

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.

May 31, 2018

As stated in court on May 30, 2018, it is hereby ORDERED that:

1. Counsel for the plaintiff class and State Street Bank and Trust Company ("State Street") shall promptly inform counsel for the Master of the categories of information they will seek to have redacted from the Master's Executive Summary, Report and Recommendation, and Exhibits.

2. By June 5, 2018, counsel for the plaintiff class and for State Street shall file motions proposing redactions of categories of information, and supporting memoranda and affidavits, including affidavits from any client who wishes to assert an attorney-client privilege. If there is a proper basis, the submissions may be filed under seal. A redacted version of any sealed submission shall also be filed under seal. The court will decide whether and when to make it part of the public record.

3. The Master shall, by June 8, 2018, respond to any requests for redaction of categories of information, making his filings in the manner described in paragraph 2 hereinabove.

4. Counsel for the plaintiff class and for State Street shall, by June 11, 2018, each file, under seal, their proposed redactions to the Master's Executive Summary, Report and Recommendation, and Exhibits, and state the reasons for any objection to their submissions being unsealed.

5. Labaton Sucharow, LLP ("Labaton") shall, by June 13, 2018, file, under seal, a version of the Master's Executive Summary, Report and Recommendation, and Exhibits which

consolidates all of the proposed redactions and identifies the party that proposed each, and state the reasons for any objection to the submission being made public. An electronic, editable form of this submission shall be provided to the court.

6. The Master shall, by June 18, 2018, respond, under seal, to the proposed redactions and any objection(s) to those proposals being made public.¹

7. Any reply to the Master's submission shall be filed, under seal, by June 20, 2018.²

8. The parties shall confer and attempt to resolve or narrow the issues before making each of the foregoing submissions. See Local Rule 7.1(a)(2).

9. If necessary, a hearing concerning the proposed redactions, which shall be closed to the public, will be held on June 22, 2018, at 2:00 p.m.³

10. The parties shall order the transcript of the May 30, 2018 hearing on an expedited basis.

11. George Hopkins, the Executive Director of Arkansas Teacher Retirement System ("ATRS") shall, by June 6, 2018, read the transcript of the May 30, 2018 hearing, and file an affidavit

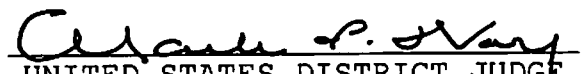
¹ This submission was not ordered orally on May 30, 2018.

² This submission was not ordered orally on May 30, 2018.

³ This hearing was not ordered orally on May 30, 2018.

stating whether ATRS wishes to continue to represent the Customer Class, and if so, whether it intends to continue to seek legal advice concerning this case from Labaton or seek advice instead from counsel whose conduct is not at issue.

12. Customer Class Counsel's Motion for Clarification or Modification (Docket No. 222) regarding the record to be filed by the Master is ALLOWED, without prejudice to possible reconsideration. The Master shall preserve all documents and information developed in his investigation. He shall file, under seal to permit appropriate redactions: (a) the exhibits to the Master's Report and Recommendation; (b) any additional documents and information the Master wishes to add; (c) any additional documents or information previously provided to the Master that any party wishes to add; and (d) any other documents that the court requests (the "Record"). The parties shall confer and, by June 6, 2018, propose a schedule and procedure for preparing and filing the Record.


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,

Defendant.

No. 11-cv-10230 MLW

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

Plaintiff,

v.

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

Defendants.

No. 11-cv-12049 MLW

THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND
PROFIT SHARING PLAN, on behalf of itself, and JAMES
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STATE STREET BANK AND TRUST COMPANY,

Defendant.

No. 12-cv-11698 MLW

JOINT MOTION TO RECEIVE SEALED TRANSCRIPT

Labaton Sucharow LLP, Lief Cabraser Heimann & Bernstein LLP, and the Thornton Law Firm (collectively, “Customer Class Counsel”); Keller Rohrback, LLP, Zuckerman Spaeder, LLP, and McTigue Law, LLP (collectively, “ERISA Counsel”); WilmerHale, LLP (counsel for State Street); and Barrett & Singal, P.C. (counsel for the Honorable Gerald E. Rosen (retired), Special Master) (collectively, the “Moving Parties”) respectfully move for the Court to order the court reporter and/or clerk of the court to provide them the full, unsealed transcript of this Court’s May 30, 2018 hearing in the above-captioned matter. In support of this motion, the Moving Parties state as follows:

1. On May 30, 2018, this Court held a hearing in the above-captioned matter, which the Moving Parties all attended.
2. Portions of the hearing were conducted at sidebar and in the judges’ lobby. Moving Parties have learned that the Court has ordered that these portions of the transcript are under seal.
3. On May 31, 2018, the Court ordered that “[t]he parties shall order the transcript of the May 30, 2018 hearing on an expedited basis.” ECF 237 ¶ 10.
4. In accordance with the Court’s May 31 Order (ECF 237), and in connection with the continued litigation of this case, Moving Parties request that the Court order that the court reporter and/or clerk of the court shall provide to undersigned counsel the full, un-redacted transcript from the May 30 hearing.
5. The Court’s May 31, 2018 order also requires that “the Executive Director of the Arkansas Teacher Retirement System (“ATRS”) shall, by June 6, 2018, read the transcript of the May 30, 2018 hearing, and file an affidavit” addressing certain issues. ECF 237 ¶ 11. In light of this requirement, undersigned counsel for Labaton Sucharow requests that the Court address this

motion on an expedited basis, so that counsel may arrange for the full transcript to be provided to the Executive Director of ATRS as soon as possible, and in time for full consideration before the June 6 deadline set by the Court.

WHEREFORE, for the reasons set forth herein, the Moving Parties respectfully request that the Court order that the court reporter and/or clerk of the court shall provide them the full unsealed transcript of the May 30, 2018 hearing forthwith.

Dated: May 31, 2018

Respectfully submitted,

By: /s/ Justin J. Wolosz

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Counsel for the Special Master

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on May 31, 2018.

/s/ Justin J. Wolosz _____
Justin J. Wolosz

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,
on behalf of itself and all others similarly situated,

Plaintiff,

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PROFIT SHARING PLAN, on behalf of itself, and JAMES
PEHOUSHEK-STANGELAND, and all others similarly
situated,

Plaintiff,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

No. 12-cv-11698 MLW

**[PROPOSED] ORDER ON JOINT MOTION TO
RECEIVE SEALED TRANSCRIPT**

The request of the Moving Parties' Joint Motion to Receive Sealed Transcript having been considered, it is hereby ORDERED that:

1. In accordance with this Court's May 31, 2018 Order (ECF 237), the court reporter and/or clerk of the court shall make available to Labaton Sucharow LLP, Lief Cabraser Heimann & Bernstein LLP, the Thornton Law Firm, Keller Rohrback, LLP, Zuckerman Spaeder, LLP, McTigue Law, LLP, WilmerHale, LLP (counsel for State Street), and Barrett & Singal, P.C. (counsel for the Honorable Gerald E. Rosen (retired), Special Master), the full, unredacted transcript of the May 30, 2018 hearing in the above-captioned matter, including any portion that has been ordered sealed.

IT IS SO ORDERED.

Dated: _____, 2018

HON. MARK L. WOLF
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,
on behalf of itself and all others similarly situated,

Plaintiffs,

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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,

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STATE STREET GLOBAL MARKETS, LLC and
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Defendants.

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THE ANDOVER COMPANIES EMPLOYEE SAVINGS
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Defendant.

No. 12-cv-11698 MLW

**THORNTON LAW FIRM LLP'S MOTION
FOR SEALING OF WORK PRODUCT INFORMATION AND INFORMATION
GOVERNED BY THE COURT'S NOVEMBER 2012 PROTECTIVE ORDER**

The Thornton Law Firm LLP files this motion to seal information protected by the work product doctrine and by the Court's November 2012 Protective Order to be set forth in proposed redactions to the Special Master's Executive Summary, Report and Recommendation, and accompanying exhibits (collectively, the "Report and Exhibits"). Pursuant to the Court's May 31, 2018 Order, the Thornton Law Firm today files this motion to identify *categories* of information it anticipates redacting in the Report and Exhibits, and will file the actual proposed redactions on June 11, 2018. In support of this motion, the Thornton Law Firm states as follows:

1. On March 8, 2017, the Court issued a Memorandum and Order appointing the Hon. Gerald Rosen as Special Master to investigate and submit a Report and Recommendation regarding the award of attorneys' fees, expenses, and service awards in this action. Pursuant to the Court's Memorandum and Order, the Special Master engaged in an extensive investigation, including the taking of more than 60 depositions and receiving over 200,000 pages of discovery.

2. On March 29, 2017, "[i]n order to permit full and expeditious production of documents requested by the Special Master" and "[i]n order to permit efficient evidentiary proceedings," the Special Master entered a Limited Protective Order stating that "the production to the Special Master and his agents of attorney/client privileged and documents protected by the work product doctrine (a) shall not constitute a specific or general waiver of either the attorney/client privilege or the work product doctrine; and (b) shall not waive any privilege or protection that attaches to the specific documents produced." The Limited Protective Order also stated that plaintiffs' counsel would be provided the opportunity to request that excerpts of deposition transcripts remained sealed.

3. On May 14, 2018, the Special Master's Report and Exhibits were filed under seal. The Report and Exhibits total over 10,000 pages and contain, among other information,

documents, transcripts, and time records revealing the strategies, notes, and mental impressions of Thornton Law Firm attorneys regarding the State Street litigation. Such information is protected from disclosure by the work product doctrine. *See Mississippi Pub. Emp. Ret. Sys. v. Boston Sci. Corp.*, 649 F.3d 5, 31 n.24 (1st Cir. 2011) (“The work-product doctrine protects documents prepared by an attorney if, in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.”) (quoting *Maine v. U.S. Dept. of Interior*, 298 F.3d 60, 68 (1st Cir. 2002)); *In re Atl. Fin. Mgmt. Sec. Litig.*, 121 F.R.D. 141, 143 (D. Mass. 1988) (“The protection of attorney work product material is designed, above all, to protect the mental impressions and thought processes of attorneys.”).

4. Unlike the attorney-client privilege, which “belongs to the client alone, the work product doctrine may be asserted by either the client or the attorney.” *In re Grand Jury Subpoena (Zerendow)*, 925 F. Supp. 849, 853 (D. Mass. 1995). *See also Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 618 (7th Cir. 2010) (“Unlike the attorney-client privilege, the attorney has an independent privacy interest in his work product and may assert the work-product doctrine on his own behalf”). The Thornton Law Firm, through undersigned counsel, wishes to assert the protection of the work product doctrine over all materials in the Report and Exhibits that qualify for such protection.

5. Although, as set forth in the Court’s May 16, 2018 Order, there is a presumption of public access to judicial records and documents, an attorney’s invocation of the work product doctrine can overcome this presumption. *See Utica Mut. Ins. Co. v. INA Reinsurance Co.*, No. 6:12-CV-194TWD, 2012 WL 13028279, at *7 (N.D.N.Y. June 12, 2012) (noting that “[w]ork product privilege has also been found to provide a basis for sealing judicial records.”); *Hanson v.*

Wells Fargo Home Mortg., Inc., No. C13-0939JLR, 2013 WL 5674997, at *2 (W.D. Wash. Oct. 17, 2013) (“This court has previously accepted both attorney client-privilege and the work-product doctrine as justification for prospectively sealing judicial records.”).

6. Given that the Thornton Law Firm fully complied with the Special Master’s investigation, including by providing the Special Master with information otherwise protected by the work product doctrine when it may have been entitled to withhold such information, it would be unfair to now release protected work product information to the public and vitiate the Thornton Law Firm’s interest in such information.

7. The Thornton Law Firm states that it anticipates any proposed redactions it submits on the basis of the work product doctrine will be minimal in light of the scope of the Report and Exhibits.

8. Separate from the work product redactions, the Thornton Law Firm moves to seal certain documents which were produced by State Street pursuant to this Court’s November 19, 2012 Protective Order and the further Order of the Special Master Modifying the Court’s November 19, 2012 Protective Order.

9. The Court’s November 19, 2012 Protective Order governed the handling of documents and other information exchanged between the parties during the underlying litigation. Absent modification of the Court’s November 19, 2012 Protective Order, counsel is obligated to request the sealing of documents subject to the Protective Order.

WHEREFORE, for the reasons set forth above, the Thornton Law Firm respectfully requests that the Court seal information protected by the work product doctrine and protected by the Court’s November 19, 2012 Protective Order, to be set forth in proposed redactions to the Report and Exhibits.

Respectfully submitted,

/s/ Brian T. Kelly
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Dated: June 5, 2018

Counsel for the Thornton Law Firm LLP

Rule 7.1 Certification

I informed counsel for all parties of this motion. Counsel for Labaton Sucharow and Lieff Cabraser Heimann & Bernstein LLP do not oppose the motion but reserve the right to object to specific redactions. Counsel for State Street, Keller Rohrback LLP, and Zuckerman Spaeder LLP take no position on the motion but reserve the right to object to specific redactions. The Special Master does not object to the request to redact work product information and takes no position on the request to redact information subject to the Court's Protective Order. I did not receive a response from any additional counsel.

/s/ Joshua C. Sharp
Joshua C. Sharp

Certificate of Service

I certify that the foregoing document was filed electronically on June 5, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF"). Paper copies will be sent to any person identified on the NEF as a non-registered participant.

/s/ Joshua C. Sharp
Joshua C. Sharp

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT)	C.A. No. 11-10230-MLW
SYSTEM, on behalf of itself and all others)	
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THE ANDOVER COMPANIES)	C.A. No. 12-11698-MLW
EMPLOYEE SAVINGS AND PROFIT)	
SHARING PLAN, on behalf of itself, and)	
JAMES PEHOUSHEK-STANGELAND,)	
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Defendants.)	
)	

**HENRIQUEZ ERISA PLAINTIFFS' UNOPPOSED MOTION AND MEMORANDUM
REQUESTING REDACTION CATEGORIES FOR SPECIAL MASTER'S REPORT
AND RECOMMENDATION**

MOTION

Pursuant to this Court’s May 31, 2018 Order, ¶2 (Dkt. No. 237) and L.R. 7.1, ERISA Plaintiffs Arnold Henriquez, Michael T. Cohn, William Taylor, and Richard Sutherland (“Henriquez ERISA Plaintiffs”), through their counsel McTigue Law LLP and Beins, Axelrod, P.C. (“Henriquez ERISA Plaintiffs’ counsel”), propose selective redaction of the following categories of information from the Special Master’s May 14, 2018 Report and Recommendation, the executive summary thereof, and the exhibits thereto (“Special Master Materials”) before they are entered on the public record:

1. Confidential medical, financial, and personal identifying information of the Henriquez ERISA Plaintiffs or any other clients of their counsel
2. Attorney-client communications for which the Henriquez ERISA Plaintiffs’ counsel were a party
3. Attorney work product of the Henriquez ERISA Plaintiffs’ counsel
4. Discussions of confidential settlement and mediation communications or strategy by Henriquez ERISA Plaintiffs’ counsel
5. Proprietary information of the Henriquez ERISA Plaintiffs’ counsel regarding law firm business development

Pursuant to L.R. 7.1(a)(2) and ¶8 of the Court’s Order (Dkt. No. 237), we certify that we have conferred with counsel for defendant State Street, counsel for the “customer class,” counsel for the Special Master, and other ERISA counsel prior to filing this motion. **No party or counsel has indicated opposition to this motion.** Counsel for the Special Master and the customer class (Labaton Sucharow LLP, Thorton & Naumes, LLP, and Leiff Cabraser Heimann & Bernstein, LLP) do not oppose this motion. Counsel for Defendants, and other ERISA counsel (Keller Rohrback LLP and Zuckerman Spaeder LLP), have stated that they take no position regarding this motion or any other similar motions by other parties or counsel.

MEMORANDUM IN SUPPORT OF MOTION

None of the ERISA counsel, or their clients, in this case have been alleged by anyone to have engaged in any misconduct of any kind. Moreover, the Special Master's Report and Recommendation has no findings implicating ERISA counsel or their clients in any misconduct. Thus, with respect to the Special Master's investigation, ERISA counsel and their clients stand as innocent third parties who have been required to expend considerable time and resources to assist the Special Master in investigating conduct for which they are utterly blameless. The public interest in disclosure of confidential information relating to ERISA counsel and their clients in this case is thus minimal, if it exists at all.

The Henriquez ERISA Plaintiffs thus seek permission from the Court to seek specific redactions in the following categories.

A. Confidential Medical, Financial, and Personal Identifying Information of the Henriquez ERISA Plaintiffs or Any Other Clients of Their Counsel

The Special Master Materials include references to medical conditions of certain of the Henriquez ERISA Plaintiffs, and may also include references to financial or personal identifying information, such as street addresses, Social Security numbers, dollar amounts of savings or investments, etc. Disclosure of such information on the public record may expose the Henriquez ERISA Plaintiffs or their counsel to risk of identity theft, invasion of privacy, and other forms of prejudice. Redaction of such materials in disciplinary proceedings is plainly authorized by local rule. *See* LR 83.6.11(b)(1), (4), & (5) (authorizing the court to permit redaction of materials in proceedings regarding alleged attorney misconduct to protect "victim or third-party privacy," "personal privacy," or in "exceptional circumstances").

B. Attorney-client Communications for Which the Henriquez ERISA Plaintiffs' Counsel Were a Party

Deposition transcripts included in the Special Master Materials contain detailed descriptions of the content of attorney-client communications, especially those surrounding the Henriquez ERISA Plaintiffs' initial retention of their counsel for litigation in this case. Redaction of such materials in disciplinary proceedings is plainly authorized by local rule. *See* LR 83.6.11(b)(2) (authorizing redaction of “[a]ny matters reasonably necessary to protect information subject to a valid attorney-client...privilege”). Affidavits from the Henriquez ERISA Plaintiffs asserting the attorney-client privilege are attached. Exs. A-D. An affidavit from a client of Henriquez ERISA Plaintiffs' counsel who is not named as a plaintiff in the litigation but whose communications are disclosed in the Special Master Materials is also attached. Ex. E.

C. Attorney Work Product of the Henriquez ERISA Plaintiffs' Counsel

The Henriquez ERISA Plaintiffs have joined in the motion filed this same day by the Andover Companies ERISA Plaintiffs seeking permission to request redactions, on grounds of attorney work product, of descriptions of work performed in attorney billing records. The Henriquez ERISA Plaintiffs also request permission to seek redactions on the same grounds with respect to other documents. For example, deposition transcripts included in the Special Master Materials include lengthy discussions by counsel for the Henriquez ERISA Plaintiffs regarding litigation strategy, and their views about the weakness of this case and similar cases. Public disclosure of such documents could prejudice them in this case, as well as their prosecution of similar cases against other defendants. Redaction of such materials in disciplinary proceedings is plainly authorized by local rule. *See* LR 83.6.11(b)(2) (authorizing redaction of “[a]ny matters reasonably necessary to protect information subject to a valid attorney-client *or other* privilege”

(emphasis added)). Moreover, the same reasons supporting redaction of billing records also support redaction of other attorney work product in this case, so the memorandum in support of the Andover Companies ERISA Plaintiffs is incorporated by reference herein.

D. Discussions of Confidential Settlement and Mediation Communications or Strategy by Henriquez ERISA Plaintiffs' Counsel

The Special Master Materials also contain deposition transcripts and other documents setting out the Henriquez ERISA Plaintiffs' counsels' settlement and mediation strategy. Settlement and mediation communications are generally non-discoverable, and their use at trial is extremely limited. *See, e.g.*, Fed.R.Evid. 408; ACQIS, LLC v. EMC Corp., No. 14-CV-13560, 2017 WL 2818984, at *2 (D. Mass. June 29, 2017) (recognizing a federal "mediation privilege" for "communications to which a mediator was personally privy, communications that were directly made at a mediator's explicit behest, or communications undertaken with the specific intent to present them to a mediator for purposes of mediation are protected by the federal mediation privilege"); Mass. Gen. Laws Ann. ch. 233, § 23C (West) (recognizing similar mediation privilege restricting disclosure of mediation communications). Disclosure of settlement strategy could prejudice Henriquez ERISA Plaintiffs' counsel's conduct of the litigation and other related cases. Redaction of such materials in disciplinary proceedings is authorized by local rule. *See* LR 83.6.11(b)(1), (2), (5).

E. Proprietary Information of the Henriquez ERISA Plaintiffs' Counsel regarding Law Firm Business Development

The Special Master Materials also contain descriptions by Henriquez ERISA Plaintiffs' counsel of various business development techniques and strategies. Courts have recognized a public interest in preserving private companies' interest in proprietary techniques they develop or employ. *See, e.g.*, HCC Specialty Underwriters, Inc. v. Woodbury, 289 F. Supp. 3d 303, 326 (D.N.H. 2018) ("[t]here is a public interest in 'guaranteeing companies protection for their

confidential or proprietary information”). Redaction of such materials in disciplinary proceedings is authorized by local rule. *See* LR 83.6.11(b)(1), (5).

By: /s/ J. Brian McTigue
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Local Counsel for the Henriquez ERISA Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the forgoing document was filed through the ECF System on June 5, 2018 and accordingly will be served electronically upon all attorneys of record.

/s/ J. Brian McTigue

Exhibit A

1. I wish to assert the attorney-client privilege in support of my attorneys' requests for redactions from the May 14, 2018 Report of Special Master, Hon. Gerald Rosen (ret.), the Executive Summary of that Report, and any Exhibits to the report.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this

4th day of June, 2018.



Michael T. Cohn

Exhibit B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,)	
on behalf of itself and all others similarly situated,	)	No. 11-cv-10230 MLW
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

ARNOLD HENRIQUEZ, MICHAEL T. COHN,)	
WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND,	)	No. 11-cv-12049 MLW
and those similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
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	)	No. 12-cv-11698 MLW
JAMES PEHOUSHEK-STANGELAND, and all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

AFFIDAVIT OF ARNOLDO HENRIQUEZ

I, Arnolndo Henriquez, under oath, affirm and declare as follows:

1. I am over the age of eighteen and I understand the meaning and obligations of an oath.
2. I wish to assert the attorney-client privilege in support of my attorneys' requests for redactions from the May 14, 2018 report of Special Master, Hon. Gerald Rosen (ret.), the Executive Summary of that Report, and any Exhibits to the Report.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this

5th day of June, 2018.

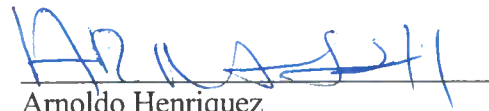

Arnoldo Henriquez

Exhibit C

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,)	
on behalf of itself and all others similarly situated,	)	No. 11-cv-10230 MLW
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

ARNOLD HENRIQUEZ, MICHAEL T. COHN,)	
WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND,	)	No. 11-cv-12049 MLW
and those similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
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	)	No. 12-cv-11698 MLW
JAMES PEHOUSHEK-STANGELAND, and all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

AFFIDAVIT OF RICHARD A. SUTHERLAND

I, Richard A. Sutherland, affirm and declare as follows:

1. I wish to assert the attorney-client privilege in support of my attorneys' requests for redactions from the May 14, 2018 report of Special Master, Hon. Gerald Rosen (ret.), the executive summary of that report, and any exhibits to the report.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this

4th day of June, 2018.

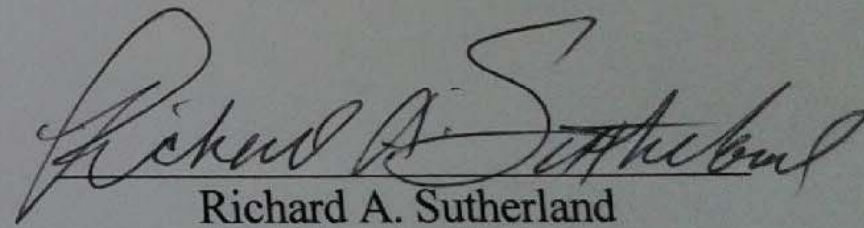

Richard A. Sutherland

Exhibit D

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,)	
on behalf of itself and all others similarly situated,	)	No. 11-cv-10230 MLW
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

ARNOLD HENRIQUEZ, MICHAEL T. COHN,)	
WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND,	)	No. 11-cv-12049 MLW
and those similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
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	)	No. 12-cv-11698 MLW
JAMES PEHOUSHEK-STANGELAND, and all others)	
similarly situated,)	
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

AFFIDAVIT OF WILLIAM R. TAYLOR

I, William R. Taylor, affirm and declare as follows:

1. I wish to assert the attorney-client privilege in support of my attorneys' requests for redactions from the May 14, 2018 report of Special Master, Hon. Gerald Rosen (ret.), the Executive Summary of that Report, and any Exhibits to the report.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 4th day of June, 2018.

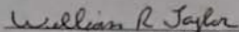

William R. Taylor

Exhibit E

06/05/2018 11:33 FAX

002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM,
on behalf of itself and all others similarly situated,

Plaintiffs,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

No. 11-cv-10230 MLW

ARNO D 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 PEHOUSHK-STANGELAND, and all others
similarly situated,

Plaintiffs,

v.

STATE STREET BANK AND TRUST COMPANY,

Defendant.

No. 12-cv-11698 MLW

DECLARATION OF CARL CARSON


06/05/2018 11:34 FAX

003

I, Carl Carson, affirm and declare as follows:

1. I am the current Chair of the Washington, D.C. Cement Masons Pension Trust Fund (the "Fund").
2. Brian McTigue of the McTigue Law Firm was retained as counsel for the Fund in the above-captioned case.
3. I wish to assert the attorney-client privilege in support of the requests of the McTigue Law Firm, the Fund's counsel in the above action, for redactions from the May 14, 2018 report of Special Master, Hon. Gerald Rosen (ret.), the Executive Summary of that Report and any Exhibits to the report.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 5th day of June, 2018.



Carl Carson, Chair
Washington, D.C. Cement Masons Pension
Trust Fund.

MOTION

Pursuant to this Court’s May 31, 2018 Order (ECF 237) and L.R. 7.1, undersigned counsel move the Court for an Order allowing Keller Rohrback L.L.P. (“Keller”) and Zuckerman Spaeder, LLP (“Zuckerman”) to redact the following information from any materials entered into the public record:

Attorney work product as reflected in work descriptions in daily time entries (Exhibits 246 and 266 to the Special Master’s Report and Recommendations).

Moving parties reserve the right to seek redactions in any materials added to the record by other counsel or the Special Master pursuant to this Court’s May 31, 2018 Order (ECF 237 ¶ 12) on the ground of work product or any other appropriate grounds.¹

Pursuant to L.R. 7.1(a)(2) and the Court’s May 31, 2018 Order (ECF 237 ¶ 8), Keller and Zuckerman certify that they conferred with all other counsel, and the Special Master prior to filing this motion. Those other parties do not oppose the relief requested.

MEMORANDUM IN SUPPORT OF MOTION

Exhibits 246 and 266 to the Special Master’s Report and Recommendations are the detailed time records of Keller and Zuckerman respectively.

A. The Detailed Work Descriptions Are Protected Attorney Work Product

As a sister court recently noted: “the clear weight of authority—including prior decisions by judges on this Court—holds that attorney time records while not *per se* protected by the work product privilege, may nonetheless contain protected work product.” *Judicial Watch, Inc. v. U.S. Dep’t of Justice*, 118 F. Supp. 3d 266, 274-76 (D.D.C. 2015) (“Where time records are not only created by legal personnel but also reference the subject of legal research, persons contacted and

¹ Keller and Zuckerman further reserve the right to seek additional redactions in the event that redactions proposed by other parties make the executive summary, report or record misleading in a manner that is unknowable at this time.

interviewed by the attorney, or other issues bearing on the mental impressions of the attorneys, those portions of the time records are protected work product.”). This Court is part of that “clear weight of authority,” as reflected in *Hanover Ins. Co. v. Rapo & Jepsen Ins. Services, Inc.*, 870 N.E.2d 1105, 1114 (Mass. 2007) (“[D]etails in billing statements may reveal confidential communications between client and attorney or the attorney’s mental impressions or legal theories, that is, his work product, which is protected and generally not open to discovery.”).²

At least one District Court expressly allows routine redaction of attorney time records submitted in support of a fee petition. Local Civil Rule 54.3(d)(1) (N.D. Ill.) (permitting time and work records to “be redacted to prevent disclosure of material protected by the . . . work product doctrine” when submitting motions for fees). This rule does not apply here, but it underscores the fact that descriptions of attorney *work* almost certainly describe protected attorney *work product*.

² See also *Wash. Bancorporation v. Said*, No. 88-3111, 1989 WL 946533, at *4-5 (D.D.C. May 10, 1989) (finding attorney time records to be protected work product where they contained “itemization of persons contacted, research conducted, and amounts of attorney time spent on identified issues”) (citation omitted); *Indian Law Res. Ctr. v. Dep’t of Interior*, 477 F. Supp. 144, 148 (D.D.C. 1979) (finding attorney time records to be protected work product where they contained “detailed itemization of persons contacted and locations visited on particular days, research memoranda prepared on specific topics, and precise amounts of attorney time spent on identified issues, frequently relates to matters of past, present or potential future litigation”); *Cottier v. City of Martin*, No. 02-5021, 2007 WL 4568989, at *2 (D.S.D. Dec. 19, 2007) (“Attorney billing records are protected by the attorney-client privilege and the work product doctrine insofar as they reveal the nature of the services provided.”); *Cardenas v. Prudential Ins. Co. of Am.*, No. 99-1422, 2003 WL 21302957, at *3 (D. Minn. May 16, 2003) (finding work product privilege applied to attorney time records containing “narrative descriptions of conversations between clients and attorneys, the subjects of legal research or internal legal memoranda, and activities undertaken on the client’s behalf”); *Hewes v. Langston*, 853 So.2d 1237, 1249 (Miss. 2003) (“We conclude that the [attorney] billing statements and DayTimer entries are the type of detailed statements that are protected by the work product doctrine, and the trial court erred in ordering them produced.”).

B. The Detailed Work Descriptions Should Be Redacted

Under ordinary circumstances, ERISA Counsel would argue that the detailed time entries be redacted in their entirety. This was the approach taken in *Judicial Watch*, 118 F. Supp. 3d at 275 (holding that all attorney time records were protected work product, even though the opposing party only wanted to know the number of hours worked as reflected in the time records). Under the unique circumstances presented here, however, ERISA Counsel respectfully submit that redaction of the work descriptions would be sufficient, and that other information in the time records—the identity of the timekeepers, the dates and hours recorded, and the billing value of the work—may appear in the public record.³

C. Conclusion

Keller and Zuckerman respectfully request the Court grant the motion to redact work descriptions reflected in detailed time entries.

RESPECTFULLY SUBMITTED this 5th day of June, 2018.

KELLER ROHRBACK L.L.P.

By: /s/ Laura R. Gerber

Laura R. Gerber
Lynn Lincoln Sarko
1201 3rd Avenue, Suite 3200
Seattle, WA 98101
Tel.: 206-623-1900
Fax: 206-623-3384
lgerber@kellerrohrback.com
lsarko@kellerrohrback.com

³ If the Court allows other counsel in the case to redact time records in their entirety, Keller and Zuckerman respectfully request the same level of protection for their time records (Exhibits 246 and 266).

***Counsel for The Andover Companies
Employee Savings and Profit Sharing Plan
and James Pehoushek-Stangeland***

By: /s/ Carl S. Kravitz

Carl S. Kravitz
Zuckerman Spaeder, LLP
1800 M Street, NW
Washington, DC 20036
Tel.: 202-778-1800
Fax: 202-822-8106
ckravitz@zuckerman.com

Counsel for Henriquez Plaintiffs

CERTIFICATE OF SERVICE

I certify that on June 5, 2018, I caused the foregoing to be filed through the ECF system in the above-captioned actions, and accordingly to be served electronically upon all registered participants identified on the Notices of Electronic Filing.

By: /s/ Laura R. Gerber
Laura R. Gerber

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM,)	
on behalf of itself and all others similarly situated,	)	No. 11-cv-10230 MLW
)	
Plaintiffs,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

ARNOLD HENRIQUEZ, MICHAEL T. COHN,)	
WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND,)	No. 11-cv-12049 MLW
and those similarly situated,)	
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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	)	No. 12-cv-11698 MLW
JAMES PEHOUSHEK-STANGELAND, and all others)	
similarly situated,)	
)	
v.)	
)	
STATE STREET BANK AND TRUST COMPANY,)	
)	
Defendant.)	

**MOTION BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP PROPOSING
LIMITED REDACTIONS FROM THE EXHIBITS TO THE SPECIAL MASTER'S
REPORT AND RECOMMENDATIONS**

Lieff Cabraser Heimann & Bernstein, LLP (“Lieff Cabraser”), Additional Counsel for the Settlement Class, respectfully submits this motion, pursuant to the Court’s Order dated May 31, 2018 (the “May 31 Order”) [Dkt. No. 237], proposing redactions limited to certain categories of information contained in the exhibits (“Exhibits”) to the Special Master’s Report and Recommendations, dated May 16, 2018 (the “Report”).

Lieff Cabraser does not propose any redactions to the Report itself, or to the Executive Summary of the Report (“Executive Summary”). Lieff Cabraser proposes only that certain categories of information contained in a relatively small number of Exhibits be redacted in order to protect information—including attorney work product, discovery material of an opponent produced pursuant to a protective order, and material impacting the privacy concerns of third parties—that is typically afforded strong protection from disclosure under the common law. The categories of redactions that Lieff Cabraser proposes will affect only a handful (roughly a dozen) of the 266 Exhibits on which the Special Master has relied. Further, in each instance, Lieff Cabraser intends to propose (to be further delineated by June 11, 2018) the barest form of redaction that “properly balances the public and private interests and allows for the greatest disclosure of the [document’s] relevant content.” *U.S. v. Kravetz*, 948 F. Supp. 2d 89, 93 (D. Mass. 2013); *see also In re Borders Grp., Inc.*, 462 B.R. 42, 47 (S.D.N.Y. 2011) (“Redacting documents to remove only protectable information is preferable to wholesale sealing. The policy favoring public access supports making public as much information as possible while still preserving confidentiality of protectable information.”).

Specifically, Lieff Cabraser proposes that the following categories of information be redacted from the Exhibits:

- (i) Attorney work product that is specific to Lieff Cabraser, including (in some instances) work product related to other cases besides the State Street litigation

(impacting, to a limited extent, Exhibits 10, 55, 57, 59, 61, 101, 106, 209, 210, 247)¹;

- (ii) Information (including material produced in discovery by State Street) protected from disclosure by the protective order entered in the underlying State Street litigation (impacting, to a limited extent, Exhibits 10, 19, 55, 57, 59, 61, 101, 106);
- (iii) Unrelated case names and client names (impacting, to a limited extent, Exhibits 10, 18, 19, 55, 57, 59); and
- (iv) Private personal financial information of Loeff Cabraser employees and/or third parties (impacting, to a limited extent, Exhibits 18, 59, 106).

With respect to category (i) above, “protection [from disclosure] for opinion work product should be ‘nearly absolute.’” *In re Grand Jury Subpoena*, 220 F.R.D. 130, 145 (D. Mass. 2004). “Opinion work product” is defined as “materials that contain the mental impressions, conclusions, opinions, or legal theories of an attorney.” *Id.* (citing *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d. 1007, 1014-15 (1st Cir. 1988) (collecting cases)). And while the standard for the disclosure of “ordinary” work product is high,² the standard for disclosure of “opinion” work product is even higher. *Id.* (“opinion work product protection can only be overridden in ‘rare circumstances,’ upon ‘a highly persuasive showing’”) (citation and internal quotation marks omitted). Certain of the Exhibits (particularly, although not exclusively, the deposition transcripts) contain descriptions or summaries of Loeff Cabraser’s mental impressions, conclusions, opinions or legal theories not only concerning this case (in some instances, with

¹ The listed Exhibits represent Loeff Cabraser’s best current understanding of those potentially impacted by Loeff Cabraser’s proposed redactions. Some Exhibits may be added to or subtracted from these lists by the time of Loeff Cabraser’s June 11 filing, but no major changes are anticipated.

² Rule 26(b)(3) permits discovery of “ordinary” work product “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” *Id.* at 144. Loeff Cabraser is largely withholding its objection to disclosure of “ordinary” work product at least as it relates to the State Street matter in particular, although it reserves the right to include proposals for at least some modest redactions on that ground in its forthcoming June 11 filing.

specific regard to information obtained by State Street pursuant to a protective order³), but also other cases that are not at issue. Again, Lieff Cabraser has identified just 10 (approximately) Exhibits for which this is a potential issue, and the proposed redactions on these grounds should be fairly modest in scope.

Category (ii) above is, in many (if not most) instances, closely tied to category (i). In a handful of instances in the Exhibits (again, predominantly in the deposition transcripts), information that State Street produced on a “confidential” basis pursuant to the Protective Order in the underlying litigation is discussed, summarized or described. State Street would (and probably will) almost certainly object to such information being disclosed in the public record, citing paragraph 1 of the Protective Order. Lieff Cabraser remains bound by the Protective Order (*see* paragraph 16 thereof) and accordingly will propose limited redactions to the Exhibits where Lieff Cabraser discusses, summarizes or describes State Street’s confidential information (as defined in the Protective Order).

As for category (iii) above, unrelated case names and client names may properly be redacted on the grounds that they implicate third party privacy interests that are not outweighed by the public’s interest in such matters. *See, e.g., U.S. v. Kravetz*, 706 F.3d 47, 62 (1st Cir. 2013) (“[P]rivacy rights of . . . third parties are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records.”) (internal citations omitted). “Third-party privacy interests,” in particular, “have been referred to as ‘a venerable common law exception to the presumption of access,’ . . . and weigh heavily in a court’s balancing equation,” *Id.* (citations and internal quotation marks omitted); *see also Abdul –Alim v. Wray*, 277 F. Supp. 3d 199, 216 (D. Mass. 2017) (observing, in the context of a FOIA request, that the “Court is

³ *See* Stipulation, Joint Motion, and Order for the Production and Exchange of Confidential Information, entered November 19, 2012 (“Protective Order”) [Dkt. No. 61].

cognizant that it must balance the privacy interests of the third parties [particularly, their names] against any public interest that might be served by disclosure”). At this point, Loeff Cabraser has identified several unrelated case and third party client names that it will seek to redact from the Exhibits. It bears noting that, in such instances, by seeking to redact the case and client names only, which predominantly arise in the context of discussing the terms and details concerning Loeff Cabraser’s representation of clients outside of the State Street litigation, Loeff Cabraser is choosing the path of greatest disclosure, *i.e.*, honoring the Court’s directive to leave as much of the pertinent details undisturbed (and public) as possible.

Finally, as to category (iv) above, “[p]ersonal financial information, such as one’s income or bank account balance, is universally presumed to be private, not public.” *In re Boston Herald, Inc.*, 321 F.3d 174, 190 (1st Cir. 2003) (citing *United States v. Amodeo (Amodeo II)*, 71 F.3d 1044, 1051 (2d Cir. 1995)). References to an employee’s annual income (which, for Loeff Cabraser, occurs in only a handful of instances in the Exhibits) accordingly may properly be redacted prior to filing. *Id.*

Dated: June 5, 2018

Respectfully submitted,

Loeff Cabraser Heimann & Bernstein, LLP

By: /s/ Richard M. Heimann
Richard M. Heimann (*pro hac vice*)
Robert L. Loeff, *of counsel* (*pro hac vice*)
275 Battery Street, 29th Floor
San Francisco, California 94111
Tel: (415) 956-1000
Fax: (415) 956-1008

Steven E. Fineman
Daniel P. Chiplock (*pro hac vice*)
250 Hudson Street, 8th Floor
New York, New York 10018
Tel: (212) 355-9500
Fax: (212) 355-9592

Additional Counsel for the Settlement Class

LOCAL RULE 7.1(a)(2) CERTIFICATION

I hereby certify that prior to filing, I sought to confer with all counsel by sending an email seeking their assent or reaction to the relief requested herein. The Special Master indicated he does not object to categories (i), (ii) and (iv) of Lief Cabraser's requested relief herein, nor to category (iii) "to the extent it applies only to those unrelated case names and client names the Special Master did not specifically identify and rule upon in his factual and legal findings." Lief Cabraser can confirm that category (iii) of its requested relief applies only to unrelated case names and client names that were not specifically identified and ruled upon in the Special Master's factual and legal findings contained in the Report. The Special Master reserved the right to modify and/or update his positions upon receiving the actual proposed redactions.

June 5, 2018

/s/ Richard M. Heimann
Richard M. Heimann

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will thereby be served on this date upon counsel of record for each party identified on the Notice of Electronic Filing.

June 5, 2018

/s/ Richard M. Heimann
Richard M. Heimann

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM, on)
behalf of itself and all others similarly situated,) No. 11-cv-10230 MLW
)
Plaintiffs,)
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)
Plaintiffs,)
)
v.)
)
STATE STREET BANK AND TRUST COMPANY,)
)
Defendant.)

STATE STREET'S MOTION TO SEAL

Pursuant to Local Rule 7.2, and contemporaneous with the filing of a redacted copy of State Street Bank and Trust Co.'s and State Street Global Markets LLC's (collectively, "State Street") June 5, 2018 Motion and Supporting Memorandum of Law in Support of State Street's Motion to Redact Confidential and Proprietary Information in the Special Master's Report, Executive Summary, and Exhibits (the "Redaction Motion"), State Street respectfully moves for leave to file the Redaction Motion under seal.

As grounds for this motion, State Street states as follows:

1. On May 14, 2018, the Special Master's Report, Executive Summary, and exhibits to the Report were filed under seal.

2. At the hearing held on May 30, 2018, the Court ordered that Class Counsel and State Street file by June 5, 2018 motions proposing redactions of information. The Court also stated that, if there is a proper basis, such submissions may be filed under seal.

3. State Street's Redaction Motion references the content of the Special Master's Report and exhibits currently under seal. Publicly filing State Street's Redaction Motion would therefore disclose portions of the Special Master's Report and exhibits currently under seal.

WHEREFORE, pursuant to Local Rule 7.2, State Street respectfully requests that this Court enter an order granting it leave to file State Street's Redaction Motion under seal.

Dated: June 5, 2018

Respectfully submitted,

WILMER PICKERING HALE AND DORR LLP

By 

William H. Paine

Daniel W. Halston

WILMER PICKERING HALE AND DORR LLP

60 State Street

Boston, MA 02109

Tel: (617) 526-5000

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email: william.paine@wilmerhale.com

email: daniel.halston@wilmerhale.com

*Counsel for Defendants State Street Bank
and Trust Co. and State Street Global
Markets LLC*

CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2018, a true and correct copy of the above document has been served by email on all counsel of record.



Robert K. Smith

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

ARKANSAS TEACHER RETIREMENT SYSTEM, on)
behalf of itself and all others similarly situated,)
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similarly situated,)
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Plaintiffs,)
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v.)
)
STATE STREET BANK AND TRUST COMPANY,)
)
Defendant.)

No. 12-cv-11698 MLW

**ORAL ARGUMENT
REQUESTED**

REDACTED

**MOTION AND SUPPORTING MEMORANDUM OF LAW IN SUPPORT OF STATE
STREET'S MOTION TO REDACT CONFIDENTIAL AND PROPRIETARY INFORMATION
IN THE SPECIAL MASTER'S REPORT, EXECUTIVE SUMMARY, AND EXHIBITS**

State Street Bank and Trust Co. and State Street Global Markets LLC (collectively, “State Street”) respectfully submit this motion and memorandum of law pursuant to Paragraph 2 of the Court’s May 31, 2018 Order (ECF No. 237) proposing redactions of categories of information in the Special Master’s Report and Recommendations (“Report”), the Executive Summary of the Report, and the exhibits to the Report.

INTRODUCTION

The Special Master’s Report, its Executive Summary, and the exhibits to the Report contain highly confidential or proprietary information that is protected from public disclosure and for which good cause exists to be kept under seal, including: (1) proprietary information of State Street’s counsel’s rates; (2) proprietary State Street business information, including confidential client names and information, revenue or pricing information; (3) confidential personal contact information for State Street employees and clients; and (4) information protected by the federal and/or state mediation privilege. That information is at most tangentially related to the subject matter of the Special Master’s Report and narrowly redacting those categories of information will in no way prejudice the public’s ability to understand the Special Master’s Report and the reasons for the Special Master’s findings. For these reasons, and the other reasons specified below, State Street respectfully requests permission to redact from the Special Master’s Report, its Executive Summary, and the exhibits to the Report the categories of information identified below.

ARGUMENT

Documents and information may be filed under seal with the Court for “good cause.” *See Dunkin Donuts Franchised Restaurants, LLC v. Agawam Donuts, Inc.*, No. CIV.A. 07-11444-RWZ, 2008 WL 427290, at *1 (D. Mass. Feb. 13, 2008). What constitutes “good cause” and “what concerns can justify a document being filed under seal[] depends on the nature of the filing.” *Bradford & Bigelow, Inc. v. Richardson*, 109 F. Supp. 3d 445, 447 (D. Mass. 2015). The

burden for sealing documents is lower when the documents or information sought to be sealed is less important to the central issue before the Court. *Id.* (“The more important the document is to the core judicial function of determining the facts and law applicable to the case, the stronger the presumption of public access and the higher the burden to overcome it.”). “[I]nterests which courts have found sufficient to justify impoundment include trade secrets, confidential business information [and] information covered by a recognized privilege” *Velcro Grp. Corp. v. Zijlstra*, 180 F. Supp. 3d 106, 107 (D. Mass. 2016) (citations omitted).

Here, good cause exists to keep under seal State Street’s counsel’s proprietary rate information, confidential information concerning State Street’s clients, employees and its business, and information protected by the federal common law and/or state mediation privilege. This information has little bearing on the Special Master’s Report and would not inhibit the public from understanding the Special Master’s Report or the bases for the Special Master’s findings.

I. GOOD CAUSE EXISTS TO MAINTAIN UNDER SEAL PROPRIETARY INFORMATION OF STATE STREET’S COUNSEL

Trade secrets are among the categories of information for which good cause exists to maintain under seal. *See Zijlstra*, 180 F. Supp. 3d at 107; *Deetz Family, LLC v. Rust-Oleum Corp.*, 217 F. Supp. 3d 430, 434 (D. Mass. 2016) (ordering the sealing of court filings containing trade secrets). And non-public firm pricing information is “routinely given trade secret protection.” *See EMC Corp. v. Pure Storage, Inc.*, No. 13-12789-JGD, 2016 WL 7826662, at *6 (D. Mass. Aug. 19, 2016) (quoting *Brocade Commc’ns Sys., Inc. v. A10 Networks, Inc.*, 873 F. Supp. 2d 1192, 1214 (N.D. Cal. 2012)); *see also Bruno Int’l Ltd. v. Vicor Corp.*, No. 14-10037-DPW, 2015 WL 5447652, at *12 (D. Mass. Sept. 16, 2015) (holding that “pricing information . . . can constitute trade secrets where the information provides its holder with a competitive advantage”); *Aggreko, LLC v. Koronis*, No. 13-13034-TSH, 2013 WL 6835165, at *4 (D. Mass. Dec. 19, 2013)

(holding that “pricing . . . information” constitutes a trade secret). Indeed, the Special Master recognized the proprietary nature of attorney rate information. *See* Report at 162.

Here, the exhibits to the Special Master’s Report contains references to State Street’s counsel’s rate information. [REDACTED]

[REDACTED] That rate information is not available to the public and affords State Street’s counsel a competitive advantage in competing for business with its competitor firms. [REDACTED]

[REDACTED] Disclosure of that rate information could cause State Street’s counsel irreparable harm. Accordingly, good cause exists to maintain under seal State Street’s counsel’s rate information.

II. GOOD CAUSE EXISTS TO MAINTAIN UNDER SEAL CONFIDENTIAL INFORMATION REGARDING STATE STREET’S BUSINESS, CLIENTS, AND EMPLOYEES

Good cause exists to maintain under seal confidential and proprietary State Street business information, including the identities of State Street’s clients and confidential client information, proprietary business information, including revenue and pricing information, and personal contact information of State Street employees and its clients.

First, the identities of State Street’s clients—other than those identified in already public court filings—are trade secrets that should remain under seal. *See Bruno*, 2015 WL 5447652, at *12 (holding that “customer lists . . . can constitute trade secrets where the information provides its holder with a competitive advantage”); *Optos, Inc. v. Topcon Med. Sys., Inc.*, 777 F. Supp. 2d 217, 240 (D. Mass. 2011) (holding that customer list was protectable trade secret).

Here, the exhibits to the Special Master’s Report contain the names of numerous State Street clients that were not named parties in this litigation. [REDACTED]

[REDACTED] Disclosing the names of

these clients would afford competitors with a list of clients to target to State Street's detriment. And the identities of those clients have no bearing at all on the issues that are the subject of the Special Master's Report. Thus, good cause exists to maintain under seal these identities and identifying information of State Street's clients.

Second, State Street's confidential and proprietary business information should remain under seal. *See Glass Dimensions, Inc. v. State St. Corp.*, No. CIV.A. 10-10588-FDS, 2013 WL 6280085, at *1 (D. Mass. Dec. 3, 2013) (ordering the sealing of "sensitive business information" to "avoid the serious competitive injury that dissemination would more than likely entail"); *see also Tdn Money Sys., Inc. v. Glob. Cash Access, Inc.*, No. 2:15-CV-02197-JCM-NJK, 2016 WL 4708466, at *2 (D. Nev. Sept. 7, 2016) (sealing information regarding "the parties' operations" because "competitors could use the information to exploit its strategic business plans, could replicate its business methods, and could gain a competitive advantage over Defendant by identifying its business formulas and processes"); *Stout v. Hartford Life & Accident Ins. Co.*, No. CV 11-6186 CW, 2012 WL 6025770, at *2 (N.D. Cal. Dec. 4, 2012) (sealing information that competitors could use to inform their business strategy).

Certain of the exhibits to the Special Master's Report contain proprietary business information that was the subject of the underlying litigation in this Action. [REDACTED]

[REDACTED] This document, in addition to others reflected in exhibits or discussed in depositions, was initially produced by State Street pursuant to the Protective Order in this case, entered by this Court on November 19, 2012. *See* ECF No. 61. Disclosing State Street's proprietary business information would provide competitors with access to State Street's business strategy, pricing, and performance metrics, and provide those competitors with a competitive

advantage to State Street's detriment. That proprietary business information also has very little bearing on the issues that are the subject of the Special Master's Report, and thus its disclosure is of no need to the public reviewing the Special Master's Report. Accordingly, good cause exists to maintain under seal such confidential, proprietary business information.

Finally, the personal contact information of State Street employees and its clients should remain under seal. *Benedict v. Hewlett-Packard Co.*, No. 13-CV-00119-BLF, 2016 WL 4943007, at *2 (N.D. Cal. Sept. 16, 2016) (sealing personal contact information and email addresses); *Nursing Home Pension Fund v. Oracle Corp.*, No. C01-00988 MJJ, 2007 WL 3232267, at *2 (N.D. Cal. Nov. 1, 2007) (sealing contact information of third-parties); *cf. Eil v. U.S. Drug Enf't Admin.*, 209 F. Supp. 3d 480, 488 (D.R.I. 2016) (sealing personally identifiable information (citing *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 478 (6th Cir. 1983) ("the privacy rights of participants and third parties are among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records" (quotation marks and citations omitted))), *rev'd on other grounds*, 878 F.3d 392 (1st Cir. 2017).

The same exhibits to the Special Master's Report containing proprietary business information that was the subject of the underlying litigation in this Action also occasionally contain personal contact information of State Street employees and its clients. [REDACTED]

[REDACTED] That information is not public, has no bearing on the either the underlying litigation or the issues that are the subject of the Special Master's Report, and could expose State Street employees and their clients to unwanted invasion of their privacy and potential harassment. For these reasons, good cause exists to maintain under seal such confidential, proprietary business information.

III. GOOD CAUSE EXISTS TO MAINTAIN UNDER SEAL PRIVILEGED MEDIATION COMMUNICATIONS

Good cause exists to maintain under seal information absolutely protected from disclosure by a recognized privileged. *See Siedle v. Putnam Invs., Inc.*, 147 F.3d 7, 12 (1st Cir. 1998) (holding communications protected by the attorney-client privilege must remain sealed). As numerous courts have recognized, at the very least, communications with a neutral third-party mediator, communications between parties during a mediation, and communications in preparation for and during the course of a mediation are absolutely protected from disclosure by the federal common law mediation privilege. *See ACQIS, LLC v. EMC Corp.*, No. 14-CV-13560, 2017 WL 2818984, at *2 (D. Mass. June 29, 2017) (“This Court holds that communications to which a mediator was personally privy, communications that were directly made at a mediator’s explicit behest, or *communications undertaken with the specific intent to present them to a mediator for purposes of mediation are protected by the federal mediation privilege.*” (emphasis added)); *In re RDM Sports Grp., Inc.*, 277 B.R. 415, 430 (Bankr. N.D. Ga. 2002); *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1180 (C.D. Cal. 1998), *aff’d*, 216 F.3d 1082, 2000 WL 420636 (9th Cir. April 18, 2000); *Sheldone v. Pa. Turnpike Com’n*, 104 F.Supp.2d 511, 515-18 (W.D. Pa. 2000).¹ That is because successful mediation, which is an invaluable means of “reducing litigation costs and . . . decreasing the size of state and federal court dockets” depends on “the imperative need for confidence and trust among participants.” *Folb*, 16 F. Supp. 2d at 1176-77.

¹ Massachusetts recognizes, by statute, a mediation privilege of similar scope. *See* Mass. Gen. Laws. ch. 233, § 23C (“Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding . . .”).

Here, the Special Master's Report and exhibits to the Report contain mediation and settlement discussions elicited during numerous depositions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Public disclosure of these communications would vitiate the mediation privilege and disincentivize candid disclosure during mediation. Accordingly, good cause exists to maintain under seal the portions of the Special Master's Report and exhibits thereto that disclose the substance of communications protected by the mediation privilege.

CONCLUSION

For the foregoing reasons, State Street respectfully requests permission to redact from the Special Master's Report, its Executive Summary, and the exhibits to the Report its counsel's rate information, its clients' identities and other confidential proprietary business information, the contact information of its employees and clients, and confidential mediation communications and positions. State Street requests that this information be kept under seal.

Dated: June 5, 2018

Respectfully submitted,

WILMER PICKERING HALE AND DORR LLP

By 

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*Counsel for Defendants State Street Bank
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LOCAL RULE 7.2(a)(2) CERTIFICATION

Pursuant to Local Rule 7.1(a)(2), I hereby certify that on June 4, 2018 State Street conferred by email with Class Counsel and the Special Master regarding the resolution of this Motion. Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, the Thornton Law Firm LLP, Keller Rohrback LLP, and Zuckerman Spaeder LLP consented to the Motion. Labaton Sucharow LLP, Keller Rohrback LLP, and Zuckerman Spaeder LLP reserved their right to challenge individual redactions. State Street did not hear from the Special Master or McTigue Law LLP.



William H. Paine

CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2018, a true and correct copy of the above document has been served by email on all counsel of record.



Robert K. Smith

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.

June 6, 2018

On May 31, 2018, the court ordered, among other things, that:

By June 5, 2018, counsel for the plaintiff class and for State Street [Bank and Trust Company] shall file motions proposing redactions of categories of information, and supporting memoranda and affidavits, including affidavits from any client who wishes to assert an attorney-client privilege. If there is a proper basis, the submissions may be filed under seal. A redacted version of any sealed submission shall also be filed under seal. The court will decide whether and when to make it part of the public record.


Docket No. 237, ¶2.

On June 5, 2018, all counsel for the plaintiff class except Labaton Suchanow LLP ("Labaton") and State Street responded to this Order with submissions filed for the public record. Labaton filed a motion to impound its submissions, but did not, as ordered, file under seal redacted versions of them. Instead it stated that "[g]iven that the very purpose of the motion is to restrict this material from being filed publicly, it is not feasible to provide an intelligible, redacted version that removes the material that should be filed under seal." Docket No. 253 (under seal) at 2.

If Labaton wanted relief from the May 31, 2018 Order, it should have filed a motion seeking it before June 5, 2018. In any event, its claim that it is not feasible to file an intelligible redacted version of its submissions is unpersuasive.

Therefore, it is hereby ORDERED that Labaton shall file, by 9:00 a.m. on June 7, 2018, versions of its submissions with

redactions consistent with the standards discussed in the May 16, 2018 Order in this case, see Docket No. 223, and any other jurisprudence which Labaton cites with its June 7, 2018 submissions. Any failure to submit a properly redacted version of the June 5, 2018 submissions may, among other things, result in the denial of Labaton's motion to impound.


UNITED STATES DISTRICT JUDGE