017. The difference was what local counsel actually did, not the amount charged. *Id.*

counsel for work actually performed;¹¹⁰ (d) there was nothing unusual about local counsel's work being visible to lead counsel (Labaton) but not to non-lead counsel such as Lieff;¹¹¹ and (e) Lieff was not at fault for not inquiring further into Chargois's role given "numerous contemporaneous documents and emails which refer[red] to Chargois as 'local counsel' or 'the local'" and the fact that a "draft letter which referenced Chargois as 'referring counsel' . . . was shared between Labaton and Garrett Bradley, but not Lieff."¹¹²

4. Reduction of Lieff's Fee.

Although the court maintained that it was "not imposing sanctions or denying attorneys' fees,"¹¹³ the court reduced the overall fee percentage from 25% to 20%, which included "a reduction of about \$1,140,000" in Lieff's final fee to address the firm's "deficiencies."¹¹⁴ Lieff's reduction apparently resulted from attributing to Lieff a portion of the amount paid to Chargois, which had never actually been received by Lieff, as the erroneous starting point for the penalty for the firm's perceived deficiencies, and then deducting that as if it had been received.¹¹⁵ Oddly, the court did not order any repayment by Chargois.

¹¹⁰ See ECF 401-79 at 43-46, 107-09, 112-14, 230-32.

¹¹¹ A1372-76; A1021-22.

¹¹² A468 n.91.

¹¹³ Add127.

¹¹⁴ Add149.

¹¹⁵ Add160-62.

In finding the new 20% fee award to be reasonable, the court relied on the same evidence counsel had originally submitted in the fee request,¹¹⁶ primarily looking to comparable fee awards in the First Circuit.¹¹⁷ The court found further support in a declaration submitted by Lief's expert, Harvard law professor William Rubenstein.¹¹⁸ Finally, the court used Plaintiffs' Counsel's lodestar reports, together with the Master's findings, to conduct a lodestar cross-check.¹¹⁹

The Court added that it was "taking into account the proven misconduct of certain counsel in deciding where within the reasonable range to award such fees."¹²⁰ In light of "the extensive misconduct . . . by Labaton and Thornton, particularly," a lower-end award was appropriate.¹²¹ Pointing specifically to the "false and misleading" representation of the Fitzpatrick study, the Chiplock Declaration, and Lief's "facilitation" of Labaton's violation of state ethics rules as to Chargois, the court concluded, "Lief was deficient in its performance as

¹¹⁶ Add129.

¹¹⁷ Add130 ("An award of 20% of the common fund is also compatible with what Class Counsel reported to be the awards in the eight cases in the First Circuit with common funds exceeding \$100,000,000...").

¹¹⁸ *Id.*

¹¹⁹ Add130–42.

¹²⁰ Add127.

¹²¹ Add143.

counsel in this case.”¹²² It then imposed “a reduction of about \$1,140,000” yielding Lieff a total fee of \$15,233,397.53.¹²³

G. Appeals.

Lieff’s first appeal was based on the apparent finality of the district court’s February 27, 2020 order.¹²⁴ Lieff appealed on March 26, 2020 and filed its initial brief in this Court on June 9, 2020.¹²⁵

On June 25, 2020 the district court ordered supplemental notice to the class on the fee reduction, implying that its order might not be final until the notice period had run.¹²⁶ This in turn prompted this Court to question jurisdiction,¹²⁷ and then to dismiss the appeal without prejudice for lack of an appealable order, noting that the district court “appears to have simultaneously treated its order as both final and non-final...”¹²⁸ A new Fee Order was entered on January 19, 2021.¹²⁹ The district court directed Lieff to appeal by January 27, 2021,¹³⁰ which was done on January 26, 2021.¹³¹

¹²² Add148–49.

¹²³ *Id.*

¹²⁴ Ordinarily, a final order on fees would fall under collateral order doctrine from *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

¹²⁵ A1326.

¹²⁶ A1393-99.

¹²⁷ A1400.

¹²⁸ A1402-03.

¹²⁹ Add163.

¹³⁰ Add186.

¹³¹ A1406.

H. One More Order.

On January 27, 2021, Lieff filed a motion to stay distribution of all escrowed funds so that this Court could review the rulings below.¹³² Not surprisingly, the court found little merit to the sanctions appeal. With no trace of self-irony, the court found that Lieff was not likely to prevail on appeal.¹³³

There is no appeal from the denial of the stay.¹³⁴ If this Court agrees that the penalizing of Lieff was improper, Lieff will seek recovery of the clawed-back funds only if there is a surplus after the class distribution. No surplus, no reinstatement, even if this Court reverses the challenged rulings.

Nonetheless, the district court's latest 55-page missive bears mention for two reasons. First, the court seeks to discount its by-the-by disparagement of professional reputations as just "a jurist's derogatory comments,"¹³⁵ as if judicial opinions were the equivalent of trash-talking among NBA players. Second, although the court tries to sidestep the procedural requirements of Rule 11 by stating that it had not imposed a Rule 11 sanction on Lieff¹³⁶ and by rooting its

¹³² A1407-33.

¹³³ A1480.

¹³⁴ A1491-93.

¹³⁵ A1476.

¹³⁶ A1465.

actions in the court’s inherent equity powers¹³⁷, the opinion goes out of its way to reassert that it found (“only once”) that Lieff had violated Rule 11.¹³⁸

Hence this appeal.

STANDARD OF REVIEW

This court reviews *de novo* questions of law. *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 683 (1st Cir. 1997). The district court made no legal ruling concerning the “show cause” requirement of Rule 11(c)(3) or the attorney conduct at issue under Rule 11(c)(1), each triggering *de novo* review. Lower court factual rulings are generally reviewed under an abuse of discretion standard. *Young*, 404 F.3d at 38. However, this Court has ruled that in the context of court-initiated sanctions processes, “careful appellate review” is required. *Id.* at 40.

SUMMARY OF ARGUMENT

This case shows the danger of a court becoming an inquisitorial forum for an unbounded Rule 11 enterprise. The district court moved beyond the findings of the Master, held unspecified hearings, and invoked Rule 11 against lawyers in a manner that violated fundamental procedural norms and the substantive grounds for Rule 11. In so doing, the court violated the strict procedural protections that attach to Rule 11(c)(3) for cases where the court serves, in effect, as judge and

¹³⁷ A1481.

¹³⁸ A1463.

prosecutor. The condemned conduct not only does not rise to the level of “serious misconduct,” but provides an accurate representation of the law governing attorneys’ fees. The court further failed to make specific findings required to assign responsibility to a non-signatory to a brief under Rule 11(c)(1). Finally, Lieff’s submissions to the court accurately stated the firm’s rates and billing history. As a result, the district court’s sloppy and damaging invocations of Rule 11 cannot stand.

ARGUMENT

I. THE DISTRICT COURT FAILED TO FOLLOW RULE 11(C)(3).

Before a district court can invoke Rule 11 on its own motion, it must order “an attorney, law firm or party to show cause why conduct specifically described in the order has not violated Rule 11(b).” Fed. R. Civ. P. 11(c)(3); *see also Tejero v. Portfolio Recovery Assocs., L.L.C.*, 955 F.3d 453, 458 (5th Cir. 2020) (“There must first be a Rule 11 motion, or an order to show cause under Rule 11(c)(3).”). The “formality imposed on district judges when acting on their own initiative under Rule 11(c)[3] was intended to ensure due process.” *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147, 151 (7th Cir. 1996). A district court’s failure to follow Rule 11(c)(3)’s procedure constitutes an abuse of discretion. *See Hutchinson v. Pfeil*, 208 F.3d 1180, 1184 (10th Cir. 2000).

While show cause orders have largely been removed from the modern Rules, where they remain “the show-cause order satisfies the due-process notice requirement by giving the nonmoving party notice of his opportunity to respond before the substantive request for relief is entertained.” *S.E.C. v. Hyatt*, 621 F.3d 687, 695–96 (7th Cir. 2010); *see also Mercer v. Mitchell*, 908 F.2d 763, 766–68 (11th Cir. 1990) (same).

Each Circuit to address the show cause requirement for judge-initiated sanctions proceedings has demanded strict adherence to the procedural protections mandated by Rule 11(c)(3).¹³⁹ “We give the Federal Rules of Civil Procedure their plain meaning.” *Pavelic & LeFlore*, 493 U.S. at 123. A show-cause requirement “places the burden on the movant.” *Peaje Invs. LLC v. García–Padilla*, 845 F.3d 505, 513 (1st Cir. 2017). The reason is clear: sanctions imposed on the court’s own motion make the court the “accuser, fact finder and sentencing judge all in one.” *Revellino & Byczek, LLP v. Port Auth. of New York & New Jersey (PANYNJ)*, 682 F. App’x 73, 75 (2d Cir. 2017). Although this Court has not addressed the procedural contours of Rule 11(c)(3), it has warned that “judges

¹³⁹ *See, e.g., In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 117 (2d Cir. 2000); *In re Tutu Wells Contamination Litig.*, 120 F.3d 368, 379 (3d Cir. 1997); *Kenyon Int’l Emergency Servs., Inc. v. Malcolm*, No. 12-20306, 2013 WL 2489928, at *5 (5th Cir. May 14, 2013); *Indah*, 661 F.3d at 926 ; *Clark v. United Parcel Serv.*, 460 F.3d 1004, 1008 (8th Cir. 2006); *United States v. Melot*, 768 F.3d 1082, 1085–86 (10th Cir. 2014); *Donaldson v. Clark*, 819 F.2d 1551, 1559–60 (11th Cir. 1987).

must be especially careful where they are both prosecutor and judge” *Young*, 404 F.3d at 40. As a result, “careful appellate review is the answer to this concern, whether the charge is negligence or deliberate dishonesty and whether it is contempt or a Rule 11 violation.” *Id.*

A. Failure to issue a show-cause order violates due process.

The critical procedural facts are contained in a series of orders issued between March 8, 2017, and June 28, 2019.¹⁴⁰ These orders provide no notice of any Rule 11 investigation into Lief’s conduct or any indication that the fee memorandum might violate Rule 11.

1. March 8, 2017, order.

On March 8, 2017, the court appointed the Master to investigate the “accuracy and reliability” of Class Counsel’s fee award requests and “whether any misconduct occurred in connection with such awards; and, if so, . . . whether it should be sanctioned” under Rule 11 or state ethics rules.¹⁴¹

Without question, that open-ended order would be legally insufficient for Rule 11(c)(3) in all Circuits that have addressed the question. A show-cause order must specify “(1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered

¹⁴⁰ A330-36; Add209-10; Add211-14; A1200-1202; A1221-23; Add215-16; Add217-18.

¹⁴¹ A332.

so that the subject of the sanctions motion can prepare a defense.” *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 334 (2d Cir. 1999); *see also In re Tutu Wells.*, 120 F.3d at 379 (at-risk party “entitled to notice of the legal rule on which the sanctions would be based, the reasons for the sanctions, and the form of the potential sanctions”).

The March 8, 2017 order did not assert a Rule 11 violation or identify “specific conduct that is allegedly sanctionable” under Rule 11(b), as other courts would require. *See Indah*, 661 F.3d at 926. Nor did it order Liefv to defend itself against a charge of sanctionable misconduct. *See Clark*, 460 F.3d at 1008 (*sua sponte* court sanctions must “direct the attorney to show cause why he has not violated the rule”). Rather, the court directed the Master to broadly investigate the overall fee application. Even with this unspecified mandate, the Master neither found misconduct nor recommended any sanctions against Liefv.¹⁴²

2. May 31, 2019, and June 21, 2019, orders.

By orders of May 31 and June 21, 2019, the court set the agenda for the June 24 hearing to entertain objections to the Master’s report.¹⁴³ The primary agenda

¹⁴² *See, e.g.*, A416 n.44 (finding that other firms, but not Liefv, had not charged fee-paying clients claimed hourly rates). Indeed, the Master recommended that “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.” A756–57.

¹⁴³ Add211; Add215.

item was whether the total fee was “reasonable” and whether Class Counsel’s lodestar was “accurate and reasonable.”¹⁴⁴ In addition, the May 31 order included the issue of the Fitzpatrick study.¹⁴⁵ This was the first time the court raised the issue; the Master did not address it in any submission.

The orders did not mention Rule 11 with respect to Lieff,¹⁴⁶ but instead focused on whether the previously-awarded fees were “reasonable.”¹⁴⁷ The Fitzpatrick study was raised only within the context of determining whether the requested fee was “reasonable” under a percentage-of-the-fund approach.¹⁴⁸ Class Counsel were therefore on notice of the need to defend the *fees* as reasonable, but Lieff had no notice that it needed to defend *itself* under Rule 11. *See Melot*, 768 F.3d at 1085 (“The notice must include not only the conduct alleged to be sanctionable, but also the standard by which that conduct [would] be assessed.”) (internal quotations omitted).

¹⁴⁴ Add212-13.

¹⁴⁵ *Id.*

¹⁴⁶ By contrast, the court’s May 31 order did invoke the possibility of sanctions with respect to other lawyers. Add213.

¹⁴⁷ Add212.

¹⁴⁸ Add212-13. Moreover, the district court refused to allow Professor Fitzpatrick to testify. A1222. Fitzpatrick’s testimony would clearly have been relevant to whether or not Lieff’s conduct met this Court’s standard of being “culpably careless.” *See Citibank Glob. Mkts., Inc. v. Rodriguez Santana*, 573 F.3d 17, 32 (1st Cir. 2009).

3. June 28, 2019, order.

On June 28, 2019, the court directed follow-up from the June 24 hearing.¹⁴⁹ Again, this order did not raise Rule 11.¹⁵⁰ Instead, it sought briefing on the reasonableness of the fee and other related issues consistent with the court's previous orders.¹⁵¹ There was no further court activity for eight months, until the February 27, 2020 order that frames this appeal.¹⁵²

B. A court acting without benefit of an adversarial process risks violating due process.

This case presents the pitfalls of a court becoming an inquisitor rather than an adjudicator. The saga reads like Kafka's account in *The Trial* of a protagonist being shuttled from proceeding to proceeding uncertain of what the exact charges against him might be. At the conclusion of an expensive multi-year investigation into a broad, ill-specified set of issues, the district court then disregarded the Master's findings in favor of a new Rule 11 investigation with no notice of that fact – and no chance to refute charges on an informed basis. *See In re Tutu Wells*, 120 F.3d at 379 (“[A] party cannot adequately defend himself against the imposition of sanctions unless he or she is aware of the issues that must be addressed to avoid the sanctions.”). The court did all of this without the benefit of

¹⁴⁹ Add218.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Add1.

an adversarial presentation of evidence. Unsurprisingly, it concluded that its unchallenged allegations were true, all in derogation of Rule 11(c)(3)'s plain text.

Not surprisingly, the ruling below is a mess. The court states that it “is neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct.”¹⁵³ Yet, the court labels the conduct of Lieff “deficient,”¹⁵⁴ finds that Lieff violated Rule 11(b),¹⁵⁵ and asserts that Lieff “made false and misleading representations concerning the regular hourly rates charged for the attorneys who worked on this case.”¹⁵⁶ And the court even finds that Lieff’s lack of knowledge of the Chargois matter, and lack of any representations to the court about it, nonetheless was deficient and merited punishment.¹⁵⁷ These “deficiencies” then

¹⁵³ Add86.

¹⁵⁴ Add26.

¹⁵⁵ Add125.

¹⁵⁶ Add149.

¹⁵⁷ Add123. The court does not claim that there was any misrepresentation to the court by Lieff, either in a signed submission or even orally, about Chargois. The court notes that “Lieff was not accurately or completely informed of the reasons Labaton was paying Chargois. . . . [Robert Lieff] also stated that if he had been fully informed, he would not have agreed to contribute to the payment to Chargois and would have encouraged Labaton to disclose the agreement to pay Chargois to the court.” *Id.* Despite deeming Lieff’s statements “credible,” the court finds that Lieff’s “inaction and acquiescence contribute[d] to the occurrence of their misconduct concerning Chargois.” *Id.* The fact that other lawyers may have had a non-disclosed improper fee arrangement is plainly insufficient to support any type of sanction against Lieff under this Court’s authorities. Moreover, the court’s finding does not acknowledge the extensive evidence presented to and relied on by the Master in reaching the conclusion that Lieff was not only not at fault but had been affirmatively misled concerning Chargois, and reasonably believed the fee paid to Chargois followed customary payments to local counsel.

justified a reduction in compensation. Certainly, this has the appearance of a sanctions proceeding, including the imposition of punishment.

Undoubtedly, this exemplifies the capacity of Rule 11 proceedings to “devastate ... professional reputations.” *Eldridge*, 863 F.3d at 86. As the Court must recognize, Lieff is a plaintiff’s firm that must apply for leadership roles in securities and other class actions, instances where courts and institutional clients routinely ask if the firm has ever been sanctioned. The court’s cat-and-mouse flirtation with sanctions creates an impossible situation for the firm with regard to responding to such inquiries. Such potential professional harm must trigger the greater procedural requirements of Rule 11(c)(3) for court-initiated processes.

Every Circuit decision has required district courts to adhere particularly closely to the express requirements of Rule 11(c)(3). *See, e.g., In re Bees*, 562 F.3d 284, 287 (4th Cir. 2009) (“Because a *sua sponte* order to show cause does not provide an attorney with Rule 11’s twenty-one day safe harbor provision, a court is obliged to use extra care in imposing [*sua sponte*] sanctions on offending lawyers.”) (internal references omitted); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 151 (4th Cir. 2002) (absence of safe harbor means “a court is obliged to use extra care in imposing sanctions on offending lawyers”); *United Nat’l Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1115–16 (9th Cir. 2001) (procedural protections “applied with particular stringency” because, unlike party-initiated

sanctions, “there is no ‘safe harbor’ in the Rule allowing lawyers to correct or withdraw their challenged filings”).

Some courts have required an affirmative finding of bad faith for sanctions under Rule 11(c)(3), following the Advisory Committee Notes, which state: “Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a ‘safe harbor’ to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court’s own initiative.”¹⁵⁸ See *In re Pennie & Edmonds LLP*, 323 F.3d 86, 91 (2d Cir. 2003) (risk of excess sanctions “is appropriately minimized, as the Advisory Committee contemplated, by applying a ‘bad faith’ standard to submissions sanctioned without a ‘safe harbor’ opportunity to reconsider”); *McDonald v. Emory Healthcare Eye Ctr.*, 391 F. App’x 851, 853 (11th Cir. 2010) (courts must “employ a more stringent ‘akin to contempt’ standard in deciding whether the offender’s conduct is sanctionable”); *Muhammad v. Walmart Stores E., L.P.*, 732 F.3d 104, 108 (2d Cir. 2013) (power “to issue sanctions *sua sponte* ... is akin to the court’s inherent power of contempt”).

Nothing in the orders below satisfies these procedural protections. Instead, a long and diffuse special master inquiry was followed by court hearings that failed to give notice of what might be deemed sanctionable conduct. This Court should

¹⁵⁸ Fed. R. Civ. P. 11 advisory committee’s note to 1993 amendment.

join its sister Circuits in finding that such an *ad hoc* approach to court-initiated processes violates due process and the express requirements of Rule 11(c)(3). The power of an inquisitorial court without procedural guardrails is contrary to both the language of the Rule and fundamental conceptions of fairness.

II. NO FINDING BELOW SATISFIES THIS COURT’S REQUIREMENT OF “SERIOUS MISCONDUCT.”

Sanctions can “devastate [attorneys’] professional reputations.” *Eldridge*, 863 F.3d at 86. That is why this Court “cannot emphasize enough that the abuse-of-discretion standard hardly means that we must affirm every discretionary decision that comes our way.” *Id.* It is also why “Rule 11(b) is not a strict liability provision, and a showing of at least culpable carelessness is required before a violation of the Rule can be found.” *Citibank Glob. Markets, Inc.*, 573 F.3d at 32 (internal references omitted).

Rule 11(b)(3) requires “factual contentions [to] have evidentiary support.” As with other violations of Rule 11, “[a] lawyer who makes an inaccurate factual representation must, at the very least, be culpably careless to commit a violation.” *Young*, 404 F.3d at 39. This Court has set a high bar for finding that level of carelessness. *Citibank*, 573 F.3d at 32 n.14 (requiring wholly unsupported allegations).

The court charges Lieff with three instances of misconduct, although it found a violation of Rule 11(b) only with regard to the characterization of the

Fitzpatrick study on class action fee awards in 2006-2007.¹⁵⁹ Each element of this is clearly erroneous.

A. The fee memorandum did not mislead.

A pleading violates Rule 11(b)(3) only when it is “unsupported by *any* information.” *Citibank*, 573 F.3d at 32 n.14. Lead Counsel’s initial memorandum in support of a fee award easily clears that low bar. The summary paragraph is entirely correct:

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.¹⁶⁰

The Table on page 7 of the memorandum provided the court with the history of *all* settlements in the First Circuit in a comparable range, and showed that the bulk of the fee awards fell in the 20-30 percent range, with lodestar multipliers averaging about three-fold.¹⁶¹ Supplemental materials supported the filing, including a full copy of the Fitzpatrick study giving an overview of all federal court settlements in 2006 and 2007.¹⁶² Several of the cases in the First Circuit that had awarded fees in

¹⁵⁹ Add123–25.

¹⁶⁰ A114.

¹⁶¹ A119.

¹⁶² A201–37.

the 25 percent range relied upon and discussed the Fitzpatrick study as supporting their fee award, particularly Chief Judge Saris's opinion in *Neurontin*.¹⁶³

Neurontin bears special emphasis as it was cited repeatedly in the fee memorandum, including its handling of Fitzpatrick's empirical findings.¹⁶⁴

Specifically, the memorandum cited to pages 171-172 of *Neurontin* as authority for the specific fee requested,¹⁶⁵ and those pages state:

The sizes of fee awards in similar mega-cases suggest that 33 1/3% of the settlement fund is too high a percentage. An empirical study of federal class action fee awards in 2006 and 2007 found that nearly two-thirds of class action fee awards based on the percentage method were between 25% and 35% of the common fund. *See* Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Awards, 7 J. Empirical L. Stud. 811, 833–34 (2010). In the First Circuit, the mean was 27% and the median was 25%. *Id.* at 836. Importantly, however, the study also broke down fee award data according to the size of the settlement fund, and found that for settlements between \$250 million and \$500 million, the mean percentage was just 17.8%. *Id.* at 839.

It was exactly upon this evidence that the court first concluded that the fee request was reasonable, and entered a preliminary order approving it.¹⁶⁶ In its initial order, the court did not reference the Fitzpatrick study as a basis for its fee award, instead relying on awards in comparable cases (all of which were discussed

¹⁶³ *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172–73 (D. Mass. 2014).

¹⁶⁴ A117, 118, 119, 120, 121, 123, 137.

¹⁶⁵ A121.

¹⁶⁶ A95.

in the memorandum), and stating that “the Court has analyzed the factors considered within the First Circuit.”¹⁶⁷ Strikingly, the court relied on this same evidence in reaching its revised final fee award, including the Fitzpatrick study, all of which had been submitted by counsel previously.¹⁶⁸

Nonetheless, the Fitzpatrick study is the sole basis for the purported Rule 11 violation:

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.”... This statement was false and misleading.¹⁶⁹

In fact, the memorandum never represented the study as finding that the mean and median awards for comparable, megafund cases were in the range of 25%. This is the entire discussion of the Fitzpatrick study:

An in-depth review of all 688 class action settlements in federal courts during 2006 and 2007 found that the mean and median fees 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). The

¹⁶⁷ Add207, ¶ 6.

¹⁶⁸ Add129–44.

¹⁶⁹ Add106.

24.85% fee requested is right in line with Professor Fitzpatrick's findings.¹⁷⁰

This is completely accurate.

Nonetheless, the court found falsity and intent to mislead based on two "omitted" facts.¹⁷¹ First, the court found the memorandum failed to refer explicitly to the study's finding of an inverse relationship between fees and settlement size.¹⁷² Second, it found that the memorandum did not report the 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%," making an award of 25% higher than the median.¹⁷³

It is hard to fathom how the fee memorandum intentionally withheld information when it provides *all* the relevant information about fee awards in the First Circuit and nationally. The brief provided the court with a full copy of the Fitzpatrick study, cited to and quoted extensively from the *Neurontin* court's discussion of the Fitzpatrick findings, and provided additional citations to First Circuit cases of similar size finding fees in the 20-to-30% range appropriate. The opinion below does not address the fact that all the putatively occulted material was submitted to the court, except to say that the court did not read the submitted

¹⁷⁰ See A122–23 (footnote omitted).

¹⁷¹ Add105.

¹⁷² Add21–22.

¹⁷³ Add105.

Fitzpatrick study.¹⁷⁴ The submission of these materials not only undercuts the court's finding of intentional misrepresentation, but also provides a complete picture of fee awards in this Circuit. *See Young*, 404 F.3d at 41 (under Rule 11 "statements must be taken in context").

Moreover, Fitzpatrick's finding of the mean and median size of fee awards in comparably-sized cases not only does not negate, but rather supports, that the fee request was "right in line with Professor Fitzpatrick's findings."¹⁷⁵ As the court acknowledges, the Fitzpatrick study found that "for settlements between \$250,000,000 and \$500,000,000, there was a standard deviation of 7.9%."¹⁷⁶ The request for a 25% fee award was therefore within a standard deviation of the average awarded by other courts in other, similarly-sized settlements.¹⁷⁷

While the court acknowledges the large standard deviation, it fails to realize the significance. Counsel provided the court with the entirety of the comparable fee awards in the First Circuit, a presentation that is not a survey but a totality. By contrast, the Fitzpatrick study was a snapshot of practices in a limited period of time that depended on a small number of observations to determine its statistical significance. The high standard deviation reflects that there were only eight cases

¹⁷⁴ A1276-77.

¹⁷⁵ Add21.

¹⁷⁶ Add22 n.8.

¹⁷⁷ *Id.*

in the nationwide sample in 2006-2007 that were comparable to the present case, and none was from the First Circuit. Thus, the totality of comparable First Circuit awards is *more* accurate than the Fitzpatrick study when it comes to First Circuit practices.

Indeed, Professor Fitzpatrick’s proffered affidavit confirms the representations made: “The statistics recounted by class counsel were exactly as I set them forth in my study.”¹⁷⁸ Fitzpatrick explained, the “fee request here [was] within one standard deviation of the average,” and “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.”¹⁷⁹ Thus, “my study confirms rather than undermines the notion that the fee requested here is appropriate.”¹⁸⁰ The court disregarded this affidavit and disallowed Fitzpatrick’s testimony at what ultimately became an unannounced Rule 11 hearing.¹⁸¹

In sum, the fee brief’s statement that the requested fee award of 25% in this case was well within the average awarded in similar cases is fully supported by the record. It is supported by Fitzpatrick’s study and by the other materials appended

¹⁷⁸ A1206.

¹⁷⁹ A1207.

¹⁸⁰ A1208.

¹⁸¹ A1221–23.

to the main declaration in support of the fee brief.¹⁸² Because “factual allegations will run afoul of Rule 11 when they are unsupported by *any* information obtained prior to filing,” the court’s finding of a Rule 11(b) violation must be reversed.

Citibank, 573 F.3d at 32 n.14.

III. THE DISTRICT COURT IMPROPERLY HELD A NON-SIGNATORY STRICTLY LIABLE UNDER RULE 11(B).

Per the court: “Lieff violated Federal Rule of Civil Procedure 11(b) by agreeing to be a signatory to a misleading submission to the court.”¹⁸³ This is wrong as a matter of fact: Lieff was not a signatory, was not presented as a signatory, and could not have been a signatory pursuant to the court’s pretrial designation of other counsel as having that exclusive authority.¹⁸⁴ It is also wrong as a matter of law: the key to Rule 11 is the fact of having signed a pleading. The extension of the Rule to non-signatories in 1994 falls under Rule 11(c)(1), which requires specific notice of the charges against a non-signatory and a level of “culpable carelessness” that may not be presumed for a non-signatory.

To begin, Lieff did not sign the fee memorandum, which is captioned, “Memorandum of Law in Support of Lead Counsel’s Motion for an Award of

¹⁸² See generally A142–89.

¹⁸³ Add125.

¹⁸⁴ Add201.

Attorneys' Fees..."¹⁸⁵ The memorandum is presented by Lead Counsel Labaton,¹⁸⁶ and the only signatory is Lawrence Sucharow, in his capacity as Lead Counsel.¹⁸⁷ The district court elides this fact by stating that the memorandum represents that it was signed by Lieff.¹⁸⁸ This is false; there is no such representation. Instead, the memorandum speaks exclusively in the name of Lead Counsel seeking fees, expenses, and enhancement awards on behalf of all Plaintiffs' Counsel.¹⁸⁹

Labaton's representation as to the moving party was as it should have been. Unmentioned in the court's 159-page opinion is the fact that the initial pretrial orders gave Labaton exclusive authority to file any pleadings with the court: Lead Counsel "shall have sole authority over the following matters on behalf of all plaintiffs: (a) the initiation, response, scheduling, briefing and argument of all motions..."¹⁹⁰ The settlement approval order similarly retains jurisdiction for "the hearing and determination of Lead Counsel's motion, on behalf of ERISA Counsel

¹⁸⁵ A106.

¹⁸⁶ A113.

¹⁸⁷ A140.

¹⁸⁸ Add125.

¹⁸⁹ Peculiarly, the court found Lieff strictly liable for the brief, but the brief was also filed on behalf of ERISA Counsel, who are left unmentioned. *See* A113 n.2.

¹⁹⁰ Add201.

and Customer Counsel, for attorneys' fees, payment of Litigation Expenses, and any Service Awards...."¹⁹¹

The act of signing a pleading is the threshold condition for sanctions under Rule 11 as it was amended in 1983, and only a signatory could be found liable under the Rule. *Pavelic & LeFlore*, 493 U.S. at 125 (setting out the textual signature requirement for sanctions to attach). In 1993, Section 11(c)(1) was amended to allow, after proper notice and an opportunity to be heard, for sanctions to be extended to those jointly responsible for the offending filing:

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 circumstances, instead of the person actually making the presentation to the court.¹⁹²

Lieff does not dispute that it participated in the preparation of the fee memorandum—as did all other counsel, including ERISA Counsel. But the final authority belonged to Lead Counsel, and Rule 11(c)(1) requires further process to determine whether and to what extent non-signatories are responsible. No such additional inquiry took place here.

¹⁹¹ A247. Such an order is commonplace in complex litigation. The district court's assumption that all lawyers in class actions or MDLs are jointly liable for lead attorney malfeasance is an issue that this Court has not yet engaged.

¹⁹² Fed. R. Civ. P. 11 advisory committee's note (1993) (emphasis added).

By contrast, other courts begin the inquiry by asking whether or not the attorney signed the document. *See, e.g., Polar Int'l Brokerage Corp. v. Reeve*, 120 F. Supp. 2d 267, 270 (S.D.N.Y. 2000), *aff'd in part, dismissed in part sub nom. Corroon v. Reeve*, 258 F.3d 86 (2d Cir. 2001) (signatory to pleading is liable for sanctions, despite “the firm’s limited knowledge and attenuated role”). If more than one attorney signed the document, courts allocate responsibility according to the degree of control each attorney exercised in the litigation. *See, e.g., Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 397 (6th Cir. 2009) (inquiring whether attorney had supervisory or managerial authority in the case); *Religious Tech. Ctr. v. Gerbode*, No. CV 93-2226 AWT, 1994 WL 228607, at *5 (C.D. Cal. May 2, 1994) (to sanction non-signatory, “the record must show that firm’s culpability—in the Committee’s words, evidence of its ‘part in causing a violation’”). One court has even adopted a near per se rule against sanctioning non-signatory attorneys. *Ramashwar v. Espinoza*, No. 05 CIV. 2021 (AJP), 2006 WL 36752, at *11 (S.D.N.Y. Jan. 6, 2006) (“[W]here an individual attorney has not signed the offending document, there is no provision for holding him jointly responsible for a Rule 11 sanction.”).

Applying the standards of Rule 11(b) to non-signatories without the procedural protections and additional inquiry of Rule 11(c)(1) is reversible error.

The error is compounded by the court’s holding that the “deficiencies in Lieff’s conduct justify reducing the original fee award to Lieff by about \$1,140,000.”¹⁹³

Although Lieff does not challenge the reduced overall fee order to 20 percent of the class recovery, tying the fee reduction to “deficiencies” without process is legal error. The reduction was pure punishment; it was not tied to any compensatory objective.¹⁹⁴ Lieff had already paid more than \$1.15 million¹⁹⁵ to underwrite the Special Master’s investigation (not counting its costs of defense) and there were no legal expenses incurred by opposing counsel. Such free-floating punishment is directly contrary to the Supreme Court’s direct admonition that, “[t]his Court has made clear that such a sanction, when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature.” *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017).

¹⁹³ Add149.

¹⁹⁴ The court’s calculation of this figure is rather baroque. The court appears to arrive at this figure by calculating the amount paid to Chargois under the undisclosed fee sharing agreement, imputing to each firm its share under the agreement, and then deducting that amount from the firms. However, the court never ordered any disgorgement of fees by Chargois, so it ended up deducting from Lieff money that it never received. The court did all this despite its finding that Lieff had no knowledge of Chargois’s improper role or of the nature of payments to him. This calculation is never set out in any order, but instead has to be inferred, *see* Add160-62, highlighting the propensity to error in inquisitorial proceedings.

¹⁹⁵ A1315.

Accordingly, the finding under Rule 11(b) should be reversed and the exaction of \$1,138,917 in punishment should be vacated.

IV. LIEFF’S FEE DECLARATION WAS ACCURATE.

Although the court insisted it was not sanctioning Lieff, the language of condemnation used by the court in finding that the Chiplock Declaration was “false and misleading” carries just the sort of potential “devastation” of professional reputations that must be reviewed on appeal.¹⁹⁶ Moreover, the court specifically tied its findings with respect to the Chiplock Declaration to its reduction to Lieff’s fee, casting it in the form of a punishment.¹⁹⁷ The court below cannot simply single out lawyers for opprobrium and have that be immune from examination. There is no escaping the pall cast by the finding that “Lieff made false and misleading representations concerning the regular hourly rates charged for the attorneys who worked on this case.”¹⁹⁸

According to the court, Lieff should have submitted the fee declaration that it submitted previously in *BoNY Mellon*.¹⁹⁹ The court’s ire seemingly rests on its perceived distinction between Lieff’s two declarations. At no point did the court acknowledge that Lieff had been lead counsel with full filing authority in *BoNY*

¹⁹⁶ Add149.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Add124.

Mellon, but not in this case, or address the significance of the fee declaration in this case being submitted on a template prepared by Lead Counsel, not Lieff.²⁰⁰

Further, the emphasis on the wording of the declarations is bizarre because there is no material difference between the declaration submitted below and the one the court views as “accurately describing the rates attributed to [Lieff’s] lawyers.”²⁰¹ The two declarations are reproduced below, with the relevant differences between the two highlighted.

<i>BoNY Mellon</i>	<i>State Street</i>
“The hourly rates <i>charged</i> by the Timekeepers are the Firm’s <i>regular rates for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters.</i> ”	“The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm’s <i>regular rates charged for their services, which have been accepted in other complex class actions.</i> ”

The only relevant observable difference is that the *State Street* declaration does not make an explicit distinction between contingent and non-contingent matters. But that slight difference is immaterial, because the “regular rates” referred to in both declarations are the same. According to the court, however, Lieff “used the template provided by Labaton to claim that the rates attributed to”

²⁰⁰ A1074. Oddly, while Lieff is castigated for using the template developed by Lead Counsel, other counsel who used the same template were not sanctioned in any fashion. Add146 n.30; *see also* ECF 401-27 at 97-99 (explaining use of the term “regular rates” in class action fee petitions).

²⁰¹ Add124.

its attorneys “were *regularly charged* for their services.”²⁰² But Lieff never represented that these rates were “regularly charged,” but only that these were the regular rates that the firm billed to fee-paying clients and used in class action fee petitions. That is why the words “*regular rates*” are identical in the two declarations. Moreover, the court was well aware that, as a plaintiffs’ firm, Lieff is primarily paid on a contingency basis or through court-awarded fees – indeed, the court had appointed Lieff to such a role in this particular case.²⁰³ At no point in any representation to the court did anyone from Lieff claim that the firm’s revenues came “regularly” from fee-paying clients, and the court identifies no such representation.

Instead, as Lieff explained to the Master, which resulted in the Master’s conclusion that Lieff’s declaration was not misleading,²⁰⁴ the principal purpose of the Chiplock Declaration was not to inform the court that Lieff has had bill-paying clients, but to inform the court that the rates contained in the declaration are equivalent to the rates accepted in previous class actions for the purposes of a

²⁰² Add123-24 (emphasis added).

²⁰³ Lieff has been appointed to leadership roles, whether as co-lead counsel or part of the plaintiffs’ steering committee, in multiple instances in this Circuit. *See, e.g., In re New England Compounding Pharmacy, Inc., Products Liability Litig.*, 1:13-md-2419-FDS (D. Mass.); *In re Neurontin Mkt’g & Sales Practices Litig.*, MDL No. 1629, Master File No. 1:04-cv-10981-PBS (D. Mass.); *In re Lupron Mkt’g & Sales Practices Litig.*, MDL No. 1430, Master File No. 1:01-cv-10861-RGS (D. Mass.).

²⁰⁴ A809 n.33.

lodestar cross-check.²⁰⁵ Lieff’s expert, Professor Rubenstein, explained, “class action attorneys,” such as Lieff, “make a living getting paid by their clients through court-approved fee petitions.”²⁰⁶ In light of that fact, “regular rates charged” means “that these rates [have been] submitted in class action fee petitions.”²⁰⁷ Indeed, the court seems to recognize this in its order when it notes that Lieff “had a process to develop hypothetical, reliable market rates for its attorneys.”²⁰⁸ These hypothetical rates are precisely the “regular rates” referred to in the Chiplock Declaration, which have been routinely accepted in class actions across the country, and are in turn confirmed by the cases in which Lieff does charge fee-paying clients.²⁰⁹ The declaration thus accurately states Lieff’s fee structure and practice, whether viewed through the lens of regular class action practice or the court’s constricted reading of the words “regular rates charged.”

The district court’s findings with respect to the Chiplock Declaration are clearly erroneous. Indeed, at a very early hearing, before the Master’s investigation had even commenced, the court asked Chiplock: “Did you *ever* charge attorneys on your Exhibit A at their rate, at the reflected rates for paying clients — to paying clients?” Chiplock responded:

²⁰⁵ A194.

²⁰⁶ A911.

²⁰⁷ *Id.* at n.14.

²⁰⁸ Add124.

²⁰⁹ A194; A342–44; A998.

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.²¹⁰

This was the only testimony the court ever sought about the subject from Chiplock. Also unmentioned is the fact that the Master's 431-page report, after much more extensive testimony, does not find that the Chiplock Declaration contained any misrepresentation or false statement of fact regarding the firm's billing history. Chiplock's testimony and the Master's findings, in addition to the substantial record before the Master, provide clear, uncontradicted evidence in support of the Chiplock Declaration's description of Lief's fee structure that the court simply ignored.

Had the district court sought to sanction Lief for this declaration, it would have run afoul of the standard that such a submission be "unsupported by *any* information." *Citibank*, 573 F.3d at 32 n.14 (emphasis in original). If that is the standard for the actual imposition of sanctions, it must also be the standard for

²¹⁰ A342–43 (emphasis added). In its order, the court omits its use of the word "ever" and Chiplock's reference to "actual market rates" from its discussion of his testimony. Add56.

disparagement of the firm's reputation for professional integrity and the imposition of punishment in the form of a reduced fee award.

PRAYER FOR RELIEF

Appellants ask this Court to:

- a) Reverse the findings that Lieff violated Rule 11(b) and facilitated co-counsel's violation of state ethics rules;
- b) Vacate the finding that the Chiplock Declaration misrepresented the firm's regular rates and billing history;
- c) Allow Lieff to recover \$1,138,917 from unclaimed class funds, if any.

CONCLUSION

For the foregoing reasons, the identified rulings below should be reversed.

Dated: May 14, 2021

Respectfully submitted,

/s/ Samuel Issacharoff

Samuel Issacharoff

USCA Bar No. 1188614

40 Washington Square South

New York, NY 10012

Ph: (212) 998-6580

E-mail: si13@nyu.edu

*Counsel for Interested Party-Appellant
Lieff Cabraser Heimann &
Bernstein, LLP*

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document listed in Fed. R. App. P. 32(f), this document contains 12,908 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14 point.

Dated: May 14, 2021

Respectfully submitted,

/s/ Samuel Issacharoff

Samuel Issacharoff

ADDENDUM

TABLE OF CONTENTS

	Page
Memorandum and Order, filed February 27, 2020 [ECF 590].....	ADD1
Order, filed January 19, 2021 [ECF 662]	ADD163
Final Judgment Concerning Attorneys’ Fees and Service Awards [ECF 663]	ADD192
Federal Rule of Civil Procedure 11	ADD195
Memorandum and Order, filed January 12, 2021 [ECF 28].....	ADD197
Order Awarding Attorneys’ Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, filed November 2, 2016 [ECF 111]	ADD204
Order, filed May 17, 2019 [ECF 541]	ADD209
Order, filed May 31, 2019 [ECF 543]	ADD211
Order, filed June 21, 2019 [ECF 555]	ADD215
Order, filed June 28, 2019 [ECF 564]	ADD217

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

MEMORANDUM AND ORDER

WOLF, D.J.

February 27, 2020

TABLE OF CONTENTS

I. SUMMARY..... 3

II. PROCEDURAL BACKGROUND..... 31

III. THE STANDARDS FOR AWARDING ATTORNEYS' FEES..... 33

IV. THE FACTS..... 40

 A. The Approval of the Proposed Settlement40

 B. The Reports of Errors in the Fee Petitions46

 C. The Appointment of the Master52

 D. The Master's Investigation59

 E. The Report and Recommendations62

 F. Proceedings Following Submission of the Master's
 Report and Recommendations69

V. THE AWARD OF ATTORNEYS' FEES..... 77

 A. The Role of the Court77

 B. Megafund Cases78

 C. The Applicable Standards79

 D. Analysis of Certain Relevant Factors80

 E. Public Policy Considerations84

 i. The Duty of Candor..... 84

 ii. Thornton, Labaton, and Liefk 86

 F. An Award of \$60,000,000 in Attorneys' Fees is
 Reasonable and Most Appropriate.126

 G. Allocation of the Fee and Expense Award144

 H. Service Awards153

VI. REFERRAL TO THE MASSACHUSETTS BOARD OF BAR OVERSEERS..... 154

VII. IMPLEMENTATION OF THIS MEMORANDUM AND ORDER..... 155

VIII. CONCLUSION..... 156
IX. ORDER..... 157

I. SUMMARY

In 1913, Supreme Court Justice Oliver Wendell Holmes said that "[j]udges are apt to be naif, simple-minded men" Occasional Speeches of Justice Oliver Wendell Holmes 172 (Howe ed. 1962). This case is a reminder that he was right.

Judges trust lawyers. They expect that lawyers will provide the court the accurate and complete information that is necessary to decide matters properly. The Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct make these expectations legal obligations.

For example, Federal Rule of Civil Procedure 11(b) provides that by presenting a pleading to a court an attorney is representing that he or she has made a reasonable inquiry and that all factual contentions are supported by evidence. This means, among other things, that an attorney who has signed a memorandum or sworn declaration that is submitted to the court represents that he or she has read the document and that the statements in it are true. In addition, Rule 11 requires that an attorney not continue to advocate positions based on false statements after he or she learns they are not true. Similarly, Massachusetts Rule of

Professional Conduct 3.3(a) requires that an attorney not make a false statement to a court and that an attorney correct any such false statement when it is discovered to be untrue.

Judges also expect that complex class action cases conform to the paradigm prescribed by statutes, Supreme Court decisions, and other well-established jurisprudence. Although the instant consolidated cases are not subject to the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §78u-4, the parties agree that its principles apply here too.

Prior to the enactment of the PSLRA, there was "a cottage-industry of specialized securities litigation firms that researched potential targets for [class action] suits, enlisted plaintiffs, controlled the course of the litigation, and often negotiated settlements that resulted in huge profits for the law firms with only marginal recovery for the shareholders." In re Cendant Corp. Litig., 182 F.R.D. 144, 145 (D.N.J. 1998) (internal quotation marks omitted), aff'd, 264 F.3d 201. The PSLRA was intended to assure that institutional investors with a large financial stake in the litigation would "choose counsel rather than, as [was] true [in 1995], counsel choosing the plaintiff." H.R. Conf. Rep. No. 104-369, at 35. It was expected that such an institutional investor would have "sophistication and interest in the litigation [] sufficient to permit that . . . entity to function as an active agent for the class" and "actively supervise

the conduct of the litigation." Cendant Corp., 264 F.3d at 266-67.

Attorneys always have a duty to provide their clients with the information necessary to permit the clients to make informed decisions concerning the representation. See Massachusetts Rules of Professional Conduct 1.4(a)(1), (b). For an attorney representing a class, providing material information to all class members is required. Courts expect counsel to discharge this duty too.

When a class action has been settled, a common fund must be divided between class counsel and the members of the class. At this point, there is a tension between the interests of counsel in maximizing their compensation and the interests of members of the class in maximizing their recovery. The court, therefore, acts as a fiduciary to protect the interests of the class.

A defendant who has agreed to settle for a total sum has no interest in how the common fund is divided between counsel and the class. Thus, the usual adversary system does not operate to expose possible misrepresentations by counsel for the class to the court. Recognizing this, 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. Accordingly, lawyers for the class are required to inform the court of all material facts, "whether or not the facts are adverse" to

the attorneys' personal interests. Mass. R. Prof. C. 3.3(d). Judges trust attorneys to discharge this duty when seeking an award of attorneys' fees, among other things.

Usually courts award class counsel a percentage of the common fund as attorneys' fees. Frequently the most appropriate award is found to be in the 20 to 30% range. However, the percentage award is usually less than 20% if the common fund is more than \$250,000,000.

There are a series of well-known factors that judges customarily consider in awarding attorneys' fees. These include:

- (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) (citation omitted). Assuring the integrity of judicial proceedings is an important public policy consideration. Therefore, among other things, "courts should look to the various codes of ethics as guidelines for judging the conduct of counsel" in making fee awards. In re Agent Orange Prod. Liab. Litig., 818 F.2d 216, 222 (2d Cir. 1987).

"Every lawyer is an officer of the court [and] has a duty of candor to the tribunal." Pearson v. First NH Mortg. Corp., 200 F.3d 30, 38 (1st Cir. 1999) (quoting Burns v. Windsor Ins. Co., 31

F.3d 1092, 1095 (11th Cir. 1994)). If counsel in a class action fail in their duty to be candid with the court, it is permissible and appropriate for the court to take this into account in deciding what amount within the reasonable range is most appropriate to award as attorneys' fees. In some cases it is most appropriate to deny an award of attorneys' fees as a sanction for misconduct.

In addition to considering the customary factors, courts regularly check the reasonableness of a requested fee award against the "lodestar" of plaintiff's counsel to determine whether awarding a multiple of the lodestar is justified. A lodestar is calculated by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate for each attorney. See In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995) (citing Blum v. Stenson, 465 U.S. 886, 896-902 (1984)). "Reasonable fees are to be calculated according to the prevailing market rates in the relevant community" Blum, 465 U.S. at 895. "[T]he rate that private counsel actually charges for her services, while not conclusive, is a reliable indicium of market value." United States v. One Star Class Sloop Sailboat, 546 F.3d 26, 40 (1st Cir. 2008) (emphasis added).

Only counsel for a class possess the information necessary to calculate the lodestar, which they know will be used to test the reasonableness of their request for attorneys' fees. Therefore, it

is especially important that their representations concerning the lodestar be reliable. Judges expect that such representations have been carefully considered and are correct.

In 2016, these consolidated cases seemed to fit the PSLRA paradigm for class actions. Arkansas Teachers Retirement System ("ATRS"), the representative of the class of customers alleging fraud in billing for foreign exchange transactions by defendant State Street Bank and Trust Co. ("State Street"), was an institutional investor with experience as the Lead Plaintiff in class actions. ATRS had reportedly selected experienced counsel, Labaton Sucharow LLP ("Labaton"). Labaton involved other experienced counsel, The Thornton Law Firm ("Thornton"), and Lief Cabraser Heimann & Bernstein, LLP ("Lief") (collectively, "Class Counsel"). In addition, several Employee Retirement Income Security Act ("ERISA") pension plans ("ERISA Plans") in separate suits consolidated with the ATRS case made comparable allegations of fraud and were also represented by experienced counsel (collectively, "ERISA Counsel").

In 2016, the parties moved for approval of a \$300,000,000 settlement and for a fee award to plaintiffs' counsel of about 25% of that common fund -- approximately \$75,000,000.¹ At a November

¹ Counsel requested, and the court awarded, \$74,541,250 in attorneys' fees and \$1,257,697.94 in expenses. For simplicity, in this Memorandum the award is referred to as a \$75,000,000 award.

2, 2016 hearing, the court repeatedly stated that because the adversary system was not then operating, it was relying heavily on the representations of plaintiffs' counsel. After approving the settlement, considering the customary factors, and doing a lodestar check, the court decided that their reported multiplier of 1.8 was reasonable, and awarded counsel the requested \$75,000,000 in attorneys' fees.

The evolution of events since has 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 Lief, were untrue. In addition, the court now realizes that the relationship between ATRS and Labaton in this case was very different than the previously described paradigm for complex class actions.

About a week after the court ordered the \$75,000,000 fee award, David Goldsmith of Labaton informed the court that inquiries from the media had caused Class Counsel to realize that they had inadvertently double-counted the hours of staff attorneys who worked on this case. This error inflated what had been represented to be their collective lodestar by more than 9,300 hours and more than \$4,000,000. Goldsmith asserted that, nevertheless, a multiplier of 2.0, rather than 1.8, as originally erroneously

calculated, was reasonable and that the court should not reduce the \$75,000,000 award.

Soon after, a Boston Globe article raised additional questions about the reliability of the representations made by counsel in their request for attorneys' fees. For example, it was reported that staff attorneys who were represented as having a regular rate of \$335 to \$500 an hour, were typically paid \$25 to \$40 an hour. Moreover, the article pointed out that different hourly rates had been attributed to the attorneys who were double-counted by different firms, which suggested that those rates may have been fabricated. In addition, it was reported that Michael Bradley, the brother of Thornton Managing Partner Garrett Bradley, had been represented to be an employee of Thornton with a regular rate of \$500 an hour, but was actually a sole practitioner who never charged that much and often made \$53 an hour representing indigents in state court.

A subsequent Boston Globe story described the means by which Labaton and Thornton reportedly obtained clients in Massachusetts. Garrett Bradley was the Assistant Majority Leader of the Massachusetts House of Representatives. He exploited his political connections to get business. In addition, many Labaton and Thornton lawyers made campaign contributions to elected officials who chaired public pension funds. Those funds retained Labaton to monitor their investments and to represent them as Lead Plaintiffs

in class actions. The Plymouth County Retirement Fund, which Garrett Bradley had recruited as a client, and whose Chair had received substantial campaign contributions from Labaton and Thornton lawyers, reportedly recovered about \$40,000 in cases in which it represented a class, while Labaton was in those cases awarded more than \$41,000,000, which it shared with Thornton. Another fund, chaired by the Treasurer of the Commonwealth of Massachusetts who had received campaign contributions from Labaton and Thornton, reportedly recovered in two class actions about \$682,000, while Labaton was awarded approximately \$60,000,000, which it also shared with Thornton.

In view of the questions raised by the inflated lodestar and the Boston Globe articles -- which evidently prompted Garrett Bradley to resign from the Massachusetts House of Representatives -- the court proposed appointing Retired United States District Judge Gerald Rosen as a Master to investigate the reliability of the representations made to the court in the request for attorneys' fees and related issues.

On March 7, 2017, the court conducted a hearing on its proposal to appoint Judge Rosen as Master. The Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF")²

² CCAF is no longer part of the Competitive Enterprise Institute. It is now, instead, part of the Hamilton-Lincoln Law Institute.

moved for leave to serve as guardian ad litem for the class and/or to make submissions to the court and Master as amicus curiae. Class Counsel opposed these requests. The court did not appoint CCAF as guardian ad litem or authorize it to participate in proceedings before the Master. The court did, however, allow CCAF to make submissions to the court and participate in hearings it conducted. CCAF brought expertise to the proceedings, which was often very helpful to the court.³

Led by Labaton, Class Counsel and ERISA Counsel agreed to the appointment of Judge Rosen as Master. They also agreed to pay the reasonable cost of his services and those he engaged to assist him.⁴

In appointing the Master, the court ordered that:

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 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

³ The court would consider ordering that CCAF be compensated for its work if it had the authority to do so.

⁴ The initial payment to the Clerk of the District Court by Labaton on behalf of Class Counsel was \$2,000,000. Counsel were informed that the court would order additional payments if necessary.

from David Goldsmith, Esq. of Labaton Sucharow, LLP to the court (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).

Mar. 8, 2017 Order (Dkt. No. 173). The Master was ordered to attempt to complete his investigation by October 10, 2017, but the court authorized him to request an extension of time to do so if necessary.

In order to eliminate any possible doubt about the court's authority to modify the \$75,000,000 fee award after receiving the Master's Report and Recommendations, the court subsequently vacated the original fee award.

The Master worked hard to complete his investigation and Report. However, the process became protracted when -- based on documents produced by Thornton, but not Labaton or Lief -- the Master discovered that Labaton had agreed to pay \$4,100,000 to Damon Chargois, a lawyer who had done no work on this case, as an ethically impermissible finder's fee for the role of his firm, Chargois & Herron, in influencing ATRS to employ Labaton.

On May 14, 2018, the Master filed his 377-page Report and Recommendations (the "Report") and an Executive Summary of it. The

Report was filed under seal to permit the parties to propose redactions. The court denied Labaton's request to keep under seal all references to Chargois, whom it had secretly paid 20% of its fee -- amounting to millions of dollars -- in eight other class action cases in which it had represented ATRS. In addition, the court denied Labaton's motion to disqualify the court from continuing to preside in this case and the First Circuit promptly denied Labaton's appeal of that decision. The court also denied Labaton's motion to prevent the Master from responding to objections to his Report.

The Master's Report recommended that the court again award \$75,000,000 but reallocate it because of the misconduct by Class Counsel that he found. If adopted, the Master's recommendations would reduce Class Counsel's compensation: from about \$32,000,000 to about \$26,000,000 for Labaton; from about \$20,000,000 to about \$17,000,000 for Thornton; and from about \$16,000,000 to about \$13,000,000 for Lief. The Master also recommended that additional payments be made to ERISA Counsel to compensate them for the cost of participating in the proceedings after the original fee award that were prompted by the misconduct of Class Counsel. In addition, the Master recommended that some of the funds "disgorged" by Class Counsel go to the class. 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 and that Garrett

Bradley be referred to the Massachusetts Board of Bar Overseers for disciplinary action.

Numerous objections to the Report were filed. Eventually, however, Labaton and ERISA Counsel agreed to settle their disputes with the Master, if the court approved that settlement (the "Proposed Resolution"). Nevertheless, Lief and Thornton maintained their objections to the Report.

The court conducted hearings on all of the objections, including Labaton's, in June 2019. It is now deciding de novo each objection to the Master's findings of fact and conclusions of law. See Fed. R. Civ. P. 53(f)(3) & (4). It is also, in effect, modifying his Report. See Fed. R. Civ. P. 53(f)(1).

As described in detail in this Memorandum, the court finds that it is reasonable and most appropriate to award attorneys' fees in the amount of \$60,000,000, which constitutes 20% of the \$300,000,000 common fund. It is exercising its authority to allocate the total award among the participating firms as follows: \$22,202,131.25 to Labaton; \$13,261,908.10 to Thornton; \$15,233,397.53 to Lief; and a total of \$10,716,526.15 to all ERISA Counsel.⁵ The court is reducing the Service Award to ATRS from \$25,000 to \$15,000 and reinstating the original \$10,000 service

⁵ A chart comparing the amount to be received by each firm under the original award, the Master's recommendations, and this Memorandum and Order is attached hereto as Exhibit A.

awards to the six ERISA plaintiffs. An additional more than \$14,000,000 is, therefore, being allocated to the class.

In summary, the reasons for the court's decision concerning the most appropriate amount to award as attorneys' fees is as follows.

The court begins by assuming that an award of 20% to 30% would be reasonable, and uses 25% as a starting point for determining the amount to be awarded. It does not presume that a lower percentage of the common fund should be awarded merely because this case involves a "megafund" of more than \$100,000,000.

The court recognizes that this was a complex case in which capable counsel achieved for the class an unusually large settlement -- \$300,000,000. At the outset the case was based on an untested theory of liability under Massachusetts consumer protection law and was, therefore, risky. However, the risk that the class and, therefore, counsel would recover nothing was greatly reduced when the court denied State Street's motion to dismiss the ATRS case. Since being appointed in 1985, this court has never been required to try a class action. Rather, every case that has survived a motion to dismiss has subsequently been settled. There is no reason to believe that this court's experience is unique or unusual. In essence, the court believes that when class action cases are carefully chosen by experienced counsel, and claims are thoughtfully alleged to defeat a motion to dismiss, the questions,

as a practical matter, are when the case will settle and for how much.

Lieff and Thornton brought to this case special knowledge and experience they acquired as plaintiffs' counsel in settling the first foreign currency exchange class action alleging deceptive practices. See In re Bank of N.Y. Mellon Corp. Forex Trans. Litig., No. 12-md-02335-LAC-JLC (S.D.N.Y.) ("BONY Mellon"), Dkt. No. 581. The instant case involved far less work than BONY Mellon. Following the denial of State Street's motion to dismiss there was no further litigation. Rather, the case was stayed for informal discovery and the mediation that resulted in settlement.

In view of the foregoing, the court would now award less than 25% of the \$300,000,000 common fund as attorneys' fees even if public policy considerations did not make a lower award reasonable and most appropriate. However, like the Master, the court now finds that the submissions of Labaton and Thornton in support of the request for an award of \$75,000,000 were replete with material false and misleading statements. Labaton and Thornton in many respects violated Federal Rule of Civil Procedure 11(b) and related Massachusetts Rules of Professional Conduct. This misconduct makes an award at the lower end of the presumptive reasonable range -- 20% -- most appropriate.

In summary, the misconduct of Thornton and Labaton includes, but is not limited to, the following. Garrett Bradley did not, as

required by Federal Rule of Civil Procedure 11 and the Massachusetts Rules of Professional Conduct, read the fee declaration in support of the fee request that he signed under oath before it was submitted to the court on behalf of Thornton. It included many false statements. For example, Bradley represented that certain attorneys were employed by Thornton and that the hourly rates attributed to them for the purpose of calculating Thornton's lodestar were "the same as my firm's regular rates charged for their services," which have been accepted in other complex class actions." G. Bradley Decl. ¶4 (Dkt. No. 104-16) (emphasis added). However, Thornton worked solely on a contingent-fee basis. It had no clients who paid the firm on an hourly basis and no "regular rates charged" for its attorneys. In addition, Michael Bradley was not, as represented, employed by Thornton. Nor had the firm, as Garrett Bradley claimed, ever charged \$500 an hour for his services, which in this case were worth far less.⁶

Moreover, the staff or contract attorneys Thornton claimed in its lodestar did not work for Thornton. Rather they were employed by Labaton or Lief and paid for by Thornton, primarily to increase Thornton's lodestar and thus its claim for a higher percentage of the fees that would foreseeably be awarded. The arrangement for

⁶ In this Memorandum, Garrett Bradley will at times be referred to as "Bradley" and his brother will be referred to as "Michael Bradley."

Thornton to pay for lawyers employed by Labaton and Lieff led to the double-counting error that inflated their total lodestar by over \$4,000,000.

Contrary to his testimony under oath on June 25, 2019, see June 25, 2019 Tr. at 85:25 to 88:13 (Dkt. No. 565), Garrett Bradley did read his declaration after a December 17, 2016 Boston Globe article was published. He then knew that the declaration included false statements. However, he did not, as required by Rule 11 and the Massachusetts Rules of Professional Conduct, inform the court and correct them. Rather, he permitted Labaton to continue to argue for an award of \$75,000,000 based in part on his false statements.

Labaton also repeatedly violated Rule 11 and the related Massachusetts Rules of Professional Conduct. Sucharow filed a sworn declaration stating that the lodestar calculations of all of plaintiffs' firms that he submitted were "based on their current billing rates." Dkt. No. 104, ¶176. This was not true with regard to Thornton, at least. A reasonable inquiry -- such as a question to Garrett Bradley who was also Of Counsel to Labaton -- would have revealed Sucharow's sworn statement to be untrue. However, evidently neither Sucharow nor anyone at Labaton made any inquiry at all.

Nor did Sucharow or his partner Nicole Zeiss, who was in charge of assembling the documents in support of the fee petition, read with reasonable care the declarations concerning the lodestar

of each firm that Sucharow swore were accurate. If he or she had, Sucharow or Zeiss would have recognized that many attorneys were claimed to have been employed by two firms, which attributed different regular hourly rates to them.

Sucharow also falsely claimed that the rates attributed to Labaton attorneys were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." Dkt. No. 104-15, ¶7 (emphasis added). When Sucharow made this statement under oath he believed that Labaton did not have any clients who were charged or paid hourly rates.⁷

Sucharow also failed in his duty to correct his false statements after the Boston Globe alerted Labaton to the double-counting and later published its first, December 17, 2016 article. Nor did his partner, Goldsmith, who sent the court the November 10, 2016 letter disclosing the double-counting, but which did not correct Labaton's false claims to have had regular hourly rates charged for its attorneys. Rather, Goldsmith continued to rely, in part, on that false information in arguing that an award of \$75,000,000 as attorneys' fees was justified.

In addition, 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 Lief,

⁷ Labaton now claims it had a few clients who paid hourly rates.

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.

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. 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."⁸

Sucharow also did not disclose to ERISA Counsel, the ERISA pension funds in the single settlement class Labaton was representing, or the court that Labaton would pay Chargois \$4,100,000 as a finders fee for the successful efforts of his partner Tim Herron to secure ATRS as a Labaton client.

More specifically, in about 2007, Labaton asked Chargois, a Texas lawyer, to find institutional investors in the Southwest for Labaton to represent in class actions, and to influence them to hire Labaton. Neither Chargois nor his partner in Arkansas, Herron, had any relationship with an institutional investor. However, Herron knew Arkansas State Senator Steve Faris, who served on the legislative committee responsible for oversight of ATRS. Chargois introduced Labaton partners to Faris and said that Faris was "prepared to . . . take necessary steps [with ATRS] after you do your thing." Email from Chargois to Belfi (Aug. 9, 2007) (Dkt. No. 454-5). Faris subsequently introduced Labaton to the Executive Director of ATRS, Paul Doane. Chargois later reported to Labaton

⁸ 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.

that "[t]he good Senator is finalizing with Paul Doan[e]" an arrangement for Labaton to represent ATRS, urged Labaton to "act surprised" when officially informed, and added that "[e]verybody wants something sometimes." Email from Chargois to Belfi (Sept. 26, 2007) (Dkt. No. 454-8). Labaton was soon hired to serve as a "monitoring counsel" for ATRS. As monitoring counsel, Labaton would recommend that ATRS initiate certain class actions and retain Labaton as lead counsel if ATRS succeeded in being appointed lead plaintiff.

As a result of being engaged as monitoring counsel by ATRS, Labaton agreed to pay Chargois 20% of any fee Labaton was awarded as a lead counsel representing ATRS in a class action, although neither Chargois nor Herron was expected to serve as local counsel or do any work on the case. As Chargois credibly explained:

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.

Email from Chargois to Belfi (Oct. 18, 2014), R. & R. Ex. 177 (Dkt. No. 401-176) (emphasis added). With regard to the instant case, Labaton negotiated a reduced payment to Chargois of \$4,100,000. Thornton and Liefv each contributed to this payment. Thornton was fully familiar with Labaton's agreement with Chargois. Indeed,

Garrett Bradley, who was Of Counsel to Labaton, played a leading role in persuading Chargois to accept a reduced payment. Liefk had been told that Chargois had served as local counsel. However, Liefk 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.

Labaton did not inform ATRS, ERISA Counsel or their clients, or the court of the agreement to pay Chargois. This was consistent with Labaton's practice of secrecy in the eight other ATRS cases for which it paid Chargois despite the fact that, in six of them, Chargois did not file an appearance or do any work.

Labaton's \$4,100,000 payment to Chargois violated Massachusetts Rule of Professional Conduct 7.2(c), which in 2011 prohibited a lawyer from paying a person for recommending his services, except for paying a referral fee as defined in Rule 1.5(e). Contrary to Labaton's contentions, a lawyer is a person and the payment to Chargois was not a permissible "referral fee" under the Massachusetts Rules.

After the Master discovered the payment to Chargois, Labaton sought and obtained ratification of it from George Hopkins, who had succeeded Doane as the Executive Director of ATRS. However, Labaton was then Lead Counsel for a single class that included the ERISA pension funds which were not represented by ATRS. Labaton had a fiduciary duty to all class members, including those funds.

This included the duty, under Massachusetts Rules of Professional Conduct 1.4(a)(1) and (b), to provide the ERISA Plans all of the information necessary to make informed decisions concerning Labaton's representation, including concerning its request for attorneys' fees. Labaton violated this duty by failing to inform the ERISA Plans of the payment to Chargois.

If informed, ERISA Counsel would have viewed the Labaton payment to Chargois as important to their clients, to the viability of the settlement that the United States Department of Labor had approved before it was presented to the court, and to its agreement with Labaton to accept only ten percent of the total fee award, about \$7,500,000, for the valuable work they did in this case.

At a minimum, ERISA Counsel would have informed the court of Labaton's obligation to pay Chargois. This would have prompted the court to question the purpose of the payment, possibly remove Labaton as lead counsel, and/or reduce the fee awarded to Labaton.

The court had not ordered that counsel disclose the terms of any agreement concerning fees, as it could have under Federal Rules of Civil Procedure 23(h) and 54(d)(2). Therefore, in contrast to the Master, the court does not find that Labaton's failure to inform the court of the intended payment to Chargois violated Federal Rule of Civil Procedure 23(e)(3). However, Labaton's violation of its duty, under the Massachusetts Rules of Professional Conduct, to inform ERISA Counsel and their clients of

the payment had the practical effect of depriving the court of important information.

The conduct of Liefv was also deficient, but not as serious as the misconduct of Labaton and Thornton. Using the template provided by Labaton, Liefv too represented in its declaration in support of the fee petition that the hourly rates attributed to lawyers it employed were "the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." Chiplock Decl. ¶5 (Dkt. No. 104-17). However, Liefv also worked primarily on a contingent-fee basis and had only a "handful of paying clients over the years." Mar. 7, 2017 Tr. at 93:17 (Dkt. No. 176). In BONY Mellon, Liefv stated in its fee declaration 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." Dkt. No. 622-1 ¶5, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015), also available at R. & R. Ex. 186 (Dkt. No. 401-185). To the extent Liefv had ever actually charged an hourly rate for an attorney involved in this case, Liefv should have used similar language in the declaration it submitted to this court.

In addition, Liefv reviewed and authorized Labaton to represent that it had signed the memorandum submitted in support of the request for attorneys' fees that mischaracterized the

Fitzpatrick Study. In BONY Mellon, Liefk was a signatory of a memorandum that accurately described the Fitzpatrick Study. Liefk should have caused Labaton to correct the mischaracterization of the Fitzpatrick Study in this case.

In contrast to Garrett Bradley and, therefore, Thornton, Liefk was not accurately or completely informed of the reasons Labaton was paying Chargois \$4,100,000 when it agreed to contribute \$1,000,000 to that payment. More specifically, attorneys at Liefk had been told Chargois was "local counsel" and testified that they assumed that Chargois was dealing with ATRS. However, the fact that Chargois was being paid so much despite doing no work on this case should have prompted the Liefk lawyers to question Labaton carefully about the matter. Liefk claims that if fully informed, it would not have subsidized the payment to Chargois and would have encouraged Labaton to disclose it to the court. However, its inaction and acquiescence contributed to the misconduct of Labaton and Thornton concerning Chargois.

Awarding attorneys' fees in a class action is an exercise of the court's equitable authority. Each case is unique and "individualization is the name of the game." In re Fidelity/Micron Secs. Litig., 167 F.3d 735, 737 (1st Cir. 1999). The court now finds that an award of 20% of the \$300,000,000 common fund -- \$60,000,000 -- is within the reasonable range and most appropriate.

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.

An award of 20% of the common fund is at the low end of the 20-30% range generally presumed to be reasonable. It is above both the mean of 17.8% and median of 19.5% in settlements between \$250,000,000 and \$500,000,000 according to the Fitzpatrick Study on which plaintiffs' counsel asked the court to rely. It is also above the average of 13.16% that was awarded in the 20 cases with settlements between \$100,000,000 and \$500,000,000 that Labaton's expert William Rubenstein referenced in an expert declaration. See Dkt. No. 446-2, Ex. E; see also Dkt. No. 522 at 7. In addition, a 20% award is compatible with what Class Counsel reported to be the awards in the eight cases in the First Circuit with common funds exceeding \$100,000,000.

A check against the properly calculated lodestar confirms the reasonableness of a \$60,000,000 fee award. It involves a multiplier of 1.67, which is not materially less than the 1.8 multiplier that plaintiffs' counsel asserted was reasonable in their request for

a \$75,000,000 award that was based, in part, on an inflated lodestar calculation.

The parties acknowledge that the court has the authority to allocate the \$60,000,000 among the firms. The court is doing so. The award of attorneys' fees and expenses now being made is as follows:

	Fees	Expenses	Total
Labaton	21,943,464.40	258,666.85	22,202,131.25
Thornton	12,966,592.60	295,315.50	13,261,908.10
Lieff	14,961,453.00	271,944.53	15,233,397.53
Keller Rohrback	3,567,380.83	410,771.35	3,978,152.18
McTigue	3,367,917.34	71,858.08	3,439,775.42
Zuckerman Spaeder	3,193,191.83	105,406.72	3,298,598.55
TOTAL	60,000,000.00	1,413,963.03	61,413,963.03
ERISA Counsel Total	10,128,490.00	588,036.15	10,716,526.15
Customer Counsel Total	49,871,510.00	825,926.88	50,697,436.88

This fee award provides ERISA Counsel the full amount they received from the original \$75,000,000 award and compensates them for their lodestar concerning the post-award proceedings prompted by the misconduct of Labaton and Thornton primarily. Because of that misconduct, Labaton and Thornton are being required to bear the full future cost of the Master. Therefore, an additional more than \$14,000,000 is being provided to the class.

The Code of Conduct for United States Judges states that "[a] judge should take appropriate action upon receipt of reliable information indicating the likelihood . . . that a lawyer violated applicable rules of professional conduct." U.S. Judicial Conf.,

Code of Judicial Conduct for U.S. Judges, Canon 3(B)(6) (Mar. 2019). Therefore, this Memorandum and Order shall be sent to the Massachusetts Board of Bar Overseers for whatever action, if any, it deems appropriate.

The court is also ordering that the Master advise concerning whether it is necessary or appropriate to give notice to the class of this new fee award and to perform the additional work necessary to implement the Order concerning attorneys' fees now being issued. This will entail additional expense. The \$4,850,000 previously paid to the Clerk of Court to compensate reasonably the Master and those he employs has been substantially spent. Therefore, Labaton and Thornton are being ordered to provide the Clerk, by March 11, 2020, with an additional \$250,000 each for this purpose.

In addition, the Proposed Settlement among Labaton, ERISA Counsel, and the Master is being denied.

The United States has a proud history of honorable, trustworthy lawyers. However, this case demonstrates that not all lawyers can be trusted when they are seeking millions of dollars in attorneys' fees and face no real risk that the usual adversary process will expose misrepresentations that they make. Therefore, in making fee awards in class actions, it is important that judges be skeptical, and do the hard work necessary to protect the interests of the class and the integrity of the administration of justice.

II. PROCEDURAL BACKGROUND

This matter involves three related class action cases against State Street which were consolidated for pretrial purposes. In one case, C.A. No. 11-10230-MLW, ATRS sued State Street on behalf of a putative class of similarly situated customers, alleging that State Street engaged in unfair and deceptive practices by overcharging clients for foreign currency exchange transactions. As requested by ATRS, and approved by the court, the class in that case has been represented by "Lead Counsel" Labaton, and by Thornton and Lief. In the other two cases, C.A. No. 11-12049-MLW and C.A. No. 12-11698-MLW (the "ERISA cases"), members of employee pension and retirement plans covered by ERISA alleged that State Street breached its fiduciary duties under ERISA, and engaged in transactions prohibited by ERISA, Pub. L. No. 93-406, 88 Stat. 829 (codified in relevant part as amended at 29 U.S.C. §§1001-1461), with regard to foreign currency exchange. The ERISA plaintiffs have been represented by McTigue Law LLP ("McTigue"), Zuckerman Spaeder LLP ("Zuckerman"), Keller Rohrbach LLP ("Keller"), (collectively, "ERISA Counsel"), and, to a limited extent, by several other firms working with them.

In 2012, the court denied State Street's motion to dismiss the ATRS case. At the request of all parties, the court then stayed the cases to permit them to engage in informal discovery and mediated settlement negotiations.

In July 2016, the parties filed a stipulation of settlement of the three cases. They asked that the court: certify for settlement purposes a single class that included both customers in the original proposed ATRS class and the ERISA Plans in the original proposed ERISA classes; preliminarily approve the settlement; appoint Labaton as "Lead Counsel" for the single class to be certified; give class members notice of the proposed settlement and an opportunity to object; and then finally approve the settlement. While State Street did not admit liability, the proposed settlement provided for a payment by State Street of \$300,000,000. It also authorized plaintiffs' counsel to seek approximately \$75,000,000 in attorneys' fees, up to \$1,750,000 in expenses, and \$85,000 in service awards for the class representatives. The proposed settlement had previously been approved by the United States Departments of Justice and Labor and the Securities and Exchange Commission, subject to approval by the court.

These cases then appeared to the court to fit the paradigm for securities class actions prescribed by PSLRA, which the parties agree is equally applicable to these cases. See, e.g., June 26, 2019 Tr. at 126-27 (Dkt. No. 566). As the First Circuit has written, "[i]n certain types of complex litigation, the lawyers' monetary interests often comprise a tail that wags the dog." Fidelity/Micron, 167 F.3d at 736. The PSLRA "was intended to end

the perceived practice of counsel choosing plaintiffs, operating without supervision, and often profiting greatly from settlements that provided little benefit to class members." Garbowski v. Tokai Pharm., Inc., 302 F. Supp. 3d 441, 443 (D. Mass. 2018). The statute sought to ensure that plaintiffs' counsel in class actions do not "litigate with a view toward ensuring payment for their services without sufficient regard to whether their clients are receiving adequate compensation in light of evidence of wrongdoing." S. Rep. No. 104-98, at 6 (1995) (citation omitted).

When the proposed settlement in this case was presented, the court inferred that ATRS, a sophisticated institutional investor, had identified a promising basis for a class action, selected counsel, directed and monitored their performance, and concluded that about \$75,000,000 would be reasonable compensation for their work. As explained below, Class Counsel and ERISA Counsel did obtain reasonable compensation for class members. However, the evolution of events has demonstrated that in the ATRS case, the appearance of conforming to the proper paradigm was a fiction.

III. THE STANDARDS FOR AWARDING ATTORNEYS' FEES

The court's authority to award fees "has its origins in equity" Fidelity/Micron, 167 F.3d at 737. With regard to class actions, "[c]ourts have long recognized that a lawyer who recovers a 'common fund' for the class she represents is entitled to be paid a reasonable attorneys' fee and her expenses prior to

the distribution of the balance to the class." In re Lupron Mktg. & Sales Practices Litig., No. 01-cv-10861-RGS, 2005 WL 2006833, *2 (D. Mass. Aug. 17, 2005). "The common fund doctrine is founded on the equitable principle that those who have profited from litigation should share its costs." Thirteen Appeals, 56 F.3d at 305 n.6. As the award of attorneys' fees is an exercise of a court's equitable authority, the court has "wide latitude in shaping the contours of [attorneys' fee] awards." Fidelity/Micron, 167 F.3d at 736.

In exercising its discretion, the district court "functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class." Id.; see also Agent Orange, 818 F.2d at 222 (Federal Rule of Civil Procedure 23(e) "requires court approval of any settlement of a class action suit and squarely places the court in the role of protector of the rights of the class when such a settlement is reached and attorneys' fees are awarded"); In re Relafen Antitrust Litig., 360 F. Supp. 2d 166, 192-94 (D. Mass. 2005) (collecting authorities). This fiduciary duty can be difficult to discharge because "the presentation of the settlement for judicial approval is nonadversarial in nature: the prior competing parties (class counsel and the defendants) have resolved their differences and are now in harmony in seeking the court's approval." 4 William B. Rubenstein, Newberg on Class Actions §13:40 (5th ed. Dec. 2019 Update). Ultimately, courts have

to rely on counsel, particularly plaintiffs' counsel, to provide the accurate and complete information necessary for the court to exercise properly its discretion in awarding attorneys' fees. The Massachusetts Rules of Professional Conduct impose on attorneys seeking a fee award in a class action the duty to do so. See Mass. R. Prof. C. 3.3.

Courts may award fees from a common fund "either on a percentage of the fund basis or by fashioning a lodestar." Thirteen Appeals, 56 F.3d at 307. "[T]he [percentage of fund] method in common fund cases is the prevailing praxis" Id. "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. 2015) (internal quotation marks omitted), aff'd, 809 F.3d 78 (1st Cir. 2015); see also Lupron, 2005 WL 2006833 at *5 ("Courts in the First Circuit have recognized that fee awards in common fund cases typically range from 20 to 30 percent."). The First Circuit's approach is comparable to that employed in other Circuits. For example, the Ninth Circuit has written: "Twenty-five percent is the 'benchmark' that district courts should award in common fund cases. The district court may adjust the benchmark when special circumstances indicate a higher or lower percentage would be appropriate." In re Pac. Enters. Secs. Litig., 47 F.3d 373, 379 (9th Cir. 1995) (internal citation omitted).

"[T]he First Circuit does not require courts to examine a fixed laundry list of factors" in determining a reasonable attorneys' fee award. In re Tyco Int'l, Ltd. Multidist. Litig., 535 F. Supp. 2d 249, 265-66 (D.N.H. 2007). However, district courts within the First Circuit generally consider the factors initially identified by the Second and Third Circuits, particularly:

- (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.

Neurontin, 58 F. Supp. at 170 (quoting Lupron, 2005 WL 2006833 at *3); see generally Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000); Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. 237, 255-56 (1985).

Courts have a duty to promote and protect the integrity of judicial proceedings. In exercising its equitable authority to award fees, a court should not reward or encourage inequitable conduct by counsel. Therefore, it is permissible and appropriate for a court to take misconduct into account in making a fee award.

More specifically, in fulfilling its duty to serve as protector of the class, the court should, among other things, "look to the various codes of ethics as guidelines for judging the conduct of counsel." Agent Orange, 818 F.2d at 222. As the First Circuit has written, "[e]very lawyer is an officer of the court

[and] has a duty of candor to the tribunal.'" Pearson, 200 F.3d at 38 (quoting Burns, 31 F.3d at 1095).

In view of the fact that the adversary process is not operating when attorneys representing a class seek a fee award, it is especially important that they satisfy their duty of candor to the court. As explained earlier, the particular importance of attorneys' providing accurate and complete information to the court when seeking an award of attorneys' fees in a class action is emphasized in the Massachusetts Rules of Professional Conduct. Comment 14A to Rule 3.3 states that:

When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, 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).

(emphasis added). Rule 3.3(d) provides that:

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.

A petition for an award of attorneys' fees in a class action is appropriately treated as an ex parte submission because at that point the attorneys' interests in maximizing their compensation is adverse to the interest of the class in maximizing its recovery. See In re Rite Aid Corp. Secs. Litig., 396 F.3d 294, 307-08 (3d

Cir. 2005). Except in the rare case in which a well-endowed class member invests in opposing a request for attorneys' fees, the adversary process does not operate to advocate for the interests of the class.

"[I]n light of the divergence of interests that can . . . develop between counsel and the class in [] class actions, it is essential that courts not doubt the forthrightness of counsel." In re IMAX Secs. Litig., No. 06 Civ. 6128(NRB), 2012 WL 3133476, at *11 (S.D.N.Y. Aug. 1, 2012). When counsel fail in their duty to be candid and complete in their presentations to the court, "the grant of fees and expenses must reflect this." Id.

Indeed, "'[i]t is well settled . . . that the district court has the duty and responsibility to supervise the conduct of attorneys who appear before it, and that . . . [d]enial of attorneys' fees may be a proper sanction' for attorney misconduct." Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 542 (1st Cir. 2015) (quoting Culebras Enters. Corp. v. Rivera-Rios, 846 F.2d 94, 97 (1st Cir. 1988)). Therefore, as the Ninth Circuit wrote in a decision concerning a class action, "under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation." Rodriguez v. Disner, 688 F.3d 645, 655 (9th Cir. 2012).

In addition to considering whether a requested award is reasonable based on the customary Goldberger factors and any others

that are relevant in the unique circumstances of the case, courts in the First Circuit and nationally regularly check the requested award against the "lodestar" to evaluate whether such an award would be reasonable. See David F. Herr, Annotated Manual for Complex Litigation §14.122 (4th ed. May 2019 Update) ("[T]he lodestar is . . . useful as a cross-check on the [percentage of fund] method"); see also Goldberger 209 F.3d at 50 (encouraging use of lodestar as a cross check). A lodestar is properly calculated by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. Thirteen Appeals, 56 F.3d at 305 (citing Blum, 465 U.S. at 896-902); Bezdek, 79 F. Supp. 3d at 350. "Reasonable fees are to be calculated according to the prevailing market rates in the relevant community" Blum, 465 U.S. at 895. "[T]he rate that private counsel actually charges for her services, while not conclusive, is a reliable indicium of market value." One Star Class Sloop Sailboat, 546 F.3d at 40 (emphasis added).

Although awarding a percentage of the fund in the 20% to 30% range is common, the First Circuit has explained that "'[r]easonableness is the goal,' and that courts should avoid 'mechanical or formulaic application' of rigid rules." Fidelity/Micron, 167 F.3d at 737 (quoting In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 109 F.3d 602, 607 (9th Cir. 1997)). Accordingly, "because each common

fund case presents its own unique set of circumstances, trial courts must assess each request for fees and expenses on its own terms," and "when a court exercises [its] equitable power, individualization is the name of the game." Id.

Moreover, "the court has the ultimate authority to determine" not only the most appropriate total amount to award in attorneys' fees but also "how the aggregate fee is to be allocated among counsel." 5 Rubenstein, Newberg on Class Actions §15:23.

Counsel for the plaintiffs in this case agree that the foregoing are the generally applicable principles for awarding attorneys' fees, including concerning the authority of the court to allocate an award of attorneys' fees among counsel. See June 24, 2019 Tr. at 17 (Dkt. No. 560).

IV. THE FACTS

A. The Approval of the Proposed Settlement

On August 8, 2016, the court conducted a hearing on the requests for preliminary approval of the proposed settlement and for attorneys' fees. The court stated that the case was at "a point at which the adversary system doesn't work." Aug. 8, 2016 Tr. at 41:13-14 (Dkt. No. 93). Indeed, the court characterized a proposed class action settlement as "a point at which the adversary process usually fails." Id. at 14:4-5.

The court was referring to the fact that when plaintiffs' counsel request an award of attorneys' fees, their interest in

maximizing their compensation is in tension with the interests of the members of the class, who will share the remainder of the common fund. The court's statements should have reminded Class Counsel of the importance of their ethical duty to provide the court, as fiduciary for the class, with accurate and complete information. See Mass. R. Prof. C. 3.3 cmt. 14A; Pearson, 200 F.3d at 38. However, as explained below, the court's remarks did not influence Labaton and Thornton, and to a lesser extent Lief, to satisfy their duty of candor to the court.

At the August 8, 2016 hearing, the court certified for settlement purposes the proposed single class that included the members of the putative ATRS class and of the putative ERISA classes. As requested, the court appointed Labaton as Lead Counsel for that single class. It also preliminarily approved the settlement and subsequently approved a revised notice of it to be provided to the classes. See Aug 8, 2016 Tr. at 11:17-21, 21:21-23:6 (Dkt. No. 93); Aug. 11, 2016 Order (Dkt. No. 97). A hearing concerning whether the proposed settlement should be finally approved and to award attorneys' fees was scheduled for November 2, 2016. See id.

In advance of the November 2, 2016 hearing, Labaton, as Lead Counsel, filed a memorandum in support of the proposed settlement which stated that it was signed by Thornton and Lief as well. See Dkt. No. 101-1. As Lead Counsel, Labaton also filed a memorandum

in support of a request for \$74,541,250 in attorneys' fees, \$1,257,698 in expenses, and \$85,000 in service awards. See Dkt. No. 103-1. That memorandum too stated that it was also signed by Thornton and Lief. See id. at 28-29 of 36. In addition, Sucharow of Labaton submitted a sworn declaration attesting to the accuracy of the sworn declarations concerning the request for attorneys' fees submitted by representatives of each law firm that had appeared for plaintiffs in these cases. See Sucharow Decl. ¶¶161-98 (Dkt. No. 104).

The memorandum in support of the request for attorneys' fees: addressed the Goldberger factors, including public policy considerations; noted that the requested fee was in the 20% to 30% range that is usual in the First Circuit, and was consistent with the typical 25% starting benchmark, citing Bezdek, 79 F. Supp. 3d at 349-50; asserted that the requested fee was reasonable when compared to settlements in First Circuit in other cases involving more than \$100,000,000, which are often referred to as "megafund" cases; and argued that a sliding scale had not been used by judges in the First Circuit to reduce the percentage of the common fund awarded in megafund cases and should not be used in this case. See Dkt. No. 103-1. The memorandum also stated that the requested fee was comparable to the award in another foreign currency exchange class action in which Thornton and Lief were counsel for the class, BONY Mellon. See id. at 17 n.17 of 36.

In addition, the memorandum stated that:

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 awarded in the 444 settlements where the [percentage of fund] 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). The 24.85% fee requested is right in line with Professor Fitzpatrick's findings.

Id. at 17-18 (emphasis added) (footnote omitted). The memorandum also stated in a footnote that Fitzpatrick "found . . . that the mean and median fees awarded in settlements in the First Circuit (23 of 444) were 27.0% and 25.0%." Id. at 18 n.18 of 36. As explained below, the court now finds that Class Counsel's characterization of the Fitzpatrick Study was materially misleading because Class Counsel did not inform the court that for settlements between \$250,000,000 and \$500,000,000 Fitzpatrick found that the mean award was 17.8% and the median award was 19.5%. See Fitzpatrick Study, supra, at 839.

In further support of the motion for attorneys' fees, Sucharow, Garrett Bradley of Thornton, and Daniel Chiplock of Lief submitted sworn declarations. Each of their declarations included an attachment listing the attorneys and professional staff each

firm employed who worked on this case, the hours that each worked, the regular hourly rate for each attorney, and the total lodestar for his firm. More specifically, each declarant stated 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. 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. . . .

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.

Sucharow Decl. ¶¶6-7 (Dkt. No. 104-15) (emphasis added); G. Bradley Decl. ¶¶3-4 (Dkt. No. 104-16) (emphasis added); Chiplock Decl. ¶¶4-5 (Dkt. No. 104-17) (emphasis added).

In view of the well-established jurisprudence described earlier and the representations of counsel, the court understood that in calculating the lodestar, plaintiffs' law firms 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 the rates actually charged to clients for similar services by other attorneys in their community. Counsel for Labaton has acknowledged that a judge would have reasonably

interpreted the foregoing representations this way. See June 24, 2019 Tr. at 119-20 (Dkt. No. 560). However, as explained below, the court's understanding, based on the statements in the declarations and the clearly established law they addressed, was incorrect. More specifically, various representations concerning calculation of the lodestar were false or misleading, including the representation that the rates attributed to Labaton, Thornton, and Lief attorneys were actually charged to paying clients.

Nevertheless, in his sworn declaration, Sucharow stated that the declarations of each of the nine firms in support of the requested fee award were based on "the current billing rates" of each of the attorneys in each firm, including his own. Sucharow Decl. ¶¶175-76 (Dkt. No. 104). Based on this representation Sucharow stated that the total lodestar was \$41,323,895.75. See id. ¶177; Mem. Supp. Attys.' Fees 31 of 36 (Dkt. No. 103-1); Nov. 2, 2016 Tr. at 30:18-31:12 (Dkt. No. 114). Sucharow claimed that the \$75,000,000 requested fee award would constitute a 1.8 multiplier of the lodestar, which was reasonable in view of the risk that plaintiffs and their counsel might have recovered nothing, the delay in obtaining any payment, and the multipliers deemed reasonable in other cases. See Mem. Supp. Attys.' Fees at 31-32 of 36 (Dkt. No. 103-1). These assertions were reiterated at the November 2, 2016 hearing by Goldsmith of Labaton. See Nov. 2, 2016 Tr. at 30:24-33:1 (Dkt. No. 114).

At the November 2, 2016 hearing, the court approved the proposed \$300,000,000 settlement. Id. at 35:6-37:3. 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 \$74,541,250 in attorneys' fees and \$1,257,697.94 in expenses. See id. It also made service awards of a total of \$85,000 to the plaintiff class representatives. See id. at 36:18-37:3.

B. The Reports of Errors in the Fee Petitions

On November 10, 2016, Goldsmith, on behalf of all Class and ERISA Counsel, sent the court a letter. See Dkt. No. 116. Goldsmith noted that the court had used the lodestar calculated by Labaton as a check concerning the reasonableness of the percentage of the common fund requested for attorneys' fees. See id. at 3 n.4. He 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 Lief Cabraser Heimann & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees" Id. at 1. Goldsmith reported that the hours of 23 temporary "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. More specifically, Goldsmith stated that lawyers located at Labaton's and Lief's offices were counted by Thornton and should have been included only in Thornton's lodestar. See id. at 2. Goldsmith also wrote that in some instances different billing rates had been attributed to the same staff attorneys by different firms. See id. at 3.

This 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. See id. at 2-3. As a result, Goldsmith stated that the correct lodestar was approximately \$37,270,000 and that a multiplier of 2, rather than 1.8, should have been used to test the reasonableness of the request for an award of \$75,000,000 in attorneys' fees. See id. at 3. He asserted that the award nevertheless remained reasonable and should not be reduced. See id.

The letter did not indicate that the reported lodestar was not based on what plaintiffs' counsel actually customarily charged paying clients for the type of work done by the staff attorneys or other lawyers involved in this case. Nor did the letter raise any other question concerning the reliability of the representations made to the court in the request for attorneys' fees.

Additional questions were, however, raised by a December 17, 2016 Boston Globe article headlined "Critics hit law firms' bills

after class-action lawsuits." See Dkt. No. 117, Ex. B. For example, the article reported that the staff attorneys involved in this case were typically paid \$25 to \$40 an hour. Id. at 24 of 37. In calculating the lodestar, Class Counsel had represented to the court that the regular hourly billing rates for the staff attorneys were much higher—for example, \$425 to \$500 for Thornton, see Dkt. No. 104-16 at 7-8 of 14, and \$335 to \$440 for Labaton, see Dkt. No. 104-15 at 7-8 of 52. A representative of Labaton reportedly confirmed the accuracy of the article in this respect. See Dkt. No. 117, Ex. B at 24 of 37.

The article also raised questions concerning the reliability of statements made in his sworn declaration by Garrett Bradley, the Managing Partner of Thornton, concerning his brother Michael Bradley. Id. at 22-23, 25. Garrett Bradley had represented that Michael Bradley was employed by Thornton and the regular rate charged by the firm for his brother's services was \$500 an hour. See Dkt. No. 104-16 at 7 of 14. However, the article stated, without reported contradiction, that "Michael Bradley . . . normally works alone, [and] often mak[es] \$53 an hour as a court-appointed defender in [the] Quincy District Court" See Dkt. No. 117, Ex. B. at 22 of 37.

The Boston Globe published a second article six weeks later. See Andrea Estes, "Firms profited from Garrett Bradley's

ties," Boston Globe (Jan. 28, 2017). The article stated that Plymouth County Treasurer Thomas J. O'Brien was:

an unlikely magnet for campaign contributions from high-powered attorneys in Manhattan and downtown Boston. . . . Yet, since 2007, lawyers from the Thornton Law Firm in Boston and Labaton Sucharow of New York City have given \$100,000 to O'Brien's political campaigns, accounting for almost half of all of the donations he's received over the decade.

Id. The article also reported that "[f]ourteen times in the past decade, the Plymouth County retirement system has filed [class action] lawsuits on the advice of lawyers from Labaton and Thornton" Id. Reportedly, "[c]ourt records show that the retirement fund has collected a grand total of \$40,035 from all the lawsuits combined while the lawyers have received 1,000 times that amount: \$41.4 million." Id. In addition, the article stated that "in Massachusetts, no one is better at persuading investors to join class action lawsuits than O'Brien's friend, [Garrett] Bradley, the managing partner of Thornton Law Firm and, until his sudden departure a few months ago, assistant majority leader in the state House of Representatives." Id. Thornton's lawyer reportedly explained that Bradley's role was indeed to "drum[] up business" for Thornton and Labaton. Id. "O'Brien said his county's decision to join so many Labaton lawsuits has nothing to do with political favors." Id.

The January 28, 2017 Boston Globe article also described more than \$30,000 in campaign contributions Thornton and Labaton attorneys and their family members had made to former Massachusetts Treasurer Timothy Cahill. Reportedly, several months after those contributions, the state pension fund Cahill chaired hired Labaton. Id. Labaton reportedly subsequently filed two successful class action lawsuits for the state pension fund. Id. As a result, Labaton reportedly received approximately \$60,000,000 and gave \$9,000,000 to Thornton, while the state pension fund collected \$681,763. Id. The article also reported that after the Boston Globe began asking questions about Bradley's work with the pension fund, "he took [the] drastic step [of] . . . abruptly resign[ing] from the [state] Legislature" Id.

In testimony on June 25, 2019, Garrett Bradley confirmed that he had served in the Massachusetts Legislature with O'Brien, the Plymouth County Treasurer who chaired the Plymouth County Retirement Board, and he was instrumental in obtaining the Board as a client for Labaton and Thornton.⁹ See June 25, 2019 Tr. at 37-39 (Dkt. No. 565). Garrett Bradley also confirmed that it was indeed his role to "drum up business" for Labaton and Thornton. More specifically, he testified that it was his job to get Labaton

⁹ Garrett Bradley also testified that he obtained the Plymouth County Retirement Board as a client before O'Brien became its Chair. See June 25, 2019 Tr. at 38-39 (Dkt. No. 565).

retained as a monitor for a fund and to represent it if the fund became a lead plaintiff in a class action. See id. at 42-43. Thornton would then get up to 20% of the fees awarded to Labaton in a class action in which Labaton represented a client obtained by Bradley, even if Thornton did not file an appearance or do any work on the case. Id. at 39-40, 44, 45.

Bradley also confirmed that Labaton and Thornton lawyers, including himself, made campaign contributions to O'Brien. Id. at 40. With regard to the Boston Globe report that the Plymouth County Retirement System received about \$40,000 in cases in which Labaton had received more than \$41,000,000, which it shared with Thornton, Bradley testified that while the numbers seemed high, "that's the class action model." Id. at 41. Christopher Keller of Labaton also confirmed the essential accuracy of the Boston Globe report regarding the relationship between Labaton, Thornton, and the Plymouth County Retirement System. See June 26, 2019 Tr. at 120:13-124:5 (Dkt. No. 566).¹⁰

¹⁰ In Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization, LLC, 616 F. Supp. 2d 461 (S.D.N.Y. 2009), Judge Jed Rakoff expressed concern about monitoring arrangements like the agreement Labaton had with ATRS and other pension funds.

Going far beyond any traditional contingency arrangement of which the Court is aware, this practice, on its face, creates a clear incentive for [the plaintiffs' firm] to discover "fraud" in the investments it monitors and to recommend to the Fund's non-lawyer administrator (and, through him, to the trustees) that the Fund, at no cost

C. The Appointment of the Master

In a February 6, 2017 Memorandum and Order, the court wrote that the December 17, 2016 Boston Globe article raised questions concerning whether the hourly rates plaintiffs' counsel attributed to the staff attorneys in calculating the lodestar were, as represented, what these firms actually charged for their services or what other lawyers in their community charge paying clients for similar services. See Dkt. No. 117. This concern was enhanced by the fact that different firms represented that they customarily charged clients for the same lawyer at different rates. See id. at 7. In general, the court questioned whether clients customarily

to itself, bring a class action lawsuit. In other words, the practice fosters the very tendencies toward lawyer-driv[en] litigation that the PSLRA was designed to curtail.

Id. at 464.

This court shares that concern. Serving as monitoring counsel for an institutional investor is potentially very lucrative. The opportunity for monitoring counsel to profit greatly creates a risk that firms will engage in questionable conduct to obtain such assignments. As explained below, questionable conduct was involved in Labaton's successful effort to become one of ATRS' monitoring counsel and, as a result, Lead Counsel in this case.

There may be good reasons for a pension fund, particularly a smaller pension fund, to engage someone to monitor its portfolio in order to minimize the risk that it will be injured by fraudulent conduct. However, it would be far more consistent with the purposes of the PSLRA if such monitors, who could provide the service to many funds that would share the cost, were paid on a fee-for-service basis and did not have powerful financial incentives to recommend initiating a class action from which they would foreseeably benefit the most.

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. See id.

In addition, the court noted that the article raised a question concerning whether Thornton regularly charged \$500 an hour for Michael Bradley's services as Garrett Bradley had represented in his sworn declaration. See id.

The court also stated that the acknowledged double-counting of hours of staff attorneys and the other matters discussed in the December 17, 2016 Boston Globe article raised questions generally about the accuracy and reliability of the representations plaintiffs' counsel made in their calculation of the lodestar. See id. at 8. These questions caused the court to express concern about whether the award of almost \$75,000,000 in attorneys' fees was reasonable. Therefore, the court informed the parties that it proposed to appoint Retired United States District Judge Gerald Rosen as a Master to investigate and provide a Report and Recommendation on all issues relating to the award of attorneys' fees in this case. See id. at 8-10.

On March 7, 2017, a hearing was held concerning the proposed appointment of Judge Rosen as Master and related issues. The court first addressed a motion filed by Ted Frank of CCAF to participate in these proceedings, including as a guardian ad litem for the class with the authority to serve as an adversary to the

plaintiffs' law firms in any proceedings before the proposed Master. See Dkt. No. 126. In successfully opposing this request counsel for Labaton argued that Judge Rosen could retain someone "to ask cross-examination questions in an adversarial or quasi-adversarial model," and, therefore, neither the class nor the Master would need Frank's assistance. Mar. 7, 2017 Tr. at 40:19-42:15 (Dkt. No. 176). Labaton's counsel added that Judge Rosen was "obviously very skilled and has been in the role of a judge for many, many years" Id. at 40:22-25. She expressed appreciation for "the opportunity to present to a special master of his qualifications." Id. at 41:7-9. Therefore, Labaton had "no objection to Judge Rosen" being appointed as Master. Id. at 41:7, 43:8-9. Nor did anyone else object to Judge Rosen's appointment. Id.

Labaton also agreed to the court's proposal that it return \$2,000,000 to the Clerk of the District Court to permit the court to compensate the Master and those he employed. Id. at 43:14-45:7, 65:18-25. The court informed Class Counsel that if more than \$2,000,000 was needed they might be required to return additional funds. Id. at 65:18-25.

The March 7, 2017 hearing also included discussion of some of the issues that prompted the appointment of the Master. Counsel for Thornton stated that the court's concerns about the representations that had been made in the requests for attorneys'

fees were "justifiable." Id. at 71:20-72:5. He represented that Michael Bradley had actually worked more than the number of hours attributed to him in the fee petition, but did not have conventional time sheets to document his time. See id. at 72:1-24. Thornton's counsel and Michael Bradley each also stated that Michael Bradley was not an employee of Thornton, and that neither the firm nor Michael Bradley had, as represented under oath in Garrett Bradley's declaration, ever billed for his time at the rate of \$500 per hour. See id. at 72:25-77:10. Although Garrett Bradley claimed that Thornton's regular rate for Michael Bradley was \$500 an hour, he could not identify any case in which a client had been charged that rate, and identified only one case in which his brother was billed by Thornton at a rate of as much as \$300 an hour. See id. at 87:10-90:3.

As explained earlier, Sucharow of Labaton had stated in his sworn declaration in support of Labaton's request for attorneys' fees that: "[t]he hourly rates for the attorneys and professional support staff in [Labaton] included in Exhibit A [to my declaration] are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." Sucharow Decl. ¶7 (Dkt. No. 104-15). At the March 7, 2017 hearing, however, Sucharow stated that the rates characterized as Labaton's "regular rates charged for [the] services" of the attorneys who worked on this case had never been

charged to paying clients because his firm always worked on a contingent-fee basis and had no "billable clients." Mar. 7, 2017 Tr. at 79:1-22 (Dkt. No. 176).

Similarly, Garrett Bradley acknowledged that Thornton had never billed a paying client \$425 an hour for a staff attorney and, indeed, the staff attorneys that he had represented in his declaration worked for Thornton actually worked at, and were paid by, Labaton and Lieff. See id. at 88:6-18.

Richard Heimann of Lieff explained at the March 7, 2017 hearing that Lieff was "almost entirely a contingent-fee firm," with only a "handful of paying clients." Id. at 93:11-21. His partner Daniel Chiplock stated that the "staff attorneys" were sometimes called "contract attorneys," and there had been "two or three cases" in which clients had paid "close to" the rates attributed to them in his declaration. Id. at 93:2-6.

The court stated at the March 7, 2017 hearing that the propriety of the hourly rates attributed to "staff" and "contract" attorneys for the purpose of calculating lodestars for use in class actions had become the subject of litigation recently in cases in the Southern District of New York and mentioned several of them. Id. at 93:22-94:13 (citing In re Weatherford Int'l Secs. Litig., No. 11 Civ. 1646(LAK), 2015 WL 127847, *1 (S.D.N.Y. Jan. 5, 2015); In re Citigroup Inc. Secs. Litig., 965 F. Supp. 2d 369 (S.D.N.Y. 2013); In re Citigroup Inc. Bond Litig., 988 F. Supp. 2d

371 (S.D.N.Y. 2013); In re Beacon Assocs. Litig., Nos. 09 Civ 777(CM) et al., 2013 WL 2450960 (S.D.N.Y. May 9, 2013); City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp., 954 F. Supp. 2d 276 (S.D.N.Y. 2013)). In one of those cited cases, which included a firm involved in the instant case as ERISA Counsel, the judge wrote:

There is little excuse in this day and age for delegating document review (particularly primary review or first pass review) to anyone other than extremely low-cost, low-overhead temporary employees (read, contract attorneys) -- and there is absolutely no excuse for paying those temporary, low-overhead employees \$40 or \$50 an hour and then marking up their pay ten times for billing purposes.

Beacon Assocs., 2013 WL 2450960 at *18. The lodestars and requested fee awards were reduced in some of the cases in the Southern District of New York. See, e.g., Weatherford, 2015 WL 127847 at *2; Citigroup Secs. Litig., 965 F. Supp. 2d at 373-74.

With the consent of Class and ERISA Counsel, the court appointed Judge Rosen to serve as the Master in this matter. See Mar. 8, 2017 Order (Dkt. No. 173). With regard to his duties, it ordered that:

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 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 [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, (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).

Id. ¶2. Class Counsel were ordered to pay \$2,000,000 to the Clerk of the District Court from the fee awards they received. See id.

¶13. The Master was authorized to retain counsel and others, who would be reasonably compensated by the court from this fund. See

id. ¶14. The Master was directed to attempt to complete his investigation and report by October 10, 2017, but the court authorized him to seek an extension of time to do so if necessary.

See id. ¶3.

In order to eliminate any possible doubt about the court's authority to modify the fee award after receiving the Master's report and resolving any objections to it, the court later vacated the original fee award. See June 22, 2018 Order (Dkt. No. 331).

D. The Master's Investigation

The Master promptly retained counsel and other assistants. They worked hard to perform their duties. However, the Master's investigation became more protracted than anticipated when he discovered, as a result of documents produced by Thornton, but not Labaton or Lieff, that Labaton had paid \$4,100,000, about 5.5% of the \$75,000,000 fee award, to Chargois.

Chargois is a Texas lawyer who had done no work on these cases. However, in 2007, Labaton had asked Chargois to find institutional investors in the Southwest that could hire Labaton as monitoring counsel and to influence them to do so. Neither Chargois, nor his partner in Arkansas, Herron, had a relationship with any institutional investor. No institutional investor had ever asked either of them for advice generally or to find monitoring counsel particularly.

However, Herron knew Steve Faris, an Arkansas State Senator on the Joint Committee on Public Retirement and Social Securities, which was responsible for oversight of ATRS. Chargois arranged for Labaton's partners Eric Belfi and Chris Keller to meet Faris. In an August 2007 email to Belfi, Chargois explained that Faris was "prepared to hear you out and take necessary steps after you do

your thing." Email from Chargois to Belfi (Aug. 9, 2007) (Dkt. No. 454-5).¹¹

Faris subsequently introduced Belfi and Keller to Doane, the Executive Director of ATRS. Belfi and Keller met with Doane in Little Rock and New York City, and explained Labaton's desire to become a monitoring counsel for ATRS.

In September 2007, Chargois wrote to Belfi that "[t]he good senator is finalizing with Paul Doan[e]," and "[e]verybody wants something sometimes." Email from Chargois to Belfi (Sept. 26, 2007) (Dkt. No. 454-8).¹² Chargois reported that "the Labaton firm will represent the pension fund," and asked Belfi to "[p]lease be discreet and act surprised when it happens." Id.

To formalize Doane's agreement that Labaton would be retained, ATRS issued a Request for Qualification ("RFQ") to Labaton to act as monitoring counsel. See Chargois Dep. Tr. at 37:19-24, R. & R. Ex. 125 (Dkt. No. 401-124). Labaton responded by submitting a joint proposal on behalf of Labaton and Chargois & Herron. See Joint Response (July 30, 2008), R. & R. Ex. 128 (Dkt. No. 401-127). In October 2008, the Board formally selected Labaton as monitoring counsel. See Email from Clark to Belfi (Oct. 13,

¹¹ It is not clear what Chargois meant by "do your thing."

¹² It is also not clear what Chargois meant in writing that "[e]verybody wants something sometimes."

2008), R. & R. Ex. 129 (Dkt. No. 401-128). ATRS stated that "the state procurement process is not conducive to a joint proposal" and, therefore, it could select only Labaton, and not also Chargois & Herron, as monitoring counsel. See id.¹³ The agreement did, however, permit Labaton to affiliate with Chargois & Herron to work on particular ATRS matters. See id.

Labaton did not disclose to ATRS in its submission to become monitoring counsel, or after being selected as monitoring counsel, that Labaton already had an arrangement with Chargois. See Belfi Dep. Tr. at 23:5-16; 115:17-21; 118:16-19, R. & R. Ex. 122 (Dkt. No. 401-121); Keller Dep. Tr. at 297:14-16, R. & R. Ex. 83 (Dkt. No. 401-82). More specifically, as Chargois wrote 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

¹³ The exclusion of Chargois & Herron from the ATRS contract with Labaton had the effect, if not purpose, of concealing from the public that Herron was involved. Public disclosure of Herron's involvement could have led to an investigation of his role by the media, the state legislature, or law enforcement.

In 2008, the Arkansas State Treasurer, Martha Shoffner, was a Trustee of ATRS. See Dkt. No. 420, at 18-21; Dkt. No. 420-1, Ex. D. Faris had introduced Shoffner to Herron in 2006. See Dkt. No. 420-1, Ex. D. Herron then allowed her to live rent-free in a house he owned until 2011. See Dkt. No. 420-1, Ex. D. Herron was reportedly interviewed by the Federal Bureau of Investigation about this arrangement in an investigation of Shoffner that led to her conviction for accepting bribes that she used to pay rent to Herron when he began, in about 2011, charging her about \$800 a month to live in another of his properties. See Dkt. No. 420 at 20; Dkt. No. 420-1, Ex. D.

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.¹⁴

R. & R. at 125 n.111 (quoting Email from Chargois to Belfi (Oct. 18, 2014), R. & R. Ex. 177 (Dkt. No. 401-176)). As Chargois explained and others confirmed, this meant that Labaton had agreed that Chargois would receive 20% of its fee in any ATRS case in which Labaton was Lead Counsel despite there being no expectation that Chargois would do any work on the case.

As Chargois credibly and, as explained below, correctly testified, the agreement that he would be paid 20% of Labaton's fee in each ATRS case was not "a referral fee arrangement." Chargois Dep. Tr. at 62, R. & R. Ex. 125 (Dkt. No. 401-124). Nor was it a "local counsel arrangement." Id. Rather, it was "just an arrangement." Id.

E. The Report and Recommendations

In his investigation, the Master interviewed 34 witnesses, conducted 63 depositions, and reviewed over 200,000 pages of documents. On May 14, 2018, he filed under seal his 377-page Report, as well as an Executive Summary and exhibits. See Dkt. No.

¹⁴ The Special Master did not investigate further what Chargois meant by his reference to "considerable political favors" and "money spent." R. & R. at 125 n.111. Nor has this been clarified in proceedings after the Master's Report.

224 (under seal). The court provided a framework for the parties to propose redactions. See May 16, 2018 Mem. & Order (Dkt. No. 223); May 30, 2018 Tr. at 24-47 (Dkt. No. 243). The parties proposed redactions and, on June 28, 2018, the Master filed for the public record redacted versions of the Report and Executive Summary. See Dkt. No. 357.

The Master found the original \$75,000,000 fee award to be reasonable. However, he recommended that Labaton, Thornton, and Liefkowitz return approximately \$10,000,000 to ERISA Counsel and the class to remedy and sanction what he found to be misconduct. The Report addresses two broad subjects: (1) the truthfulness and accuracy of Labaton's, Thornton's, and Liefkowitz's fee declarations; and (2) the Chargois matter. In analyzing the fee declarations, the Report focuses on the double-counting error, Thornton's declaration, and the hourly rates used to calculate the lodestar.

With respect to the double-counting error, the Master found that Class Counsel inadvertently double-counted 9,332.9 hours, overstating the lodestar by \$4,058,654.50. See R. & R. at 219-225. He attributed the error to a cost-sharing arrangement among Labaton, Thornton, and Liefkowitz. Pursuant to the cost-sharing arrangement, Thornton paid for and included in its lodestar certain staff attorneys who worked in Labaton's and Liefkowitz's offices. See id. at 221-23. The Master faulted Labaton, as Lead Counsel, for failing to detect the error. See id. at 223-24. To remedy the

error, the Master recommended that Labaton, Thornton, and Lieff return to the class the double-counted lodestar in equal shares, meaning \$1,349,551.50 each. See id. at 363-64.

With respect to Thornton, the Master concluded that Garrett Bradley "deliberately and intentionally" filed a false and misleading fee declaration, in violation of Federal Rule of Civil Procedure 11 and Massachusetts Rules of Professional Conduct 3.3(a) and 8.4(c), all of which prohibit making false statements to the court. Id. at 234, see generally id. at 229-45. More specifically, the Master found that, contrary to Garrett Bradley's representations in his declaration, Thornton did not employ any of the staff attorneys included in its lodestar; Thornton did not maintain contemporaneous daily time records for those staff attorneys; Thornton did not maintain any "regular" or "current billing rates" for the staff attorneys; and Michael Bradley's "regular" rate was not \$500 an hour. See id. at 195, 225-35.

The Master recommended that the court impose sanctions on Thornton in the range of \$400,000 to \$1,000,000 and refer Garrett Bradley to the Massachusetts Board of Bar Overseers for possible disciplinary action. See id. at 364-65. In addition, the Master recommended that Thornton return to the class the difference between the total multiplied lodestar calculated with Michael Bradley at \$500 an hour, and a lodestar calculated at a rate for

him of \$250 per hour. See id. at 366-67. This would amount to Thornton returning \$182,880 to the class.

With regard to the reported hourly rates, the Master found the rates attributed by plaintiffs' counsel to partners, ranging from \$535 to \$1000 an hour, to be reasonable. See id. at 173-76.

The November 10, 2016 Goldsmith letter to the court characterized all 23 of the lawyers whose hours were double-counted as "staff attorneys." See Dkt. No. 116. However, in the course of the Master's investigation, a distinction emerged between "staff attorneys" and "contract attorneys."

In the Master's lexicon, staff attorneys were lawyers employed directly by Labaton or Liefv who were not on a track that could result in their becoming partners. The Master found that staff attorneys did much more than low-level document review, for example by writing memoranda. See id. at 177. They each had years of relevant experience, including knowledge gained in the earlier foreign currency exchange class action case, BONY Mellon. See id. Most of the staff attorneys were paid \$40 to \$60 an hour. Nevertheless, the Master found that it was generally reasonable to attribute to them hourly rates of \$335 to \$515 an hour for the purpose of calculating the lodestar. See id. at 176-81. This conclusion was based in meaningful measure on the Master's finding that the staff attorneys did the work of low to mid-level associates. See id. at 180. The Master's finding is material to

the lodestar calculation as the staff attorneys were responsible for about 70% of the hours included in it. See id. at 180.

In contrast to the staff attorneys, the "contract attorneys" included in Lieff's lodestar were not employed directly by the firm. Id. at 181. Rather, they were employed by a staffing agency, which Lieff paid for their work. Id. at 181. The Report indicates that Lieff engaged only four or seven contract attorneys. Id. at 181, 367. However, Heimann of Lieff stated in an affidavit that there were nine. See Heimann Decl. at 10 n.4 of 11 (Dkt. No. 533-1).

In any event, the Master found that the rates of \$415 to \$515 per hour for contract attorneys claimed by Lieff and Thornton were unreasonable. See id. at 181-89. The Master reasoned that because firms generally pay a third-party to supply contract attorneys, the firms do not have the same overhead or "long-term financial obligations in securing contract attorneys" compared to staff or associate attorneys. Id. at 186-87. Accordingly, the Master recommended that the court treat contract attorneys as an expense and, therefore, not include them in Class Counsel's lodestar. See id. at 367-68. In addition, the Master recommended that Lieff and Thornton disgorge the difference between the total amount of the lodestar and multiplier attributable to the contract attorneys, and \$50 an hour per contract attorney. Believing there were only

seven contract attorneys, the Master recommended disgorgement of \$2,386,058. See R. & R. at 367.

The Master characterized as a "more serious issue" the Chargois matter. Exec. Summ. at 25 (Dkt. No. 357-1). The Master found that Labaton had agreed to pay Chargois approximately \$4,100,000 from the attorneys' fee award in this case, even though Chargois "made no appearance, did no work, and did not participate in the case in any way" Exec. Summ. at 25. Rather, the payment was consideration for Chargois & Herron's efforts -- which included "considerable favors, political activity, [and] money spent" -- to obtain ATRS as a client for Labaton. See R. & R. at 92-96, 125 n.111 (quoting Ex. 177 (Dkt. No. 401-176)). The Master also found that Labaton "engaged in consistent, conscious, and calculated efforts to conceal Chargois from almost all participants" in this case. Exec. Summ. at 26.

The Master concluded that the Chargois arrangement violated Massachusetts Rule of Professional Conduct 1.5(e), which at the inception of this case in 2011 required the client's informed consent to any fee division between lawyers in different firms. See id. at 249-63. In addition, the Master found that by violating Rule 1.5(e), Labaton also violated Rule 7.2(c), which in 2011 prohibited a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services" except for, among other things, payment of a "referral fee" under Rule 1.5(e). See id. at

263-73. The Master also found that Labaton's concealment of Chargois from the class violated Massachusetts Rule of Professional Conduct 1.4, which in 2011 provided that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions" See id. at 281-86.

With respect to Labaton's failure to disclose Chargois to ERISA co-counsel and the court, the Master found that "general principles of fairness and professional responsibility toward co-counsel, and toward the [c]ourt, strongly suggest that Labaton was required to disclose the Chargois agreement." Id. at 290. The Master found that by not disclosing Chargois to the court, Labaton violated both Massachusetts Rule of Professional Conduct 3.3(a), which imposes a general duty of candor to the court, and Federal Rule of Civil Procedure 23(e)(3), which requires that parties seeking approval of a proposed class action settlement "file a statement identifying any agreement made in connection with the proposal." See id. at 318-326, 353-57.

The Master did not recommend that the court impose Rule 11 sanctions on Labaton because "there is no First Circuit case, either appellate or district, holding that a material omission warrants the imposition of Rule 11 sanctions." Id. at 317-18. However, he recommended disgorgement of the entire \$4,100,000 payment to Chargois, with Labaton paying \$3,400,000 to ERISA Counsel and \$700,000 to the class. See id. at 368-70.

F. Proceedings Following Submission of the Master's Report and Recommendations

The submission under seal of the Master's Report on May 19, 2018, generated intense litigation.

As indicated earlier, on May 16, 2018, the court issued an order establishing a schedule for proposing redactions to the Report so it could be at least substantially unsealed. See Dkt. No. 223. It also provided a framework for redactions rooted in the principle that the public has a right to "materials on which a court relies in determining the litigants' substantive rights." Id. at 3 (quoting F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987)). It was, therefore, then foreseeable that the court would not authorize redaction of the references to Chargois, including to the payments he received from Labaton relating to eight other ATRS cases.

A court has a continuing duty to assess at all stages of class action litigation whether a named class representative has interests which conflict with those of the class and, even if there is no conflict, whether it will vigorously represent the interests of the class through qualified counsel. See, e.g., Nat'l Ass'n of Reg'l Med. Programs, Inc. v. Matthews, 551 F.2d 340, 345 (D.C. Cir. 1976); see also 7A Wright & Miller, Fed. Prac. & Proc., §§1765, 1768 (3d ed. 2018). The Master's Report raised questions concerning whether ATRS remained an adequate class representative

because of its relationship with Labaton. See Ark. Teachers Ret. Sys. v. State St. Bank & Tr. Co., 404 F. Supp. 3d 486, 507-10 (D. Mass. 2018). These questions were magnified because despite the Master's finding that Labaton violated its ethical duties by not disclosing to ATRS the \$4,100,000 paid to Chargois from its fee award in this case, the Executive Director of ATRS, Hopkins, had stated he did not expect to be told of it. See id. at 509-10. Hopkins' position prompted the Master to write that, "[w]e cannot see how, in light of this clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately protect the class' interests moving forward." Id. at 509. (quoting R. & R. at 257 n.7).

The court also anticipated that when the Master's Report was unsealed, questions would be raised about the origins of the ATRS relationship with Labaton, similar to the questions raised by the Boston Globe about Garrett Bradley's role in obtaining Massachusetts pension funds as clients for Labaton. See id. 510-11. The court was concerned that such foreseeable questions could render ATRS an atypical and inadequate class representative. Therefore, on May 25, 2018, it ordered Hopkins to appear at a May 30, 2018 hearing to testify about these issues. See id. at 509.

On Memorial Day, May 28, 2018, two days before the May 30, 2018 hearing, Hopkins met with former State Senator Faris, who had, as a result of Herron's efforts, introduced Labaton to ATRS.

See id. at 511. At the hearing, the court asked Hopkins a series of questions concerning whether he could be an adequate representative of the class, making only general references to the questions relevant to the origins of ATRS relationship with Labaton, the details of which were in the still sealed Report. See id. at 511-12. The court did not on May 30, 2018 decide whether ATRS was then an adequate representative of the class. Rather, the court ordered Hopkins to take time to reflect and to report whether he wanted ATRS to continue as class representative. See id.

At a subsequent sidebar, counsel for Labaton asked if the court was suggesting there was impropriety concerning possible payments to Faris. See id. at 512-13 (quoting now-unsealed May 30, 2018 Tr. at 3-4 (Dkt. No. 244)). The court stated that it was foreseeable that when the Report became public such questions could be raised and might render ATRS an atypical and inadequate class representative. See id.¹⁵

¹⁵ As anticipated by the court, soon after the Report became public, the Arkansas legislature began investigating the Chargois matter. See July 31, 2018 Letter from Master's Counsel to the Court (Dkt. No. 411). More specifically, on July 25, 2018, an email was sent to the Master by Arkansas State Representative Mark Lowery, stating:

I am co-chair of the Arkansas Joint Performance Review Committee that has recently held a 3 hour hearing questioning Arkansas Teacher Retirement System director George Hopkins.

We are extremely concerned about references to "political favors" in Arkansas that brought about the

Based on the colloquy at side bar, Labaton moved for the court's disqualification. See Dkt. No. 315. Labaton did not contend that the court was actually biased, which would require disqualification under 18 U.S.C. §455(b). Rather, it argued that a reasonable person could question the court's impartiality and, therefore, recusal was required under §455(a). For the reasons described in a 72-page Memorandum and Order, the court denied the

relationship between ATRS, Labaton Sucharow and the Chargois/Herren [sic] law firm.

We are especially interested in the following excerpt from a Forbes article: Rosen was more circumspect in his report, only noting the questions raised by Chargois' 2014 e-mail discussing the "considerable favors" and "money spent" getting ATRS as a client.

"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," the special master said in a footnote. "This investigation is beyond the scope of the Special Master's assignment."

Is it possible that Judge Rosen's work in the case has come to a point where he would be able to discuss with me findings about the Chargois/Herren [sic] relationship with Labaton that may not have been included in the Special Master report to the Court?

If so please let me know how I could go about discussing with him or a representative any information that may assist us in our investigation going forward.

Id. The court did not authorize the Master to speak to Representative Lowery because of the pendency of proceedings in this case. See Dkt. No. 412.

Hopkins resigned as Director of ATRS several months later. See June 26, 2019 Tr. 15:19-21 (Dkt. No. 566).

motion. See Ark. Teachers, 404 F. Supp. 3d 486. Labaton then petitioned the First Circuit for a writ of mandamus ordering recusal. The First Circuit promptly denied the petition. See In re Labaton Sucharow LLP, No. 18-1651 (1st Cir. Jul. 25, 2018).

While the motion for the court's recusal was pending, Labaton moved to have redacted from the public version of the Report all references to its agreement to pay Chargois 20% of its fee in every ATRS class action in which it served as Lead Counsel, including this case and eight others. See Dkt. No. 254. The court denied the motion because of: the strong presumption of public access to records on which judicial decisions are made; the Master's view that the payments to Chargois in the eight other ATRS cases were of "great significance" to his conclusion that the payment to Chargois in this case was an impermissible fee for "solicitation" rather than a legitimate "referral fee"; and the fact that redaction would mask information concerning possible ethical violations by Labaton that might, if disclosed, be investigated in other jurisdictions. See June 28, 2018 Mem. & Order 6-13 (Dkt. No. 356). On June 28, 2019, the Report was unsealed with limited, appropriate redactions. See Dkt. No. 357.

In June 2018, Class Counsel moved for an order declaring that the Master's appointment had ended. See Dkt. No. 302. If that motion had been allowed, the Master and his counsel would have been precluded from responding to objections to the Report, and

the court would again have been deprived of information presented and tested through the customary adversary process. The court denied Class Counsel's request to end the Master's appointment. Instead, pursuant to Federal Rules of Civil Procedure 23(h)(4) and 53(f)(1), the court resubmitted the Report to the Master to respond to objections to it. See Dkt. No. 445.

After the failure of the efforts to remove this court and the Master from this case, and to conceal from the public information concerning the origins of Labaton's relationship with ATRS and the firm's obligation to make substantial payments to Chargois in all ATRS class actions in which Labaton served as Lead Counsel, the focus of the litigation moved to Class Counsel's numerous objections to the Report.

However, on September 18, 2018, the Master reported that Labaton, ERISA Counsel, and he had "reached a tentative agreement . . . for the Court's consideration resolving all of the disputed issues as to those firms." See Dkt. No. 468. If approved, the "Proposed Resolution" would result in the reinstatement of the original \$75,000,000 fee award and Labaton would "acknowledge[] that its . . . payment to Damon Chargois did not constitute a case-specific referral fee," pay the class \$2,052,666.67, pay ERISA Counsel \$2,750,000, and adopt certain organizational and compliance reforms. Id.

Labaton and the ERISA Counsel also agreed not to appeal if the settlement was accepted by the court. Id. However, Labaton retained the right to revive its objections if the court did not accept the proposed settlement fully. Id. Lieff urged the court not to act on the proposed settlement until it decided its objections. See Lieff Resp. Proposed Resolution 1-4 (Dkt. No. 513). Thornton deferred to the court as to whether to accept the Proposed Resolution before ruling on Thornton's objections. See Thornton Resp. Proposed Resolution 2 (Dkt. No. 514).

The court conducted hearings on the Proposed Resolution and other matters in October and November 2018. As authorized by Federal Rule of Civil Procedure 53(f)(1), the hearings included testimony by Labaton partners concerning the firm's relationship with Chargois, among other things.

The court then decided that it would not act on the Proposed Resolution before deciding Lieff's and Thornton's objections to the Report. See Nov. 7, 2018 Tr. at 73 (Dkt. No. 519). It reasoned that the process of resolving those objections would provide information relevant to evaluating the Proposed Resolution. Id. at 73. In addition, the court was concerned that deciding matters piecemeal would result in unwarranted disparity in the treatment of counsel despite the existence of common issues resulting from the collaboration in this case between Labaton, Thornton, and Lieff. Id. at 106.

In a May 31, 2019 Order, the court notified counsel of the framework to address objections to the Report at hearings scheduled for June 24, 25, and 26, 2019. See Dkt. No. 543. Among other things, the court expressed its intention to hear argument concerning: (1) whether the initial \$75,000,000 fee award was reasonable or whether another amount should be awarded; (2) whether the Fitzpatrick Study had been misrepresented; (3) whether Class Counsel's reported lodestar, not including the double-counting, was accurate; (4) whether Garrett Bradley intentionally filed a false fee declaration concerning certain identified matters, among other things; and (5) issues relating to Chargois. Id. The court also stated it might hear testimony from Thornton attorneys in addition to Garrett Bradley, and additional testimony from Labaton lawyers relating to Chargois. Id.

On June 20, 2019, the court denied without prejudice Labaton's request to present Fitzpatrick as a witness because it viewed the issue of whether his study had been characterized in a false and misleading manner to be a question of fact on which his testimony was neither necessary nor appropriate. See Dkt. No. 554. In addition, the court stated that it did not then intend to receive expert testimony on the reasonableness of the original \$75,000,000 fee award. Id.

At the outset of the hearing on June 24, 2019, the court further explained and amplified the agenda for addressing the

objections to the Report, and the Proposed Settlement with Labaton and ERISA Counsel. It then heard three days of argument and testimony concerning the contested issues. Class Counsel, ERISA Counsel, and the Master subsequently submitted memoranda further addressing those issues.

V. THE AWARD OF ATTORNEYS' FEES

As explained earlier, the court vacated the original award of attorneys' fees in the amount of \$75,000,000. It is, therefore, deciding de novo all of the objections to the Report, including Labaton's, determining the most appropriate amount to award, and exercising its authority to allocate that award between counsel. In doing so, the court is deciding de novo all objections to the Master's findings of fact and conclusions of law, including those of Labaton. See Fed. R. Civ. P. 53(f)(3) & (4). It is also, in effect, modifying his Report. See Fed. R. Civ. P. 53(f)(1).

A. The Role of the Court

As more fully explained earlier, in awarding attorneys' fees, the court must act as a fiduciary or protector of the class. See Fidelity/Micron, 167 F.3d at 736; Agent Orange, 818 F.2d at 222. The goal is to make a reasonable award that is fair to both counsel and the class. See Fidelity/Micron, 167 F.3d at 737. Courts customarily consider certain factors and make certain presumptions in fashioning a reasonable award. See, e.g., Goldberger, 209 F.3d at 50; Neurontin, 58 F. Supp.3d at 170-71; Bezdek, 79 F. Supp. 3d

at 349-50. However, as the First Circuit has written, "each common fund case presents its own unique set of circumstances . . . [and] when a court exercises [its] equitable power [to award attorneys' fees], individualization is the name of the game." Fidelity/Micron, 167 F.3d at 737.

B. Megafund Cases

This case is properly characterized as a "megafund" case because the common fund exceeds \$100,000,000. See Neurontin, 58 F. Supp. 3d at 170. As CCAF has noted, some courts find that lower percentage awards should regularly be made in megafund cases. See CCAF Mem. at 6 of 41 (Dkt. No. 522). This "sliding scale" approach is intended to "to prevent a windfall for plaintiffs' attorneys at the expense of the class" because "[i]t 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).

Empirical studies demonstrate that there is an inverse relationship between fee awards as a percentage of settlement and the size of settlement. See, e.g., Fitzpatrick Study, supra, at 811, 837, 843; 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) (the "Eisenberg-Miller Study"). However, this court does not find that it is appropriate to apply special standards or presumptions categorically to reduce

fee awards in all megafund cases, including this one. The customary Goldberger factors capture considerations relevant to determining the most reasonable award in a megafund case, such as the time attorneys devoted to the case, their skill, and their efficiency. See Goldberger, 209 F.3d at 50. A properly calculated lodestar allows the court to assess whether the multiplier being requested by counsel is justified by the complexity of the case, the risks of the litigation, and the benefit they conferred on the class. See id; Rite Aid, 396 F.3d at 303. Therefore, this court agrees that "it would be inappropriate to reduce the percentage award based on the size of the recovery alone." Tyco Int'l, 535 F. Supp. 2d at 270; see also Lupron, 2005 WL 2006833, at *6.

C. The Applicable Standards

Accordingly, this court, like others in the District of Massachusetts and nationally, begins by presuming that an award of 20% to 30% of the common fund would be reasonable. See Bezdek, 79 F. Supp. 3d at 349-50; Lupron, 2005 WL 2006833, at *5. Twenty-five percent, meaning \$75,000,000 in this case, is the court's starting benchmark. See Pac. Enters., 47 F.3d at 379; Bezdek, 79 F. Supp. 3d at 349-50. However, again, this benchmark should be adjusted if the unique circumstances of this case demonstrate that a higher or lower award would be most reasonable. See Fidelity/Micron, 167 F.3d at 737; Pac. Enters., 47 F.3d at 379.

As explained earlier, courts in the District of Massachusetts and nationally generally consider the following factors in tentatively fashioning an award of attorneys' fees and then subject that tentative award to a lodestar cross-check to evaluate whether such an award would indeed be reasonable:

(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.

Neurontin, 58 F. Supp. 3d at 170 (quoting Lupron, 2005 WL 2006833, at *3); see generally Goldberger, 209 F.3d at 50; Third Circuit Task Force, Court Awarded Attorney Fees, 108 F.R.D. at 255-56.

D. Analysis of Certain Relevant Factors

In these consolidated cases, the size of the common fund produced by the work of Class Counsel and ERISA Counsel is unusually large -- \$300,000,000. The settlement will benefit thousands of participants in the pension funds and retirement plans represented by ERISA Counsel. It will also benefit the approximately 1,300 custody clients of State Street. See Mem. Supp. Attys.' Fees at 18 of 36 (Dkt. No. 103-1).

This case was complex. At the outset the case was also risky. It began with a theory of liability for alleged unfair and deceptive practices in violation of M.G.L. c. 93A that was then untested. The risk that these consolidated cases would not be

settled was reduced when the court denied State Street's motion to dismiss the ATRS case. Since being appointed in 1985, this court has never been required to try a class action. Rather, every case that has survived a motion to dismiss has subsequently been settled. There is no reason to believe that this court's experience is unique or unusual. Rather, the court expects that when cases are thoughtfully chosen and claims are carefully alleged by competent counsel to defeat a motion to dismiss, almost all class actions settle and experienced counsel know that. Following the denial of a motion to dismiss, the practical issues are usually when and for how much the case will settle. A delay in settling may benefit class counsel, as they do more work on the case and their increased lodestar supports an award of a larger percentage of the common fund than might otherwise be justified. The risk that this case would not be settled was further diminished when settlement was reached in March 2015, in the first foreign currency exchange class action alleging deceptive practices against a bank, BONY Mellon.

Lieff, Thornton, and McTigue brought the special knowledge and experience that they gained as plaintiffs' counsel in BONY Mellon to this case. Generally, all plaintiffs' counsel in this case were skilled and experienced in class action litigation. They had to contend with a well-endowed defendant that was represented by able counsel. They did so well.

Following the denial of State Street's motion to dismiss the ATRS case, there were no additional motions or other litigation. However, plaintiffs' counsel received substantial discovery voluntarily, participated in review of millions of documents, analyzed many issues, and participated in about 15 mediation sessions. See Mem. Supp. Attys.' Fees at 27 of 36 (Dkt. No. 103-1); Marks Decl. ¶16 (Dkt. No. 104-5). The Master closely examined the work done by all of plaintiffs' counsel and did not find the number of hours included in the lodestar to be unreasonable. The court accepts his finding that the hours reported were not inaccurate or unreasonable.

With regard to similar cases, as Lead Counsel, Labaton argued that BONY Mellon is the most relevant comparator. See Dkt. No. 537, at 12 of 27. There, the court awarded 25% of the \$325,000,000 common fund -- \$83,750,000 -- in attorneys' fees. However, CCAF argued, without contradiction in this case, that "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)." CCAF Mem. Re Fee Award at 31 of 41 (Dkt. No. 522). Therefore, the court finds that BONY Mellon involved much more work by plaintiffs' counsel than the instant case.

Labaton also argued that an award of 25% of the \$300,000,000 common fund would be reasonable in comparison with awards in the

eight other First Circuit cases involving more than \$100,000,000. See Dkt. No. 103-1, at 13-17 of 36. In those cases the awards reportedly ranged from about 9% to 31% of the common fund, with six in the 20 to 31% range. Id. at 14. There is no evidence calling into question these reported facts.

In addition, an award of 25% is arguably within the range of reason based on the findings in two often cited empirical studies, the Fitzpatrick Study and another by Theodore Eisenberg and Geoffrey Miller, because 25% is within one standard deviation of the median and mean awards in megafund cases. As accurately described by Lief as "Co-Lead Customer Counsel" in the request for attorneys' fees in BONY Mellon:

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% and 19.5%, respectively, with a standard deviation of 7.9%. See Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award, 7 J. Empirical Legal Studies 811, 839 (2010). Other well-known commentators have opined 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." Theodore Eisenberg and Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Studies 27, 74 (2004). The 25% fee requested here [in BONY Mellon] is within one standard deviation of the mean shown in the Fitzpatrick study.

Dkt. No. 619 at 35 of 44, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015) (footnote omitted). Similarly, an award of 25% of the common fund in this case would be far above the 17.8%

mean and 19.5% median for settlements between \$250,000,000 and \$500,000,000, but within one standard deviation of them.

Therefore, there is support for the argument that an award of \$75,000,000 would be reasonable. However, as explained below, important public policy considerations, among other things, persuade the court that a lower award is reasonable and most appropriate.

E. Public Policy Considerations

i. The Duty of Candor

As explained earlier, in fulfilling its duty to serve as a protector of the class, the court should, among other things, "look to the various codes of ethics as guidelines for judging the conduct of counsel." Agent Orange, 818 F.2d at 222. As the First Circuit has written, "'[e]very lawyer is an officer of the court [and] has a duty of candor to the tribunal.'" Pearson, 200 F.3d at 38 (quoting Burns, 31 F.3d at 1095).

In view of the fact that the adversary process is not operating to inform the court when attorneys representing a class seek a fee award, it is especially important that they satisfy their duty of candor to the court. As indicated earlier, this particular importance of attorneys' providing accurate and complete information to the court when seeking an award of attorneys' fees in a class action is emphasized in the

Massachusetts Rules of Professional Conduct. Comment 14A to Rule 3.3 states that:

When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit or the settlement of a suit involving a minor, 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).

(emphasis added). Rule 3.3(d) provides that:

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.

As explained earlier, a petition for an award of attorneys' fees in a class action is appropriately treated as an ex parte submission because at that point the attorneys' interests in maximizing their compensation is adverse to the interest of the class in maximizing its recovery. See Rite Aid, 396 F.3d at 307-08. Except in the rare case in which a well-endowed class member invests in opposing a request for attorneys' fees, the adversary process does not operate to advocate for the interest of the class.

"[I]n light of the divergence of interests that can . . . develop between counsel and the class in [] class actions, it is essential that courts not doubt the forthrightness of counsel." IMAX, 2012 WL 3133476 at *11. When counsel fail in their duty to

be candid and complete in their presentations to the court, "the grant of fees and expenses must reflect this." Id. Indeed, "[i]t is well settled . . . that the district court has the duty and responsibility to supervise the conduct of attorneys who appear before it and that . . . [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 67). More specifically, in a class action case, "under long-standing equitable principles, a district court has broad discretion to deny fees to an attorney who commits an ethical violation." Rodriguez, 688 F.3d at 655.

In this case, the court is neither imposing sanctions nor denying a fee award to any attorney or firm because of misconduct. It is, 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.

ii. Thornton, Labaton, and Lief

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.

1. Thornton

The declaration of Garrett Bradley in support of the request for an award of \$75,000,000 in attorneys' fees was false in several respects. This contributed to the double-counting and, therefore, undermined the value of the lodestar check on the reasonableness of the request.

As explained earlier, courts, including this court, regularly use a properly calculated lodestar, and the multiplier that a requested larger fee award would involve, to evaluate the reasonableness of that request. The lodestar is calculated by multiplying the number of hours reasonably worked on the case by a reasonable hourly rate. See Thirteen Appeals, 56 F.3d at 305. Again, reasonable rates are those charged in the relevant community. Blum, 465 U.S. at 895. "[T]he rate that private counsel actually charges for her services, while not conclusive, is a reliable indicium of market value." One Star Class Sloop Sailboat, 546 F.3d at 40 (emphasis added).

The court foreseeably understood that Garrett Bradley was employing these familiar standards when he made the following statements in his declaration and the court relied on them:

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 services, which have been accepted in other complex class actions.

Dkt. No. 104-16, R. & R. Ex. 66 (Dkt. No. 401-65) (emphasis added).

Exhibit A to Bradley's declaration included the names of 23 staff attorneys with reported regular rates of \$425 an hour. It also characterized Michael Bradley as a staff attorney and represented that he had a regular rate of \$500 an hour.

As the Master succinctly and accurately summarized in his Report, Garrett Bradley's quoted statements were untrue in virtually every respect.¹⁶ See R. & R. at 227-28. More specifically, the staff attorneys listed on Exhibit A were not employed by Thornton. Rather, except for Michael Bradley, they were employed

¹⁶ The Report on pages 227-228 provides citations to the record that support some of the relevant findings of the Master and the court.

by Lief or Labaton, at their offices. Thornton had no contemporaneous time records for them. The billing rates attributed to each staff attorney were not Thornton's current billing rates for them. Thornton worked exclusively on a contingent-fee basis. It did not charge any clients for any partner, associate, or staff attorney on an hourly basis. Therefore, the purported hourly rates were not "the same as [Thornton's] regular rates charged for their services." Id. Moreover, with the exception of four lawyers, the \$425 rate attributed to the staff attorneys had never been accepted by a court in a complex class action.

In addition, Garrett Bradley directed his colleagues to include his brother Michael as having a regular hourly rate of \$500 an hour. However, as Garrett Bradley knew, neither Thornton nor Michael Bradley as a sole practitioner regularly charged for his services at the rate of \$500 an hour. Michael Bradley had once charged \$500 an hour for three hours work in a case, and \$450 an hour for his work in one other. See R. & R. at 195. His regular rate was much less. Often he worked for \$53 an hour representing indigent defendants in state court. Id.

Michael Bradley worked on this case in his own office, not Thornton's, in his spare time. His work involved only document review. He found a few possibly relevant documents. However, he produced no memoranda or made any other contribution to this case.

It was untrue to claim that the regular rate for his service was \$500 an hour or that the market would have valued his services at \$500 an hour.

Several factors contributed to Garrett Bradley making many misrepresentations in his declaration. First, Thornton, Labaton, and Liefv had entered into an unusual arrangement that allowed Thornton to pay for Staff and contract attorneys employed by Labaton and Liefv, and to claim them on its lodestar for the purpose of allocating among themselves attorneys' fees awarded by the court. Class Counsel claim that this arrangement was motivated by a desire to share costs and reduce the risk to Labaton and Liefv that the class and its counsel might recover nothing in this case. However, the court finds that Thornton demanded this arrangement because, as Garrett Bradley wrote to 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 Liefv and Labaton. Email from Bradley to Thornton & Lesser (Feb. 6, 2015), R. & R. Ex. 64 (Dkt. No. 401-63); G. Bradley Dep. Tr. at 67, R. & R. Ex. 43 (Dkt. No. 401-42). Labaton acquiesced in this arrangement to maintain the goodwill of Thornton, particularly of Garrett Bradley, who was so adept at exploiting his political connections to get lucrative institutional clients for Labaton that Labaton made Bradley Of Counsel to the firm in January 2015. See R. & R. at 105 n.86.

Similarly, Thornton had brought Lieff into this case. Garrett Bradley reminded Lieff of this in negotiating the arrangement that allowed Thornton to pay for staff and contract attorneys that Lieff employed. See R. & R. Ex. 87 (Dkt. No. 401-86). Lieff too wanted to maintain a good relationship with Garrett Bradley and Thornton to enhance the likelihood that they would bring Lieff into future lucrative cases as counsel for institutional investors, including those recruited by Garrett Bradley.

The Master found that more than \$4,500,000, constituting more than 60% of Thornton's purported lodestar, was attributable to the Lieff and Labaton Staff and contract attorneys for whom Thornton paid. See R. & R. at 227. Daniel Chiplock of Lieff wrote to Garrett Bradley that he was "happy" to allow this "as a courtesy" because Thornton had brought Lieff into this case. Email from Chiplock to Bradley (Aug. 30, 2015), R. & R. Ex. 87 (Dkt. No. 401-86).

The manner in which Garrett Bradley's declaration was prepared also contributed to the inclusion of many misrepresentations. Labaton partner Nicole Zeiss prepared a template for the fee declarations that was provided to each firm. Zeiss had no prior involvement in this case. Among other things, she did not know about the cost-sharing arrangement between Labaton, Lieff, and Thornton, which had not been memorialized in a written contract. The court infers that she knew that Labaton worked almost exclusively on a contingent-fee basis. There is no

evidence that she inquired or knew whether or not the other firms had any clients that paid regular hourly rates for their services. Nevertheless, she provided plaintiffs' firms, including Thornton, a template that stated:

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 services, which have been accepted in other complex class actions.

R. & R. Ex. 201 (Dkt. No. 401-200) (emphasis added). The template also included several blanks to be filled in with information specific to the firm submitting the declaration, and a blank Exhibit A concerning the hours and regular rates for each of the firm's attorneys and employees.

Two Thornton attorneys added information to the template before the declaration was given to Garrett Bradley to sign. Evan Hoffman filled in the blanks concerning the total hours worked and expenses, and added to Exhibit A the hours and the rates that

Thornton purportedly regularly charged for the staff and contract attorneys, among others, who were represented to be employees of Thornton. See June 25, 2019 Tr. at 146 (Dkt. No. 565). Michael Lesser added the narrative concerning Thornton's contribution to the case. See June 26, 2019 Tr. at 185 (Dkt. No. 566). Hoffman brought the declaration to Garrett Bradley or left it for him. See G. Bradley Dep. Tr. at 84-85, R. & R. Ex. 43 (Dkt. No. 401-42). Neither Hoffman nor Lesser told Garrett Bradley that the declaration included statements that were not true.

Garrett Bradley credibly testified that on September 14, 2016, he signed his declaration, under oath, without reading it. See June 25, 2019 Tr. at 66 (Dkt. No. 565). This constituted a violation of Federal Rule of Civil Procedure 11(b).

As described earlier, Rule 11(b) provides, in pertinent part that:

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

(emphasis added).

"Fed. R. Civ. P. 11 requires that an attorney make a reasonable inquiry to assure that all pleadings, motions, and papers filed with the court are factually well-grounded, legally tenable, and not interposed for any improper purpose. Counsel is held to standards of due diligence and objective reasonableness." Mariani v. Drs. Assocs., Inc., 983 F.2d 5, 7 (1st Cir. 1993) (internal citations omitted). "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." CQ Int'l Co., Inc. v. Rochem Int'l USA, 659 F.3d 53, 62 (1st Cir. 2011) (alteration in original) (internal quotation marks omitted). To determine whether an inquiry was reasonable under the circumstances, courts consider "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." Navarro-Ayala v. Nunez, 968 F.2d 1421, 1425 (1st Cir. 1992).

Garrett Bradley not only failed in his duty to make a reasonable inquiry concerning whether the representations he was making were reliable, he made no inquiry at all. There is no excuse for his failure to read his declaration before he signed it under oath or for the many misrepresentations included in it. Bradley had ample time to read his declaration before signing it.

The declaration had only two pages of text and Exhibit A was only another two pages. See Dkt. No. 104-16. Bradley was the Managing Partner of Thornton. He was fully familiar with its operations. If Bradley had read his declaration before signing it on September 14, 2016, he would have realized that the representations in paragraphs 3 and 4, and on Exhibit A were incorrect. He then could and should have corrected them.

Especially egregious was Garrett Bradley's claim that "[t]he 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." G. Bradley Decl. ¶4 (Dkt. No. 104-16). Bradley was experienced in class action litigation. He knew this information was relevant to the important lodestar cross-check the court would use to determine whether the request for \$75,000,000 in attorneys' fees was reasonable. See June 25, 2019 Tr. at 73 (Dkt. No. 565). He also knew that Thornton did not charge any clients on an hourly basis and had not employed any process to develop reliable hypothetical market rates for its attorneys. Garrett Bradley now acknowledges that the representations about Thornton's regular hourly rates were not correct. See id. at 86. If he had read his declaration before signing it, he would have recognized that it was false and misleading in many respects.

The template language could have easily been revised to be true and not misleading. Three of ERISA Counsel's firms -- McTigue, Zuckerman, and Beins Axelrod -- made changes to the template language in their declarations. See Kravitz Decl. ¶4 (Dkt. No. 104-20); McTigue Decl. ¶20 (Dkt. No. 104-19); Axelrod Decl. ¶8 (Dkt. No. 104-22). For example, Beins' declaration stated:

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 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.

Axelrod Decl. ¶8 (Dkt. No. 104-22).

Thornton's failure to make reliable representations to this court appears to be part of a pattern. In BONY Mellon, using language evidently drafted by Lief, Thornton and Lief stated in their declarations 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." Chiplock Decl. ¶5, Dkt. No. 622-1, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015); Lesser Decl. ¶9, Dkt. No. 622-8, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015). This statement would have been true and, therefore, not misleading if made by Lief in this case. It was

evidently not true when made on behalf of Thornton in BONY Mellon because the firm charged no clients by the hour and had not developed hypothetical market rates for its attorneys. See June 25, 2019 Tr. at 91, 110 (Dkt. No. 565).

Garrett Bradley violated Rule 11(b) again in November 2016, when, the court finds, he did read his declaration. As explained earlier, soon after the court awarded \$75,000,000 in attorneys' fees on November 2, 2016, the Boston Globe alerted Class Counsel to errors in their fee submissions, including but not only concerning the double-counting of staff and contract attorneys. Lesser, Hoffman, and Garrett Bradley reviewed Bradley's declaration.¹⁷ They did so again after the first Boston Globe article was published on December 17, 2016.

The Advisory Committee Note to the 1993 amendment to Rule 11 states that "a litigant's obligations . . . are not measured solely as of the time [papers] are filed with or submitted to the court, but include reaffirming to the court and advocating

¹⁷ Garrett Bradley testified that in November and December 2016, he only read Exhibit A and did not read paragraphs 2 and 3 of his declaration. See June 25, 2019 Tr. at 87 (Dkt. No. 565). This contention is not credible. The Boston Globe was raising a major issue that threatened the award of \$75,000,000 as attorneys' fees. Bradley learned of it from counsel for Thornton. See id. As indicated earlier, the declaration was only two-pages long and referenced Exhibit A. Bradley was discussing the declaration with his partners. Therefore, the court concludes he read his declaration in November 2016.

positions contained in those pleadings and motions after learning that they cease to have any merit." Therefore, "[t]he duty under Rule 11 to inquire into the facts is a continuing duty and counsel cannot ignore the realities of life once facts come to their attention which indicate that their earlier reliance was misplaced." Meadow Ltd. P'ship v. Heritage Sav. & Loan Ass'n, 118 F.R.D. 432, 434 (E.D. Va. 1987), aff'd sub nom. Fahrenz v. Meadow Farm P'Ship, 850 F.2d 207 (4th Cir. 1988).

Here, Garrett Bradley did not inform the court that his declaration contained false statements, even as Goldsmith argued on behalf of all plaintiffs' counsel in his November 10, 2016 letter to the court that the original \$75,000,000 fee award was reasonable despite the double-counting error. Therefore, the court finds that Garrett Bradley intentionally violated Rule 11 after reading his declaration in November 2016.¹⁸

Garrett Bradley's failure to correct his declaration after he read it also violated Massachusetts Rule of Professional Conduct 3.3(a). Rule 3.3(a) provides in relevant part, that "[a] lawyer

¹⁸ In any event, Bradley testified that he read his declaration after the court issued its February 6, 2017 Order raising questions concerning his representations regarding the regular hourly rates reportedly charged by Thornton. See June 25, 2019 Tr. at 86 (Dkt. No. 565). He did not, however, inform the court that his declaration was incorrect until the court questioned him at the March 7, 2017 hearing. See Mar. 7, 2017 Tr. at 88 (Dkt. No. 176). Therefore, Bradley violated Rule 11 again no later than shortly after February 6, 2017.

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" (emphasis added). "Knowingly" means with "actual knowledge of the fact in question." Mass. R. Prof. C. 1.0(g) "A person's knowledge may be inferred from the circumstances." Id. 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, 899 N.E.2d 778, 784 (Mass. 2009). "It is not necessary . . . that the statement of material fact did in fact influence a determination by the judge." Id. at 785.

The conduct of Garrett Bradley that violated Rule 3.3(a)(1) also violated Massachusetts Rule of Professional Conduct 8.4(c). Rule 8.4(c) provides that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

In this case the court finds that Garrett Bradley knew that his declaration included false statements of fact after he read it in November 2016. He did not, however, correct it. The matter of whether the hourly rates attributed to attorneys Thornton claimed to employ were regularly charged to clients was material. As explained earlier, the lodestar check to determine the multiplier of a requested fee award has the potential to influence the court to award a lesser amount. The reasonable hourly rate, measured in

part by what clients actually pay for each lawyer's services, is essential to calculating the lodestar correctly. It is, therefore, important that a lawyer's representations concerning regular hourly rates and the resulting lodestar be reliable. In this case Garrett Bradley repeatedly violated his duty to be candid with the court and to correct the misrepresentations he had made.

2. Labaton

Labaton also violated Federal Rule of Civil Procedure 11(b) and Massachusetts Rules of Professional Conduct 3.3(a) and 8.4(c). In support of the request for \$75,000,000 in attorneys' fees, Sucharow submitted two declarations. The first Sucharow declaration, Dkt. No. 104, presented the facts on which plaintiffs' counsel relied to justify the \$75,000,000 fee request and addressed the attached declarations by a member of each firm that had appeared on behalf of plaintiffs. Among other things, Sucharow stated, under oath, that:

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.

Dkt. No. 104, ¶176 (emphasis added).

As explained earlier, with regard to Thornton, these representations were false. Among other things, Thornton did not have "current billing rates" for the attorneys it employed because it never billed clients at an hourly rate or even used a process to develop hypothetical rates for its attorneys. There is no evidence that Sucharow, or anyone at Labaton, made any effort to determine if Thornton's representations were true. This was unreasonable and, therefore, in violation of Rule 11.

In addition, Sucharow knew that Thornton was paying for staff and contract attorneys employed by or working at Labaton and Lief. See Mar. 7, 2017 Tr. at 81:14-23 (Dkt. No. 176). Therefore, if he had read it, Sucharow would have known that the lawyers listed as staff attorneys on Thornton's Exhibit A were not, as Bradley claimed, members of that firm. However, neither Sucharow nor Zeiss compared the Exhibits of Labaton, Lief, and Thornton to assure that none of the staff and contract attorneys were double-counted. See R. & R. at 56, n.39. In view of the cost-sharing agreement, this too was unreasonable. As Thornton and Lief were not given the declarations of other firms, Labaton's negligence was the major cause of the submission by Sucharow of a declaration that falsely claimed that an additional 9,322 double-counted hours had been worked, improperly inflating the purported lodestar by more than

\$4,000,000, and rendering it unreliable as a check of the reasonableness of the requested \$75,000,000 fee award.

Sucharow's declaration concerning Labaton's lodestar calculation was also false and misleading. Like Garrett Bradley, Sucharow represented 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." Dkt. No. 104-15, ¶7. However, when he made this statement under oath, Sucharow believed that Labaton did not have any clients who were charged or paid hourly rates. See Mar. 7, 2017 Tr. at 79 (Dkt. No. 176). More specifically, he testified, "we don't have paying clients, your Honor Most firms in our field do not have billable clients . . . [w]e don't have billable clients." Id.

Labaton now claims that it had a few paying clients. See Master's Suppl. Resp. 3 (Dkt. No. 523); Labaton's Resp. to Master's 1st Set of Interrogs. 34 (Dkt. No. 526-1).¹⁹ To the extent, if any, that it would have been accurate, Sucharow could have easily used language similar to that used by Liefv in the fee declaration it

¹⁹ Labaton later identified several clients who had been charged an hourly rate. See Wolosz Decl. Ex. A (Dkt. No. 510-2). However, Sucharow did not know or believe Labaton billed any clients by the hour when he signed and submitted his declaration. Moreover, even if Sucharow's reference to Labaton's "regular rates charged" was not completely false, it was misleading.

submitted in BONY Mellon quoted earlier: "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." Chiplock Decl. ¶5, Dkt. No. 622-1, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015). Labaton's counsel acknowledged that "it would be silly for me to argue that language is not preferable." June 24, 2019 Tr. at 125 (Dkt. No. 560). Using language in sworn declaration that is not false or misleading, however, is not merely preferable. It is required. See Fed. R. Civ. P. 11(b)(3); Mass. R. Prof. C. 3.3(a), 8.4(c).

Like Garrett Bradley, Sucharow did not correct his false representation regarding regular rates charged by Labaton before the court questioned him on March 7, 2017, despite the fact that the court raised this issue in its February 6, 2017 Memorandum and Order. See Dkt. No. 117 at 4.

Nor did Sucharow's partner Goldsmith correct Sucharow's misrepresentation concerning Labaton's rates when he reported the double-counting to the court. As explained earlier, prompted by "an inquiry from the media," on November 10, 2016, Goldsmith filed a letter informing the court of the double-counting that resulted in the court using an inflated purported lodestar in deciding to award \$75,000,000 in attorneys' fees. The detailed four-page letter indicates that Goldsmith scrutinized all of the fee

declarations. See Dkt. No. 116. The court infers Goldsmith knew that Labaton had few, if any, clients who were charged and paid an hourly rate, and that few, if any, of the attorneys who worked on this case had ever been charged to a client at an hourly rate. However, Goldsmith continued to rely on what Sucharow falsely stated were Labaton's "regular rates charged" in claiming a revised lodestar of \$37,265,241. Id. As the 1993 Advisory Committee note quoted earlier indicates, this too constituted a violation of Rule 11. See also Meadow Ltd. P'ship, 118 F.R.D. at 434.

In addition, in the Memorandum in Support of the Motion for Attorneys' Fees submitted by Sucharow as Lead Counsel on behalf of Labaton, and represented to have been also signed by counsel for Thornton and Lieff, Labaton provided a misleading characterization of the Fitzpatrick Study. See Dkt. No. 103-1, at 17-18 of 36. More specifically, Labaton argued:

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 awarded in the 444 settlements where the [percentage of fund] 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). The 24.85% fee requested is right in line with Professor Fitzpatrick's findings.

Id. at 17-18 (emphasis added) (footnote omitted). Labaton added in a footnote that Fitzpatrick "found . . . that the mean and median fees awarded in settlements in the First Circuit . . . were 27.0% and 25.0%." Id. at 18 n.18.

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.

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. In contrast to Neurontin, counsel did not in this case file an affidavit from Fitzpatrick, which would have focused the court on his study. See Neurontin, 58 F. Supp. 3d at 171.²⁰ 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

²⁰ In Neurontin the court noted that Fitzpatrick had found that "for settlements between \$250 million and \$500 million, the mean percentage was just 17.8%." F. Supp. 3d at 172. However, while Labaton repeatedly cited Neurontin in its Memorandum, it did not include reference to this statistic. See Dkt. No. 103-1, at 15-18 of 36.

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.

As explained earlier, the description of the Fitzpatrick Study made by Lief and Thornton in requesting attorneys' fees in the BONY Mellon case was not false or misleading.²¹ Similar language could and should have been used in this case as well.

Labaton also violated the Massachusetts ethical rules, but not the Federal Rules of Civil Procedure, in concealing its agreement to pay Chargois 20% of its fees in all ATRS cases in which Labaton was Lead Counsel.

²¹ In BONY Mellon, counsel wrote:

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% and 19.5%, respectively, with a standard deviation of 7.9%. See Brian T. Fitzpatrick, An Empirical Study of Class Action Settlements and Their Fee Award, 7 J. Empirical Legal Stud. 811, 839 (2010). Other well-known commentators have opined 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.' Theodore Eisenberg and Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 74 (2004). The 25% fee requested here [in BONY Mellon] is within one standard deviation of the mean shown in the Fitzpatrick study.

Dkt No. 619 at 35 of 44, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015).

ATRS entered into a Retention Agreement designating Labaton to serve as its counsel in this case on February 8, 2011. See R. & R. Ex. 138 (Dkt. No. 401-137). The Retention Agreement stated, in part, that "Arkansas Teachers 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," meaning this case. Id. (emphasis added).

The Master and Labaton agree that the relevant Massachusetts Rules of Professional Conduct then in effect should be used to evaluate the propriety of Labaton's conduct, rather than the revisions of those Rules that were effective as of March 15, 2011. See R. & R. at 251; Dkt. No. 359 at 27-8. The relevant Massachusetts Rules were then Rules 7.2(c) and 1.5(e).

Rule 7.2(c) stated, in pertinent part, that "[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 Rule 1.5(e)" Mass. R. Prof. C. 7.2(c) (eff. Oct. 1, 1999), R. & R. Ex. 231 (Dkt. No. 401-233) (emphasis added). Rule 1.5(e) then provided, in pertinent part, 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." Mass. R. Prof. C. 1.5(e) (eff. Jan. 2, 2001), R. & R. Ex. 225 (Dkt. No. 401-227).

Prior to February 8, 2011, Labaton had agreed to pay Chargois 20% of its fee in all ATRS cases in which Labaton was Lead Counsel, including this case.²² Labaton agreed to make this payment because, as Chargois wrote to Labaton, Chargois & Herron "got [Labaton] ATRS as a client (after considerable favors, political activity, money spent and time dedicated in Arkansas)" Email from Chargois to Belfi (Oct. 18, 2014), R. & R. Ex. 177 (Dkt. No. 401-176). Therefore, Chargois & Herron "recommended" Labaton to ATRS and did much more to assist Labaton in getting ATRS as a client. However, neither Chargois nor Herron performed any services in connection with this case.

Labaton argues that a lawyer is not a "person" for the purpose of Rule 7.2(c) and, therefore, the Rule does not apply. This contention is incorrect. "Where the statutory language is clear, it must be given its plain and ordinary meaning." Nationwide Mut.

²² Labaton has represented ATRS in at least six other cases in which it paid Chargois a percentage of the fee award even though Chargois did no work on the case and did not file an appearance. See Brado v. Vocera Commc'ns, Inc., No. 13-cv-3567 (N.D. Cal.); In re Spectrum Pharm., Inc. Secs. Litig., No. 13-cv-0433 (D. Nev.); In re Colonial BancGroup Inc. Secs. Litig., No. 09-cv-0104 (M.D. Al.); Gammel v. Hewlett-Packard Co., No. 11-cv-1404 (C.D. Cal.); Hoppaugh v. K12 Inc., No. 12-cv-0103 (E.D. Va.); In re Beckman Coulter, Inc. Secs. Litig., No. 10-cv-1327 (C.D. Cal.); see also Am. Brown Report at 12-13 of 16 (Dkt. No. 539-1) (listing the foregoing cases); R. & R. at 124.

Ins. Co. v. Comm'r of Ins., 491 N.E.2d 1061, 1064 (Mass. 1986). A lawyer, like any other human being, is commonly and correctly understood to be a "person."²³

In addition, the payment to Chargois in connection with this case was not a "referral fee" within the meaning of Rules 7.2(c)(4) and 1.5(e). In 2005, in Saggese v. Kelley, 837 N.E.2d 699 (2005), the Massachusetts Supreme Judicial Court described a referral fee as follows:

Jan Doe consulted Saggese about a matter. Saggese told Doe he had little experience in the field for which Doe sought his representation, but that the Kelleys had such experience. Later that month, he introduced Doe to Kathleen Kelley. . . . Kathleen Kelley sent Doe a written fee agreement that specified an hourly rate and a retainer. A copy of the agreement was sent to Saggese.

Id. at 702 (footnote omitted). Subsequently, the Kelleys agreed to Saggese's request for one-third of their fees in cases he referred, including Doe's case. Id.

²³ The relevant revised, current Massachusetts Rules of Professional Conduct refer specifically to individuals who are not lawyers in sections other than 7.2(b) (the successor to Rule 7.2(c)), including within 7.2. This indicates that the drafters of the Massachusetts Rules know how to make a distinction between individuals who are not lawyers and those who are. See, e.g., Mass. R. Prof. C. 5.3, 7.2(b)(4). The fact that no distinction is now made between lawyers and other individuals in Rule 7.2(b) indicates that the prior version of the Rule applied to lawyers as well as others, and the drafters did not in the revision narrow the Rule to exclude lawyers.

The instant case does not resemble the paradigmatic referral fee described in Saggese. As explained earlier, Labaton asked Chargois to find institutional investors in the Southwest that could engage Labaton as monitoring counsel and to influence them to do so. Neither Chargois nor Herron had a relationship with any institutional investor. No institutional investor ever asked either of them for advice generally or to find monitoring counsel particularly. However, Herron somehow persuaded Arkansas State Senator Faris to use his influence as a member of the legislative committee that oversaw ATRS to assist Labaton. When Faris' intervention led to ATRS' selection of Labaton as a monitoring counsel, Labaton agreed to pay Chargois 20% of its fees in every ATRS case in which Labaton served as Lead Counsel, despite the fact that Chargois did not refer that case to Labaton and was not expected to file an appearance or do any work on it. Therefore, the payment to Chargois concerning this case constituted what could be called a "finders fee." It was, in any event, not a referral fee within the meaning of Rules 7.2(c)(4) and 1.5(e).

The conclusion that the payment to Chargois was a "finders fee" is consistent with Vita v. Berman, DeValerio & Pease, LLP., 967 N.E.2d 1142 (Mass. App. Ct. 2012). In Vita, the Massachusetts Appeals Court used the term "referral fee" to describe an "ongoing arrangement whereby Vita [a criminal defense attorney], who had many contacts in the financial securities field, would refer

potential class action plaintiffs to [Berman, DeValerio & Pease]." Id. at 1145. Neither Chargois nor Herron were comparable to Vita.

In 2005, in Saggese, the Supreme Judicial Court held that with regard to agreements for what genuinely constitute referral fees, Rule 1.5(e) would in the future be construed to require disclosure of the fee-sharing agreement to the client before the referral is made and securing the client's consent to it in writing. See 837 N.E.2d at 706. Labaton did not satisfy those requirements with regard to this case.²⁴

The payment to Chargois is also not a "referral fee" within the meaning of the Retention Agreement, which allowed Labaton to divide fees with other attorneys for serving as "local or liaison counsel, as referral fees, or for other services performed in connection with" this case because Chargois did not serve as local or liaison counsel, refer this case to Labaton, or perform any other services in connection with it. Letter from Belfi to Hopkins (Feb. 8, 2011), R. & R. Ex. 138 (Dkt. No. 401-137).

²⁴ The revised Rule 1.5(e), which was promulgated in December 2010, before the February 8, 2011 Retention Agreement, and became effective March 15, 2011, codified the ruling in Saggese by requiring that "the client [be] 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). With regard to Chargois, Labaton also did not satisfy the requirements of the revised Rule of which it had notice when it entered into the Retention Agreement.

Moreover, assuming, without finding, that the payment to Chargois was a "referral fee" within the meaning of the Retention Agreement, ATRS did not have the authority to relieve Labaton of its ethical obligations under Massachusetts Rules 7.2(c) and 1.5(e). See R. & R. at 230. Labaton argues, however, that it did not violate Rule 7.2(c) or 1.5(e) because after this issue emerged, Hopkins, the Executive Director of ATRS, ratified Labaton's agreement to share its fees with Chargois. See Hopkins Decl. ¶116 (Mar. 15, 2018), R. & R. Ex. 130 (Dkt. No. 401-129); Dkt. No. 579 at 23. In Saggese, the Supreme Judicial Court permitted ratification to authorize belated disclosure of a referral fee sharing agreement. See 837 N.E.2d at 705. The Court reasoned that "[a]lthough Doe's consent came toward the end of the attorney-client relationship, the beneficiary in a fiduciary relationship may ratify the conduct that otherwise would constitute a breach of fiduciary duties, provided the requisite disclosure has been made." Id.

Significantly, however, Saggese was not a class action. In this case, no later than when the class was certified for settlement purposes on August 8, 2016, Labaton had fiduciary duties to all class members, not only to ATRS. In January 2012, the court appointed Labaton as "interim lead counsel to act on behalf of all plaintiffs and the proposed class." See Dkt. No. 4. In the Notice of the proposed settlement drafted by Labaton, the class was

defined as including "all custody and trust customers of [State Street]," including the ERISA Plans. Revised Long-Form Notice 8 (Dkt. No. 95-3). In the August 10, 2016 Notice, Labaton described itself as "Lead Counsel" for the single class. Id. at 17. This was proper because "once a class has been certified, the default presumption is that there is an attorney-client relationship between class counsel and the absent class members." 6 Rubenstein, Newberg on Class Actions §19:2; see also Fulco v. Cont'l Cablevision, Inc., 789 F. Supp. 45, 47 (D. Mass. 1972) ("[O]nce the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel.") (citing cases).

Lawyers generally have a fiduciary duty to their clients. See, e.g., Saggese, 837 N.E.2d at 705. As counsel for the certified class, Labaton had a fiduciary duty to all members of the class. Indeed, it has been held that even prior to class certification, attorneys for the putative class have fiduciary and ethical obligations to all putative class members. See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. 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."); Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985) ("The lawyers who bring [class actions] have a heavy fiduciary

responsibility to their clients"); Singer v. AT&T 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.").

In this matter, the ERISA Plans brought their own cases and had their own counsel, while permitting Labaton to serve as "Lead Counsel" in the consolidated cases. ATRS did not represent the ERISA Plans or have the authority to ratify the Labaton payment to Chargois on their behalf. Labaton did not consult the representatives of the ERISA Plans concerning the payment to Chargois or ask them to ratify the fee sharing agreement. If ERISA Counsel had been informed of the proposed payment to Chargois, they would have advised the ERISA Plans not to ratify it and the Plans would have followed that advice. In these circumstances, ATRS' purported ratification does not qualify the conclusion that Labaton violated Rule 7.2(c) because the payment to Chargois did not constitute a permissible "referral fee" within the meaning of Rule 1.5(e).

The failure to inform the ERISA Plans of the fee sharing arrangement and to seek their ratification of it also violated Massachusetts Rules of Professional Conduct 1.4(a)(1) and (b). Rule 1.4(b) states that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.4(a)(1) requires

that a lawyer "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required. Rule 1.0(f), in turn, defines "[i]nformed consent" as "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."

As ERISA Counsel have stated, information concerning the Labaton payment to Chargois was important to their clients, to the viability of the settlement, and to the allocation of attorneys' fees. If it had been disclosed to them, ERISA Counsel may have felt compelled to disclose the Chargois payment to the Department of Labor. The Department of Labor then might not have approved the proposed settlement, which was a prerequisite for presenting it for court approval. At a minimum, ERISA Counsel would have discussed the issue of disclosure to the Department of Labor with the Plans representing the putative ERISA classes. In addition, ERISA Counsel would not have agreed to Labaton's demand that they accept only \$7,500,000 in attorneys' fees if they had known Chargois was going to receive \$4,100,000 without having done anything concerning this case. See Sarko Dep. Tr. at 75, R. & R. Ex. 37 (Dkt. No. 401-36).

Labaton's conduct in assiduously trying to conceal its obligation to pay Chargois indicates that it knew the arrangement

was highly questionable, if not improper. Labaton did not at the outset of this case disclose to ATRS its obligation to pay Chargois as was required by Rule 7.2(c). Labaton attorneys consistently sent Chargois blind copies of relevant emails to Hopkins and forwarded Hopkins' responses to Chargois, rather than copying Chargois, in order to keep Hopkins from discovering Chargois' financial interest in this case. In addition, Labaton ardently, but unsuccessfully, argued to this court that all references to Chargois in the Master's Report should be redacted from the version of it filed for the public record. See June 28, 2018 Mem. & Order (Dkt. No. 356).

Labaton did discuss the \$4,100,000 payment to Chargois with Thornton and Lief. Thornton shares responsibility for Labaton's misconduct in failing to disclose the Chargois arrangement and payment to ATRS, the ERISA Plans, and ERISA Counsel. Garrett Bradley was fully familiar with the Chargois arrangement. He knew Chargois and understood that Chargois' role, like his own, was to use political connections to generate clients for Labaton. Labaton had Bradley speak to Chargois in a successful effort to get Chargois to agree to reduce his demand for 20% of Labaton's fee in this case. As part of the effort to conceal the reasons for the payment to Chargois from Lief, Bradley referred to Chargois as "the local attorney in this matter who played an important role," in an email to his partner Michael Thornton, Sucharow and others

at Labaton, Chiplock of Lief, and Chargois. See R. & R. Ex. 157 (Dkt. No. 401-156). However, Bradley knew Chargois had not served as local counsel or done any other work concerning this case.

Bradley's email was part of a successful effort to persuade Lief to reduce its share of the fee award by about \$1,000,000 in order to compensate Labaton for part of its payment to Chargois. See Email from Lief to Chiplock (Aug. 28, 2015), R. & R. Ex. 153 (Dkt. No. 401-152). Chiplock and Robert Lief had been told that Chargois was a local counsel assisting ATRS in Arkansas. See R. & R. at 109-110, Lief Dep. Tr. at 58-80, R. & R. Ex. 139 (Dkt. No. 401-138), Chiplock Dep. Tr. at 101-116, R. & R. Ex. 41 (Dkt. No. 401-40). However, they should have been suspicious about the reasons for a payment of more than \$4,000,000 to an attorney who did not file an appearance in the case and did no work on it that they had seen. Nevertheless, evidently to sustain Lief's harmonious, lucrative relationship with Labaton and Thornton, Chiplock did not object to the reduction of Lief's fee.

While the court finds that Labaton violated its duty to disclose its obligation to pay Chargois to the ERISA Plans through their counsel, in contrast to the Master, see R. & R. at 309, 357, the court does not find that Labaton violated Federal Rule of Civil Procedure 23(e)(3) by not disclosing to the court its agreement to pay Chargois. Rule 23(e)(3) states that "[t]he parties seeking approval must file a statement identifying any agreement made in

connection with the proposal." Read in isolation, the Rule would appear to have required Labaton to inform the court of its agreement to share with Chargois the fee award it received. As one of Labaton's experts, Professor Rubenstein, has written, Rule 23(e) "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 agreement about fees - may also fall within the purview of Rule 23(e)." 5 Rubenstein, Newberg on Class Actions §15.12.

Disclosure to the court would have prompted it to ask many questions. Disclosure might have resulted in the removal of Labaton as Lead Counsel, and/or a decision by the court to exercise its discretion to allocate fees among counsel and award less to Labaton than it otherwise would have.

However, Rule 23(h) directly addresses awards of attorneys' fees. It provides, in part, that a request for attorneys' fees must be made pursuant to Rule 54(d)(2). Rule 54(d)(2)(B)(iv) states that a motion for attorneys' fees must "disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made." (emphasis added). The court did not issue such an order in this case. In view of the fact that Rule 23(h) expressly addresses the obligations of counsel in seeking attorneys' fees and incorporates Rule 54(d)(2)(B)(iv)'s

requirement that agreements concerning fees be disclosed if ordered, the court finds that Rule 23(e)(3) should not be interpreted as requiring disclosure of the Chargois arrangement to the court in this case.

However, based on its experience in this case, the court agrees with Rubenstein that "there is little obvious downside to transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should readily provide them under Rule 23(e) in any case." 5 Rubenstein, Newberg on Class Actions §15.12.²⁵

The Master also found that the failure to disclose Chargois to the court violated the Massachusetts Rules of Professional Conduct. See id. at 318-27. In reaching this conclusion, the Master relied substantially on the thorough and thoughtful analysis of Professor Stephen Gillers concerning Rule 3.3, which as explained earlier defines counsel's duty of candor to the courts. See id.;

²⁵ This court intends to order, pursuant to Rule 54(d)(2), disclosure of agreements concerning fees in all future class actions. It also intends to recommend that the District of Massachusetts adopt a Local Rule requiring such disclosure that is similar to the Local Rule for the Southern and Eastern Districts of New York.

Rule 23.1 of the Local Rules for the Southern and Eastern Districts of New York provides that "[t]he notice [of a class action settlement] shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively and shall disclose any fee sharing agreements with anyone" (emphasis added).

see also Gillers Suppl. Ethical Report for the Master 87-93, R. & R. Ex. 233 (Dkt. No. 401-232). As the Master and Gillers note, and as explained earlier, for the purposes of Rule 3.3, applications for fee awards in class actions are treated as ex parte submissions and, therefore, plaintiffs' counsel have a duty to inform the court of all facts that are material concerning the requested award. See Mass. R. Prof. C. 3.3(d), cmt. 14A. As also indicated earlier, the court agrees that the Chargois matter was material. Again, if the court had been informed of the matter in 2016, it might have removed Labaton as Lead Counsel, and/or reduced the total fee award or the amount of it allocated to Labaton.

However, it would be anomalous to find that conduct permitted in the circumstances of this case by Federal Rule of Civil Procedure 23 violates the Massachusetts Rules of Professional Conduct. Comment 14 to Rule 3.3(d) concerning ex parte proceedings provides guidance in resolving the tension between the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct. It states, in part, that "Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law, such as presentation of evidence to grand juries, applications for search or other investigative warrants and the like." Federal Rule of Civil Procedure 23 is comparable to the examples cited in Comment 14. Therefore, the court does not find

that Labaton violated Rule 3.3(d) in concealing Chargois from the court.

However, an attorney must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Mass. R. Prof. C. 1.4(b). As explained earlier, Labaton did violate Rules 1.4(a)(1) and (b) in failing to inform the ERISA Plans, through their counsel, that Chargois would be paid \$4,100,000 if, as requested, the court awarded \$75,000,000 as attorneys' fees. If Labaton had made that required disclosure concerning Chargois to ERISA Counsel, the court finds that they would have informed the court of it. Concealing the Chargois matter from ERISA Counsel and their clients was part of a consistent effort by Labaton to assure that the court, among others, would not have an opportunity to explore the origins and propriety of Labaton's obligation to pay Chargois, and to consider those matters in deciding the most reasonable amount to award as attorneys' fees. While the court does not find that Labaton violated a Federal or Massachusetts Rule in concealing Chargois from the court alone, the concealment of its obligation to pay Chargois from the ERISA Plans and their counsel constituted misconduct.

As explained earlier, Thornton acted in concert with Labaton in improperly concealing the Chargois matter from the ERISA Plans, their counsel, and the class members they represent. This

contributed to the Chargois matter being concealed from the court and from the public as well.

3. Lieff

As also explained earlier, in contrast to Garrett Bradley and, therefore, Thornton, Lieff was not accurately or completely informed of the reasons Labaton was paying Chargois. Robert Lieff testified that he was told that Chargois was local counsel and assumed that Chargois was dealing with ATRS. See R. & R. at 110, 288, Ex. 139, at 97 (Dkt. No. 401-138). He also stated that if he had been fully informed, he would not have agreed to contribute to the payment to Chargois and would have encouraged Labaton to disclose the agreement to pay Chargois to the court. Id. These contentions are credible. However, as indicated earlier, the fact that Chargois was being paid \$4,100,000 -- which the court infers was a very large amount to pay to a local counsel who had done no work that was visible to Robert Lieff or his colleagues -- should have prompted questions to Labaton that, if honestly answered, would have provided Lieff material information. Therefore, while the court finds that Lieff is much less responsible than Labaton and Thornton, it did by its inaction and acquiescence contribute to the occurrence of their misconduct concerning Chargois.

Lieff's performance was also deficient in other ways. Like Thornton, it used the template provided by Labaton to claim that the rates attributed to the attorneys it employed and those it

engaged as contract attorneys were regularly charged for their services. Lieff had what it characterized as a "handful of paying clients over the years." Mar. 7, 2017 Tr. at 93 (Dkt. No. 176). It also had a process to develop hypothetical, reliable market rates for its attorneys. See R. & R. at 173; Fineman Dep. Tr. at 58-60, R. & R. Ex. 18 (Dkt. No. 401-17). However, as noted earlier, in its BONY Mellon declaration Lieff stated 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." Chiplock Decl. ¶5, Dkt. No. 622-1, BONY Mellon, 12-md-02335-LAK-JLC (S.D.N.Y. Aug. 17, 2015). To the extent that was true, Lieff should in this case have revised the template to use the same language accurately describing the rates attributed to its lawyers.

Lieff, in contrast to Thornton, did employ the staff and contract attorneys it listed on its Exhibit A, and attributed to them rates that had been developed through a process intended to determine their market value. However, Lieff knew that Thornton was paying for some of those attorneys. Nevertheless, it did not receive, request, or review Thornton's fee declaration. Lieff also did not communicate with Labaton or Thornton to assure that Thornton was not claiming those attorneys in its lodestar. Nor did Lieff review the submission to the court made by Labaton on Lieff's

behalf to assure the hours of the attorneys paid for by Thornton were not double-counted. This was unreasonable.

In addition, Liefv authorized Labaton to represent on the signature page that the misleading memorandum in support of the request for attorneys' fees was signed by Liefv attorneys as "Additional Counsel for Plaintiff [ATRS] and the Settlement Class," as well as by Labaton as "Lead Counsel for Plaintiff [ATRS] and the Settlement Class," and by Thornton, as "Liaison Counsel for Plaintiff [ATRS] and the Settlement Class." Dkt. No. 103-1, at 36 of 36. Liefv reviewed that memorandum. See Liefv's Objs. to Master's Report 33 (Dkt. No. 367). However, Liefv did not attempt to correct the misleading characterization of the Fitzpatrick Study in the memorandum. As explained earlier, Liefv submitted an accurate description of the Fitzpatrick Study in the memorandum in support of the request for attorneys' fees in BONY Mellon. It should have caused Labaton to do the same in this case. In any event, Liefv violated Federal Rule of Civil Procedure 11(b) by agreeing to be a signatory to a misleading submission to the court.

Similarly, Liefv reviewed and suggested revisions to Sucharow's declaration attesting to the accuracy of all of the fee declarations. See id. Liefv did not, however, inform Labaton that the template language characterizing the rates attributed to its attorneys as "regularly charged" was inaccurate and misleading. It should have done so.

F. An Award of \$60,000,000 in Attorneys' Fees is Reasonable and Most Appropriate

Having vacated the original award of attorneys' fees in the amount of \$75,000,000, the court is now deciding de novo the amount to award that is reasonable and most appropriate in the unique circumstances of this case. See Fidelity/Micron, 167 F.3d at 737. The court presumes that an award of 20-30% would be reasonable and begins by considering whether an award of 25% would be most appropriate. See Pac. Enters., 47 F.3d at 379; Bezdek, 79 F. Supp. 3d at 349-50; Lupron, 2005 WL 2006833 at *5.

Even absent the misconduct of Thornton, Labaton, and to a lesser extent Lief, that the court has found, the court would not now award \$75,000,000 in attorneys' fees. At the outset, whether plaintiffs would recover anything in these cases was uncertain. However, after the court denied the motion to dismiss the ATRS case, the consolidated cases were stayed. What proved to be a prolonged period of informal discovery and mediated negotiations resulted in settlement. Plaintiffs' counsel were not required to conduct any depositions, litigate any discovery disputes, oppose a motion for summary judgment, or try the case. After the denial of the motion to dismiss the ATRS case and the settlement in BONY Mellon, the risk that the class and its attorneys would not receive anything was greatly diminished. By then, at least, experienced counsel would have realized that, as a practical matter, the key

questions were not whether settlement would be reached, but rather when and for how much. In these circumstances alone, the court would now make an award of less than 25% of the common fund.

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.

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.

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.

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).

Judges expect that representations made to them by lawyers result from reasonable inquiries, are not false or misleading, and do not violate Federal Rule of Civil Procedure 11 or related ethical rules. As explained earlier, it is especially important that attorneys meet those standards in their requests for attorneys' fees in class actions when the adversary process does not operate and have the potential to expose misrepresentations. The repeated, egregious misconduct of counsel for Labaton and Thornton in this case should not be ignored in the award of attorneys' fees. See Agent Orange, 818 F.2d at 222; Travers, 808 F.3d at 542; Culebras Enters., 846 F.2d at 67. That misconduct contributes to the court's conclusion that it is most appropriate to award counsel 20% of the common fund, \$60,000,000.

There are several facts that confirm that an award of \$60,000,000 is reasonable. An award of 20% of the common fund is at the low end of the range generally presumed reasonable. See Pac. Enters., 47 F.3d at 379; Bezdek, 79 F. Supp. 3d 324, 349-50; Lupron, 2005 WL 2006833 at *5. It is above both the mean of 17.8% and the median of 19.5% in settlements between \$250,000,000 and \$500,000,000 according to the Fitzpatrick Study on which plaintiffs' counsel originally asked the court to rely. See

Fitzpatrick Study, supra, at 839. An award of 20% of the common fund is also compatible with what Class Counsel reported to be the awards in the eight cases in the First Circuit with common funds exceeding \$100,000,000 in which the fee awards ranged from 9% to 30.9%, with the majority (5) in the 20% to 25% range. See Dkt. No. 103-1, at 13-14 of 36.

In addition, the reasonableness of an award of 20% of the common fund is consistent with the views expressed by Labaton's expert, Professor Rubenstein, in his treatise. Professor Rubenstein wrote that "empirical data on class action fee awards [] 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)." Rubenstein, 5 Newberg on Class Actions §15:81 (citing and discussing the Fitzpatrick (2010) and Eisenberg-Miller (2010) Studies). Professor Rubenstein added that, "the author's own database, taken from a six-year sample shows the average . . . for settlements over \$44.625 million is 20.9%." Id. In a declaration in this case, Professor Rubenstein referenced 20 cases with settlements between \$100,000,000 and \$500,000,000, See Dkt. No. 446-2, Ex. E. The average award in those cases was 13.16% of the common fund. See Dkt. Nos. 522 at 7; 522-1 at 8-9.

In addition, a \$60,000,000 award is reasonable when checked against the properly calculated lodestar. As indicated earlier

when, as here, the percentage of fund method is used to calculate an award of attorneys' fees in a common fund case, a lodestar check of the reasonableness of the amount requested is encouraged. See, e.g., Goldberger; 209 F.3d at 50; In re Gen. Motors, 55 F.3d at 820. District Courts regularly do so. See, e.g., Bezdek, 79 F. Supp. 3d at 349-50; Lupron, 2005 WL 2006833 at *5; Neurontin, 58 F. Supp. 3d at 170-71. When used merely as a cross-check, the reasonableness of the hours and rates used to develop the lodestar "need not be exhaustively scrutinized by the district court" in part because it is assumed that "the strictures of Rule 11," which requires attorneys to make representations that are not false or misleading, have been observed. Goldberger, 209 F.3d at 50.

Again, as explained earlier, a lodestar is properly calculated by multiplying the number of hours reasonably spent on the litigation by a reasonable hourly rate. See Thirteen Appeals, 56 F.3d at 305 "Reasonable fees . . . are to be calculated according to the prevailing rates in the relevant community." Blum, 465 U.S. at 895. "The rate that private counsel actually charges for her services, while not conclusive, is a reliable indicium of market value. One Star Sloop Sailboat, 546 F.3d at 40. Where the award being considered is larger than the lodestar, the court must decide if the resulting multiplier would be reasonable.

Labaton originally reported that the lodestar for all of plaintiffs' counsel was \$41,323,895.75 and, if \$75,000,000 was

awarded, the multiplier of 1.8 would be reasonable. See, e.g., Letter from Goldsmith to the Court (Nov. 10, 2016), Dkt. No. 116. When the double-counted hours were removed, Labaton represented that the combined lodestar was \$37,265,241.25, and the correct multiplier was, therefore, 2.00. Labaton contended it would also be reasonable.

As indicated earlier, this case raises substantial doubts about whether courts should assume that the representations made by counsel to the court concerning their lodestar are reliable, as required by Rule 11. See Goldberger, 209 F.3d at 50. As explained earlier, Thornton, Labaton, and to a lesser extent Liefv made false and misleading representations concerning the regular hourly rates charged for their attorneys because Thornton works exclusively, and Labaton and Liefv work almost exclusively, on a contingent-fee basis. When questions were raised by the Boston Globe about the reliability of their representations, and were magnified by the court's questioning on March 7, 2017, it was necessary and appropriate to appoint a Master to investigate the reliability of the representations made concerning the reported lodestar, among other things.

In a detailed Memorandum, Thornton asserts that the language used in this case characterizing the rates attributed to attorneys as each firm's "regular rates charged for their services . . ." is "very common and is somewhat of a standard practice," although

often the representation is not true. Dkt. No. 530 at 40. Thornton supports this assertion with two volumes of exhibits. See Dkt. No. 530-4 (attaching 73 exhibits). Thornton correctly cites another ATRS class action before this court, Ark. Teachers Ret. Sys. v. Insulet Corp., No. 15-cv-12345-MLW (D. Mass.), in which two of plaintiff's firms used the same language used by Labaton, Thornton, and Lief in this case and, in response to questions from the court, acknowledged that they had no paying clients because they work exclusively, or almost exclusively, on a contingent-fee basis. See id. at 41. Thornton cites many other cases before this court, before other judges in the District of Massachusetts, and throughout the United States in which the same or substantially similar statements, which are likely false or misleading, have been made by other firms that specialize in representing plaintiffs in class actions. See id. at 42-58.²⁶ Therefore, it appears the lodestar check that district judges regularly employ in making percentage of the common fund awards is often fundamentally flawed and, at a minimum, that the representations of counsel should be scrutinized, rather than accepted on the assumption that they satisfy the requirements of Rule 11.

²⁶ Thornton does not claim that the fact that misrepresentations concerning regular rates charged are evidently common excuses its conduct in this case. Rather, it argues that it should not have been singled out by the Master for the imposition of sanctions. See Dkt. No. 530 at 40-41.

In this case, the Master did substantial investigation and research to attempt to calculate the lodestar properly. He found that each of the plaintiffs' firms except for Thornton had contemporaneous time records as required by the jurisprudence. See R. & R. at 202-09; Hensley v. Eckerhart, 461 U.S. 424, 438 n.13 (1983); Gay Officers Action League v. Puerto Rico, 247 F.3d 288, 297. The Master also found that the hours reportedly worked in calculating the revised, lower lodestar were reliable. See R. & R. at 209-18. The court accepts this conclusion.

In addition, the Master found that the rates attributed to the partners and associates who worked on this case, although not as represented regularly charged to paying clients, were reasonable. See R. & R. at 173-76. The court accepts this conclusion too.

Addressing a question raised initially in the December 17, 2016 Boston Globe article, the Master found that even though the hourly rates attributed to the staff attorneys by Labaton and Liefkowitz also were not regularly charged to paying clients, they were reasonable. See R. & R. at 176-81. In essence, the Master found that the staff attorneys were experienced lawyers who did much more than low-level document review. All had years of experience, and some at Liefkowitz had specialized knowledge acquired working on the BONY Mellon case. The Master viewed the staff attorneys as comparable to low to mid-level associates. See id. at 180. Although

they were paid \$40 to \$60 an hour, plus benefits, he found that attributing billing rates to them of \$335 to \$515 was reasonable. This was material to the Master's calculation of the lodestar because he found that staff attorneys were responsible for 70% of the work that comprised it. Id. at 178.

The court accepts the finding that the staff attorneys, who were paid an average of \$55 an hour, see Exec. Summ. at 23 (Dkt. No. 357-1), were comparable to associates and that the rates attributed to them were justified. However, those rates should not have been misrepresented as regularly charged.

In contrast to the staff attorneys, the Master found that the lodestar should not include the hours and rates attributed to the seven contract attorneys hired by Liefk through an agency at an hourly rate of \$45 to \$50. See Exec. Summ. at 23, 50; R. & R. at 367-68. Rather, he recommended that the contract attorneys be treated as an expense at the rate of \$50 an hour. The seven contract attorneys were represented by Liefk to have reasonable rates between \$415 and \$515 an hour. According to the Master, their time, after a 1.8 multiplier, contributed \$2,386,058 to the lodestar. The Master reasoned that the contract attorneys were not permanently or continuously employed by Liefk and did not receive benefits from the firm, even if they in some instances did work comparable to the work performed by the staff attorneys.

When appointing the Master, the court noted that courts, particularly in the Southern District of New York, have begun questioning whether attorneys hired temporarily through an agency should be included in the lodestar at greatly inflated rates or treated as an expense. See Mar. 7, 2017 Tr. at 93-94 (Dkt. No. 176) (citing Weatherford, 2015 WL 127847; Citigroup Secs. Litig., 965 F. Supp. 2d 369; Citigroup Bond Litig., 988 F. Supp. 2d 371; Beacon Assocs., 2013 WL 2450960; City of Pontiac, 954 F. Supp. 2d 276). For example, in City of Pontiac, 954 F. Supp. 2d at 280, the court wrote that "a sophisticated client, knowing these contract attorneys cost plaintiff's counsel considerably less than what the firm's associate attorneys cost (in terms of both salaries and benefits) would have negotiated a substantial discount in the hourly rates charged the client for these services."

The court hoped that the Master would find definitive evidence of whether this commonsense observation was confirmed by the operation of the actual marketplace. He was evidently unable to do so as the Report does not include discussion of such evidence.

However, in response to an inquiry from the court, counsel for the defendant stated that State Street itself hired and paid an agency for contract attorneys to do first level document review for its law firm. See Mar. 7, 2017 Tr. at 83-84 (Dkt. No. 176). State Street paid \$35 an hour for those contract attorneys. Id. at 84. The contract attorneys were, therefore, an expense for State

Street, providing support for the Master's conclusion that they should not be included in plaintiffs' lodestar.

In addition, in some cases, plaintiffs' firms have treated contract attorneys as an expense in their fee petitions. See Meredith Corp. v. SESAC, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); Dial Corp. v. News Corp., 317 F.R.D. 436, 438 (S.D.N.Y. 2016). In other cases, courts have allowed contract attorneys to be included in the lodestar at rates higher than their actual cost. See, e.g., Tyco Int'l, 535 F. Supp 2d at 272; Carlison v. Xerox Corp., 596 F. Supp. 2d 409, 410 (D. Conn. 2009); Citigroup Secs. Litig., 965 F. Supp 2d at 394-95; In re WorldCom, Inc. Sec. Litig., 2004 WL 2591402, at *21 (S.D.N.Y. Nov. 12, 2004).

However, courts have increasingly rejected the assertion that contract attorneys who do document review should be valued at rates comparable for those of an associate. For example, in Citigroup Inc. Securities Litigation, the court wrote:

"There is little excuse in this day and age for delegating document review (particularly primary review or first pass review) to anyone other than extremely low-cost, low-overhead temporary employees (read, contract attorneys) -- and there is absolutely no excuse for paying those temporary, low-overhead employees \$40 or \$50 an hour and then marking up their pay ten times for billing purposes."

965 F. Supp 2d at 395 (quoting Beacon Assocs., 2013 WL 2450960 at *18). The Citigroup court concluded that, "[c]onsidering the hypothetical client and the range of services at issue, . . . a

reasonable blended hourly rate for the contract attorneys here is \$200." Id. at 399.

Other courts have reached comparable conclusions. In City of Pontiac, contract attorneys were valued at rates between \$295 and \$435 an hour and the court found that "a sophisticated client could have negotiated a total of, say, half that amount, or less." 954 F. Supp. 2d at 280. In Weatherford, the "staff attorneys" who reviewed documents and organized them for depositions were represented to have hourly rates of \$375 to \$395. The court wrote that, "[a]s [the firm] has conceded, the hourly rates for which the firm seeks compensation for these staff attorneys are more than 600 percent of their direct cost to the firm, and the Court has been provided with nothing persuasive from which to conclude that this sort of markup is reasonable." 2015 WL 127847 at *1.

As the Second Circuit has written, "'the burden is on the fee applicant to produce satisfactory evidence -- in addition to the attorney's own affidavits -- that the requested rates are in line with' prevailing market rates." Citigroup Secs. Litig., 965 F. Supp. 2d at 396 (quoting Savoie v. Merchs. Bank, 166 F.3d 456, 463 (2d Cir. 1999)). In this case, plaintiffs' counsel have not provided evidence that paying clients in complex cases pay many multiples of cost for contract attorneys who do basic document review and that law firms do not generally bill contracts attorneys to such clients as an expense. As described earlier, there is

evidence, including the direct payment for its contract attorneys by State Street, that indicates that in some cases contract attorneys are treated as an expense. Therefore, it would be reasonable for the court to adopt the Master's recommendation and to treat the cost of the contract attorneys as an expense, rather than include them in the lodestar for cross-check purposes.

However, the court did not at the outset of this case inform counsel that contract attorneys doing basic document review should not be included in their lodestars. Nor did the caselaw put them on clear notice that such attorneys would not be counted in calculating the lodestar. Therefore, the court finds that, in these circumstances, it is also reasonable and most appropriate to include the contract attorneys in the lodestar, which does not have to be calculated with precision because it is only being used to check the reasonableness of the \$60,000,000 award the court is considering. See Beacon Assocs., 2013 WL 2450960 at *19.

However, the court finds that ascribing rates between \$415 and \$515 an hour for the contract attorneys is unjustified. Therefore, as in Citigroup, 965 F.Supp. 2d at 399, for the purpose of the lodestar check, the court is using a blended rate of \$200 an hour for them.

The contract attorneys reportedly worked 4,779.1 hours. See Heimann Decl. at 10 of 11 n.4 (Dkt. No. 533-1).²⁷ At a rate of \$200 an hour, they contribute \$955,820 to the total lodestar. This amount is \$1,168,470 less than the \$2,124,290 attributed to the contract attorneys in the corrected purported lodestar presented to the court after the media alerted counsel to the double-counting. See Heimann Declaration (Dkt. No. 533-1) at 9-11 of 11.

As explained earlier, like the Master, the court finds that Michael Bradley should not be included in the lodestar at a rate of \$500 an hour. This rate was fabricated by Garrett Bradley. Michael Bradley had in his career only charged \$500 an hour one time, for three hours work. He never charged more and clients regularly paid him much less an hour.

Nor was Michael Bradley's work in this case worth \$500 an hour. He only did the lowest level document review, which was comparable to the work done by the contract attorneys. His

²⁷ The Master stated in the Report that the total number of contract attorney hours was either 2,833.5 or 2,949.5. See R. & R. at 367. At the request of the Master, Liefv prepared memoranda calculating the lodestar applying various billing rates for contract attorneys. Liefv notes that the Report fails to account for 1,879.9 additional, non-duplicative contract attorney hours listed on Thornton's lodestar, which bring the correct total contract attorney hours to 4,779.1. See Heimann Decl. at 6-7 of 11 (Dkt No. 533-1). The Master does not appear to have addressed this discrepancy. The court is using this higher figure for the purpose of calculating a revised lodestar. However, the difference in the revised lodestar resulting from inclusion of these additional hours -- \$375,980, or about 1% of the total -- is not material to the court's analysis.

experience as a state prosecutor and criminal defense lawyer did not enhance his value in this case. He claims to have identified and made comments on only a few relevant documents.

In these circumstances, it would be reasonable to attribute to Michael Bradley the \$200 an hour rate the court has ascribed to the contract attorneys. However, unlike the contract attorneys, Michael Bradley was not paid hourly during the pendency of this case and took some risk that he would not be paid at all if plaintiffs did not recover anything. Therefore, the court accepts the Master's recommendation that Michael Bradley be attributed a rate of \$250 an hour for the purpose of the lodestar check. See R. & R. at 366.

Michael Bradley reportedly worked 406.4 hours on this case. At \$250 an hour, his work contributes \$101,600 to the lodestar, which is \$101,600 less than claimed by Thornton.

After removing the originally double-counted hours, and valuing the contract attorneys at \$200 an hour and Michael Bradley at \$250 an hour, the total lodestar is \$36,005,171.25. Therefore, a fee award of \$60,000,000 represents a lodestar multiplier of 1.67.

A 1.67 multiplier is reasonable in this case. In arguing for a \$75,000,000 award, counsel asserted that a 1.8 multiplier would be reasonable. See Mem. Supp. Attys.' Fees at 9 of 36 (Dkt. No.

103-1); Nov. 2, 2016 Tr. at 30-31 (Dkt. No. 114). 1.67 is not materially less than 1.8.

In addition, a 1.67 multiplier is greater than that in some other cases involving fee awards that counsel characterized as "comparable" to their request in this case for an award of \$75,000,000. Dkt. No. 103-1, at 13-14 of 36. For example, in In re Lupron, in which there was a \$150,000,000 settlement, the multiplier was 1.41. Id. at 14. In In re Lernout & Hauspie Sec. Litig., which involved a \$120,520,000 settlement, the multiplier was 1.4. Id. The court recognizes that in some other megafund cases in the First Circuit awards have involved multipliers greater than 1.67, including in one case, New England Carpenters Health Benefits Fund v. First Databank, a multiplier of 8.3. See 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009). However, the lodestar confirms the court's tentative view that an award of \$60,000,000 is within the range of reason.

As explained earlier, in deciding the most appropriate fee to award, the court is now exercising its "equitable power [and] individualization is the name of the game." Fidelity/Micron, 167 F.3d at 737. For the reasons described in detail in this Memorandum, the court finds that an award of 20% of the \$300,000,000 is reasonable and most appropriate in the unique circumstances of this case. Id.

In summary, in this case capable counsel performed well in achieving a \$300,000,000 settlement. In other circumstances, the court might find an award greater than 20%, but less than 25%, to be most appropriate. However, in exercising its equitable authority to award fees, the court can and should consider misconduct by counsel. See Agent Orange, 818 F.2d at 222; Travers, 808 F.3d at 542; Rodriguez, 688 F.3d at 655; IMAX, 2012 WL 3133476, at *11. In view of the fact that the adversary process cannot be relied upon to reveal misrepresentations and other ethical violations by counsel seeking fee awards in class actions, it is especially important that, when discovered, such misconduct not be ignored.

The evidently unprecedented appointment of a Master to investigate the application for a prior award of attorneys' fees in this case, and arduous effort, revealed the extensive misconduct detailed in this Memorandum by Labaton and Thornton, particularly. That misconduct contributes to the conclusion that an award at the lower end of the presumptively reasonable 20-30% range is appropriate.

As this is a megafund case, a lower award would also be reasonable. As explained earlier, the Fitzpatrick Study that counsel mischaracterized to this court found that the percentage of the common fund awarded in attorneys' fees "plunged well below 20%" for settlements of more than \$100,000,000. Fitzpatrick Study,

supra, at 838. In settlements, such as this one, between \$250,000,000 and \$500,000,000, Fitzpatrick found the mean award was 17.8% and the median award was 19.5%. See id. The award being made in this case is above both the median and the mean. It is also well-above the 13.16% average award in the 20 cases Professor Rubenstein referenced with common funds of \$100,000,000 to \$500,000,000. See Dkt. Nos. 446-2, Ex. E; 522 at 7; 522-1 at 8-9.

In view of the foregoing, the court concludes that an award of \$60,000,000 is reasonable and most appropriate.

G. Allocation of the Fee and Expense Award

As explained earlier, "the court has the ultimate authority to determine how the aggregate fee is to be allocated among counsel." 5 Rubenstein, Newberg on Class Actions §15:23. The parties have acknowledged this authority. See June 24, 2019 Tr. at 17:8-19 (Dkt. No. 560). In view of the varying degrees of responsibility for the misconduct in this case, the court finds it appropriate to exercise its authority to allocate the fee award among counsel.

By agreement, class counsel allocated the original, vacated fee award as follows:

Firm	Fees	Expenses	Total
Labaton	31,530,948.75	258,666.85	31,789,615.60
Thornton	19,455,266.25	295,315.50	19,750,581.75
Lieff	16,100,910.00	271,944.53	15,399,163.17
Keller Rohrback	2,484,708.33	342,766.63	2,827,474.96
McTigue	2,484,708.34	50,176.39	2,534,884.73
Zuckerman Spaeder	2,484,708.33	38,670.29	2,523,378.62
TOTAL	74,541,250.00	1,257,540.19	75,798,790.19

See Dkt. No. 562-1.

In total, therefore, ERISA Counsel originally received \$7,454,125 in fees and \$431,613 in expenses.²⁸ Using the lodestar formula, the Master's investigation and related proceedings have cost ERISA Counsel an additional \$2,674,365 in fees and \$156,422.84 in expenses.²⁹

Other than the fact that three ERISA firms used the template language concerning fees regularly charged prepared by Labaton, which they should have revised, the conduct of ERISA Counsel was

²⁸ The total amount awarded to ERISA Counsel included payments they made to firms that assisted them in this case. The new award to ERISA Counsel also includes amounts the court understands they will make to these other firms.

²⁹ More specifically, the Master's investigation and related proceedings have cost: Keller Rohrback an additional \$1,082,672.50 in lodestar and \$68,004.72 in expenses; Zuckerman Spaeder an additional \$708,483.50 in fees and \$66,736.43 in expenses; and McTigue an additional \$883,209.00 in fees and \$21,681.69 in expenses. See ERISA Counsel Resp. June 28, 2019 Order at 5-6 n.8 (Dkt. No. 580).

not deficient.³⁰ Rather, they and their clients were victimized by the misconduct of Labaton and Thornton. Therefore, it would be inequitable for ERISA Counsel to receive less in fees or expenses under a new award than under the original, vacated award.

Accordingly, the court is awarding 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. This amounts to \$10,128,490 in fees and \$588,036.15 in expenses. This total amount is comprised of \$3,567,380.83 in fees and \$410,771.35 in expenses for a total of \$3,439,777.42 to Keller Rohrback; \$3,367,917.34 in fees and \$71,858.08 in expenses for a total of \$3,439,775.42 to McTigue; and \$3,193,191.83 in fees and \$105,406.72 in expenses for a total of \$3,298,598.55 to Zuckerman Spaeder.

At the inception of the Masters' investigation, ERISA Counsel agreed with Labaton that if the court reduced the fee award, each firm would "refund to [Labaton] . . . [its] pro rata share of any Court Ordered reduction of fees, expenses, or service awards." R. & R. Ex. 179 (Dkt. No. 401-178) (the "Claw Back Agreement"). However, prior to entering into the Claw Bank Agreement with ERISA Counsel, Labaton did not disclose material information concerning

³⁰ The three ERISA firms that did not revise the misleading template language were Keller Rohrback LLP; Richardson, Patrick, Westbrook & Brickman, LLC; and Feinberg, Campbell & Zack, P.C. See R. & R. at 57.

Labaton's misconduct, and misconduct by its ally Thornton, that caused the Master's investigation to become more protracted and expensive than ERISA Counsel could have reasonably anticipated, and has contributed to the court's conclusion that a \$60,000,000 fee award is most appropriate. As explained earlier, such misconduct included, but was not limited to, the failure of Labaton, Thornton, and Lief, to inform ERISA Counsel of Labaton's obligation and intention to pay Chargois more than \$4,000,000.

ERISA Counsel were duped into entering into the Claw Back Agreement. In these circumstances, it would be inequitable, contrary to public policy, and inconsistent with the court's acknowledged equitable authority to allocate fees, to allow Labaton to enforce the Claw Back Agreement. Therefore, the court deems the Claw Back Agreement to be inoperative and unenforceable.³¹ Cf. Kenda Corp. v. Pot O'Gold Money Leagues, Inc., 329 F.3d 216, 224 (1st Cir. 2003) (fraud in the inducement is grounds for rescission of a contract, an equitable remedy, in Massachusetts); Restatement (Second) of Contracts §164 (1981) ("If

³¹ Labaton recognized that the Claw Back Agreement might be unenforceable if only some of counsel for the class were found to have engaged in misconduct that resulted in a reduction of the \$75,000,000 fee award. More specifically, Goldsmith of Labaton testified that: "if there is a determination that expressly applied only to some firms, then I guess [that] letter would bring up some questions about how [The Claw Back Agreement] would be handled." Goldsmith Dep. Tr. at 159:10-15, R. & R. Ex. 58 (Dkt. No. 401-57).

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."); id. §161 ("[A party's] assertion of only some of the facts without the inclusion of such additional matters as he knows or believes to be necessary to prevent it from being misleading is itself a misrepresentation.").

After the award of \$10,128,490 to ERISA Counsel, there remains \$49,871,510 to be allocated among Labaton, Thornton, and Lieff. Of the original \$75,000,000 fee award, \$67,913,051.88, was divided between them. Labaton received 47%, \$31,789,615.60. Thornton received 29%, \$19,750,581.75. Lieff received 24%, \$16,372,854.53. See Dkt. No. 562-1.

The court now deems it most appropriate to award Lieff \$15,233,397.53, comprised of \$14,961,453 as fees and \$271,944.53 as expenses. This is a reduction of about \$1,140,000 and provides Lieff 30% of the new award to Customer Class Counsel.

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, Liefk made false and misleading representations concerning the regular hourly rates charged for the attorneys who worked on this case. The failure of Liefk 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 Liefk's conduct justify reducing the original fee award to Liefk by about \$1,140,000.

As Thornton engaged in repeated, serious misconduct, the court finds it most appropriate to award Thornton \$13,261,908.10, comprised of \$12,966,592.60 in fees and \$295,315.50 in expenses. This is a reduction of \$6,488,673 from the original fee award, and provides Thornton 25% of the new award to Customer Class Counsel. Again, for example only, acting for Thornton, 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 represented to have been 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 the ERISA Plans and their counsel, and thus from the court and the public. In addition, two of Bradley's partners knew that the declaration drafted for his signature included false and misleading statements and did not correct those statements or inform Bradley of them. Therefore, reducing the fee award to Thornton by almost \$6,500,000 is reasonable and appropriate.

The court finds it most appropriate to award Labaton \$22,202,131.25, comprised of \$21,943,464.40 in fees and \$258,666.85 in expenses. This is a reduction of about \$9,587,484 from the original fee award and provides Labaton 44% of the new award to Customer Class Counsel.

Labaton bears ultimate responsibility for all of the false and misleading representations made to the court in connection with the petition for attorneys' fees, which in many respects violated Federal Rule of Civil Procedure 11(b) and Massachusetts Rules of Professional Conduct as well. Again, for example only, Labaton: 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 violated

the Massachusetts Rules of Professional Conduct by concealing Labaton's obligation to pay Chargois \$4,100,000.

Labaton caused or contributed to the deficiencies in the performance of Thornton and Lief as well. Evidently, no one at Labaton informed Zeiss, the attorney who prepared the settlement documents, that Thornton was paying for staff and contract attorneys employed by Labaton and Lief. If she had been fully informed, she might have discharged her duty to compare the declarations of Thornton and Lief and recognized that each had included the same attorneys in their lodestar calculations, in some instances at different hourly rates. Similarly, Labaton did not inform Zeiss of its obligation to pay Chargois \$4,100,000, thus causing her to draft documents that were false and misleading, and that violated the Massachusetts Rules of Professional Conduct.

In these circumstances, awarding Labaton \$22,202,131.25 is reasonable and most appropriate. As indicated earlier, attached as Exhibit A is a chart which includes the fees each firm received under the original \$75,000,000 award, the fee each firm would have received if the Master's recommendations had been adopted, the fee each firm will receive under the new \$60,000,000 award, and a comparison of the three.

With regard to payment for the cost of the Master, the 2003 Advisory Committee Notes to Federal Rule of Civil Procedure 53(h) state, in part, that "[a] party whose unreasonable behavior has

occasioned the need to appoint a master . . . may properly be charged all or a major portion of the master's fees." In 2017, the court ordered that the initial payment for expense of the Master be made from the fees awarded to Labaton, Thornton, and Lief. See Mar. 8, 2017 Order (Dkt. No. 173) ¶13. The court understands that the first and subsequent payments to compensate the Master have been allocated between them by agreement. The court is not ordering an alteration of that agreement concerning prior payments. However, Labaton and Thornton are being ordered to pay equally the future costs of the Master from the awards made to them. It was their conduct that prompted the appointment of the Master, and caused his investigation to become prolonged and more expensive. Lief's conduct in this case was deficient in the ways previously described, but is not comparable to the misconduct of Labaton and Thornton. All ERISA Counsel should have modified the Labaton template concerning hourly rates to make their respective declarations accurate, as several ERISA firms did. However, if this had been the only issue the appointment of the Master may not have been necessary. Therefore, the court is not requiring ERISA Counsel to contribute to the cost of the Master or requiring Lief to contribute to the future cost of the Master.

It would be inequitable to impose any of the cost of the Master on the class -- the clients of Labaton, Thornton, and Lief. Class Counsel were appointed to represent the class properly.

Instead, Labaton and Thornton violated their ethical duty to disclose to the class Labaton's obligation to pay Chargois \$4,100,000. As explained earlier, at this point in the proceedings the court is a fiduciary for the class and must protect its legitimate interests. See Fidelity/Micron, 167 F.3d at 736. Those interests include protecting the class from being required to underwrite a reduction of the common fund caused by the misconduct of Labaton and Thornton primarily.

Labaton has, on behalf of all plaintiffs' counsel, returned to the Court to date \$4,850,000 to pay the reasonable cost of the Master and those he has employed. The court is now ordering that the Master do additional work to implement the new fee award. Therefore, Labaton and Thornton are being ordered to, by March 11, 2020, pay to the Clerk of the Court an additional \$250,000.00 each to compensate the Master for future work. See Mar. 8, 2017 Order (Dkt. No. 173), ¶13 n.4.

H. Service Awards

The court originally made service awards of \$25,000 to ATRS and \$10,000 to each of the six ERISA class representatives. See Dkt. No. 111 ¶4. There is no reason to decrease the service awards to the ERISA class representatives. Therefore, they are being reinstated.

ATRS invested time in this case. It was, however, deficient in directing and supervising Labaton as Lead Counsel, as

exemplified by its indifference to the payment to Chargois and its attempted ratification of it. Therefore, the service award to ATRS is being reduced to \$15,000.

VI. REFERRAL TO THE MASSACHUSETTS BOARD OF BAR OVERSEERS

A federal judge has an ethical obligation to "take appropriate action upon receipt of reliable information indicating the likelihood . . . that a lawyer violated applicable rules of professional conduct." U.S. Judicial Conf., Code of Judicial Conduct for U.S. Judges, Canon 3(B)(6) (Mar. 2019). The Local Rules of the United States District Court for the District of Massachusetts provide that referring the matter to a state disciplinary authority -- meaning the Massachusetts Board of Bar Overseers -- is a permissible means of discharging this duty. See L.R. 83.6.5(e)(1).

Accordingly, the court is ordering that the Clerk transmit this Memorandum and Order to the Massachusetts Board of Bar Overseers for whatever action, if any, it deems appropriate and for a report concerning the results of its consideration of this matter. Id. In addition, the Clerk shall, upon request, provide to the Board any documents in the public record of this case. Any motion for sealed filings shall be decided by the court after the affected parties have any opportunity to respond to it.

VII. IMPLEMENTATION OF THIS MEMORANDUM AND ORDER

This matter is being resubmitted to the Master for further action. See Fed. R. Civ. P. 53(f)(1). 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 provide them an opportunity to file any objections or comments. Id. at 5. The court has now, in effect, modified the Report. If notice to the class is indeed necessary or appropriate, the court has determined that it should have notice of this decision. The Master is being directed to consult Class Counsel and ERISA Counsel, with regard to whether notice to the class is now legally required or appropriate. It shall also consult CCAF, which has previously asserted that the proposed settlement concerning Labaton, ERISA Counsel, and the Master would require notice to the class under Rule 23(h). See Dkt. No. 451 at 7-8.³²

In addition, the Master shall confer with Class Counsel and ERISA Counsel regarding the logistics concerning the recovery and reallocation of funds previously awarded that is required by this Memorandum and Order.

³² As this decision 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 the Fitzpatrick Study, it is possible that, in view of the court's findings, an objector may assert that the award is too generous.

The Master is being ordered to, by March 23, 2020, report on the foregoing issues and any others relating to implementation of this memorandum and order.

VIII. CONCLUSION

As noted at the outset of this Memorandum, in 1913 Justice Oliver Wendell Holmes said that "[j]udges are apt to be naif, simple-minded men." Occasional Speeches of Justice Oliver Wendell Holmes at 172. Justice Holmes then added that "they need something of Mephistopheles." Id. Once again, this case is a reminder that he was right.

The United States has a proud history of attorneys for whom the law is an honorable calling. As Justice Robert Jackson described those lawyers, each:

loved his profession, he had a real sense of dedication to the administration of justice, he held his head high as a lawyer, he rendered and exacted courtesy, honor and straightforwardness at the Bar. He respected the judicial office deeply

Jackson, "The County Seat Lawyer," 36 A.B.A. J. 497 (June 1950). Because of such attorneys, judges have historically trusted lawyers. Many attorneys still deserve such trust.

However, this case has demonstrated that judges should recognize that in class actions not all lawyers are trustworthy. Some may engage in unethical conduct to obtain clients who will allow them to instigate and control class actions, and to be richly rewarded. When such class actions settle and the adversary process

is not operating, some attorneys may engage in misconduct to maximize their income at the expense of their clients and co-counsel.

As explained earlier, when class actions settle, the judge must serve as a fiduciary or protector for the class. See Fidelity/Micron, 167 F.3d at 736. Judges are, therefore, "subject [] to the high duty of care that the law requires of fiduciaries." Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002). This case has educated this court to understand that in view of its foreseeable fiduciary duties, it is important that judges scrutinize motions to appoint class representatives and lead counsel, as well as motions for awards of attorneys' fees, even -- indeed especially -- when such motions are not opposed. Candid, capable counsel will easily survive such scrutiny. Unethical attorneys should not.

If judges are appropriately skeptical and do the work necessary to discharge their duties as fiduciaries for a class, its members will be protected and the integrity of the administration of justice will be promoted. This effort may sometimes be arduous. It will always be important.

IX. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. The Proposed Resolution of Labaton's Objections to the Special 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 for plaintiffs 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 Lief; 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 Lief 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.

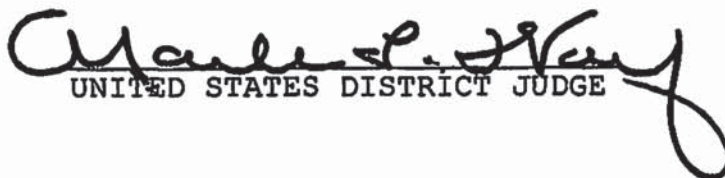

UNITED STATES DISTRICT JUDGE

Exhibit A

COMPARISON OF FEE AND EXPENSE AWARDS

ORIGINAL, VACATED FEE AWARD
 (with Chargois payment added to Customer Class Counsel's Shares)
 (Dkt. No. 562-1)

	Fees	Expenses	Total
Labaton	31,530,948.75	258,666.85	31,789,615.60
Thornton	19,455,266.25	295,315.50	19,750,581.75
Lieff	16,100,910.00	271,944.53	16,372,854.53
Keller Rohrback	2,484,708.33	342,766.63	2,827,474.96
McTigue	2,484,708.34	50,176.39	2,534,884.73
Zuckerman Spaeder	2,484,708.33	38,670.29	2,523,378.62
TOTAL	74,541,250.00	1,257,540.19	75,798,790.19
ERISA Counsel Total	7,454,125.00	431,613.31	7,885,738.31
Customer Counsel Total	67,087,125.00	825,926.88	67,913,051.88

MASTER'S RECOMMENDATIONS

	Fees	Expenses	Total
Labaton	26,081,397.25	258,666.85	26,340,064.10
Thornton	16,922,834.75	295,315.50	17,218,150.25
Lieff	12,365,300.10	419,419.53	12,784,719.63
Keller Rohrback	3,618,041.66	342,766.63	3,960,808.29
McTigue	3,618,041.67	50,176.39	3,668,218.06
Zuckerman Spaeder	3,618,041.66	38,670.29	3,656,711.95
TOTAL	66,223,657.10	1,405,015.19	67,628,672.29
ERISA Counsel Total	10,854,125.00	431,613.31	11,285,738.31
Customer Counsel Total	55,369,532.10	973,401.88	56,342,933.98

NEW FEE AWARD

	Fees	Expenses	Total
Labaton	21,943,464.40	258,666.85	22,202,131.25
Thornton	12,966,592.60	295,315.50	13,261,908.10
Lieff	14,961,453.00	271,944.53	15,233,397.53
Keller Rohrback	3,567,380.83	410,771.35	3,978,152.18
McTigue	3,367,917.34	71,858.08	3,439,775.42
Zuckerman Spaeder	3,193,191.83	105,406.72	3,298,598.55
TOTAL	60,000,000.00	1,413,963.03	61,413,963.03
ERISA Counsel Total	10,128,490.00	588,036.15	10,716,526.15
Customer Counsel Total	49,871,510.00	825,926.88	50,697,436.88

COMPARISON OF TOTALS

	Original	Master	New
Labaton	31,789,615.60	26,340,064.10	22,202,131.25
Thornton	19,750,581.75	17,218,150.25	13,261,908.10
Lieff	16,372,854.53	12,784,719.63	15,233,397.53
Keller Rohrback	2,827,474.96	3,960,808.29	3,978,152.18
McTigue	2,534,884.73	3,668,218.06	3,439,775.42
Zuckerman Spaeder	2,523,378.62	3,656,711.95	3,298,598.55
TOTAL	75,798,790.19	67,628,672.29	61,413,963.03
ERISA Counsel Total	7,885,738.31	11,285,738.31	10,716,526.15
Customer Counsel Total	67,913,051.88	56,342,933.98	50,697,436.88

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,)
Defendant.)

ARNOLD HENRIQUEZ, MICHAEL T. COHN,)
WILLIAM R. TAYLOR, RICHARD A.)
SUTHERLAND, and those similarly)
situated,)
Plaintiffs,)

v.)

C.A. No. 11-12049-MLW

STATE STREET BANK AND TRUST COMPANY,)
STATE STREET GLOBAL MARKETS, LLC and)
DOES 1-20,)
Defendants.)

THE ANDOVER COMPANIES EMPLOYEE)
SAVINGS AND PROFIT SHARING PLAN, on)
behalf of itself and all others)
similarly situated, and JAMES)
PEHOUSHEK-STANGELAND, on behalf of)
himself and all others similarly)
situated,)
Plaintiffs,)

v.)

C.A. No. 12-11698-MLW

STATE STREET BANK AND TRUST COMPANY,)
Defendant.)

MEMORANDUM AND ORDER

WOLF, D.J.

January 19, 2021

I. SUMMARY

As stated in the February 27, 2020 Memorandum and Order awarding and allocating attorneys' fees in this class action:

The Court did not appoint [the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF")] as guardian ad litem for the class or authorize it to participate in proceedings before the Master [that the court appointed to investigate the reliability of representations made to the court in the original request for attorneys' fees]. The court did, however, allow CCAF to make submissions to the court and participate in hearings it conducted. CCAF brought expertise to the proceedings, which was often very helpful to the court.

Dkt. No. 590 at 12; Arkansas Teachers Retirement System v. State Street Bank and Trust Company, 2020 WL 949885, at *4 (D. Mass. Feb. 27, 2020). The court noted that it "would consider ordering that CCAF be compensated for its work if it had the authority to do so." Id., n.3.

CCAF, which is now part of the Hamilton-Lincoln Law Institute ("HLLI"), has moved, under Federal Rule of Civil Procedure 54(d), for an award of attorneys' fees in the amount of \$60,690 as compensation for work that it performed as amicus at the invitation of the court. See Dkt. No. 647. CCAF does not seek compensation for the additional work it did as amicus at its own initiative.¹

¹ For consistency with the February 27, 2020 Memorandum and Order, among other things, the court refers to HLLI as CCAF in this Memorandum.

CCAF requests that its fee be paid from the fees awarded to Labaton Sucharow LLP ("Labaton"), The Thornton Law Firm ("Thornton"), and Lief Cabraser Heiman & Bernstein ("Lief") (collectively "Class Counsel"). Id. at 19. However, CCAF asks that, if necessary, its fee be paid from the common fund. Id.

Class Counsel argue that the court did not appoint CCAF to serve as amicus and CCAF is not entitled to compensation for the work that it did on a voluntary basis. See Dkt. No. 650. However, Class Counsel state that if the court awards CCAF attorneys' fees, they should be paid from the common fund.

The Master takes no position on whether CCAF should be awarded attorneys' fees. See Dkt. No. 652 at 3. The Master argues, however, that if an award to CCAF is made, it should be paid by Class Counsel. Id. at 3-6.

As explained below, the court concludes that it has the equitable authority to award attorneys' fees to CCAF and that it is appropriate to award \$60,690 as compensation solely for work performed in response to court orders inviting CCAF's advice. As the court did not appoint CCAF as amicus, there is a question whether the court has the authority to reduce the award made to Class Counsel to compensate CCAF even though their conduct prompted the court to seek CCAF's assistance. It is, however, permissible and appropriate to make the award from the common fund because

CCAF's work contributed to increasing it. Therefore, the court is doing so.

In the February 27, 2020 Memorandum and Order, the court awarded a total of \$60,000,000 in attorneys' fees, \$15,000,000 less than the original, vacated \$75,000,000 award. It allocated \$15,399,163 to Lief, which is \$1,139,457 less than Lief initially received pursuant to an agreement between Class Counsel. Lief appealed the reduction of its fee. On September 3, 2020, the First Circuit dismissed the appeal without prejudice because it found that there was not yet a definitive, appealable final judgment concerning attorneys' fees. See Case No. 20-1365, Judgment (Dkt. No. 8).

Following argument at a September 22, 2020 hearing, on September 29, 2020, the court ordered Class Counsel to make payments into escrow on January 4 and March 30, 2021, and ordered those funds be distributed on January 15 and April 30, 2021. See Dkt. Nos. 646, 646-1. On January 4, 2021, the court decided that the first payment into escrow did not have to be made until a final judgment concerning attorneys' fees is entered. See Dkt. No. 657.

Lief then reiterated its intent to renew its appeal and objected to its escrowed funds being distributed until the appeal is decided. See Dkt. No. 658. The Master argues that those funds should be distributed as previously ordered. See Dkt. No. 661.

The court finds that it is most appropriate to order that the funds escrowed by Liefv be distributed with the escrowed funds of other Class Counsel unless Liefv obtains a stay pending appeal. Liefv is being ordered to file its appeal and motion to stay in this court by January 27, 2021.

In addition, CCAF has moved to be appointed guardian ad litem to represent the interests of the class in Liefv's appeal. The issues addressed in the February 27, 2020 Memorandum and Order arose in meaningful measure because the usual adversary process did not operate to test representations made by Class Counsel in their request for an award of \$75,000,000 as attorneys' fees. There is no party to represent the interests of the class in responding to Liefv's appeal. The court will ask the First Circuit to invite it, as fiduciary for the class, to retain counsel to appear at public expense. Therefore, CCAF's motion to be appointed guardian ad litem is being denied without prejudice to being renewed if the First Circuit denies the court's request.

II. DISCUSSION

A. CCAF'S Request for Attorneys' Fees

As indicated earlier, CCAF requests an award of attorneys' fees in the amount of \$60,690 for work performed in 2018, at the request of the court. It does not request compensation for work performed previously or subsequently solely at its own initiative. The court finds that, in the unique circumstances of this case, it

is permissible and appropriate to compensate CCAF reasonably for the work it performed in response to the court's invitation; that \$60,690 will provide reasonable compensation for that work; and that the payment should be made from the common fund, rather than by Class Counsel.

CCAF is a non-profit organization that describes its mission as representing the interests of shareholders in connection with the settlement of class action lawsuits, often by challenging requests for attorneys' fees. Center for Class Action Fairness, HAMILTON LINCOLN LAW INSTITUTE, <https://hlli.org/class-action-fairness/>. CCAF states on its website that "[w]hen CCAF prevails, lawyers get less, class members get more, and the rule of law is strengthened." Id.

On February 6, 2017, the court gave notice that it was considering appointing a Master to investigate the accuracy and reliability of information provided by Class Counsel in support of their successful request for an award of attorneys' fees in the amount of \$75,000,000. See Dkt. No. 117.

After the February 6, 2017 Order, CCAF filed a motion to be appointed guardian ad litem for the class or to serve as amicus, and a supporting memorandum. See Dkt. Nos. 126, 126-1. CCAF asked the court to expand the scope of the Master's investigation to include, among other things, whether Class Counsel had misrepresented a study by Brian Fitzpatrick (the "Fitzpatrick

Study") in their request that the court award 25% of the \$300,000,000 common fund as attorneys' fees. See Dkt. No. 126-1 at 13. It also argued that the court should order that Class Counsel pay the cost of the Master's work. The court did both. See Dkt. No. 173.

In addition, CCAF noted that unless the original award of attorneys' fees was vacated, Class Counsel might later argue that the court lacked jurisdiction to reduce it. CCAF asked to be appointed guardian ad litem for the class, to serve pro bono if necessary, in part to permit it to move under Federal Rule of Civil Procedure 60 to vacate the \$75,000,000 award. Class counsel opposed CCAF's request to be appointed guardian ad litem, but agreed to move to vacate the original award itself. See Dkt. No. 178. The court granted the motion to vacate. See Dkt. No. 331.

On March 7, 2017, the court heard argument on CCAF's request to be appointed guardian ad litem, or to serve as amicus before the Master. See Dkt. No. 172. It took these requests under advisement.

CCAF is not seeking attorneys' fees for any of the foregoing work.

The Master conducted a thorough investigation, which became protracted after he discovered that Labaton had paid \$4,100,000 to Damien Chargois, a lawyer who helped obtain the Arkansas Teacher Retirement System ("ATRS") as a client for Labaton, but did not

work on this case. See Dkt. No. 590 at 62-68. In his voluminous Report, the Master recommended, among other things, that the court award about \$6,200,000 less than the \$75,000,000 initially awarded, including disgorgement by Labaton of the \$4,100,000 paid to Chargois, and reallocate the attorneys' fees awarded. Id. at 67. Class Counsel then asked the court to rule that the Master could not respond to the many objections to his Report. See Dkt. No. 302, 310.

On July 31, 2018, the court issued an Order that stated, in part:

The Report, with its Executive Summary, is more than 400 pages. The objections to it are comparably lengthy. The record to date, which is not complete, includes thousands of pages. Ordinarily in such matters the operation of an adversary process promotes well-informed decision-making.

When the Master was appointed the court took under advisement the Motion of the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") to participate as a guardian ad litem for the class or, alternatively, an amicus to the court. See Mar. 8, 2017 Order (Docket No. 172), ¶1. That request is now relevant to the Motion [for an Order that the Master could not respond to objections to the Report].

Dkt. No. 410. The court, therefore, asked CCAF whether it remained willing to serve as guardian ad litem or amicus, and, if so, the financial and other terms on which it was willing to serve. Id. The court also invited CCAF to address the court's authority to permit the Master to respond to the objections to the Report and

related issues. Id. It is for work performed in response to this Order and subsequent orders that CCAF requests attorneys' fees.

In a 28-page Memorandum, CCAF stated that it remained willing to serve as guardian ad litem, but could not afford to do so pro bono, in part because the complexity of the matter would require the retention of co-counsel. See Dkt. No. 420. Nevertheless, CCAF joined the Master in arguing that the court had the authority, under Federal Rule of Civil Procedure 53(f)(1), to instruct the Master to respond to objections to the Report, and provided caselaw supporting that contention. See id. at 8-13. Its position proved to be persuasive.

CCAF also argued that the court should award less in attorneys' fees than the Master recommended. Id. The court ultimately agreed. See Dkt. No. 590-1, Ex. A. The court did not, however, decide CCAF's motion to be appointed guardian ad litem.

In an October 11, 2018 Order the court invited CCAF to participate in an October 15, 2018 hearing to address whether the court should approve a proposed settlement between the Master and Labaton. See Dkt. No. 488. CCAF did participate and opposed approving the settlement. It subsequently filed a 23-page memorandum in opposition to the proposed settlement. See Dkt. No. 515. CCAF also argued that the fee award recommended by the Master in the Report was excessive, and that a compensated guardian ad litem should be appointed to advocate a lesser fee award, which

would result in more money for the class. Id. at 19. The court did not accept the proposed partial settlement and ultimately awarded about \$6,200,000 less in attorneys' fees than the Master recommended. See Dkt. No. 590-1, Ex. A.

CCAF also participated in a November 7, 2018 hearing at which the court asked CCAF to address the Fitzpatrick Study, which CCAF referenced in February 2017, concerning awards in megafund cases. See Nov. 7, 2018 Tr. (Dkt No. 519) at 103-08. On November 20, 2018, CCAF filed a 38-page memorandum discussing, among other things, the Fitzpatrick Study that showed that for settlements between \$250,000,000 and \$500,000,000 the mean fee awarded was 17.8%. See Dkt. No. 522 at 4-5. CCAF amplified its argument that Class Counsel had mischaracterized the Fitzpatrick study as supporting an award of 25% of the common fund, \$75,000,000. Id. at 7-8. CCAF also pointed out that, in a treatise, Class Counsel's expert Professor William Rubinstein, wrote that for settlements over about \$45,000,000 the average award was about 21%, rather than 25%. See id. at 7.

The court found that CCAF properly characterized the Fitzpatrick Study and Rubinstein's treatise. It relied, in part, on them in finding that an award of 20% of the common fund -- \$60,000,000 -- was reasonable and most appropriate in this case. See Dkt. No. 590 at 129-30.

CCAF offered to participate as amicus in hearings on June 24, 25, and 26, 2019, to advocate for a lesser fee award than Class Counsel requested and the Master recommended. See Dkt. No. 545. Despite the objection of Class Counsel, the court permitted CCAF to participate. CCAF also filed a Memorandum arguing that proposed testimony by Fitzpatrick was irrelevant to whether his study had been mischaracterized and should not be permitted. See Dkt. No. 553. The court agreed. See Dkt. No. 554. CCAF also made a post-hearing submission analyzing voluminous time records for Class Counsel's staff attorneys. See Dkt. No. 583.

In the February 27, 2020 Memorandum and Order, the court ordered the Master to consult CCAF concerning notice to the class of the new, \$60,000,000 fee award. See Dkt. No. 590 at 158.

In essence, as the court wrote in the February 27, 2020 Memorandum and Order, "CCAF brought expertise to the proceedings, which was often very helpful to the court." See Dkt. No. 590 at 12. Its contributions began in 2017 and continued into 2020. It served as amicus without requesting compensation for its services. The court introduced the possibility of compensating CCAF, stating in the February 27, 2020 Memorandum and Order that it would "consider ordering that CCAF be compensated for its work if it had the authority to do so." Id. at 12, n.3. After discussion at the September 22, 2020 hearing, the court ordered CCAF to file a motion

for attorneys' fees in order to permit the court to enter a definitive, appealable order concerning fees. See Dkt. No. 646.

CCAF's work was not only helpful to the court, it also contributed to a decision by the court that provided an additional almost \$15,000,000 for the benefit of the class. CCAF deserves to be reasonably compensated.

As indicated earlier, CCAF requests compensation only for work performed in 2018 in response to explicit invitations by the court. See Dkt. No. 647-1 at 5. It does not seek attorneys' fees for any other work.

It is unclear whether the court has the authority to order Class Counsel to, in effect, pay an award to CCAF. Under the established "American Rule," "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). As a related rule, "fees of amici curiae employed and paid by persons who are not parties to the action ordinarily will not be allowed." Wright & Miller, Federal Practice and Procedure, §2675 (4th ed. 2020). These general rules are subject to certain statutory exceptions, none of which are implicated here. See, e.g., Alyeska at 257-58. With regard to its request that Class Counsel be ordered to pay any award to it, CCAF relies on the common law Appointed Amicus Exception. See Dkt. No. 647 at 10-12.

The Appointed Amicus Exception to the American Rule allows an amicus to recover attorneys' fees under certain conditions. As one leading treatise has explained:

Ordinarily, an amicus curiae who participates in a proceeding by leave of court or by court appointment is not entitled to compensation when he or she serves the interests of litigants, witnesses or any other private party....However, where the court appoints an amicus curiae who renders services which prove beneficial to a resolution of the questions presented, the court may properly award compensation and direct it to be paid by the party responsible for the situation which prompted the court to make the appointment.

4 Am. Jur. 2d Amicus Curiae § 12.

Neither the Supreme Court nor the First Circuit has yet decided whether or when a court may award attorneys' fees to an amicus for assistance it renders to the court under the Appointed Amicus Exception. However, other Courts of Appeals have held that "[c]ommon law permits such an award if (1) a court-appointed amicus rendered services that helped resolve the question presented, and (2) the party taxed caused the situation prompting the appointment." Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont., 694 F.2d 203, 205 (9th Cir. 1982) (citing Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 853-54 (D.C. Cir. 1981), cert. denied, 455 U.S. 994 (1982)); see also Morales v. Turman, 820 F.2d 728, 731 (5th Cir. 1987) (accord).

Courts have construed this exception narrowly and denied attorneys' fees to amici who were not formally appointed. For

example, in Morales, the Fifth Circuit denied attorneys' fees to volunteer amici despite the significant aid they rendered to the district court. See Morales, 820 F.2d at 731. There, amici were granted leave to participate "as fully and to the same extent as though they were actual parties in interest." Id. at 730. They interviewed expert witnesses, participated in depositions, prepared pretrial memoranda, presented witnesses at trial, and cross-examined parties' witnesses. See id. Nevertheless, the Fifth Circuit concluded that the district court erred in granting the amici attorneys' fees because "amici were volunteers . . . not appointees," and "the district court did not seek the aid of amici, but allowed them to participate at their request." See id. at 731 (emphasis added). Therefore, regardless of the benefits that amici provided to the court, they did not satisfy the first condition of the Appointed Amicus Exception. See id.; see also Miller-Wohl Co., 694 F.2d at 205 (fees denied because "amici fail to satisfy the underlying requirement: they were volunteers, not appointees.")

In contrast, in the instant case the court did seek the aid of CCAF with regard to the work for which it is seeking compensation. Although the court did not state in 2018 that it was "appointing" CCAF as amicus, arguably that is a formality that should not preclude imposing the cost of CCAF's services on Class Counsel who prompted the court's request for those services.

However, as it is uncertain whether the court has the authority to do so, and there is an available, appropriate alternative that will not inject another issue to be further litigated in this contentious case, the court is making an award to CCAF to be paid from the common fund instead.

The court's "authority to order reimbursement from a common fund has its origins in equity . . ." In re Fidelity Micron, 167 F.3d 735, 737 (1st Cir. 1999); see also Dkt. No. 520 at 77-79. Under the Common Fund doctrine, "[a] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). The Common Fund doctrine "is founded on the equitable principle that those who have profited from litigation should share its costs." In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995). This rule "reflect[s] the traditional practice in courts of equity" and has been applied "in a wide range of circumstances as part of [courts'] inherent authority." US Airways, Inc. v. McCutchen, 569 U.S. 88, 104 (2013) (internal citations and quotations omitted).

Amici who render services voluntarily to the court generally "have been unsuccessful in collecting fees under the common fund/unjust enrichment theory." See William Rubinstein, 5 Newberg

on Class Actions §15:35 (5th ed. 2020); see also Miller-Wohl Co., 694 F.2d at 204 (accord). This is consistent with the Restatement (Third) of Restitution and Unjust Enrichment, §29 Common Fund (2011), which states that "a beneficiary is liable in restitution only if . . . (c) the claimant has neither acted gratuitously nor received full compensation from others."

Here, CCAF did not act gratuitously in rendering the services for which it seeks compensation. Rather, it was responding to court orders requesting its assistance. Its work complemented, rather than duplicated, the work of the Master. CCAF's expertise and efforts strengthened the adversary process. Its efforts contributed to the court's conclusion that an award of attorneys' fees in the amount of \$60,000,000 was appropriate, providing the class with almost \$15,000,000 more than the original fee award, and about \$6,200,000 more than the Master recommended.

Objectors have been awarded attorneys' fees under the Common Fund doctrine for their efforts that enhanced a common fund for a class. See, e.g., In re Sw. Airlines Voucher Litig., 898 F.3d 740, 746 (7th Cir. 2018); Federal Judicial Center, Awarding Attorneys' Fees and Managing Fee Litigation 72 (3d ed. 2015); Lobur v. Parker, 378 F. App'x 63, 65 (2d Cir. 2010); Elliott v. Sperry Rand Corp., 680 F.2d 1225, 1227 (8th Cir. 1982); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 288 (7th Cir. 2002); Duhaime v. John Hancock Mut. Life Ins. Co., 2 F. Supp. 2d 175, 176 (D.

Mass. 1998). See also McCoy v. UPS, 222 F. App'x 87 (2d Cir. 2007) (denying fee award to objectors who "failed to show that the settlement was improved as a result of their efforts") (internal quotation marks omitted). It is similarly appropriate to make an award to CCAF from the common fund in this case.

Even though the court did not state that it was exercising its inherent equitable authority to appoint CCAF as amicus, the court need not "exal[t] form over substance." Russell v. Bd. of Plumbing Examiners of Cty. of Westchester, 74 F. Supp. 2d 349, 351, n.2 (S.D.N.Y. 1999), aff'd, 1 F. App'x 38 (2d Cir. 2001). For example, in Russell, the court awarded attorneys' fees to an amicus as if it were an intervenor. See id. at 351. The court noted that amicus's "counsel contributed to the Plaintiffs' victory," which "justif[ied] reasonable compensation and blurr[ed] any technical distinction between intervenors and amici." See id. The court noted that in the particular circumstances of that case, awarding fees to the amicus would not "open the flood-gates to litigious meddlers as the Wilder court feared." See id.

In Wilder v. Bernstein, 965 F.2d 1196, 1203 (2d Cir. 1992), the Second Circuit held that treating intervenors as prevailing parties for the purpose of fee shifting in a civil rights case would "not open the flood-gates to amicus curiae, good Samaritans, or even litigious meddlers" seeking compensation. In the unique

circumstances of this case, nor will awarding attorneys' fees from the common fund to CCAF.

It is reasonable and appropriate to award CCAF the \$60,690 that it requests. In the July 20, 2020 Notice sent to the class, the court stated that:

The Court has not yet decided whether an award will be made to CCAF and, if so, whether it will be made from funds that would otherwise be distributed to the class. However, any award to CCAF will not materially reduce the additional more than \$14,000,000 the class will receive as a result of the Court's February 27, 2020 decision.

Dkt. No. 623 at 5. No class member objected. Nor has Class Counsel or anyone else involved in this case argued that a \$60,690 fee award would be excessive.

The First Circuit has held that courts may award fees from a common fund "either on a percentage of the funds basis or by fashioning a lodestar." Thirteen Appeals, 56 F.3d at 307. CCAF has based its fee request on its lodestar, which is most appropriate. See Dkt. No. 647 at 17. The lodestar is the number of hours productively spent on the case multiplied by reasonable hourly rates. Id. at 305. CCAF seeks compensation for 218.4 hours worked in response to court orders. CCAF worked efficiently and it is reasonable to compensate it for working 218.4 hours. The hourly rates used in calculating the lodestar -- \$275 to \$365 per hour -- are less than have been approved for the same lawyers in other cases. See Bednarz Decl. (Dkt. No. 647-1) ¶¶16, 21-23. They

are far less than the court found to be reasonable for Class Counsel. See, e.g., Dkt. No. 590 at 65, 134-35 (rates ranging from \$535 to \$1000 per hour for partners was reasonable). In contrast to Class Counsel, CCAF has not requested compensation for a multiplier of its lodestar. Therefore, CCAF's lodestar is reasonable.

Awarding CCAF attorneys' fees in the amount of \$60,690 is also reasonable in view of its contribution to the court's decision to award \$60,000,000 in attorneys' fees and to thus increase the common fund by almost \$15,000,000. The Master's work and the court's independent analysis also contributed greatly to this decision. However, "[c]ourts have [] awarded fees to objectors for benefits that defy easy conversion into dollars" Federal Judicial Center, Awarding Attorneys' Fees and Managing Fee Litigation 72 (3d ed. 2015) (citing Lobur, 378 F. Appx. at 65). In the context of making an award to objectors, the Seventh Circuit stated that "[t]he principles of restitution that authorize such a result also require, however, that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class." Reynolds, 288 F.3d at 288.

In this case, as advocated by CCAF, the court not only reduced the original fee award, but awarded about \$6,200,000 less than recommended by the Master. Although CCAF was not solely

responsible for this decision, its work was worth to the class many multiples of the \$60,690 it is seeking.

Therefore, the court is ordering that CCAF be awarded \$60,690 from the common fund.

B. The Distribution of Lief's Escrowed Funds

As explained earlier, the court has previously ordered that Class Counsel make two payments into escrow to reimburse the class as a result of the court's decision to vacate the original \$75,000,000 fee award and to award \$60,000,000 instead. Lief is being ordered to escrow about \$1,139,457, one half on January 27, 2021, and the other half on March 30, 2021. The court has previously ordered that the funds escrowed by Class Counsel, including Lief's, be distributed about two weeks after they are received.

Lief does not object to making the required payments into escrow. As it intends to appeal the reduction of its fees, however, Lief objects to the distribution of its escrowed funds before its appeal is decided.

At the September 22, 2020 hearing, CCAF argued without contradiction that if Lief's \$1.14 million were not distributed until after the February 27, 2020 decision is affirmed, "about half the class would get checks under \$10," and that it would not be economically feasible to issue them. Sept. 22, 2020 Tr. (Dkt. No. 642) at 22. In any event, as the court indicated at the

hearing, it is most appropriate that, after final judgment is entered pursuant to this Order, Liefv file a motion for a stay pending appeal.

Federal Rule of Appellate Procedure 8 requires in pertinent part that in order to move for a stay in the Court of Appeals, the movant must "show that moving first in the district court would be impracticable" or "state that, a motion having been made, the district court denied the motion or failed to afford the relief requested." See also In re Montes, 677 F.2d 415, 416 (5th Cir. 1982) (dismissing application for failure to first apply to district court); Whole Woman's Health v. Paxton, 972 F.3d 649, 653-54 (5th Cir. 2020) (same); Walker v. Lockhart, 678 F.2d 68, 70 (8th Cir. 1982) ("Rule 8 of the Federal Rules of Appellate Procedure directs that [an application for an injunction pending appeal] should ordinarily be made in the first instance in the district court"); Hirschfeld v. Bd. of Elections in City of New York, 984 F.2d 35, 38 (2d Cir. 1993) ("Rule 8(a) of the Federal Rules of Appellate Procedure specifies that an application for a stay of a judgment or order must generally be made first to the district court").

At the September 22, 2020 hearing, Liefv stated that after a final judgment entered, it would promptly file its notice of appeal and raise the same issues on appeal that it raised in its original appellate brief. See Sept. 22, 2020 Tr. (Dkt. No. 642) at 15.

Therefore, in a September 22, 2020 Order, the court stated that "Lieff should be prepared to appeal and move for a stay pending appeal as soon as [CCAF]'s request for attorneys' fees is decided." Dkt. No. 646 at 4. Lieff is now being ordered to appeal and file in this court, by January 27, 2021, its motion for a stay pending appeal and a memorandum addressing the applicable standard. See Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Common Cause Rhode Island v. Gorbea, 970 F.3d 11, 14 (1st Cir. 2020); Canterbury Liquors & Pantry v. Sullivan, 999 F. Supp. 144, 149 (D. Mass. 1998).

The court will decide Lieff's motion to stay and, if it denies it, provide a reasonable period of time for Lieff to attempt to obtain a stay from the First Circuit. The court is ordering that Class Counsel make their first payments into escrow by January 27, 2021. It intends to order that the first distribution from escrow be made 14-days after it is determined whether Lieff's payment into escrow will be included in that distribution.

C. CCAF's Motion for Appointment as Guardian Ad Litem to Represent the Class in Lieff's Appeal

As indicated earlier, CCAF has moved to be appointed guardian ad litem to represent the interests of the class in Lieff's appeal. The issues addressed in the February 27, 2020 Memorandum and Order arose in meaningful measure because the usual adversary process did not operate to test the representations made by Class Counsel

in their request for an award of \$75,000,000 as attorneys' fees. There is no party to represent the interests of the class in responding to Loeff's appeal.

However, as the court stated in a June 18, 2020 Order:

As described in detail in the February 27, 2020 Order, the issues it addresses arose in meaningful measure because a petition for attorneys' fees in a class action is essentially an ex parte matter and the usual adversary advocacy does not operate to educate the court. Having read Loeff's June 9, 2020 appellate brief, the court believes that the First Circuit would benefit from an adversarial presentation by counsel to be retained by this court to represent the court and the February 27, 2020 Order.

Dkt. No. 611 at 2-3. On June 28, 2020, the court asked the First Circuit to invite it, as fiduciary for the class, to retain counsel at government expense "to address issues of fact and law that will be important to the First Circuit's ability to make a properly informed decision concerning Loeff's appeal." Dkt. No. 615 at 6.

The court intends to renew this request after Loeff appeals the final judgment now being entered. Loeff has stated that it would be a "good idea" for this court to retain counsel concerning Loeff's appeal and that it would not oppose the request to do so. Sept. 22, 2020 Tr. (Dkt. No. 642) at 271. Loeff reiterated this in opposing CCAF's request to be appointed guardian ad litem, writing that "Loeff Cabraser has already stated that it does not oppose the Court's request to hire new counsel to defend the February 27 Order." Dkt. No. 651 at 2.

The court continues to find that the First Circuit would benefit from the operation of the adversary process in deciding Lief's appeal and that it is preferable that the court, as fiduciary for the class, be authorized to retain counsel, at government expense, who "hasn't been part of this battle for years."

Accordingly, CCAF's motion to be appointed guardian ad litem is being denied without prejudice. It may be renewed if the First Circuit does not invite the court to retain counsel.

III. ORDER

In view of the foregoing, 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. Lief 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 Memorandum and 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.

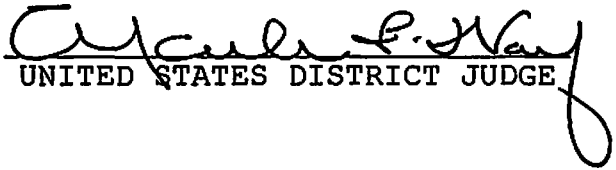

UNITED STATES DISTRICT JUDGE

EXHIBIT 1

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,)
Defendant.)
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM)
R. TAYLOR, RICHARD A. SUTHERLAND, and those)
similarly situated,)
Plaintiffs,)
v.) C.A. No. 11-12049-MLW
STATE STREET BANK AND TRUST COMPANY,)
STATE STREET GLOBAL MARKETS, LLC and DOES 1-)
20,)
Defendants.)
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND)
PROFIT SHARING PLAN, on behalf of itself and)
all others similarly situated, and JAMES)
PEHOUSHEK-STANGELAND, on behalf of himself)
and all others similarly situated,)
Plaintiffs,)
v.) C.A. No. 12-11698-MLW
STATE STREET BANK AND TRUST COMPANY,)
Defendant.)

SECOND REVISED PAYMENT PLAN

Date	Purpose/recipient	Total amount paid	Payment by Labaton	Payment by Lieff Cabraser	Payment by Thornton	Funds paid to the class
9/1/20	Lead Counsel to file motion for authorization to conduct First Distribution to ERISA and Public & Other Class members; deadline by which Final Distribution to Registered Investment Companies (RICs)	\$128.75 million				All
1/27/21	First Customer Class Counsel payment into escrow	\$8,607,807.51	\$4,793,742.18	\$569,728.50	\$3,244,336.83	
14 days after final decision on whether funds from Lieff will be distributed	First Distribution to Class and ERISA Counsel					\$7,192,413.59 to Class, or \$6,907,549.34 if Lieff excluded 1,415,393.92 to ERISA Counsel, or \$1,130,529.67 if Lieff excluded
14 days after final decision on whether funds from Lieff will be distributed	First Distribution to CCAF from Common Fund					\$30,345.00 to CCAF

3/3/21	Second Customer Class Counsel payment into escrow	\$8,607,807.49	\$4,793,742.17	\$569,728.50	\$3,244,336.82	
4/30/21	Second Distribution to Class and ERISA Counsel					\$7,192,413.59 to Class, or \$6,907,549.34 if Lieff excluded 1,415,393.92 to ERISA Counsel, or \$1,130,529.67 if Lieff excluded
4/30/21	Second Distribution to CCAF from Common Fund					\$30,345.00 to CCAF

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,)
Defendant.)

ARNOLD HENRIQUEZ, MICHAEL T. COHN,)
WILLIAM R. TAYLOR, RICHARD A.)
SUTHERLAND, and those similarly)
situated,)
Plaintiffs,)

v.)

C.A. No. 11-12049-MLW

STATE STREET BANK AND TRUST COMPANY,)
STATE STREET GLOBAL MARKETS, LLC and)
DOES 1-20,)
Defendants.)

THE ANDOVER COMPANIES EMPLOYEE)
SAVINGS AND PROFIT SHARING PLAN, on)
behalf of itself and all others)
similarly situated, and JAMES)
PEHOUSHEK-STANGELAND, on behalf of)
himself and all others similarly)
situated,)
Plaintiffs,)

v.)

C.A. No. 12-11698-MLW

STATE STREET BANK AND TRUST COMPANY,)
Defendant.)

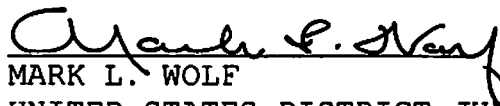
FINAL JUDGMENT CONCERNING ATTORNEYS' FEES AND SERVICE AWARDS

Pursuant to the January 19, 2021 Memorandum and Order (Dkt. No. 662) and the February 27, 2020 Memorandum and Order (Dkt. No. 590), FINAL JUDGMENT CONCERNING ATTORNEYS' FEES is hereby ENTERED and ALLOCATED as follows:

- \$60,000,000 is awarded to counsel for plaintiffs as reasonable fees and expenses.
- From the \$60,000,000 a total of \$22,202,131.25 shall be paid to Labaton Sucharow LLP.
- From the \$60,000,000 a total of \$13,261,908.10 shall be paid to The Thornton Law Firm.
- From the \$60,000,000 a total of \$15,233,397.53 shall be paid to Lief Cabraser Heiman & Bernstein, LLP.
- From the \$60,000,000 a total of \$3,978,152.18 shall be paid to Keller Rohrback LLP.
- From the \$60,000,000 a total of \$3,439,775.42 shall be paid to McTigue Law LLP.
- From the \$60,000,000 a total of \$3,298,598.55 shall be paid to Zuckerman Spaeder LLP.
- An award of \$60,690 shall be paid from the common fund to the Hamilton-Lincoln Law Institute Center for Class Action Fairness.
- A Service Award of \$15,000 shall be paid from the common fund to the Arkansas Teacher Retirement System.

- A Service Award of \$10,000 shall be paid from the common fund 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.

Date: January 19, 2021


MARK L. WOLF
UNITED STATES DISTRICT JUDGE

United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title III. Pleadings and Motions

Federal Rules of Civil Procedure Rule 11

Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions

Currentness

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(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:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(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; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) **In General.** 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.

(2) **Motion for Sanctions.** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under [Rule 5](#), but it must not be filed or be

presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) *Inapplicability to Discovery.* This rule does not apply to disclosures and discovery requests, responses, objections, and motions under [Rules 26](#) through [37](#).

CREDIT(S)

(Amended April 28, 1983, effective August 1, 1983; March 2, 1987, effective August 1, 1987; April 22, 1993, effective December 1, 1993; April 30, 2007, effective December 1, 2007.)

Fed. Rules Civ. Proc. Rule 11, 28 U.S.C.A., FRCP Rule 11
Including Amendments Received Through 5-1-21

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT)
SYSTEM, et al,)
Plaintiffs,)
)
v.)
)
STATE STREET CORPORATION,)
STATE STREET BANK & TRUST)
COMPANY, and STATE STREET)
GLOBAL MARKETS, LLC)
Defendants.)

C.A. No. 11-10230-MLW

MEMORANDUM AND ORDER

WOLF, D.J.

January 11, 2012

Plaintiff in this putative class action lawsuit has filed an Assented-To Motion ("the motion") seeking to appoint Labaton Sucharow LLP ("Labaton Sucharow") as interim lead counsel for the proposed class pursuant to Federal Rule of Civil Procedure 23(g)(3). See Plaintiff's Assented-To Mot. for Appointment of Interim Lead Counsel for the Proposed Class (Docket No. 7). In addition, defendants have filed a motion to dismiss. See Defendants' Motion to Dismiss and Request for Oral Argument (Docket No. 18). For the following reasons, plaintiff's motion for appointment of interim lead counsel is being allowed and a hearing is being scheduled on the motion to dismiss.

I. BACKGROUND

In April 2011, plaintiff Arkansas Teacher Retirement System

("ARTRS") filed an amended complaint in the District of Massachusetts, alleging that defendants State Street Corporation, State Street Bank and Trust Company, and State Street Global Markets, LLC, engaged in deceptive acts and practices in connection with foreign exchange transactions executed on behalf of their custodial bank clients, including the plaintiff. See Amended Compl. at ¶¶ 1, 3, 8. ARTRS asserted claims under Sections 2, 9 and 11 of the Massachusetts Consumer Protection Act, M.G.L. c. 93A, and further claimed breach of duty of trust, breach of contract, and negligent misrepresentation. See id. at ¶¶ 88-89, 97-98, 111-112, 120-121, 137, 140. Plaintiff sought to maintain the lawsuit as a class action pursuant to Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(3). See id. at ¶¶ 21-31.

Plaintiff moved to appoint Labaton Sucharow as interim lead counsel for the proposed class pursuant to Federal Rule of Civil Procedure 23(g)(3), seeking to facilitate efficient management of the litigation and to clarify responsibilities for: (1) opposing the motion to dismiss; (2) conducting discovery; (3) moving for class certification; and (4) conducting potential settlement discussions. See Plaintiff's Assented-To Mot. for Appointment of Interim Lead Counsel for the Proposed Class (Docket No. 7); Memorandum of Law in Support of Plaintiff's Assented-To Mot. for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, at 1-2, 4 (Docket No. 8). Labaton Sucharow, with

Thornton & Naumes, LLP ("Thornton & Naumes") and Lief Cabraser Heimann & Bernstein, LLP ("LCHB"), serve as counsel for the plaintiff (collectively, "plaintiff's counsel"). In its memorandum in support of the motion, plaintiff states that Thornton & Naumes will serve as liaison counsel for ARTRS, and LCHB will serve as additional counsel for the plaintiff and the proposed class. See Memorandum of Law in Support of Plaintiff's Assented-To Mot. for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, at 1 (Docket No. 8).

II. DISCUSSION

Rule 23(g)(3) of the Federal Rules of Civil Procedure authorizes a court to "designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Although not required, appointment of interim class counsel may help "clarif[y] responsibility for protecting the interests of the class during precertification activities, such as making and responding to motions, conducting any necessary discovery, moving for class certification, and negotiating settlement." Federal Judicial Center, Manual For Complex Litigation § 21.11, at 246 (4th ed. 2004). See also Fed. R. Civ. P. 23(g)(3), 2003 Advisory Committee Notes for Rule 23(g).

Counsel's duty is to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4). See also Fed. R. Civ. P. 23(g)(3), 2003 Advisory Committee Notes for Rule 23(g).

In appointing interim counsel, courts generally look to the factors used for determining adequacy of class counsel under Federal Rule of Civil Procedure 23(g)(1)(A):

- "(i) the work counsel has done in identifying or investigating potential claims in the action;
- (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
- (iii) counsel's knowledge of the applicable law; and
- (iv) the resources that counsel will commit to representing the class[.]"

In addition, a court may "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. P. 23(g)(1)(B).

Plaintiff's counsel have invested substantial resources in investigating and preparing this action. See Memorandum of Law in Support of Plaintiff's Assented-To Mot. for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, at 4-5. Each of the firms, including Labaton Sucharow, have extensive experience with complex commercial litigation and class action lawsuits involving financial and securities fraud. See id. at 5-9. The firms are knowledgeable the applicable areas of law, and individually and collectively possess the resources required to represent the proposed class. See id. Moreover, plaintiff's

counsel concur with the proposed leadership structure. See Plaintiff's Assented-To Mot. for Appointment of Interim Lead Counsel for the Proposed Class (Docket No. 7).

Accordingly, it is hereby ORDERED that:

1. Plaintiff's motion for appointment of Labaton Sucharow as interim lead counsel is ALLOWED. Pursuant to Fed. R. Civ. P. 23(g)(3), the court designates Labaton Sucharow as interim lead counsel to act on behalf of all plaintiffs and the proposed class in the action until and unless class counsel is appointed, with the responsibilities hereinafter described. Thornton & Naumes shall serve as liaison counsel for plaintiff and the proposed class, and LCHB shall serve as additional attorneys for plaintiff and the proposed class.

2. The court appoints Labaton Sucharow LLP to be responsible for: (a) ensuring that orders of the court are served on all counsel; (b) communicating with the court on behalf of all counsel in each case as to scheduling matters; and (c) maintaining a master service list of all parties and their respective counsel.

3. Interim lead counsel shall have sole authority over the following matters on behalf of all plaintiffs: (a) the initiation, response, scheduling, briefing and argument of all motions; (b) the initiation and coordination of plaintiffs' pretrial activities and plan for trial, including but not limited to the scope, order and conduct of all discovery proceedings and of all trial and post-trial proceedings; (c) the delegation of work assignments to

other plaintiffs' counsel and arrangement of meetings of plaintiffs' counsel as they may deem appropriate; (d) designation of which attorneys may appear at hearings and conferences with the court; (e) the retention of experts; (f) the timing and substance of any settlement negotiations with defendants; and (g) other matters concerning the prosecution and/or resolution of the action.

4. Interim lead counsel shall have sole authority to communicate with defendants' counsel and the court on behalf of all plaintiffs unless that authority is expressly delegated to other counsel. Defendants' counsel may rely on all agreements made with interim lead counsel, and such agreements shall be binding on all other plaintiffs' counsel.

5. Interim lead counsel is authorized to create committees of plaintiffs' counsel as it deems appropriate for the efficient prosecution of this action. Any such committee shall operate under the direct supervision of interim lead counsel.

6. Subject to any restrictions agreed upon or set forth in a protective order, all discovery obtained by any plaintiff in these cases may be shared with any other plaintiff. All discovery obtained by any defendant in these cases shall be deemed discovered in each of these cases.

7. All counsel shall make best efforts to avoid duplication, inefficiency and inconvenience to the court, the parties, counsel and witnesses. Interim lead counsel shall ensure that schedules are met and unnecessary expenditures of time and funds are avoided, including the avoidance of unnecessary or duplicative

communications among plaintiffs' counsel. However, nothing stated herein shall be construed to diminish the right of any counsel to be heard on matters that are not susceptible to joint or common action, or as to which there is a genuine and substantial disagreement among counsel.

8. Nothing herein shall limit the requirements on plaintiffs and plaintiffs' counsel set forth in Fed. R. Civ. P. 23, or affect whether any of the current actions should be certified as a class action, whether plaintiffs are adequate representatives of any class that may be certified, or whether plaintiffs' counsel are adequate counsel for any such class.

9. All plaintiffs' counsel shall keep contemporaneous time records and shall periodically submit summaries or other records of time and expenses incurred by their respective firms to interim lead counsel in such manner as interim lead counsel shall require. Failure to provide such documents and/or data on a timely basis may result in the court's not considering non-compliant counsel's application for fees and expenses, should this litigation be resolved successfully for plaintiffs.

10. A hearing on defendants' motion to dismiss is scheduled for February 24, 2012 at 3:00 p.m.

/s/ 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, *et al.*

Plaintiffs,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

No. 12-cv-11698 MLW

mmw
11/2/16

**[PROPOSED] ORDER AWARDING ATTORNEYS' FEES, PAYMENT OF
LITIGATION EXPENSES, AND PAYMENT OF SERVICE AWARDS TO PLAINTIFFS**

WHEREAS, on November 2, 2016, a hearing was held before this Court to determine, among other things, whether and in what amount to award Lead Counsel Labaton Sucharow LLP (“Labaton Sucharow” or “Lead Counsel”), on behalf of itself and all other counsel for Plaintiffs (collectively, “Plaintiff’s Counsel”), attorneys’ fees and Litigation Expenses directly relating to their representation of the Settlement Class, and whether and in what amount to grant Service Awards to Plaintiff Arkansas Teacher Retirement System (“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”) directly relating to their service as representatives of the Settlement Class;

WHEREAS, it appears that a Notice of the hearing, substantially in the form approved by the Court, was mailed to all reasonably identified 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;

WHEREAS, it further appears that a Summary Notice of the hearing, substantially in the form approved by the Court, was published in *The Wall Street Journal* and transmitted over *PR Newswire*; and

WHEREAS, the Court has considered and determined the fairness and reasonableness of the attorneys’ fees, Litigation Expenses, and Service Awards requested;

WHEREAS, the Court has considered all papers filed and proceedings had herein, and is otherwise fully informed;

NOW, THEREFORE, after due deliberation, IT IS ORDERED, ADJUDGED AND DECREED that:

1. 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, counsel, and the Claims Administrator.

2. All capitalized terms used herein have the meanings set forth and defined in the Stipulation and Agreement of Settlement, dated as of July 26, 2016 (the “Settlement Agreement”).

3. Notice of Lead Counsel’s application for attorneys’ fees, litigation expenses, and service awards was given to all Settlement Class Members who could be identified with reasonable effort. The form and method of notifying the Settlement Class of the application for attorneys’ fees and expenses met 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 any other applicable laws and rules, constituted the best notice practicable under the circumstances, and constituted due, adequate, and sufficient notice to all persons and entities entitled thereto.

4. The Court hereby awards fees in the amount of \$74,541,250.00, plus any accrued interest, which is approximately 25% of the Class Settlement Fund, orders payment of Litigation Expenses in the amount of \$1,257,697.94, and grants Service Awards in the amount of \$25,000.00 to Plaintiff ARTRS and \$10,000.00 to each of the six ERISA Plaintiffs, totaling \$85,000.00, which sums the Court finds to be fair and reasonable.

5. The award of attorneys' fees and litigation expenses may be paid to Lead Counsel from the Class Settlement Fund subject to the terms, conditions, and obligations of the Settlement Agreement, which terms, conditions, and obligations are incorporated herein.

6. In making this award of attorneys' fees, payment of litigation expenses, and grant of service awards to be paid from the Class Settlement Fund, the Court has analyzed the factors considered within the First Circuit and found, among other things, that:

- (a) 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;
- (b) The Settlement has created a common fund of \$300 million in cash and numerous Settlement Class Members will benefit from the Settlement created by the efforts of Plaintiffs' Counsel;
- (c) Plaintiffs' Counsel undertook the Class Actions on a contingent basis, and have borne all the ensuing risk, including the risk of no recovery;
- (d) Plaintiffs' Counsel have worked more than 86,000 hours, with a lodestar value of \$41,323,895.75, to achieve the Settlement;
- (e) The Class Actions involved difficult and novel factual and legal issues and, in the absence of settlement, would involve lengthy proceedings whose resolution would be uncertain;
- (f) Plaintiffs' Counsel are experienced in the field of class actions and conducted the Class Actions and achieved the Settlement with skillful and diligent advocacy;
- (g) The requested attorneys' fee furthers the important policy goal of encouraging common fund cases asserting claims in the public interest; and


(h) Notice was disseminated to Settlement Class Members stating that Lead Counsel would be submitting an application for attorneys' fees in an amount not to exceed \$74,541,250.00, plus interest, and payment of Litigation Expenses incurred in connection with the prosecution of the Class Actions in an amount not to exceed \$1,750,000, plus interest. The Notice stated that Plaintiffs may apply to the Court for Service Awards of up to \$85,000.00 in the aggregate. No Settlement Class Members have filed an objection to the application for fees and expenses submitted by Lead Counsel.

7. Any appeal or challenge affecting this Court's approval of any attorneys' fee or expense application in the Class Actions shall in no way disturb or affect the finality of the Judgment entered with respect to the Settlement.

8. Exclusive jurisdiction is retained over the subject matter of the Class Actions and over all parties to the Class Actions, including the administration and distribution of the Net Class Settlement Fund to Settlement Class Members.

9. In the event that the Settlement is terminated or does not become Final or the Effective Date does not occur in accordance with the terms of the Settlement Agreement, this order shall be rendered null and void to the extent provided by the Settlement Agreement and shall be vacated in accordance with the Settlement Agreement.

Dated: November 2, 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,)
Plaintiff)

) C.A. No. 11-10230-MLW

v.)

STATE STREET BANK AND TRUST COMPANY,)
Defendants.)

ARNOLD HENRIQUEZ, MICHAEL T.)
COHN, WILLIAM R. TAYLOR, RICHARD A.)
SUTHERLAND, and those similarly)
situated,)
Plaintiff)

) C.A. No. 11-12049-MLW

v.)

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)

) C.A. No. 12-11698-MLW

v.)


STATE STREET BANK AND TRUST COMPANY,)
Defendants.)

ORDER

WOLF, D.J.

May 17, 2018

A hearing will begin on June 24, 2019, at 10:00 a.m., and continue as necessary on June 25 and June 26, 2019, to address objections by Lief Cabraser Heimann & Bernstein, LLP ("Lief") and Thornton Law Firm LLP ("Thornton") to the Special Master's Report and Recommendations, and other pending issues. The court intends to issue another order with an agenda for that hearing.


UNITED STATES DISTRICT JUDGE

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.

May 31, 2019

As previously ordered, a hearing, pursuant to Federal Rule of Civil Procedure 53(f)(1), concerning the objections to the Special Master's Report and Recommendations, and the proposed settlement concerning Labaton Sucharow LLP ("Labaton"), will commence on June 24, 2019, and, if necessary, continue on June 25 and 26, 2019. Rather than addressing the discrete objections to the Report and Recommendations, the court at present intends to hear argument, and on some matters testimony, concerning the issues identified below, which include questions that prompted the appointment of the Special Master. See Feb. 6, 2017 Mem. & Order (Dkt. No. 117); Mar. 8, 2017 Mem. & Order (Dkt. No. 173). If the court proposes to exercise its Rule 53(a)(1) authority to modify the Report and Recommendations with regard to an issue on which the parties have not had notice and an opportunity to be heard, the court will provide such notice and conduct another hearing.

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)).

(2) Hear argument on whether Customer Class Counsel's reported lodestar, not including double-counted time, is accurate and reasonable. Among other things, the participants shall be prepared to address whether: contract attorneys should be treated as an expense and, therefore, not be included in the lodestar; Customer Class Counsel reported reasonable rates for staff attorneys in their fee petition; and Customer Class Counsel made errors other than double-counting time in their fee petitions.

(3) Hear argument and testimony concerning whether Garrett Bradley, Esq. intentionally filed a false fee declaration and, if so, what consequences--including possible sanctions, fines, or other remedial or deterrent measures--are permissible and appropriate. Among other things, the Thornton Law Firm ("Thornton") shall be prepared to address whether the representations made concerning Michael Bradley, Esq. in the fee declaration were accurate, and whether the rate listed for him was reasonable and commensurate with the "regular" rates Michael Bradley charges clients.

Testimony may include questioning of Michael Bradley, Garrett Bradley, and other Thornton lawyers who worked on Thornton's fee declaration, including Michael Thornton, Esq., Michael Lesser, Esq., and Evan Hoffman, Esq., regarding Michael Bradley's

relationship with Thornton, his work on this case, and the selection of the hourly rate attributed to him in the fee declaration.¹

(4) Testimony of Eric Belfi, Esq. and Christopher Keller, Esq. concerning, among other things: (a) other cases involving Damon Chargois, including Bristol County Retirement System v. HCC Insurance Holdings, Inc., No. 07-0801 (S.D. Tex.); and (b) the October 17, 2007 email from Belfi to Keller (Dkt. No. 531-1).

(5) Discuss with Garrett Brown his "Phase I Report" concerning Labaton.

In view of the foregoing, it is hereby ORDERED that Michael Bradley, Garrett Bradley, Michael Thornton, Michael Lesser, Evan Hoffman, Eric Belfi, and Christopher Keller shall be present and prepared to testify on June 24, 25, and/or 26, 2019. A Sequestration Order concerning the witnesses shall issue. Garrett Brown shall also be present and prepared to participate.


UNITED STATES DISTRICT JUDGE

¹ Counsel for the Special Master shall be prepared to question the potential witnesses.

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.

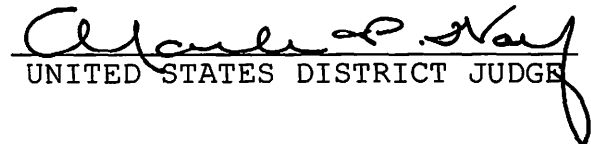
June 21, 2019

On May 31, 2019, the court provided a preliminary agenda for the hearing scheduled to begin on June 24, 2019. See Dkt. No. 543. Additionally, the court intends to:

(1) Hear argument concerning the impact, if any, that the Chargois matter should have on the total fee award and/or the amount to be allocated to Labaton Sucharow LLP.

(2) Hear argument concerning whether the court should exercise its authority to allocate fees awarded and, if so, how. See 5 William B. Rubenstein, Newberg on Class Actions §15:23 (5th ed.) ("[I]t is axiomatic that the court has the ultimate authority to determine how the aggregate fee is to be allocated among counsel.").

(3) Discuss a procedure for identifying and resolving additional matters, if any, as to which there are objections to the Master's Report and Recommendations, which must be resolved under Federal Rule of Civil Procedure 53(f).


UNITED STATES DISTRICT JUDGE

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.

June 28, 2019

For the reasons stated in court on June 26, 2019, it is hereby ORDERED that:

1. The Master, Labaton Sucharow LLP ("Labaton"), Lief Cabraser Heimann & Bernstein, LLP, Thornton Law Firm LLP ("Thornton"), and ERISA Counsel shall submit memoranda on the implications of the June 24, 25, and 26, 2019 hearings. The memoranda may address, among other things: (a) the reasonable percentage range of an award of attorneys' fees from the common fund in this case; (b) whether the court should exercise its authority to allocate the fee award among class counsel and how the fee award should be allocated; (c) a reasonable billing rate for contract attorneys; and (d) whether Labaton violated Massachusetts Rule of Professional Conduct 7.2.

2. The Center for Class Action Fairness may, by July 10, 2019, submit a memorandum addressing, among other things, the foregoing issues.

3. The Master and law firms that participated shall order the transcripts of the June 24, 25, and 26, 2019 hearings.


UNITED STATES DISTRICT JUDGE

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:

Jonathan G. Axelrod
Beins Axelrod PC
1717 K St NW
Ste1120
Washington, DC 20006

M. Frank Bednarz
Hamilton Lincoln Law Institute
1145 E. Hyde Park Blvd. Apt. 3A
Chicago, IL 60615

Lawrence A. Sucharow
Joel H. Bernstein
Michael H. Rogers
Paul J. Scarlato
Nicole M. Zeiss
Labaton Sucharow LLP
140 Broadway
New York, NY 10005-1108

Dwight Bostwick
Graeme Bush
Zuckerman Spaeder LLP
1800 M St, NW
Ste 1000
Washington, DC 20036-5802

Kimberly Keevers Palmer
Richardson, Patrick, Westbrook & Brickman LLC
1017 Chuck Dawley Blvd
PO Box 1007
Mount Pleasant, SC 29465

Gary S. Peeples
Burch, Porter & Johnson, PLLC
130 North Court Avenue
Memphis, TN 38103

Michael P. Thornton
Thornton Law Firm LLP
1 Lincoln St
Boston, MA 02111

/s/ Robyn Cocho
Robyn Cocho