UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 12-cv-11698 MLW

THORNTON LAW FIRM LLP'S MOTION
FOR LEAVE TO FILE SUPPLEMENTAL 5 PAGE MEMORANDUM

The Thornton Law Firm LLP respectfully requests leave of Court to file a supplemental five-page memorandum that addresses two discrete issues which post-date the Court's July 17, 2019 briefing deadline: (1) the import of boilerplate declarations submitted to Judge O'Toole on August 8, 2019 by the law firms Glancy Prongay and Block & Leviton; and (2) the import of a knowingly false statement which was repeated in the Special Master's July 17, 2019 post-hearing brief after initially being stated by counsel in open court on June 25, 2019. The proposed memorandum is attached hereto as Exhibit A.

Respectfully submitted,

/s/ Brian T. Kelly

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Dated: August 16, 2019

Counsel for the Thornton Law Firm LLP

LOCAL RULE 7.1 CERTIFICATION

I informed counsel for all parties of this motion. Lieff Cabraser and State Street do not oppose the motion. Labaton takes no position on the motion. At the time of filing, I did not receive a response from Keller Rohrback, McTigue Law, Zuckerman Spaeder, or the Competitive Enterprise Institute. Counsel for the Special Master stated that the Special Master required further information about the motion before the Special Master could take a position.

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on August 16, 2019 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF").

/s/ Joshua C. Sharp
Joshua C. Sharp

EXHIBIT A

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[PROPOSED]
THORNTON LAW FIRM LLP'S SUPPLEMENTAL SUBMISSION

TLF respectfully submits this filing to highlight the following two post-hearing issues.

I. The Submission of Boilerplate Declarations to the District of Massachusetts in August 2019 Further Undermines any Inference of Intent to Mislead

The Court has understandably expressed concern regarding the boilerplate "regular rates charged" language in most of the fee declarations submitted in this case. TLF agrees that the language was sloppy and imprecise. As TLF emphasized, however, the language was not intentionally misleading, and draconian sanctions are not warranted for failure to correct boilerplate language that is in widespread use by contingent fee law firms across the country. *See* TLF Sur-Reply at 40-56 (Dkt. 530). As further evidence that such language was not intentionally misleading, TLF refers the Court to the August 8, 2019 fee declaration of Block & Leviton in *Machado v. Endurance Int'l Grp. Holdings, Inc.*, No. 1:15-cv-11775-GAO (D. Mass.). Block & Leviton appears to be a primarily contingent fee law firm, and the firm's website states, "Our firm covers all litigation costs and operates entirely on a contingency basis. Block & Leviton is only compensated after a successful outcome for our clients."[1] Yet the Block & Leviton declaration submitted to Judge O'Toole states, "The hourly rates for the attorneys and professional support staff in my Firm shown below are the reasonable and customary rates charged for each individual." Leviton Decl. at 3, *Machado*, No. 1:15-cv-11775-GAO (D. Mass. Aug. 9, 2019) (Dkt. 86-7). Such language is nearly identical to the language this Court

[1] https://blockesq.com/faqs/. It is unclear if the statement applies to all of the firm's cases or the majority of its cases. The Block & Leviton resume submitted to Judge O'Toole suggests that, at the very least, it is primarily a contingent fee law firm. The firm (like Labaton and Lieff) may have a small number of paying clients, but a small number of paying clients does not make the "customary rates charged" language any better. *See, e.g.*, *Middlebrooks v. Teva Pharms. USA, Inc.*, No. 17-412, 2019 WL 936645, at *11-12 (E.D. Pa. Feb. 26, 2019) (where law firm argued that its "hourly rates reflected in the billing entries in its lodestar calculation are the same as the regular rates charged for services in non-contingent cases," the court found, "[w]e cannot recklessly leap to [] find a reasonable fee in this District today because some undefined fraction of [law firm's] annual revenue is drawn from hourly rates paid by someone for some case in some venue"). TLF does not in any way suggest that Block & Leviton's misstatement was intentional. The firm acted as local counsel and its lodestar was less than $20,000.

highlighted in both the *State Street* and *Insulet* fee declarations, as well as the approximately sixty declarations TLF identified for the Court in its Sur-Reply at pages 40-56.

Glancy Prongay also submitted a fee declaration to Judge O'Toole. Although the firm did not use the same "charged" language it used in *Insulet*,[2] and subsequently in the Northern District of California,[3] it referred to contract attorneys in nearly the same way that TLF and Lieff referred to contract attorneys in *State Street*. In particular, thirteen "staff attorneys" are listed on its lodestar with rates of $380 to $395 per hour. Glancy Decl. at 27-29, *Machado*, No. 1:15-cv-11775-GAO (D. Mass. Aug. 9, 2019) (Dkt. 86). The declaration also refers to the "hourly rates for the attorneys and professional support staff in my firm" and the "time of Lead Counsel attorneys and professional staff." *Id.* But last August, under questioning from this Court, Glancy Prongay stated that it did not employ staff attorneys and that the individuals listed as "staff attorneys" on its *Insulet* lodestar were, in fact, contract attorneys.[4] Of note, one of the same "staff attorneys" listed on the firm's *Insulet* lodestar last year, Gary Johnston, is also listed as a "staff attorney" on the lodestar submitted to Judge O'Toole last week.

None of this is to suggest that these firms or any of the *State Street* firms that submitted boilerplate declarations should be sanctioned. Instead, TLF refers the Court to these declarations to demonstrate the widespread use of imprecise boilerplate language among the plaintiffs' bar.[5]

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[2] *See* Crowell Decl., *Ark. Tchrs. Ret. Sys. v. Insulet Corp.*, No. 1:15-cv-12345-MLW (D. Mass. June 1, 2018) (Dkt. 129-5).

[3] *See* Albert Decl., *In re: Capacitators Antitrust Litig.*, No. 3:13-cv-03264-JD (N.D. Cal. Aug. 13, 2018) (Dkt. 2176-9). The *Capacitators* declaration was filed approximately one week **after** the August 2, 2018 hearing at which this Court advised Glancy Prongay of the issues with its *Insulet* declaration.

[4] 8/2/18 Hr'g Tr. at 36:8-37:25, *Insulet*, No. 1:15-cv-12345-MLW (D. Mass. Aug. 6, 2018) (Dkt. 136).

[5] TLF also respectfully refers the Court to Judge Woodlock's comments at a recent hearing regarding lodestar calculations:

> One is, there is a lodestar, but how it's calculated is not altogether clear. And I'm not sure that I think the way lodestars are calculated now are not misleading. I'll put to one side the number of hours, but the rates strike me as confected depending on the business plan of the firms involved. What's generally the case, at least as I understand it, is that there is a stated fee or stated hourly rate, but whether that's always paid or frequently paid or not paid at all or not followed at all is unclear.

The point is not to evade TLF's responsibility for a sloppy error, but to provide the Court with evidence that tends to negate any inference of intent to mislead and put TLF's mistakes, and the mistakes of the other *State Street* law firms, in context.

II. The Special Master and His Counsel Provided False Explanations to the Court Regarding Evan Hoffman's Deposition Testimony

As the Court recalls, the Special Master's November 20, 2018 Response (Dkt. 525) attributes a statement to Mr. Hoffman which Mr. Hoffman's certified deposition transcript attributes to the Special Master. TLF's December 18, 2018 Sur-Reply (Dkt. 530) attached affidavits from Mr. Hoffman, former Nixon Peabody partner Emily Harlan, and an email from the court reporting service verifying the transcript's accuracy and the falsity of the Special Master's alteration. Although he was notified of this serious error more than six months ago, the Special Master never corrected it.

Now, in an attempt to cover up the extreme sloppiness of the error, the Special Master and his counsel have again misled this Court. In particular, at the June 25, 2019 hearing, in reference to the alteration, the Special Master's counsel asked Mr. Hoffman:

> **Well, sir, would it surprise you to hear that the special master and his team have a different recollection?**

6/25/19 Hr'g Tr. at 2-189:10-11 (Dkt. 565). The Special Master repeated this claim in the post-hearing brief, declaring that "**the change reflected a difference in recollection.**" Dkt. 582 at 39. These statements convey to the Court that the Special Master was not sloppy in changing Mr. Hoffman's testimony, that the Special Master has an independent recollection of "who said

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7/17/19 Hr'g Tr. at 4:17-25, *Cullinane v. Uber Techs., Inc.*, No. 14-14750-DPW (D. Mass. July 19, 2019) (Dkt. 109). Judge Woodlock further noted, "I'm not so sure that the lodestar doesn't mask a whole series of other matters that aren't really accurately disclosed for purposes of actual practice of what's going on," *id.* at 20:13-16, and that he was "recognizing that there are different ways that attorneys get paid between contingent cases and hourly cases," *id.* at 21:7-8.

what," and that the Special Master actually believes Mr. Hoffman made the statement in question. Therefore, the argument would go, there was no need to correct, even when notified of the error, and even in the face of the actual transcript, the attorney affidavits, and the court reporter's email.

But the Special Master's counsel was misleading this Court, and doing so knowingly, in asserting that "the change reflected a difference in recollection" and that "the special master and his team have a different recollection." The Special Master's brief admits as much, stating:

> **Neither the Special Master, nor his team, quite understandably, have an explicit recollection of who made the statement.**

Id. at 39 n.23. This is, of course, the much more likely explanation: (1) the Special Master and his "team" have no independent memory of who said what; (2) they simply assumed that Mr. Hoffman made the statement in question; (3) they decided it was acceptable to alter the deposition testimony without making "an inquiry reasonable under the circumstances"; (4) they were caught off guard when TLF alerted them to the error; (5) they decided it was acceptable to leave the error uncorrected for over six months; and (6) in order to cover up their own sloppiness, they decided to represent to the Court that they have a "different recollection" of Mr. Hoffman's testimony when in fact they have no such memory.

TLF respectfully suggests that the knowingly false statement regarding the "different recollection" is further evidence of the unreliability of the Special Master's process and findings.[6] It is also further support for the proposition that there must be "no unwarranted

[6] As with his other submissions, the Special Master's recent brief is riddled with various errors. For instance, the Special Master and his counsel falsely state that TLF submitted a "$18.2M fee request" to the Court, and that the Court was "considering an allocation of fees between the firms," Dkt. 582 at 27, 38. This is demonstrably false. There was a *single* fee request submitted, the Court did *not* allocate fees, and the Court did not request any information regarding the fee split among counsel. As further evidence of sloppiness, TLF refers the Court to the certificate of service on the Special Master's Post-Hearing Memorandum, which states: "I certify that on July 17, 2019 I caused the foregoing *Motion for Extension of Time to Submit Memoranda* to be served by electronic mail on

disparity in the way the lawyers are treated." 11/7/18 Hr'g Tr. at 106:10-13 (Dkt. 519). This is especially so here, where nearly all firms failed to correct boilerplate language in a fee declaration, but the Special Master and his counsel intentionally misled the Court in order to conceal their sloppiness.

Respectfully submitted,

/s/ Brian T. Kelly

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Dated: August 16, 2019

Counsel for the Thornton Law Firm LLP

counsel for all parties." Dkt. 582 at 42 (emphasis added). Although the error is immaterial, it shows that counsel *did not read* the boilerplate certification prior to affixing his signature and filing the document with the Court.