**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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

**LABATON SUCHAROW LLP'S SUBMISSION OF**
**UN-REDACTED VERSION OF DOCUMENT**

Pursuant to Paragraph 4(a) of the Court's November 8, 2018 Order, ECF 518, Labaton Sucharow LLP respectfully submits, as Exhibit 1 hereto, an un-redacted version of Exhibit

40343 (LBS04043) to the Cover Memorandum to the Special Master's First Submission of Documents to Supplement the Record, ECF 423-174.

Dated: December 18, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on December 18, 2018.

*/s/ Joan A. Lukey*
Joan A. Lukey

# Exhibit 1

Message

**From:** Keller, Christopher J. [/O=GOODKIN LABATON RUDOFF SUCHAROW/OU=FIRST ADMINISTRATIVE GROUP/CN=RECIPIENTS/CN=KELLERC]
**Sent:** 10/17/2007 4:02:59 PM
**To:** Belfi, Eric J. [EBelfi@labaton.com]
**CC:** Tetefsky, Jennifer [JTetefsky@labaton.com]
**Subject:** Re: Oklahoma Teachers

Agree on the conference - doane should be invited to speak.

Christopher Keller
Partner
Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Ph. 212-907-0853
---
Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Belfi, Eric J.
To: Keller, Christopher J.
Cc: Tetefsky, Jennifer
Sent: Wed Oct 17 11:43:46 2007
Subject: Oklahoma Teachers

I met with AAG David Kinney and Tom Beaver of the Oklahoma Teachers Retirement System. We had a very good meeting.

They have been represented by Bernstein Litowitz and Nix Patterson (they knew they were small) and they know that Litowitz is the only real firm - so we discussed conflicts and they seem understand that having more than one credible counsel makes sense.

We discussed access to all of their trading which they seemed open to.

They were very interested in our international presence because 17 percent of the fund is overseas now. They were curious about overseas cases.

They are doing a private placement next Wednesday and they said that we should follow up with them after that.

All and all a good meeting and we will go back to them in a week or so to touch base. In the meantime I am going to talk to Damon's contact about what is going on behind the scenes.

Also, they went to the Bernstein conference last week and they were impressed so we need to do one soon.

Eric

Eric J. Belfi
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# Exhibit 1

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

*Kirk Dahl, et al., v. Bain Capital Partners LLC, et al.*

*Case No. 1:07-cv-12388-WGY*

**DECLARATION OF BRIAN T. FITZPATRICK**

I. Background and qualifications

1. I am a Professor of Law at Vanderbilt University in Nashville, Tennessee. I joined the Vanderbilt law faculty in 2007, after serving as the John M. Olin Fellow at New York University School of Law in 2005 and 2006. I graduated from Harvard Law School in 2000. After law school, I served as a law clerk to The Honorable Diarmuid O'Scannlain on the United States Court of Appeals for the Ninth Circuit and to The Honorable Antonin Scalia on the United States Supreme Court. I also practiced law for several years in Washington, D.C., at Sidley Austin LLP. My C.V. is attached as Exhibit 1.

2. My teaching and research at Vanderbilt and New York University have focused on class action litigation. I teach the Civil Procedure, Federal Courts, and Complex Litigation courses at Vanderbilt. In addition, I have published a number of articles on class action litigation in such journals as the University of Pennsylvania Law Review, the Journal of Empirical Legal Studies, and the Vanderbilt Law Review. My work has been cited by numerous courts, scholars, and popular media outlets, such as the New York Times, USA Today, and Wall Street Journal. I am also frequently invited to speak at symposia and other events about class action litigation, such as the ABA National Institute on Class Actions in 2011 and the ABA Annual Meeting in 2012. Since 2010, I have also served on the Executive Committee of the Litigation Practice Group of the Federalist Society for Law & Public Policy Studies.

3. In December 2010, I published an article in the Journal of Empirical Legal Studies entitled *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical L. Stud. 811 (2010) (hereinafter "Empirical Study"). This article is what I believe to be the most comprehensive examination of federal class action settlements and attorneys' fees that has ever been published. Unlike other studies of class actions, which have been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as settlements approved in published opinions), my study attempted to examine *every* class action settlement approved by a federal court over a two-year period, 2006-2007. *See id*. at 812-13. As such, not only is my study an unbiased sample of settlements, but the number of settlements included in my study is several times the number of settlements per year that has been identified in any other empirical study of class action settlements: over this two-year period, I found 688 settlements, including 33 from the First Circuit alone. *See id*. at 817. I presented the findings of my study at the Conference on Empirical Legal Studies at the University of Southern California School of Law in 2009, the Meeting of the Midwestern Law and Economics Association at the University of Notre Dame in 2009, and before the faculties of many law schools in 2009 and 2010. This study has been relied upon by a number of courts, scholars, and testifying experts. *See, e.g.*, *Silverman v. Motorola Solutions, Inc.*, 739 F.3d 956, 958 (7th Cir. 2013) (relying on article to assess fees); *Tennille v. W. Union Co.*, 2014 WL 4723805, at *3 (D. Colo. Sept. 23, 2014) (same); *In re Colgate-Palmolive Co. Erisa Litig.*, 2014 WL 3292415, at *4 (S.D.N.Y. July 8, 2014); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, 2014 WL 92465, at *5-*6 & n.8 (E.D.N.Y. Jan. 10, 2014) (same); *In re Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation*, 2013 WL 6383000, *11-*12 (D.D.C. Dec. 6, 2013) (same);

*In re Vioxx Products Liability Litigation*, 2013 WL 5295707, at *3-4 (E.D. La. Sep. 18, 2013) (same); *In re Black Farmers Discrimination Litigation*, 953 F.Supp.2d 82, 98-99 (D.D.C. 2013) (same); *In re Southeastern Milk Antitrust Litigation*, 2013 WL 2155387, at *2 (E.D. Tenn., May 17, 2013) (same); *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1081 (S.D. Tex. 2012) (same); *Pavlik v. FDIC*, 2011 WL 5184445, at *4 (N.D. Ill. Nov. 1, 2011) (same); *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1, 40 (D.D.C. 2011) (same); *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 792 F. Supp. 2d 1028, 1033 (N.D. Ill. 2011) (same); *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 359 (E.D.N.Y. 2010) (same).

4. I have been asked by class counsel to opine on whether the attorneys' fees they have requested are reasonable. In order to formulate my opinion, I reviewed a number of documents provided to me by class counsel; I have attached a list of these documents in Exhibit 2 (and note there how I refer to them herein). As I explain, based on my study of settlements across the country and in the First Circuit in particular, I believe the requests here are within the range of reasonable fee awards in federal class action settlements.

II. Case background

5. This case was brought on behalf of shareholders of several publicly-traded companies against several private equity firms and others for violations of the federal antitrust laws. The plaintiffs alleged that the defendants conspired not to compete with one another when purchasing publicly-traded companies through leveraged buyouts between 2003 and 2006, thereby suppressing the prices at which shareholders could tender their shares. The first complaint was filed in December 2007, and, after years of discovery and dozens of dispositive

motions, the parties have now entered into five separate settlement agreements that fully resolve the case against the seven remaining defendants. The parties have asked the court to certify a settlement class and approve these settlements, and the court preliminarily did so on September 29, 2014.

6. As summarized in the table below, the five separate settlement agreements require cash payments to the class of between $29.5 million and $325 million depending on the defendants. All the monies will be distributed to the class (after the deduction of administrative expenses, attorneys' fees, litigation expenses, and service awards) with no amount reverting to the defendants. *See* Bain Settlement ¶¶ 20, 23(b), 26-27; Goldman Settlement ¶¶ 27, 42, 43-44; Silver Lake Settlement ¶¶ 21, 24(c), 27-28; Blackstone Settlement ¶¶ 27, 31(c), 34-35; Carlyle Settlement ¶¶ 23, 27(c), 30-31.

| Defendant(s) | Settlement Date | Settlement Amount |
|---|---|---|
| Bain Capital Partners | 6/9/2014 | $54,000,000 |
| Goldman Sachs Group | 6/10/14 | $67,000,000 |
| Silver Lake Technology | 7/9/14 | $29,500,000 |
| Blackstone Group<br>Kohlberg Kravis Roberts<br>TPG Capital | 7/28/14 | $325,000,000 |
| Carlyle | 9/5/14 | $115,000,000 |

7. Class counsel have now moved the court for awards of fees equaling 33% of each of the five settlements. In my opinion, it would be reasonable for the court to grant these fee requests.

III. Assessment of the reasonableness of the requests for attorneys' fees

8. This is a so-called "common fund" settlement, where the efforts by attorneys for the plaintiffs have created a common fund of cash for the benefit of class members, but, because

this is a class action and there is no fee-shifting statute applicable, the attorneys can be compensated only from the fund they have created. At one time, courts that awarded fees in common fund class action cases did so using the familiar lodestar approach. *See In re Thirteen Appeals*, 56 F.3d 295, 305-6 (1st Cir. 1995). Under this approach, courts awarded class counsel a fee equal to the number of hours they worked on the case (to the extent the hours were reasonable), multiplied by a reasonable hourly rate as well as by a discretionary multiplier that courts often based on the risk of non-recovery and other factors. Over time, however, the lodestar approach fell out of favor in common fund class action cases because it was difficult to calculate the lodestar (courts had to review voluminous time records and the like) and the method did not align the interests of class counsel with the interests of the class (because class counsel's recovery did not depend on how much the class recovered). *See id.* at 307. According to my empirical study, the lodestar method is now used to award fees in only a small percentage of class action cases, usually where the settlement calls for substantial non-monetary relief or where a fee-shifting statute is applicable. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832 (finding the lodestar method used in only 12% of settlements).

9. The method of calculating attorneys' fees now most often used is known as the "percentage-of-the-fund" method. Under this approach, courts select a percentage that they believe is fair to class counsel, multiply the settlement amount by that percentage, and then award class counsel the resulting product. The percentage-of-the-fund approach has the advantages of being easy to calculate (because courts need not review voluminous time records and the like) and of aligning the interests of class counsel with the interests of the class (because the more the class recovers, the more class counsel receives). *See In re Thirteen Appeals*, 56 F.3d at 307 (noting that the percentage method "is often less burdensome to administer than the

lodestar method" and that "using the lodestar method . . . encourages inefficiency"); *Bussie v. Allmerica Financial Corp.*, 1999 WL 342042, at *2 (D. Mass. May 19, 1999) ("From a public policy standpoint, the [percentage of the fund] method of calculating fees 'more appropriately aligns the interests of the class with the interests of class counsel—the larger the value of the settlement, the larger the value of the fee award.' Furthermore, the [percentage of the fund] method encourages efficiency and avoids the disincentive to settle cases early created by the lodestar method." (citation omitted)).

10. In the First Circuit, district courts have the discretion to use either the lodestar method or the percentage-of-the-fund method in common fund cases. *See In re Thirteen Appeals*, 56 F.3d at 307 ("[W]e hold that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar."); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 78 (D. Mass. 2005). In light of the well-recognized disadvantages of the lodestar method and the well-recognized advantages of the percentage-of-the-fund method, it is my opinion that courts should generally use the percentage-of-the-fund method in common fund cases unless special circumstances counsel otherwise. Because there are no such special circumstances in this case, it is my opinion that the percentage-of-the-fund method should be used here.

11. Courts usually examine a number of factors when deciding what percentage to award class counsel under the percentage-of-the-fund approach. *See* Fitzpatrick, *Empirical Study*, *supra*, at 832. The First Circuit has not yet prescribed a list of factors, but district courts in this Circuit often follow the factors prescribed by the Second and Third Circuits. *See, e.g., In re Relafen*, 231 F.R.D. at 79 (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 n. 1 (3d Cir. 2000) and *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000)); *In re*

*Lupron Marketing and Securities Litig.*, 2005 WL 2006833, at *3 (D. Mass. Aug. 17, 2005). These factors (in the order that I will address them) are:

(1) awards in similar cases;

(2) public policy considerations;

(3) the size of the fund created and the number of persons benefited;

(4) the complexity of the litigation;

(5) the risks of the litigation;

(6) the risk of nonpayment.

(7) the duration of the litigation;

(8) the amount of time devoted to the case by plaintiffs' counsel;

(9) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; and

(10) the skill and efficiency of the attorneys involved.

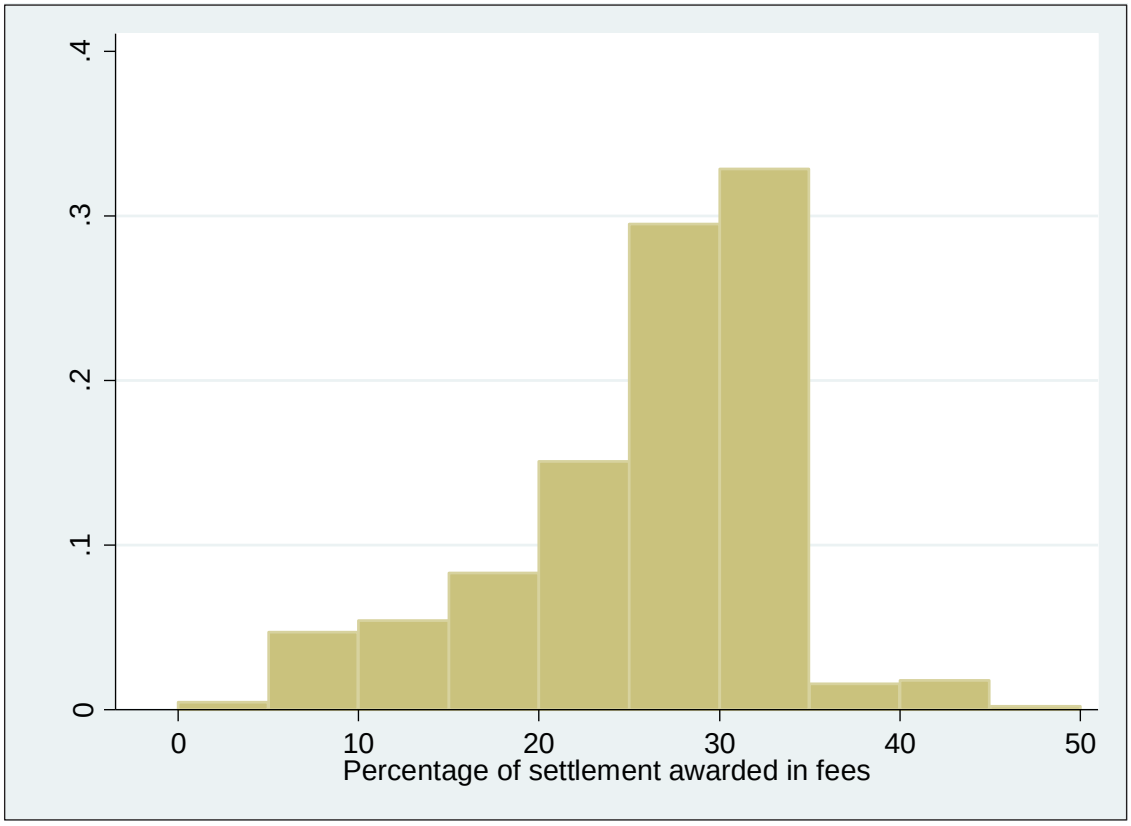
12. In my opinion, examination of these factors shows that awards equal to 33% of each of the five settlements here would be reasonable.

13. Consider first factor (1): fee awards in similar cases. According to my empirical study, courts awarded fee percentages over a broad range (3% to 47%), but the most common percentages awarded by all federal courts in 2006 and 2007 using the percentage-of-the-fund method were 25%, 30%, and 33%, with nearly two-thirds of awards between 25% and 35%, and with a mean award of 25.4% and a median award of 25% (with standard deviation of 7.5%). *See* Fitzpatrick, *Empirical Study, supra,* at 833-34, 838. The mean and median in antitrust cases were the same as those for all cases. *See id.* at 835. The findings of the other two large-scale studies of class action fee awards are largely consistent with my own. *See* Theodore Eisenberg

& Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. Empirical Legal Studies 27 (2008) ("Attorney Fees I"); Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical L. Stud. 248 (2010) ("Attorney Fees II")

14. Although the fee awards requested here are on the high end of the range established in previous cases, they are hardly unusual. This can be depicted graphically in Figure 1, which shows the distribution of all of the percentage-method fee awards in my study. In particular, the figure shows what fraction of settlements (y-axis) had fee awards within each five-point range of fee percentages (x-axis). As the figure shows, the most populous range—the one comprising over thirty percent (i.e., .3) of all settlements—included fee awards that fell between 30% and 35%.

**Figure 1: Percentage-method fee awards among all federal courts, 2006-2007**

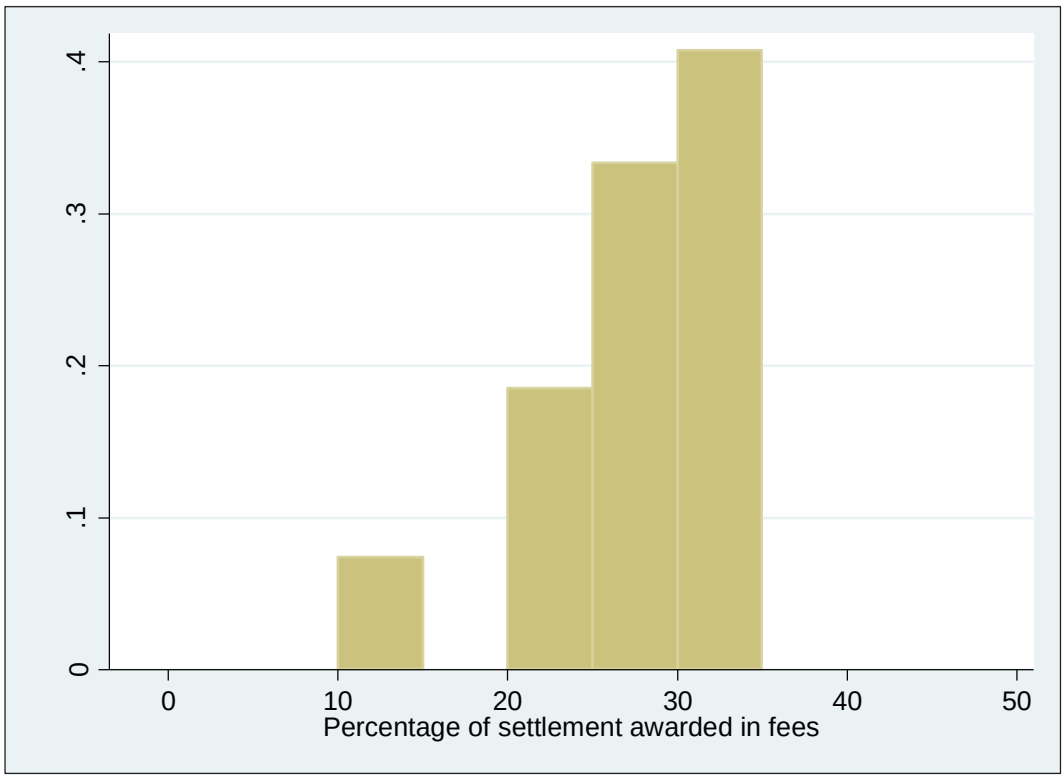



15. The fee requests here are hardly unusual even when they are considered against cases from the First Circuit alone. In the 27 settlements in my study from the First Circuit where the percentage-of-the-fund method was used, the most common percentages were 25% and 33%, with over forty percent of awards between 30% and 35%. The mean was 27% and the median 25% (with a standard deviation of 6.0%).[1] *See* Fitzpatrick, *Empirical Study*, *supra*, at 836. This

[1] In their study of class action fees, Ted Eisenberg and Geoff Miller found mean and median fee awards in the First Circuit somewhat lower than those found in my study: 20%. *See* Eisenberg & Miller, *Attorneys Fees II*, *supra* at 260. I think their lower numbers can be explained by two factors. First, their study was based on settlements dating back to 1993, and, as such, their data are older than mine. Second, their study examined only a small fraction of the settlements over this period, and the fraction examined was not designed to be representative of the whole. *See id*. at 253 ("[O]ur data include only opinions that were published in some readily available form. Obviously, therefore, we have not included the full universe of cases . . . . [P]ublished opinions are not necessarily representative of the universe of all cases."). Indeed, their study oversampled larger cases, where, as I note below, the fee percentages awarded are often smaller than in other

is depicted graphically in Figure 2. Like the nationwide data, the most populous range of fee awards was between 30% and 35%.

**Figure 2: Percentage-method fee awards in the First Circuit, 2006-2007**




16. It should be noted that some of the settlements here are quite large, two are for over $100 million, with one over $300 million. In my empirical study, only 41 settlements nationwide (less than 7%) exceeded $100 million and only 18 settlements (less than 3%) exceeded $300 million. *See id.* at 828. This is notable because my empirical study showed that settlement size had a statistically significant but inverse relationship with the fee percentages awarded by federal courts—*i.e.*, that federal courts awarded lower percentages in cases where settlements were larger. *See id*. at 838, 842-44. (Even when only the fee awards in the First

cases. *See* Fitzpatrick, *Empirical Study*, *supra*, at 829 (discussing the unrepresentative sampling in the Eisenberg-Miller studies).

Circuit are considered, this relationship persisted.) Thus, for example, the mean and median fee percentages awarded in the fourteen percentage-of-the-fund settlements in my dataset between $100 and $250 million were only 17.9% and 16.5%, respectively, with similar numbers for settlements between $250 million and $500 million: 17.8% and 19.5%. *See id.* at 839. This raises the question whether it would be unreasonable to award 33% in fees in the two larger settlements here. As I explain below, I believe such awards would still be reasonable.

17. First, nothing in First Circuit law requires that fee percentages decline as settlement sizes increase. Indeed, this court rejected such a suggestion in *In re Relafen*. *See* 231 F.R.D. at 81 (overruling objection that "33-1/3% is high for a large settlement fund" despite "cases that suggest that the standard percentage is generally lower as the common fund increases"). Second, it sorely undermines the public policy considerations discussed below to reduce fee percentages for no reason other than the fact that the settlement is large. As some courts and many commentators have noted, if class action lawyers believe they will receive a smaller share of larger settlements, then class counsel may not have incentives to resolve cases for the maximum compensation and deterrence. *See, e.g.*, *In re Cendant Corp. Litigation*, 264 F.3d 201, 284 n.55 (3d Cir. 2001) ("Th[e] position [that the percentage of a recovery devoted to attorneys' fees should decrease as the size of the overall settlement or recovery increases] . . . has been criticized by respected courts and commentators, who contend that such a fee scale often gives counsel an incentive to settle cases too early and too cheaply." (alteration in original)). As one court has put it, "[b]y not rewarding Class Counsel for the additional work necessary to achieve a better outcome for the class, the sliding scale approach creates the perverse incentive for Class Counsel to settle too early for too little." *Allapattah Servs. Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1213 (S.D.Fla. 2006).

18. Consider the following example: if courts award class action attorneys 33% of settlements when they are under $100 million but only 20% of settlements when they are over $100 million, then rational class action attorneys will prefer to settle cases for $90 million (*i.e.*, a $30 million fee award) than $125 million (*i.e.*, a $25 million fee award). That is the very definition of perverse incentives.

19. Third, the fact that average and median fee percentages are lower in larger cases does not mean, of course, that courts do not award higher fee percentages when the other factors justify it. Indeed, there are a number of examples from all across the country of fee awards equal to 33% or more in large settlements, including in antitrust cases. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp.2d 467, 516 (S.D.N.Y. 2009) (33% of $510 million); *In re Vitamins Antitrust Litig.*, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001) (34% of $365 million); *In re Tricor Direct Purchaser Antitrust Litigation*, No. 1:05-cv-00340, at 10 (D. Del. Apr. 23, 2009) (33% of $250 million); *In re Buspirone Antitrust Litig.*, No. 01-md-1413 (S.D.N.Y. Apr. 11, 2003) (33% of $220 million); *In re Relafen Antitrust Litig.*, No. 01-12239, at 8 (D. Mass. Apr. 9, 2004) (33% of $175 million); *In re Apollo Group Inc. Securities Litigation*, 2012 WL 1378677, at *9 (D.Ariz. April 20, 2012) (33% of $145 million); *In re Combustion Inc*., 968 F.Supp. 1116, 1142 (W.D.La. 1997) (36% of $127 million); *City of Greenville v. Syngenta Crop Protection*, 904 F.Supp.2d 902, 908-09 (S.D. Ill. 2012) (33% of $105 million).

20. Consider next factor (2): public policy considerations. In my opinion, fee awards in class action cases should be set in order to facilitate the two most significant policies of class action litigation: complete compensation for injuries and optimal deterrence of wrongdoing. *See, e.g.*, David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871, 1874 (2002). In doing so, courts should be

cognizant of the fact that, when they set fees, it affects not only the cases before them but future cases as well: it is class action lawyers working on contingency who determine whether or not to file a class action case and how to litigate the case, and, like any other rational actors, they make such decisions based in large part on how they think they will be compensated. Accordingly, courts should set fee awards such that future lawyers will make the best decisions about what cases to file and how to resolve them. In my view, this means courts should set fees such that lawyers will have incentives 1) to bring as many meritorious cases as possible and 2) to litigate those cases in a way that maximizes the resulting compensation for the class and deterrence of future wrongdoing.

21. Consider next the factors: (3) the size of the fund created and the number of persons benefited, (4) the complexity and duration of the litigation, (5) the risks of the litigation, and (6) the risk of nonpayment. These factors ask the court to assess how the results achieved by class counsel look in light of the risks presented by the litigation. In other words, these factors ask the court to assess how much value for the class the lawyers here generated from the case. These factors are important because, if class action lawyers know courts will increase or decrease their fee percentages based on how much value they generate from cases, then they will have the incentive to generate as much value from cases as they can, which furthers the public policies of maximizing compensation and deterrence. Here, I believe class counsel generated considerable value from this case. Based on the estimates calculated by the class's damages expert during the course of litigation, the five settlements here recovered approximately 5% of the class's "single damages" (i.e., damages excluding any possible trebling).[2] *See* Motion for

[2] There appears to be a difference of opinion among courts over whether antitrust settlements should be judged by the plaintiffs' estimated single damages or their estimated trebled damages. *See Sullivan v. DB Investments*, 667 F.3d 273, 324-25 (3d Cir. 2011) (citing cases exhibiting

Class Certification p. 36. While that may seem like a small percentage, in light of the many challenges in class action litigation, it is not at all unusual to see settlements recover similar percentages. Although I am aware of no published studies of recovery rates in antitrust class actions, in shareholder securities class actions (a context not unlike this one), courts routinely approve settlements for similar fractions of the class's estimated damages. *See, e.g., Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review, available at* http://www.nera.com/content/dam/nera/publications/archive2/PUB_2013_Year_End_Trends_1.2014.pdf at 8, 33 (finding that the median securities fraud class action between 1996 and 2013 settled for between 1.3% and 7.0% of investor losses depending on the year).

22. The fraction of the class's damages recovered by the settlement does not mean much without comparing it to the risks and complexity of the case. The risks and complexities here were formidable. This case alleged antitrust violations in a completely novel market: the market for leveraged buyouts of publicly-traded companies. As far as I am aware, no one has ever won an antitrust case in this market before. But the court need not speculate about the difficulties class counsel faced in this novel context because there were two prior efforts to bring antitrust actions against these very defendants that went nowhere. First, in 2006, the Department of Justice commenced an antitrust investigation into the defendants' practices, but that investigation never led to any charges. *See* Declaration ¶ 23. And lest it be thought that class counsel somehow piggybacked on the Department of Justice's investigation, it should be noted that, not only did the Department of Justice not share with class counsel any of the information it derived from its investigation, but *the Department* actually asked *class counsel* to share *their* efforts with *the Department*. *See id*. at ¶ 198. Second, before class counsel filed this lawsuit,

"disagreement"). Nonetheless, the single-damages standard is frequently used. *See id*. at 325; *City of Detroit v. Grinnell*, 495 F. 2d. 448 (2d Cir. 1974).

there was another private lawsuit against the defendants but it was voluntarily dismissed after the United States Supreme Court decided the *Bell Atlantic v. Twombly* antitrust case, presumably because the lawyers there did not believe the antitrust violations here would even survive a motion to dismiss after *Twombly*. *See id.* at ¶ 28. Why did class counsel succeed where these other efforts failed? They succeeded because, before they even filed this lawsuit, they spent over one year studying the leveraged buyout market with a team of economists and other analysts to determine whether they could prove that the defendants had formed an agreement not to compete with one another. *See id.* at ¶¶ 25-27. It was these substantial efforts that permitted class counsel to survive motions to dismiss and (along with the years of discovery class counsel took) motions for summary judgment. Even so, it was far from clear at the time that class counsel filed the complaint that they would have made it this far, and it is still unclear whether class counsel would have made it much further had they not settled (and, even if they did, whether they would have further prevailed on appeal). The declaration of Professor Charles Silver describes in detail many of the risks the class faced, and I will canvass only some of them here. To begin with, there is no smoking gun that the defendants had an overarching agreement with one another; in order to prevail in this case, a jury would have to infer such an agreement, and it is hard to predict whether the jury would have done so in light of the diversity of defendants and the diversity of leveraged buyouts alleged in the conspiracy. Moreover, it is hard to predict how much the jury would have decided any such agreement injured the class; the parties had competing experts on the damages question. But even apart from these factual questions, there were legal ones, such as whether shareholder antitrust claims are displaced to some extent by the securities laws, and the extent to which releases in settlements of derivative litigation against the officers of some of the publicly-traded companies here insulated their private equity firms from

liability. Although the class prevailed, at least in part, on these questions before the court, *see, e.g.,* Motion to Dismiss Order pp. 3-8; Renewed Summary Judgment Order pp. 16-17, it is not clear they would have on appeal. In light of all of these risks, the recovery here is an excellent result. Indeed, it is all the more exceptional because it came against some of the very finest law firms in the United States. As such, I believe these factors strongly counsel in favor of awarding class counsel a high-end fee percentage: high-end results should be rewarded with high-end fees. *See, e.g., In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp.2d 467, 483 (S.D.N.Y. 2009) (awarding class counsel 33% in fees from a $510 million securities settlement where class counsel recovered 2% of the class's estimated damages).

23. Consider next factor (7): the duration of the litigation. I think courts should be careful how they construe this factor because we should want class counsel to resolve cases as quickly as possible, not to drag them along. Nonetheless, I think this factor can be helpful to courts to ensure that class counsel did not sell out the class by rushing to settlement. The first complaint in this case was filed in late 2007. It is now almost seven years later. According to my empirical study, this case has lasted more than twice as long as the average and median class actions (three years) as well as the average and median antitrust class actions (also three years). *See* Fitzpatrick, *Empirical Study, supra*, at 820. In other words, this was not a case rushed to resolution for a quick fee award. Quite the contrary: this case had reached the cusp of trial when the last defendant agreed to settle. *See* Declaration ¶¶ 155-161.

24. Consider next factor (8): the amount of time devoted to the case by plaintiffs' counsel. There are two ways that courts might consider this factor: qualitatively or quantitatively. The qualitative approach is to assess how fiercely class counsel fought the defendants—that is, what class counsel did during all those years of litigation. *See, e.g., Brown*

*v. Phillips Petroleum Co.*, 838 F.2d 451, 456 (10th Cir. 1988) ("[I]n awarding attorneys' fees in a common fund case, the 'time and labor involved' factor need not be evaluated using the lodestar formulation . . . ."). The quantitative approach is to calculate class counsel's lodestar and to "crosscheck" the fee percentage requested against the lodestar to ensure that the ensuing multiplier is not in some sense "too much." *See e.g., In re Cendant Corp. Litig.*, 264 F.3d at 285.

25. There are numerous examples of judges in this Circuit, including in this District, who have awarded fees under the percentage-of-the-fund approach without calculating class counsel's lodestar. *See, e.g., In re Celexa and Lexapro Marketing and Sales Practices Litig.*, 2014 WL 4446464, at *8 (D. Mass. Sep. 8, 2014); *Latorraca v. Centennial Tech.*, 834 F.Supp.2d 25, 27-29 (D. Mass. 2011). In my view, it is clear from the public policy considerations discussed above these courts have taken the better path. The quantitative approach does little other than give class action lawyers poor incentives to litigate cases efficiently and to resolve them for the maximum compensation and deterrence. As scholars have explained, limiting the fee percentage awarded to some multiple of class counsel's lodestar simply caps the amount of compensation class counsel can receive from a settlement and thereby blunts their incentives to achieve the largest possible resolution. *See, e.g.*, Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103, 140-45 (2006). That is, the "lodestar crosscheck" reintroduces the very same undesirable consequences of the lodestar method that the percentage-of-the-fund method was designed to correct in the first place. For this reason, it is my view that courts should not consider class counsel's lodestar when they set fee awards under the percentage-of-the-fund method. By contrast, the qualitative approach permits courts to focus on considerations consistent with sound public policy: it, too, can assure the court that class counsel have dug

deeply enough into a case to know what it is worth as opposed to selling out the class for a quick fee award. There is little question that this case has been hard fought. The parties spent nearly four years in discovery alone, reviewing some 13 million documents, taking and defending over 50 depositions of fact witnesses, and preparing numerous expert witnesses, expert reports, and expert depositions. *See* Declaration ¶¶ 12, 13, 134-136. In addition, the motions practice here has been extensive by any measure: 15 motions to dismiss and 30 summary judgment motions, not to mention motions for class certification and many other matters. *See id.* at 104 (motions to strike claims), 119 (motions to reconsider summary judgment), 152 (motions for class certification and to strike expert reports), 199 (motions to dismiss and for summary judgment). Finally, as I noted, class counsel was even preparing for trial when the last defendant settled.

26. Nonetheless, in order to be thorough, I will discuss whether the lodestar in this case suggests in any way that awarding class counsel their requested fee awards would be unreasonable. In my view, it does not. According to class counsel, their lodestar across all five of these settlements is $80.1 million. This means the requested fee awards would result in a multiplier of only 2.43 over the lodestar. A multiplier of this magnitude is not unusual. Of the 204 cases in my study where the district court used the percentage-of-the-fund method with a lodestar crosscheck and the lodestar multiplier was ascertainable, the multipliers ranged from .07 to 10.3, with a mean and median of 1.65 and 1.34, respectively, and with 75% of multipliers under 2.0 and 90% under 3.0. *See id*. Although the multiplier here is greater than most of the cases in my study, it should be noted that the vast majority of class action settlements are for far less money than the five here[3] and this is important because class action fee awards in *larger* settlements like these tend to result in *larger* lodestar multipliers. *See* Eisenberg & Miller,

[3] According to my study, the average class action settlement was for $54 million and the median for $5 million. *See* Fitzpatrick, *Empirical Study*, at 828.

*Attorney Fees II, supra* at 274 ("As the recovery . . . increases, the multiplier also tends to increase, with the multiplier in the highest recovery decile more than triple that of the multiplier in the lowest recovery decile."). For example, when I limited the settlements in my study to only those above $100 million (with data ascertainable in 24 of those settlements), I found that the mean and median lodestar multipliers that resulted more than doubled to 3.34 and 2.74, respectively. The multiplier here, then, is lower than in the typical large case. It is therefore unsurprising that it is easy to find many cases, including in this District, where fee awards resulted in multipliers well above the one here. *See, e.g., New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (8.3 multiplier); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 182 (D. Mass. 1998) (8.9 multiplier); *Steiner v. American Broadcasting Co.*, 248 Fed.Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier); *In re Doral Financial Corp. Secs. Litig.*, MDL 1706 (S.D.N.Y. July 17, 2007) (10.26 multiplier); *Hainey v. Parrott*, 2007 WL 3308027 (S.D. Ohio Nov. 6, 2007) (7.5 multiplier); *Spartanburg Regional Health Servs. District, Inc. v. Hillenbrand Indus., Inc.*, No. 03-2141 (D.S.C. Aug. 15, 2006) (6 multiplier); *In re Cardinal Health Inc. Secs. Litigs.*, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier); *In re Enron Corp. Secs. Litig.*, 586 F. Supp.2d 732, 791 (S.D. Tex. 2008) (5.2 multiplier over three different settlement dates); *In re Nortel Networks Corp. Secs. Litig.* (Nortel II), No. 05-1659 (S.D.N.Y. Dec. 26, 2006) (4.9 multiplier); *see also In re Enron Corp. Secs. Litig.*, 586 F. Supp.2d at 798-800 (citing other examples).

27. Consider finally the last two factors. One of these is inapplicable here (at least as of yet) because the time to file objections has not yet passed: (9) whether there are any substantial objections.[4] But the other factor—(10) the skill and efficiency of the attorneys

[4] It is important to note that, even if there is opposition to the settlement from class members, not all opposition is created equal. Although some class members file objections because they

involved—looks favorably on the fee award requested here. Class counsel count among their number some of the most experienced and highly regarded lawyers in the United States. Although I have not closely examined class counsel's work product or their time records, I think the results here speak for themselves: had class counsel not been so skilled, it is doubtful they would have achieved the exceptional results that they did.

28. In short, this was no ordinary case and the lawyers do not deserve mere ordinary fee awards. For all these reasons, I believe the fee awards requested here are reasonable.

29. My compensation in this matter has been $595 per hour plus expenses.

Nashville, TN

November 12, 2014

Brian T. Fitzpatrick

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sincerely believe there is something amiss in the settlement, many others do so only to try to delay final resolution of the case and to use that delay to extract side payments from class counsel. This phenomenon is known as objector blackmail, and courts are wise to stand guard against it. *See generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on November 13, 2014.

s/ David W. Mitchell
DAVID W. MITCHELL

# EXHIBIT 1

# BRIAN T. FITZPATRICK

Vanderbilt University Law School
131 21st Avenue South
Nashville, TN 37203
(615) 322-4032
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## ACADEMIC APPOINTMENTS

**VANDERBILT UNIVERSITY LAW SCHOOL**, *FedEx Research Professor*, 2014 to present
- *Professor*, 2012-present; *Associate Professor*, 2010-2012; *Assistant Professor*, 2007-2010
- Classes: Civil Procedure, Federal Courts, Complex Litigation
- Hall-Hartman Outstanding Professor Award, 2008-2009
- Vanderbilt's Association of American Law Schools Teacher of the Year, 2009

## EDUCATION

**HARVARD LAW SCHOOL**, J.D., *magna cum laude*, 2000
- Fay Diploma (for graduating first in the class)
- Sears Prize, 1999 (for highest grades in the second year)
- *Harvard Law Review*, Articles Committee, 1999-2000; Editor, 1998-1999
- *Harvard Journal of Law & Public Policy*, Senior Editor, 1999-2000; Editor, 1998-1999
- Research Assistant, David Shapiro, 1999; Steven Shavell, 1999

**UNIVERSITY OF NOTRE DAME**, B.S., Chemical Engineering, *summa cum laude*, 1997
- First runner-up to Valedictorian (GPA: 3.97/4.0)
- Steiner Prize, 1997 (for overall achievement in the College of Engineering)

## CLERKSHIPS

**HON. ANTONIN SCALIA**, Supreme Court of the United States, 2001-2002

**HON. DIARMUID O'SCANNLAIN**, U.S. Court of Appeals for the Ninth Circuit, 2000-2001

## EXPERIENCE

**NEW YORK UNIVERSITY SCHOOL OF LAW**, Feb. 2006 to June 2007
*John M. Olin Fellow*

**HON. JOHN CORNYN**, United States Senate, July 2005 to Jan. 2006
*Special Counsel for Supreme Court Nominations*

**SIDLEY AUSTIN LLP**, Washington, DC, 2002 to 2005
*Litigation Associate*

**ACADEMIC ARTICLES**

*The End of Class Actions?*, 57 Ariz. L. Rev. (forthcoming 2015)

*The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839 (2012)

Twombly *and* Iqbal *Reconsidered*, 87 NOTRE DAME L. REV. 1621 (2012)

*An Empirical Study of Class Action Settlements and their Fee Awards*, 7 J. EMPIRICAL L. STUD. 811 (2010) (selected for the 2009 Conference on Empirical Legal Studies)

*Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010)

*Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919 (2010)

*The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009) (selected for the 2009 Stanford-Yale Junior Faculty Forum)

*The Politics of Merit Selection*, 74 MISSOURI L. REV. 675 (2009)

*Errors, Omissions, and the Tennessee Plan*, 39 U. MEMPHIS L. REV. 85 (2008)

*Election by Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473 (2008)

*Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & LAW 277 (2007)

**BOOK CHAPTERS**

*Civil Procedure in the Roberts Court* in BUSINESS AND THE ROBERTS COURT (Jonathan Adler, ed., Oxford University Press, forthcoming 2014)

*Is the Future of Affirmative Action Race Neutral?* in A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50 (Ellen Katz & Samuel Bagenstos, eds., Michigan University Press, forthcoming 2014)

**ACADEMIC PRESENTATIONS**

*The Economics of Objecting for All the Right Reasons*, 14th Annual Consumer Class Action Symposium, Tampa, Florida (Nov. 9, 2014)

*Compensation in Consumer Class Actions: Data and Reform*, Conference on The Future of Class Action Litigation: A View from the Consumer Class, NYU Law School, New York, New York (Nov. 7, 2014)

*The Future of Federal Class Actions: Can the Promise of Rule 23 Still Be Achieved?*, Northern District of California Judicial Conference, Napa, California (panelist) (Apr. 13, 2014)

*The End of Class Actions?*, Conference on Business Litigation and Regulatory Agency Review in the Era of Roberts Court, Institute for Law & Economic Policy, Boca Raton, Florida (Apr. 4, 2014)

*Should Third-Party Litigation Financing Come to Class Actions?*, University of Missouri School of Law (Mar. 7, 2014)

*Should Third-Party Litigation Financing Come to Class Actions?*, George Mason Law School (Mar. 6, 2014)

*Should Third-Party Litigation Financing Come to Class Actions?*, Roundtable for Third-Party Funding Scholars, Washington & Lee University School of Law (Nov. 7-8, 2013)

*Is the Future of Affirmative Action Race Neutral?*, Conference on A Nation of Widening Opportunities: The Civil Rights Act at 50, University of Michigan Law School (Oct. 11, 2013)

*The Mass Tort Bankruptcy: A Pre-History*, The Public Life of the Private Law: A Conference in Honor of Richard A. Nagareda, Vanderbilt Law School (Sep. 28, 2013) (panelist)

*Rights & Obligations in Alternative Litigation Financing and Fee Awards in Securities Class Actions*, Conference on the Economics of Aggregate Litigation, Institute for Law & Economic Policy, Naples, Florida (Apr. 12, 2013) (panelist)

*The End of Class Actions?*, Symposium on Class Action Reform, University of Michigan Law School (Mar. 16, 2013)

*Toward a More Lawyer-Centric Class Action?*, Symposium on Lawyering for Groups, Stein Center for Law & Ethics, Fordham Law School (Nov. 30, 2012)

*The Problem: AT & T as It Is Unfolding*, Conference on *AT & T Mobility v. Concepcion*, Cardozo Law School (Apr. 26, 2012) (panelist)

*Standing under the Statements and Accounts Clause*, Conference on Representation without Accountability, Corporate Law Center, Fordham Law School (Jan. 23, 2012)

*The End of Class Actions?*, Washington University Law School (Dec. 9, 2011)

*Book Preview Roundtable: Accelerating Democracy: Matching Social Governance to Technological Change*, Searle Center on Law, Regulation, and Economic Growth, Northwestern University School of Law (Sep. 15-16, 2011) (participant)

*Is Summary Judgment Unconstitutional? Some Thoughts About Originalism*, Stanford Law School (Mar. 3, 2011)

*The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, Northwestern Law School (Feb. 25, 2011)

*The New Politics of Iowa Judicial Retention Elections: Examining the 2010 Campaign and Vote*, University of Iowa Law School (Feb. 3, 2011) (panelist)

*The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, Washington University Law School (Oct. 1, 2010)

Twombly *and* Iqbal *Reconsidered*, Symposium on Business Law and Regulation in the Roberts Court, Case Western Reserve Law School (Sep. 17, 2010)

*Do Class Action Lawyers Make Too Little?*, Institute for Law & Economic Policy, Providenciales, Turks & Caicos (Apr. 23, 2010)

*Originalism and Summary Judgment*, Georgetown Law School (Apr. 5, 2010)

*Theorizing Fee Awards in Class Action Litigation*, Washington University Law School (Dec. 11, 2009)

*An Empirical Study of Class Action Settlements and their Fee Awards*, 2009 Conference on Empirical Legal Studies, University of Southern California Law School (Nov. 20, 2009)

*Originalism and Summary Judgment*, Symposium on Originalism and the Jury, Ohio State Law School (Nov. 17, 2009)

*An Empirical Study of Class Action Settlements and their Fee Awards*, 2009 Meeting of the Midwestern Law and Economics Association, University of Notre Dame Law School (Oct. 10, 2009)

*The End of Objector Blackmail?*, Stanford-Yale Junior Faculty Forum, Stanford Law School (May 29, 2009)

*An Empirical Study of Class Action Settlements and their Fee Awards*, University of Minnesota School of Law (Mar. 12, 2009)

*The Politics of Merit Selection*, Symposium on State Judicial Selection and Retention Systems, University of Missouri Law School (Feb. 27, 2009)

*The End of Objector Blackmail?*, Searle Center Research Symposium on the Empirical Studies of Civil Liability, Northwestern University School of Law (Oct. 9, 2008)

*Alternatives To Affirmative Action After The Michigan Civil Rights Initiative*, University of Michigan School of Law (Apr. 3, 2007) (panelist)

**OTHER PUBLICATIONS**

*Lessons from Tennessee Supreme Court Retention Election*, THE TENNESSEAN (Aug. 20, 2014)

*Public Needs Voice in Judicial Process*, THE TENNESSEAN (June 28, 2013)

*Did the Supreme Court Just Kill the Class Action?*, THE QUARTERLY JOURNAL (April 2012)

*Let General Assembly Confirm Judicial Selections*, CHATTANOOGA TIMES FREE PRESS (Feb. 19, 2012)

*"Tennessee Plan" Needs Revisions*, THE TENNESSEAN (Feb. 3, 2012)

*How Does Your State Select Its Judges?*, INSIDE ALEC 9 (March 2011) (with Stephen Ware)

*On the Merits of Merit Selection*, THE ADVOCATE 67 (Winter 2010)

*Supreme Court Case Could End Class Action Suits,* SAN FRANCISCO CHRONICLE (Nov. 7, 2010)

*Kagan is an Intellect Capable of Serving Court*, THE TENNESSEAN (Jun. 13, 2010)

*Confirmation "Kabuki" Does No Justice*, POLITICO (July 20, 2009)

*Selection by Governor may be Best Judicial Option*, THE TENNESSEAN (Apr. 27, 2009)

*Verdict on Tennessee Plan May Require a Jury*, THE MEMPHIS COMMERCIAL APPEAL (Apr. 16, 2008)

*Tennessee's Plan to Appoint Judges Takes Power Away from the Public*, THE TENNESSEAN (Mar. 14, 2008)

*Process of Picking Judges Broken*, CHATTANOOGA TIMES FREE PRESS (Feb. 27, 2008)

*Disorder in the Court*, LOS ANGELES TIMES (Jul. 11, 2007)

*Scalia's Mistake*, NATIONAL LAW JOURNAL (Apr. 24, 2006)

*GM Backs Its Bottom Line*, DETROIT FREE PRESS (Mar. 19, 2003)

*Good for GM, Bad for Racial Fairness*, LOS ANGELES TIMES (Mar. 18, 2003)

*10 Percent Fraud*, WASHINGTON TIMES (Nov. 15, 2002)

**OTHER PRESENTATIONS**

*Hedge Funds + Lawsuits = A Good Idea?*, Vanderbilt University Alumni Association, Washington, DC (Sep. 3, 2014)

*Judicial Selection in Historical and National Perspective*, Committee on the Judiciary, Kansas Senate (Jan. 16, 2013)

*The Practice that Never Sleeps: What's Happened to, and What's Next for, Class Actions*, ABA Annual Meeting, Chicago, IL (Aug. 3, 2012) (panelist)

*Life as a Supreme Court Law Clerk and Views on the Health Care Debate*, Exchange Club of Nashville (Apr. 3, 2012)

*The Tennessee Judicial Selection Process—Shaping Our Future*, Tennessee Bar Association Leadership Law Retreat, Dickson, TN (Feb. 3, 2012) (panelist)

*Reexamining the Class Action Practice*, ABA National Institute on Class Actions, New York, NY (Oct. 14, 2011) (panelist)

*Judicial Selection in Kansas*, Committee on the Judiciary, Kansas House of Representatives (Feb. 16, 2011)

*Judicial Selection and the Tennessee Constitution*, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Mar. 24, 2009)

*What Would Happen if the Judicial Selection and Evaluation Commissions Sunset?*, Civil Practice and Procedure Subcommittee, Tennessee House of Representatives (Feb. 24, 2009)

*Judicial Selection in Tennessee*, Chattanooga Bar Association, Chattanooga, TN (Feb. 27, 2008) (panelist)

*Ethical Implications of Tennessee's Judicial Selection Process*, Tennessee Bar Association, Nashville, TN (Dec. 12, 2007)

# EXHIBIT 2

Documents Reviewed:

- Order of Dismissal (document 153, filed 11/19/08)
- Order of Dismissal (document 156, filed 11/20/08)
- Memorandum and Order ("Motion to Dismiss Order") (document 157, filed 12/15/08)
- Memorandum and Order (document 200, filed 2/12/09)
- Order (document 201, filed 2/12/09)
- Memorandum and Order (document 407, filed 1/13/11)
- Order (document 437, filed 3/1/11)
- Order (document 455, filed 6/29/11)
- Order (document 576, filed 5/24/12)
- Memorandum and Order (document 616, filed 7/18/12)
- Defendants' Memorandum in Support of Their Omnibus Motion for Summary Judgment As to Count One of the Fifth Amended Complaint (document 632, filed 7/23/12)
- Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment on Plaintiffs' Overarching Conspiracy Claim (document 689, 8/23/12)
- Fifth Amended Class Action Complaint (document 745, filed 10/10/12)
- Memorandum and Order (document 763, filed 3/13/13)
- Memorandum and Order (document 876, filed 6/20/13)
- Memorandum and Order ("Renewed Summary Judgment Order") (document 894, filed 7/18/13)
- Memorandum and Order (document 912, filed 8/29/13)

- Plaintiffs' Motion for Class Certification ("Motion for Class Certification") (document 927, filed 10/21/13)
- Memorandum and Order (document 952, filed 11/22/13)
- Defendants' Memorandum in Opposition to Plaintiffs' Motion for Class Certification (document 966, filed 1/24/14)
- Named Plaintiffs' Unopposed Motion for Preliminary Approval of Settlements with Defendants Bain Capital Partners, LLC, and The Goldman Group, Inc. (and exhibits thereto) (document 984, filed 6/11/14)
- Memorandum of Law in Support of Named Plaintiffs' Unopposed Motion for Preliminary Approval of Settlements with Defendants Bain Capital Partners, LLC, and The Goldman Group, Inc. (and appendix thereto, including Exhibit A ("Bain Settlement") and Exhibit B ("Goldman Settlement")) (documents 985 & 986, filed 6/11/14)
- Supplemental Memorandum of Law in Support of Named Plaintiffs' Unopposed Motion for Preliminary Approval of Settlements with Defendants Bain Capital Partners, LLC, and The Goldman Group, Inc. (and exhibits thereto, including Exhibit A ("Silver Lake Settlement") (document 997, filed 7/10/14)
- Supplemental Memorandum of Law in Support of Named Plaintiffs' Motion for Preliminary Approval of Settlements, including a Settlement with Defendants The Blackstone Group L.P., Kohlberg Kravis Roberts & Co. L.P. and TPG Capital, L.P. (and exhibits thereto, including Exhibit A ("Blackstone Settlement")) (document 1018, filed 8/7/14)

- Supplemental Memorandum of Law in Support of Named Plaintiffs' Motion for Preliminary Approval of Settlements, including a Settlement with Defendants TC Group III, L.P. and TC Group IV, L.P. (and exhibits thereto, including Exhibit A ("Carlyle Settlement")) (document 1037, filed 9/5/14)
- Transcript of Hearing on Preliminary Approval of Settlement (9/29/14)
- Order Preliminarily Approving Settlements, Conditionally Certifying Class, Appointing Class Counsel for the Settlement Class, Approving Notice Plan, and Setting a Final Approval Hearing (document 1042, filed 9/29/14)
- Declaration of Lead Counsel in Support of Named Plaintiffs' Motions for Final Approval of Settlement and Plan of Distribution Proceeds and for an Award of Attorneys' Fees and Reimbursement of Expenses ("Declaration") (filed herewith)

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 11-cv-10230 MLW |
| ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20,<br><br>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,<br><br>Plaintiff,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 12-cv-11698 MLW |

**CUSTOMER CLASS COUNSELS' MEMORANDUM OF LAW**
**IN SUPPORT OF THE REASONABLENESS OF**
**THE ATTORNEYS' FEES AWARD**

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In the Court's Order dated November 8, 2018 Order, ECF 518, among other things, the Court permitted the Competitive Enterprise Institute ("CEI") to "submit a memorandum addressing the reasonableness of the award of approximately $75,000,000 in attorneys' fees," and permitted Lieff Cabraser Heimann & Bernstein, LLP ("Lieff"), and the Thornton Law Firm LLP ("Thornton"), to reply to CEI's submissions by December 18, 2018. *Id.* at ¶¶ 2-3. The Court also directed Labaton Sucharow LLP ("Labaton") to file "a memorandum addressing the reasonableness of the award of approximately $75,000,000 in attorneys' fees and expenses." *Id.* at ¶ 4.[1] Because the Court's directives to Lieff, Thornton, and Labaton overlap with regard to the reasonableness of the award of attorneys' fees (the "Fee Award") and expenses in the approximate amount of $75,000,000, Customer Class Counsel submit this consolidated Memorandum on that issue, and include within it the response to CEI's Memorandum Propounding an Appropriate Total Fee Award (the "CEI Submission"), ECF 522.[2]

## PRELIMINARY STATEMENT

The Fee Award in this case is reasonable and amply justified by Customer Class Counsel's diligent, skilled, and cost-effective work to obtain a tremendous result for the class in the face of significant litigation risk. The $300 million settlement in this case resolved the Plaintiffs' allegations that, for over a decade, State Street Bank and Trust Company ("State Street") had violated Massachusetts law by charging its custodial clients artificially inflated, or deflated, foreign exchange ("FX") rates, making hundreds of millions of dollars of undisclosed profits. *See* Am. Class Action Compl. at ¶¶ 8, 10, ECF 10.

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[1] Lieff, Thornton, and Labaton are referred to collectively herein as "Customer Class Counsel."

[2] Lieff and Thornton are submitting separate memoranda pursuant to the Court's order addressing the Master's Further Response to the Court's Directives at the November 7, 2018 Hearing and in its November 8, 2018 Order (the "Master's Submission"), ECF 253, and additional issues in CEI's Submission unique to Lieff and Thornton. November 8, 2018 Order at ¶ 3.

The Plaintiffs' case against State Street was risky, and the hybrid mediation and discovery process ordered by the Court was lengthy and contentious. *Arkansas Teacher Retirement System v. State Street Bank and Trust Company* constituted the first indirect FX class action publicly filed in any court, and the Plaintiffs asserted a novel legal theory under the Massachusetts Consumer Protection Act, Mass. Gen. Laws ch. 93A. *Id.* at ¶¶ 86-104; Sucharow Decl.[3] at ¶¶ 35-37. Customer Class Counsel also commenced, litigated, and settled the action with no beneficial regulatory or investigative action by the SEC, DOL, or DOJ. Sucharow Decl. at ¶ 38. Over the three-year mediation and discovery process, the parties exchanged and reviewed millions of pages of documents and participated in 16 in-person mediation sessions that included extensive exchanges of each side's views on the merits, including presentations on class certification, liability, and damages issues. Joint Status Report at 3, ECF 81; Sucharow Decl. at ¶¶ 90-99. The resulting $300 million settlement was the largest common fund settlement in any case brought under Chapter 93A, and the third largest common fund settlement (excluding federal securities actions) filed in the First Circuit. Sucharow Decl. at ¶ 6. Plaintiffs' counsel spent over 76,000 hours investigating, prosecuting, and resolving the Plaintiffs' claims, for a total lodestar of over $37,000,000. November 10, 2016 Letter to Hon. Mark L. Wolf at 3, ECF 116.[4]

[3] Declaration of Lawrence A. Sucharow in Support of (A) Plaintiff's Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Sucharow Decl."), ECF 104.

[4] CEI points out that Labaton inadvertently included in its lodestar time spent on the fee petition. *See* Bednarz Decl. at ¶ 11, ECF 522-1; *see also* Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 9 Response at 34-37, ECF 401-173. Even if this modest amount is subtracted from the lodestar, it does not change the lodestar multiplier of 2.0 and thus does not impact the analysis.

CEI's argument that the Court should reduce the Fee Award because of a "scaling" effect observed in so-called "mega-fund" cases finds no support in the law of this Circuit or the fees awarded by other courts in the First Circuit in similar-sized cases. While CEI populates its brief with a motley assortment of fee award percentages from other circuits (none of which are a representative sample), a review of all of the "mega-fund" cases in the First Circuit confirms that the 24.85% Fee Award in this case is reasonable and consistent with other fee awards in cases of similar size in the First Circuit. By contrast, the 16.7% award proposed by CEI is completely out of step with what courts in this Circuit award.

Moreover, courts in the First Circuit, some emphatically, reject using the "sliding scale" approach CEI advocates. Rather, courts rely on the lodestar multiplier to confirm that plaintiffs' counsel are compensated commensurate with their work on the case, and empirical studies agree that the lodestar multiplier increases with the size of the common fund. The 2.0 lodestar multiplier in this case is on the low end of lodestar multipliers awarded in the First Circuit in "mega-fund" cases, which underscores the reasonableness of the Fee Award. The lodestar multiplier resulting from the 16.7% fee award CEI proposes would be the lowest lodestar multiplier ever awarded in a similarly-sized case in the First Circuit.

CEI's Submission also completely disregards the record in this case, and the Master's consistent conclusion based on that record, that the Fee Award is well-supported by Customer Class Counsel's extraordinarily hard and skilled work and the excellent settlement Customer Class Counsel achieved for the class. After applying unusual scrutiny to the pleadings and fee petition in this case, the Master has never wavered in his conclusion that the Fee Award is reasonable in light of Customer Class Counsel's skilled and effective work against a tenacious

and well-funded adversary. CEI's counterfactual contention that Customer Class Counsel's work was "churn" without risk is directly contradicted by the evidence in the record.

Pursuant to the Court's November 8, 2018 Order, Customer Class Counsel now respectfully submit this memorandum addressing the reasonableness of the Fee Award and expenses awarded in this case.

## ARGUMENT

### I. The Fee Award Is Reasonable.

#### A. Legal Standard.

Under Federal Rule of Civil Procedure 23(h), the Court is responsible for awarding "reasonable attorney's fees . . . that are authorized by law or by the parties' agreement." Fed. R. Civ. P. 23(h). Under the common fund doctrine, a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

> The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorneys' fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

*Id.* (citations omitted). Courts in the First Circuit have discretion to award fees either by the percentage of the fund ("POF") method, or the lodestar method. *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 308 (1st Cir. 1995). Overwhelmingly, courts in the First Circuit use the POF method with a lodestar "cross-check." *See, e.g.*, *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 171-73 (D. Mass. 2014) (using POF method and lodestar cross-check). "When the lodestar is used in this way, the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort

expended by the attorneys." *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007) (quoting *In re Thirteen Appeals*, 56 F.3d at 307). In assessing the reasonableness of a requested fee award, First Circuit courts:

> [G]enerally consider the following so-called *Goldberger* factors: (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 (internal quotation marks omitted). "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) (quoting *Latorraca v. Centennial Techs., Inc.*, 834 F. Supp. 2d 25, 27-28 (D. Mass. 2011)).

### B. The Fee Award is Reasonable When Compared to Other "Mega-Fund" Cases in the First Circuit.

Customer Class Counsel submitted an extensive memorandum and supporting declarations in support of their initial Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards. *See* ECF 103-104, 108-109. Counsel incorporates by reference this extensive argument, which will not be repeated in full here. Based on recent comments from the Court,[5] Customer Class Counsel focuses in this submission on the recent suggestion that this is a so-called "mega-fund"[6] case, and that this fact warrants a reduction in fees that would be appropriate but for the size of the settlement.

In fact, the Fee Award as requested and previously awarded is reasonable, even when viewed in the context of all of the other "mega-fund" cases in the First Circuit. The following table lists all of the cases identified in the First Circuit where a fee award was made from a

[5] *See* October 15, 2018 Hearing Tr. at 16, ECF 496.

[6] Without conceding the point for other purposes, Customer Class Counsel is using, for purposes of this memorandum, the term "mega-fund" to mean common fund settlements in excess of $100 million.

common fund of over $100 million, including the Fee Award in this case, organized by decreasing percentage of the fund awarded. This table demonstrates that the Fee Award falls within the range of reasonable percentages awarded by other courts in this Circuit from common funds of similar size, and that the 2.0 adjusted lodestar multiplier in this case is at the low end of lodestar multipliers awarded in this Circuit.

| Case | POF | Common Fund | Lodestar Multiplier |
|---|---|---|---|
| *Relafen* (D. Mass. 2004)[7] | 33 1/3% | $175 million | 4.87 |
| *Klein* (D. Mass. 2005)[8] | 33% | $590.5 million | 2.43 |
| *DuPont Plaza* (D.P.R. 1995)[9] | 30.9% | $220 million | n/a |
| *Neurontin* (D. Mass. 2014)[10] | 26.65% | $325 million | 3.32 |
| *CVS* (D. Mass 2005)[11] | 25% | $110 million | 3.27 |
| *State Street* (D. Mass 2016) | 24.85% | $300 million | 2.00 |
| *Lupron* (D. Mass 2005)[12] | 23.79% | $150 million | 1.41 |

[7] *In re Relafen Antitrust Litig.*, No. 01-12239-WGY, 2004 U.S. Dist. LEXIS 28801 (D. Mass. Apr. 9, 2004). The total award in *Relafen* was 34.36% of the common fund, including $1,799,023.24 in expenses. *See id.* The *Relafen* court did not perform a lodestar cross-check. The lodestar multiplier is calculated by dividing the attorneys' fees sought ($58,333,333), *id.* at *21, by the attorneys' self-reported lodestar ($11,961,985). Memorandum in Support of Class Counsel's Motion for an Award of Attorney Fees, Reimbursement of Expenses and an Incentive Award for the Named Plaintiff at 4, *Relafen*, ECF 293-3.

[8] Tr. of Final Approval of Settlement, *Klein v. Bain Capital Partners, LLC*, No. 1:07-cv-12388-WGY (D. Mass. Feb. 11, 2015), ECF 1110. The total award in *Klein* was 35.04% of the common fund, including $12,028,514.99 in expenses. *See* Memorandum in Support of an Award of Attorneys' Fees, Litigation Expenses, and Named Plaintiff Service Awards at 2, 9, *Klein*, ECF 1052. The *Klein* court did not perform a lodestar cross-check. The lodestar multiplier is calculated by dividing the attorneys' fees sought ($194,865,000) by the attorneys' self-reported lodestar ($80,145,191.50). *See id.* at 16.

[9] *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995). The lodestar multiplier is unknown because fees were reallocated on appeal between two groups of plaintiffs' counsel. *See id.*

[10] *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167 (D. Mass. 2014). The total award in *Neurontin* was 28% of the common fund, including $4.38 million in expenses. *See id.* at 170, 173.

[11] Order and Final J., *In re CVS Corp. Sec. Litig.*, C.A. No. 01-11464 (JLT) (D. Mass. Sept. 7, 2005), ECF 195. The *CVS* court did not perform a lodestar cross-check. The lodestar multiplier is calculated by dividing the attorneys' fees sought ($27,500,000), *id.* at 7, by the attorneys' self-reported lodestar ($8,404,807), *see* Joint Declaration of Deborah Clark-Weintraub and Michael K. Yarnoff in Support of Proposed Class Action Settlement and Petition for an Award of Attorneys' Fees and Reimbursement of Expenses at 31, *In re CVS Corp.*, ECF 181.

[12] *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 U.S. Dist. LEXIS 17456 (D. Mass. Aug. 17, 2005). The total award in *Lupron* was 25% of the $95 million of the total fund awarded to individual consumers and third party payer class members. *Id.* at *6-7. To calculate the lodestar

| Case | POF | Common Fund | Lodestar Multiplier |
|---|---|---|---|
| *First Databank* (D. Mass. 2009)[13] | 20% | $350 million | 8.3 |
| *Lernout & Hauspie* (D. Mass. 2004)[14] | 20% | $120.52 million | 1.4 |
| *Tyco* (D.N.H. 2007)[15] | 14.5% | $3.2 billion | 2.7 |
| *Duhaime* (D. Mass. 1997)[16] | 9.3% | $368 million | 2.6 |
| *Raytheon* (D. Mass. 2004)[17] | 9% | $460 million | 3.15 |
| *Conley (*D. Mass. 1998) [18] | 4.5% | $165 million | 9.07 |

The 16.75% of the fund that CEI argues is appropriate in its submission would be well below both the mean and median of percentages in this Circuit. *See* CEI Submission at 3. But more importantly, the resulting lodestar multiplier, 1.34, would be *the lowest lodestar multiplier ever awarded in this Circuit* for a case with a common fund over $100 million. In the only two

multiplier, the court subtracted counsels' $1,893,521.67 costs from the $23,750,000 awarded and then divided by the lodestar. *Id.* at *21-22.

[13] *New Eng. Carpenters Health Benefits Fund v. First Databank*, No. 05-11148-PBS, 2009 U.S. Dist. LEXIS 68419 (D. Mass. Aug. 3, 2009).

[14] Electronic Order Entered Granting 984 Motion for an Award of Attorney Fees and Reimbursement of Expenses, *In re Lernout & Hauspie Sec. Litig.*, No. 00-CV-11589 (PBS) (D. Mass. June 23, 2005). The *Lernout* court did not perform a lodestar cross-check. The lodestar multiplier is calculated by dividing the attorneys' fees sought ($24,104,000) by the attorneys' self-reported lodestar ($17,249,019.40). Class Plaintiffs' Supplemental Filing in Support of Their Motion for an Award of Attorneys' Fees, *In re Lernout & Hauspie Sec. Litig.*, No. 00-CV-11589 (PBS) (D. Mass. May 25, 2005), ECF 997.

[15] *In re Tyco Int'l, Ltd*., 535 F. Supp. 2d 249 (D.N.H. 2007).

[16] *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 380 (D. Mass. 1997). The *Duhaime* court did not perform a lodestar cross-check. The lodestar multiplier is calculated by dividing the attorneys' fees sought ($39,000,000) by the attorneys' self-reported lodestar ($15,000,000). *Id.*

[17] *In re Raytheon Co. Sec. Litig.*, No. 99-12142-PBS (D. Mass. Dec. 6, 2004), ECF 645. The *Raytheon* court did not perform a lodestar cross-check. The lodestar multiplier is calculated by dividing the attorneys' fees sought ($41,400,000), *see id.* at 9-10, by the attorneys' self-reported lodestar ($13,160,578), *see* Memorandum of Law in Support of Plaintiff's Counsel's Application for an Award of Attorneys' Fees and Reimbursement of Expenses at 16, *In re Raytheon Co. Sec. Litig.*, No. 99-12142-PBS (D. Mass. Nov. 22, 2004), ECF 626.

[18] *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181 (D. Mass. 1998). Although the case produced a common fund and the court used the POF method to calculate attorneys' fees, the fees ultimately were paid directly by the defendant. The total award in *Conley* was 4.57% of the common fund, including $48,237.60 in expenses, which was the full amount requested by plaintiffs' counsel. *Id.* The court calculated that the requested fees were between 20 – 25% of the "value added by plaintiffs' settlement efforts," which the court calculated to be more than $32,000,000. *Id.* at 189. The *Conley* court stated that "the requested attorneys [sic] fees would constitute a lodestar multiplier of 8.9 percent." *Id.* at 182. This does not appear to be correct, as $7,500,000 (the attorneys' fees sought) divided by $826,775 (the lodestar) is 9.07.

other cases where the fee award resulted in multipliers that were lower than the 2.0 adjusted lodestar multiplier in this case—*Lupron* (1.41) and *Lernout & Hauspie* (1.4)—the percentages of the fund awarded were significantly higher than the 16.75% of the common fund CEI argues is appropriate here—23.79% and 20% of the common fund, respectively.

An additional useful comparator is the fee award in *In re Bank of N.Y. Mellon Corp. Forex Transactions Litigation*, a case that involved the same subject matter as this case and a settlement of similar size, although it was brought under a different statute and legal theory. *See* No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y.) ("*BoNY Mellon*"). In *BoNY Mellon*, Bank of New York Mellon agreed to pay $335 million to settle private customer class cases alleging unfair and deceptive acts and practices for conduct similar to that alleged by the Plaintiffs in this case—excessive, undisclosed markups on indirect foreign exchange transactions. Order and Final J. at 5-7, *BoNY Mellon*, ECF 99. Plaintiffs' counsel sought, and the court awarded, 25% of this common fund ($83.75 million). Order Awarding Attorneys' Fees, Service Awards, and Reimbursement of Litigation Expenses, *BoNY Mellon*, ECF 98. The 24.85% fee award in this case is entirely consistent with the fee awarded in *BoNY Mellon*.

CEI incorrectly claims that the 20 cases that Professor Rubenstein included in Exhibit E to the July 31, 2017 Expert Declaration of William B. Rubenstein ("2017 Rubenstein Declaration") suggest that the Fee Award would be unreasonable. *See* CEI Submission at 7-8. But, these cases are not a representative sample. Professor Rubenstein generated this data set to assess the reasonableness of the *billing rates* used by Class Counsel. Expert Declaration of William B. Rubenstein ("Rubenstein Decl.") at ¶ 7(a), filed herewith. Therefore, Professor Rubenstein's research assistants generated the data set by searching only for cases that included data on billing rates. *Id.* The cases included in the data set are limited to those where the courts

undertook a lodestar cross-check or used a straight lodestar approach. *Id.* It is fair to assume that the percentages of the common fund awarded in cases where courts used the POF method without a lodestar cross-check are higher; excluding cases using only a POF method thus results in percentages that are lower than they would be if the complete set were included. *Id.* The empirical study with the closest data, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010) ("*Fitzpatrick*"), shows that in all $250-$500 million settlements, the mean percentage awarded is 17.8% and the median percentage is 19.5% (with a standard deviation of 7.9%). Rubenstein Decl. at ¶ 7(a); *Fitzpatrick* at 839 tbl.11.

**C. The First Circuit Does Not Scale Fee Awards in "Mega-Fund" Cases.**

Given that this is a First Circuit case, the most significant cases are those decided pursuant to First Circuit precedent. Of note, this Circuit has *not* adopted a "scaling" approach in so-called "mega-fund" cases, and the Court should reject CEI's suggestion that the Court depart from prior precedent in order to do so. *See* CEI Submission at 3-6. Indeed, out of the class action cases in the First Circuit involving "mega-funds," only four of the courts have even referenced the sliding scale approach, none has adopted the approach, and some courts have explicitly rejected it. *See In re Tyco*, 535 F. Supp. 2d at 270 (explicitly rejecting scaling); *Neurontin*, 58 F. Supp. 3d at 167 (reducing requested 33 1/3% of $325 million common fund to 26.65% of fund, representing a 3.32 lodestar multiplier); *In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *20-21 (explicitly rejecting scaling argument as reflecting "neither reality nor sound judicial policy"); *Conley*, 222 B.R. at 189 (granting counsel's request for 4.5% of $165 million common fund representing a 9.07 lodestar multiplier).

In *Tyco*, the court expressly rejected arguments from objectors that it should reduce the percentage of the fund awarded as attorneys' fees because of the size of the fund. *Tyco* involved

a "super mega-fund" of $3.2 billion. Counsel requested fees comprising 14.5% of the fund. *Tyco*, 535 F. Supp. 2d at 266. Two objectors appeared at the fairness hearing and argued that the court should award a lower percentage because in "super mega-fund" cases, as CEI argues also occurs in "mega-fund" cases, CEI Submission at 4, "the size of the recovery is explained more by the size of the class than the work expended by counsel," and the percentages awarded are typically lower. *Tyco*, 535 F. Supp. 2d at 266.

The court flatly rejected the argument. "The objectors' contention that super mega-fund cases warrant lower POF awards than smaller cases because they require proportionally less work may well be true as a general matter," the court observed, but "the generalization on which the objectors' argument depends does not hold in this case." *Id.* at 267.[19] The court explained that "[t]he best measure of the effort required to produce a particular result in a given case is the lodestar," and that "it would be inappropriate to artificially reduce the percentage award based on the size of the recovery alone." *Id.* at 267, 270; *see also In re Lupron*, 2005 U.S. Dist. LEXIS 17456, at *20-21 (concluding that "the argument for a reduction of the percentage award as the size of a settlement fund increases reflects neither reality nor sound judicial policy"). "[F]or cases like this one," the court continued, "in which a satisfactory settlement only became possible after years of hard-fought motion practice and searching discovery, it would be against public policy for me to set an unreasonably low POF award that would encourage future plaintiffs' attorneys to settle too early and too low." *Tyco*, 535 F. Supp. 2d at 270. The court

[19] The court also noted that it did not attach "undue significance" to the POF awarded in cases with funds of comparable size because

> Settlement size is at best a crude indicator of comparability. Each case, regardless of its size, presents its own set of challenges. The work required to resolve the case, the risk of an adverse result, and the quality of the outcome will all vary from case to case. Whether the proposed POF award is reasonable ultimately will depend on an assessment of these largely subjective factors.

*Id.* at 268 n.15.

also conducted a lodestar cross-check, concluding that the lodestar multiplier of 2.697 "appropriately compensates counsel for the risk that they assumed in litigating the case." *Id.* at 271.

In *In re Relafen Antitrust Litigation*, a class action with a common fund of $75 million, the court likewise explicitly rejected an argument raised by objectors, akin to the argument CEI makes here, CEI Submission at 3-6, that the percentage of the fund awarded should be no more than 23.9%, based on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248 (2010) ("*Eisenberg I*"). *See* 231 F.R.D. 52, 80-82 (D. Mass. 2005). The court disagreed and awarded 33 1/3% of the fund, explaining:

> This Court welcomes citation to these thorough and objective studies; they provide but a starting place. Here the court concludes it would be inappropriate to use a mean – an average – categorized according to the size of the settlement fund as the be all and end all of analysis. Rather, this Court respectfully notes these authorities but pursues this nuanced analysis looking at the complexity, duration, and type of the case, and the skill and efficiency of the attorneys involved.

*Id.* at 81-81.

Like courts in the First Circuit, Professor Rubenstein is critical of the "scaling" approach, for several reasons. Rubenstein Decl. at ¶ 7(b). First, the scaling approach lacks rigor because it provides no concrete direction to courts on when to decrease the percentage award, or by how much. *Id.* Second, it is inaccurate to assume a smooth inverse relationship between the size of the common fund and an appropriate percentage because some large common fund cases involve significant risk, investment of money and time, and therefore merit a large percentage award. *Id.* A relatively small fund where the lodestar is very low may not. *Id.* Third, this approach can create a perverse incentive. *Id.* If class counsel receives less of each next dollar that they secure

for a class as the common fund increases, class counsel may have an incentive to settle quickly at a sub-optimal level for the class. *Id.*; *see also Tyco*, 535 F. Supp. 2d at 270.

Accordingly, the case law in this Circuit provides no support for decreasing the percentage of the fund awarded because of the size of the fund.

**D. The 2.0 Lodestar Multiplier Confirms There Is No Windfall.**

The lodestar cross-check is the best way to ensure that class counsel is not receiving a windfall, and the 2.0 lodestar multiplier here confirms that the Fee Award is reasonable based on the amount of work done by counsel to investigate, litigate, and settle this case on behalf of the class.

The lodestar multiplier provides a precise measurement of class counsel's profit and potential windfall. *See* William B. Rubenstein, 5 *Newberg on Class Actions* § 15:89 at 346 (5th ed. 2015) ("*Newberg on Class Actions*"); Rubenstein Decl. at ¶ 8. "[W]ithout a lodestar cross-check, a straight percentage award has no measuring stick by which to assess whether a particular percentage is or is not a windfall." *Newberg on Class Actions* § 15:81. Using a lodestar cross-check permits consistency across cases because it enables the Court to do an apples-to-apples comparison of the fee's relationship to the firm's actual work in the case. Rubenstein Decl. at ¶ 3. Absent the lodestar cross-check, the Court has no meaningful way to compare a $1 billion common fund case with another case where attorneys' fees of 25% were awarded from a $10 million common fund. *Id.* Class Counsel's reasonable 2.0 lodestar multiplier in this case is a more meaningful data point than an abstract comparison of percentages across cases. *Id.* at ¶ 8.

Empirical studies confirm that the lodestar multiplier *increases* with the size of the fund, even as the percentage of the fund decreases, and that the 2.0 lodestar multiplier in this case is well below the average of cases of its size. *See Newberg on Class Actions* § 15:89 tbl.2

(comparing data from *Eisenberg I* and William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (unpublished manuscript) (draft on file with author)). In *Eisenberg I*, the study's authors found that the mean lodestar multiplier for common funds over $175.5 million was 3.18. *Eisenberg I* at 274 tbl.15. They observed that "[t]he pattern for the mean and median multiplier confirms that . . . [a]s the recovery decile increases, the multiplier also tends to increase, with the multiplier in the highest recovery decile more than triple that of the multiplier in the lowest recovery decile." *Id.* at 274. In Theodore Eisenberg, Geoffrey Miller, *et al.*, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937 (2017) ("*Eisenberg II*"), the study's authors found that the mean lodestar multiplier for common funds over $67.5 million was 2.72. *Eisenberg II* at Table 13. In Professor Rubenstein's draft article *Class Action Fee Awards: A Comprehensive Empirical Study*, the mean multiplier for cases over $44.6 million is 2.39. Rubenstein Decl. at ¶ 7(c); *Newberg on Class Actions* § 15:89 tbl.2. These data strongly support the Fee Award and 2.0 lodestar multiplier in this case. *See* Rubenstein Decl. at ¶ 8.

**E. The Fee Award Is Consistent with Professor Fitzpatrick's Findings.**

Both Professor Fitzpatrick's 2010 article *An Empirical Study of Class Action Settlements and Their Fee Awards* and his declaration submitted in another case in the District of Massachusetts are strong support for the reasonableness of the Fee Award.

*Fitzpatrick*, a comprehensive study of every federal class action settlement from 2006 and 2007, showed that the most common percentages awarded by all federal courts in 2006 and 2007 using the POF method were 25% and 30%, with nearly two-thirds of awards between 25% and 35%, a mean award of 25.4%, and a median award of 25% (standard deviation 7.5%). *Id.* at 833-34.

In 2014, Professor Fitzpatrick submitted a declaration in support of counsels' request for 33 1/3% of a $590.5 common fund in another class action case in the District of Massachusetts. Decl. of Brian T. Fitzpatrick, *Klein v. Bain Capital Partners, LLC*, No. 1:07-cv-12388-WGY (D. Mass. Nov. 12, 2014), ECF 1060, attached hereto as Exhibit 1. Professor Fitzpatrick opined in that case that 33% was "hardly unusual even when they are considered against cases from the First Circuit alone." *Id.* at ¶ 15. Fitzpatrick explained that "[i]n the 27 settlements in my study from the First Circuit where the percentage-of-the-fund method was used, the most common percentages were 25% and 33%, with over forty percent of awards between 30% and 35%. The mean was 27% and the median 25% (with a standard deviation of 6.0%)." *Id.*[20]

Fitzpatrick concluded that despite the often inverse relationship between settlement size and fee award percentage, a 33% award was a reasonable percentage in the First Circuit. *Id.* at ¶ 16. Fitzpatrick also emphasized that class action fee awards in larger settlements result in larger lodestar multipliers. *Id.* at ¶ 26. Fitzpatrick explained that when he limited the settlements in his study to those with common funds of over $100 million, the mean and median lodestar multipliers were 3.34 and 2.74. *Id.* Thus, Fitzpatrick's empirical study and declaration submitted in *Klein* amply support the Fee Award.[21]

[20] Fitzpatrick addressed the lower numbers found by Eisenberg and Miller in *Eisenberg I* as attributable to the age of that study's data and the fact that "their study examined only a small fraction of the settlements over this period, and the fraction examined was not designed to be representative of the whole," resulting in an oversampling of larger cases. *Id.* at ¶ 15 n.1; *see also Eisenberg I* at 253 (acknowledging that "our data include only opinions that were published in some readily available form. Obviously, therefore, we have not included the full universe of cases in our data set. . . . [P]ublished opinions are not necessarily representative of the universe of all cases.")

[21] CEI is incorrect that Customer Class Counsel misrepresented Fitzpatrick's findings in its memorandum in support of the fee petition. *See* CEI Submission at 1-2. As the above discussion demonstrates—and Fitzpatrick himself confirmed in his declaration in *Klein*—a 25% award is well in line with Fitzpatrick's findings.

**F. After a Lengthy and Thorough Investigation the Master Concluded That the Fee Award Is Reasonable.**

Finally, the Master spent well over a year analyzing the lodestar and concluded that the approximately $75 million fee award is reasonable. The Master has explained that the Fee Award was fully justified and "appropriate to compensate Plaintiffs' Counsel for the hard-fought litigation and does not represent a windfall, particularly in light of the laudable settlement." Master's Submission at 4. The Master concluded that, "in the context of the protracted and hard-fought State Street case, applying the traditional percentage of fee range does not yield a windfall to the attorneys who litigated the case." *Id.* at 4-5.

**G. Counsels' Litigation Expenses Are Reasonable.**

Counsel who create a common fund also are entitled to payment of reasonable litigation expenses. *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999). Counsels' request for $1,257,029.24 for expenses is reasonable and supported by itemized submissions in support of the fee petition, which Customer Class Counsel hereby incorporate by reference.[22] These submissions demonstrate that class counsels' expenses were necessary to prosecuting the Plaintiffs' and the class's claims and achieving the outstanding settlement for the class. *See* Sucharow Decl. at ¶¶ 187-198; Sucharow Decl. Exs. 15-23 (individual firms' declarations attaching itemized expense reports); Sucharow Decl. Ex. 24 (master chart of litigation expenses); Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs at 26, ECF 103-1.

[22] This amount represents a reduction of $668.70 from the original request to reflect a small amount of expenses inadvertently included. *See* Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 9 Response at 37, ECF 401-173.

## II. The Fee Award is Justified by Customer Class Counsel's Effort and Skill and the Significant Risks of this Litigation.

CEI's allegation that Customer Class Counsel "churn[ed]" and "billed without risk" in the months following the announced settlement of the class action against Bank of New York Mellon ignores the extensive record reviewed by the Master concerning the scope and the quality of the work performed by Customer Class Counsel at all times in the litigation, including the staff attorneys whom they employed. CEI Submission at 24. It also ignores the reality, amply documented by that same record, that State Street was not going to settle on terms comparable to those offered to class members in *BoNY Mellon* absent a substantial threat of an adverse judgment—a threat made real only by Customer Class Counsel's demonstrated capacity to proceed with all due haste to the next phase of litigation should the mediation not have resulted in a satisfactory resolution. Simply put, Customer Class Counsel's hard work made the settlement possible, and increased the settlement's value, right up to the point where the agreement to settle was reached.

Indeed, the intensity with which Customer Class Counsel and the Master continue to disagree with respect to certain of the Master's recommendations makes it all the more notable that, after two years of extensive investigation, there is *no* disagreement that Customer Class Counsel worked extraordinarily hard, at significant risk, to obtain an excellent result for the class, for which a 25% fee would under any normal circumstances be warranted. CEI's ill-informed contentions to the contrary simply assume the extraordinarily detailed record in this investigation out of existence.

The scope of the discovery undertaken by the Master would be notable if undertaken in a complex class action. It included more than 60 depositions, scores of interrogatories and document requests, and over 200,000 pages of documents produced by Customer Class Counsel.

Among the documents produced were numerous detailed memoranda (with exhibits) prepared by staff attorneys in the final months of the case concerning specific issues raised by their review of State Street's documents. After two years, based on his review of this expansive record, the Master concluded in no uncertain terms that (a) the $300 million Settlement was an "excellent result for class members" that was the "product of the *highly dedicated and professionally skilled work* of the class's law firms"; (b) the "attorney *fee award was not disproportionate* or unsupportable *when measured against* the positive result for the class and *the attorneys' effort and skill* that was required to achieve it"; (c) with only "minor exceptions" as noted, "*the hours and rates of the attorneys* of each of the law firms for whom lodestar reports were submitted to the Court [were] *reasonable and accurate*"; and (d) "contrary to the picture painted in the *Boston Globe*… [the] staff attorneys [did] the same kind of work done by associates at large firms" and "*all made substantive contributions* to the case." *See* Executive Summary: Special Master's Report and Recommendations at 3, 7, 21-22, 49-50, ECF 357-1 ("Executive Summary") (emphases added); Special Master's Report and Recommendations at 6, 70-72, 125, 176-77, 180, 365-66, ECF 357 ("Master's Report") (emphases added). Indeed, the Master specifically noted that, based on his review of the record, "the firms *appropriately staffed the case*, assigning lawyers to specific tasks commensurate with their experience and capabilities *with a sensitivity to the costs ultimately passed on to the client, the class, through the common fund*." *See* Master's Report at 210 (emphases added).

Disregarding all this, CEI blithely asserts that "the writing was on the wall" after the *BoNY Mellon* settlement was reached in the spring of 2015 "that [the State Street] case would follow, and on similar terms." CEI Submission at 23. On this basis, CEI contends, Class

Counsel's efforts after the *BoNY Mellon* settlement was reached amounted to riskless "churn." *Id.* This is thoroughly belied by the record.

First, there is simply no evidence in the voluminous record, or in the Master's detailed Report that, as a result of the *BoNY Mellon* settlement, State Street's position in mediation changed, or that State Street (or its able counsel) decelerated its aggressive defense to the Plaintiffs' claims in any way.

Second, it bears emphasis that the agreement to settle the *BoNY Mellon* litigation was not actually finalized until March 19, 2015. *See* Chiplock 6/16/17 Dep. at 107-12, 124-25, 134, ECF 401-9 (describing timing and staffing of document review). As the record reflects, Class Counsel began ramping up their efforts to complete document review in the State Street action more than two months prior to this, in December 2014 – January 2015, and that this timing was principally the result of three things that were independent of the subsequent *BoNY Mellon* settlement: (i) the close of fact discovery in *BoNY Mellon* in January 2015, which freed up the time of a substantial group of staff attorneys who had developed expertise in FX issues who were immediately transitioned to State Street document review; (ii) an evaluation (in December 2014) of the extent of State Street's production that still remained to be reviewed; and (iii) the passing of another Court-ordered deadline for completing the mediation in State Street (eventually extended one final time to April 2015), and a desire to bring the mediation to a timely conclusion, whether it be through a mediated resolution or proceeding to full-on litigation. *Id.*

The State Street action was also fraught with litigation risk throughout, including risks to class certification and to plaintiffs' theories of liability on summary judgment. *See* Master's Report at 29-32; Chiplock 6/16/17 Dep. at 57-58, 65-67, 105-06 (describing litigation and class certification risks); *see also* Goldsmith 7/17/17 Dep. at 27-29, ECF 401-57. These risks

remained after the announcement of the *BoNY Mellon* settlement—which happened prior to decisions on class certification and summary judgment in that case. As the record reflects, once the class complaint in State Street withstood defendant's motion to dismiss, the parties entered a Court-ordered mediation and period of "information exchange" that ultimately consisted of a similar type and volume of document production that was made in the *BoNY Mellon* litigation, with Plaintiffs' Counsel reviewing those documents to prepare their case for litigation in the event the mediation was terminated. Master's Report at 39-42, 77. The main difference from the *BoNY Mellon* litigation was that, while the mediation was ongoing, depositions and third party discovery did not commence. *See* Chiplock 6/16/17 Dep. at 30-32, 105-12 (describing the similarity in intensity of document review and analysis in both cases). But as is typical in complex financial cases, and as was the case both in the *BoNY Mellon* litigation and here, the most time-intensive activity undertaken by Customer Class Counsel consisted of document review and analysis. That is quite simply how liability cases are built, and the time spent doing it is and was necessary for a successful outcome for Plaintiffs—right up to the moment a mediated resolution was reached.[23]

If it were true, as CEI contends, that settlement "on similar terms" to the *BoNY Mellon* litigation was a foregone conclusion as of March 19, 2015 (when the *BoNY Mellon* settlement was actually signed),[24] Customer Class Counsel would have had little or no motivation to

[23] CEI erroneously claims that the settlement in principle was reached in the State Street litigation on June 21, 2015, and criticizes Customer Class Counsel for continuing document review for another "7-10 days" thereafter. CEI Submission at 36. In actuality, however, the agreement in principle to settle was not reached until June 30, 2015, at an in-person mediation at which Customer Class Counsel, ERISA counsel, State Street and representatives from the Department of Labor were all present. *See* Sucharow Decl. at ¶ 101.

[24] CEI states that the *BoNY Mellon* settlement was reached "in principle" in February 2015, CEI Submission at 30, but the fact is that that settlement agreement was not actually signed until March 19, 2015, and whether it would actually be successfully executed—and whether the accompanying global

complete the review of the millions of pages produced by State Street and engage in the type of high-level analysis of those documents which the Master specifically lauded in his Report in the final months leading up to June 30, 2015 (when the State Street settlement was agreed to in principle). *See* Executive Summary at 3, 7, 21-22, 49-50; Master's Report at 6, 70-73, 176-77, 179-80. This is because Customer Class Counsel's lodestar even as of mid-March 2015 likely would have been sufficient to support a fee award of 25 percent, assuming a settlement of $300 million. Recent First Circuit jurisprudence supports lodestar multipliers of up to 8.3, and commonly above 3.0, in class settlements of sizes comparable to this one. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs at 7-8, ECF 103-1; *see also supra* at § I.B. To justify a fee award of just under 25 percent of $300 million, therefore, Customer Class Counsel reasonably could have invested many millions less than the nearly $40 million in lodestar that they ultimately did in preparing this case—a number they could have presented months before the agreement in principle to settle was actually reached (June 30, 2015). Instead, the reason Customer Class Counsel completed their review of the documents produced and prepared as if the mediation would end without a positive resolution—as was testified to at length in the Master's investigation—was not to make their eventual fee application (as CEI contends) look even more modest than it eventually was, but rather to put Customer Class Counsel in a position to aggressively litigate the case without delay in the event

resolution of the government actions against BoNY Mellon would be consummated—remained very much an open question until literally the eve of that date.

State Street failed to agree to terms that were satisfactory for the Settlement Class. Master's Report at 40-42.[25]

The parties engaged in multiple, at times contentious, mediation sessions for several more months after the *BoNY Mellon* settlement was reached. The parties ultimately reached agreement due primarily to Plaintiffs' ability to demonstrate a seriousness of intent to litigate further in the absence of a satisfactory resolution. *See* Chiplock 6/16/17 Dep. at 67-69, 116-17, 119-22 (describing work performed in and tenor of mediation discussions). CEI's suggestion that a settlement was a foregone conclusion at any moment before the parties actually reached agreement betrays CEI's lack of familiarity with the uncertainty of mediation, ignores the vigorous defense mounted by State Street and its counsel and, critically, lacks any support in the extensive record in this case (including portions of the record that remain under seal). For all of these reasons, CEI's purported factual basis for awarding Customer Class Counsel a reduced fee simply does not hold up.

## CONCLUSION

For the foregoing reasons, Customer Class Counsel respectfully requests that the Court re-instate its award of attorneys' fees in the amount of $74,541,250.00 and expenses in the amount of $1,257,029.24.

[25] Indeed, contrary to CEI's contention, the time spent in 2015 by staff attorneys performing document review and analysis was arguably *more* valuable than their prior time because, by 2015, as a result of their extensive experience in the *BoNY Mellon* litigation and in this case, many of them had developed even greater expertise in foreign currency exchange issues. *See* Chiplock 6/16/17 Dep. at 50, 105-12; *see also* Master's Report at 40-42.

Dated: December 18, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on December 18, 2018.

*/s/ Joan A. Lukey*
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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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

**EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN**

1. A court's goal in overseeing a class action fee award is to ensure that counsel's fee request is reasonable, Fed. R. Civ. P. 23(h), and thus does not constitute a windfall at the class's expense. While courts have employed a variety of different tests in performing this

function, I have long argued that one test – the lodestar cross-check – is both necessary and sufficient for the task. The lodestar cross-check is the best measure of what constitutes a windfall because it compares class counsel's proposed percentage award to what they would have been paid on an hourly basis and it measures windfall by a gross disparity between the two. The Competitive Enterprise Institute's Class Action Fairness Center argues that windfall can and should be measured by the difference between counsel's proposed percentage and average percentage awards in cases with similar fund sizes and, in making that argument, it relies on data I supplied to the Court for a distinct purpose in an earlier phase of these proceedings.[1] I do not believe that differences in percentages across cases provide significant insight into the windfall analysis, particularly where a lodestar cross-check has been undertaken. CEI's approach is therefore misguided and its reliance on my data for this purpose is misleading. I write to explain why.[2]

2. Among the many approaches to assessing fee requests, five are particularly common:[3] the multifactor test;[4] the benchmark approach;[5] the market approach;[6] the sliding scale[7] and related mega-fund[8] approaches; and the lodestar cross-check.[9]

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[1] *See* The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum Propounding an Appropriate Total Fee Award (ECF No. 522) at 3-10 (hereafter "CEI Brief").

[2] Both the Special Master – who supports the reasonableness of the initial $75 million fee award – and the CEI argue for downward adjustments based on the other issues in this case. This Declaration addresses only the reasonableness of the initial fee award and, in particular, the best method for assessing that initial reasonableness.

[3] In the *Newberg* treatise, I discuss two others courts have used: measuring the proposed fee against an *ex ante* fee contract with the class representatives generally and against an *ex ante* fee agreement with lead plaintiffs in in cases litigated under the Private Securities Litigation Reform Act (PSLRA) specifically. William B. Rubenstein, 5 *Newberg on Class Actions* §§ 15:74-75 (5th ed. 2015) (hereafter *Newberg on Class Actions*). Courts generally do not place particular emphasis on contracts with class representatives since such representatives typically lack the capacity to negotiate meaningfully with class counsel. *Id.* at § 15:74. PSLRA cases are somewhat different: the lead plaintiff in such cases hires the lead counsel and may have the institutional capacity to negotiate a meaningful fee arrangement *ex ante*. *Id.* at § 15:75. While

3. I am a proponent of the lodestar cross-check for several inter-related reasons:[10]

- *First*, the lodestar cross-check provides a straightforward and pertinent measure of windfall by providing a court with information about the relationship of the percentage award to class counsel's aggregate billing for the case.[11]

- *Second*, the lodestar cross-check performs that safeguarding function better than the alternative sliding-scale or mega-fund tests, both of which respond to the windfall concern by lowering percentages as fund sizes increase. When employing those approaches, courts guess at both when to start lowering the percentage and by how much. By contrast, the lodestar cross-check enables a court to calibrate the appropriate bonus (or demerit) – the positive or negative multiplier – with a more fine-tuned and less back-of-the-envelope analysis.

- *Third*, the lodestar cross-check makes transparent the profit that counsel will make in a particular case and thereby assists a court in determining whether counsel are entitled to that profit. It is one thing to say counsel deserve 25% of a common fund, but quite another to learn that this amount is two times their lodestar or 20 times their lodestar.

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such agreements may contain probative information, a leading study shows that they are rarely executed. *Id.* at n.5.

[4] *Id.* at § 15:77.

[5] *Id.* at § 15:78.

[6] *Id.* at § 15:79.

[7] *Id.* at § 15:80.

[8] *Id.* at § 15:81.

[9] *Id.* at §§ 15:84-89.

[10] This paragraph is adapted from an *amicus* brief I filed in the California Supreme Court, in 2016, urging that Court to encourage lower courts to undertake a lodestar cross-check when applying the percentage method, an invitation the Justices accepted. *See Laffitte v. Robert Half Internat. Inc.,* 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016) ("We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns [with the lodestar cross-check] are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases."). That brief drew on my extensive review (and support) of the lodestar cross-check in the *Newberg* treatise. 5 *Newberg on Class Actions* §§ 15:84-15:89.

[11] *See, e.g., In re Cendant Corp. Litig.*, 264 F.3d 201, 285 (3d Cir. 2001) ("The goal of [the lodestar cross-check] is to ensure that the proposed fee award does not result in counsel being paid a rate vastly in excess of what any lawyer could reasonably charge per hour, thus avoiding a 'windfall' to lead counsel.").

- *Fourth,* the lodestar cross-check enables consistency in fee awards across cases in ways that the percentage method alone does not. It is true in the abstract that a 25% award in one case and a 25% award in another case are both 25%, such that the percentage method ensures some level of consistency. But since that 25% figure, standing alone, provides so little information about the fee's relationship to profit, it is a rather meaningless form of consistency. By contrast, a 25% award in a $10 million case that embodies a positive multiplier of 1.5 (times counsel's lodestar) is the functional equivalent of a 5% fee award in a $1 billion case that similarly embodies a positive multiplier of 1.5 (times counsel's lodestar). There may be reasons that the multiplier should be higher or lower in the $10 million case or the $1 billion case, but using the lodestar cross-check enables a discussion of those reasons by providing an apples-to-apples comparison. Awarding counsel 25% in each case, without more analysis, is simply stabbing in the dark and, absent a lodestar cross-check, there is no meaningful basis for comparing a 25% award in one case to a 25% award in another.

4. My initial Declaration in this case[12] accordingly focused on key components of the lodestar cross-check. I opined (a) that the percentage award with a lodestar cross-check is the most widely used fee approach; (b) that counsel's billing rates were reasonable; (c) that non-partnership track attorneys were appropriately billed as attorneys, not costs, and (d) at reasonable rates;[13] and (e) that counsel's multiplier was reasonable.

[12] As the Special Master did not make my initial declaration part of the record in the case, I appended it to the Third Declaration I filed, ECF No. 368, as Exhibit A. *See* Declaration of William B. Rubenstein in Support of Lieff Cabraser Heimann & Bernstein, LLP's Response and Objection to the Special Master's Report and Recommendations (ECF No. 368) at Exhibit A (hereafter First Rubenstein Dec.).

[13] In my initial filing to the Special Master in 2017, I reported that the blended hourly rate of non-partnership track attorneys was $379.31 (without Michael Bradley) and $382.94 with him, numbers that were .06% below and .9% above the mean of a comparison set, respectively. First Rubenstein Dec. at ¶ 36 & n.44. I accordingly concluded that "the billing rate for non-partnership track attorneys in this case is entirely normal." *Id*. at ¶ 36; *see also id*. at ¶1; *id.* at ¶ 46; Third Rubenstein Dec. (ECF No. 368) at 9-10 (describing First Declaration's conclusion that the non-partnership track attorney billing rates were "comparable with those approved by other courts in a comparison set of other class action cases."). In preparing the present report, I learned that a miscommunication between the Lieff Cabraser firm and my team led to the omission of some non-partnership track attorneys from my initial calculations. When those attorneys are included, the blended hourly rate for non-partnership track attorneys is $396.19 (without Michael Bradley) and $397.04 with him, numbers that are 4.39% and 4.61% above the mean of the comparison set. I therefore remain comfortable with my initial conclusion that the billing rates class counsel employed for non-partnership track attorneys in this case were normal.

5. The Special Master spent well over a year investigating these same issues and reached the same conclusions, but for his contention that some of the non-partnership track attorneys (*contract* attorneys as opposed to *staff* attorneys) should be billed as costs not lawyers.[14] Most generally, the Master has also concluded that Counsel's $75 million (or roughly 25%) was "appropriate to compensate Plaintiffs' Counsel for the hard-fought litigation and does not represent a windfall, particularly in light of the laudable settlement."[15]

6. CEI, by contrast, argues, *inter alia*, that Counsel's fee award should be assessed by comparison to fee percentages in other settlements of a similar magnitude and, in doing so, it utilizes a data set from my initial Declaration as evidence of percentages in similarly-sized cases.[16]

7. CEI's argument encompasses three distinct errors.

a. *Wrong data for this purpose.*[17] In representing to this Court what constitutes a normal percentage in cases of this magnitude, CEI relies on the 20 cases in Exhibit E of my initial report.[18] That list of cases was generated to enable me to assess whether the

[14] I responded to the Special Master's arguments on these points in my Third Declaration (ECF No. 368) at 9-17.

[15] Special Master's Further Response to the Court's Directives at the November 7, 2018 Hearing and in its November 8, 2018 Order (ECF No. 523) at 4 (hereafter "Special Master Br."). *See also id.* at 4-5 ("[I]n the context of the protracted and hard-fought State Street case, applying the traditional percentage of fee range does not yield a windfall to the attorneys who litigated the case."). The Special Master does, of course, also conclude that "given the conduct discovered during [his] investigation by some of the firms, this fee is just a starting point that must be adjusted to redress that conduct." *Id.* at 4.

[16] CEI Br. at 3-10.

[17] The Special Master also criticizes CEI's use of data, noting that the organization "substantially distorts the results of a single empirical study" to reach its desired conclusion. Special Master Br. at 7.

[18] CEI Br. at 6-8.

*billing rates* Class Counsel were charging were reasonable.[19] Accordingly, I reported that when my research assistants generated that data set, they only searched for cases that encompassed data on the billing rates counsel used.[20] What that means is that all of the cases in that data set are cases in which courts undertook a lodestar cross-check or used a straight lodestar approach. What are missing from that data set are cases in which courts approved percentage awards without undertaking a lodestar cross-check. It is a fair assumption that percentages in non-cross-checked cases are higher than those in cases in which courts insist upon a lodestar cross-check – indeed, that is the precise reason I embrace the lodestar cross-check. Thus, CEI notes that the mean percentage award in the 20 lodestar cross-checked cases in my billing rate set was 13.16%.[21] However, the empirical study with the closest data on this point shows that in $250-$500 million settlements, the mean percentage is 17.8% and the median percentage is 19.5%.[22]

b. *Wrong approach.*[23] The idea of lowering the percentage as the fund size increases is called a "sliding scale" or "mega-fund" approach.[24] In the *Newberg* treatise,[25] I am critical of these approaches for several reasons:

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[19] *See* First Rubenstein Dec. (ECF No. 368, Ex. A) at ¶ 31.

[20] *Id.* at n.40 ("My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar."). I also explained that this dataset was not cherry-picked. *Id.* ("No cases of the relevant size enabling reference to counsel's lodestar information were rejected.").

[21] CEI Br. at 9.

[22] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 839 tbl. 11 (2010).

[23] CEI's general approach in its submission also misses the mark: it spends much of its brief arguing that a different fee award ($50 million) would be reasonable. CEI Br. at 8-31. A court's task at the fee stage is not to determine whether a different number would be reasonable, but rather to determine whether class counsel's proposed number is reasonable. Thus, this Court ordered CEI to "submit a memorandum addressing the reasonableness of the award of approximately $75,000,000 in attorney's fees in this case . . .," ECF No. 518 at 2, not to offer other numbers and opine on their reasonableness. There are a lot of other numbers that might be

- *First*, the sliding scale lacks rigor because it provides no direction to courts about when to start decreasing the percentage award, nor by how much.

- *Second*, its suggestion that there is a smooth inverse relationship between the size of the common fund and an appropriate percentage may not be accurate: some high fund cases involve significant risks, require enormous investments of money and time, and may appropriately trigger a healthy percentage award; conversely, a relatively small fund (say $25 million), secured with a few months' work, may not truly entitle class counsel to a mean 25% award.

- *Third*, the approach can create perverse incentives: if class counsel receives less of each next dollar that they secure for the class, they may have an incentive to settle when their percentage drops from 25% to 20%, for example, thereby encouraging quick settlements at sub-optimal levels. Indeed, both scholars and courts have embraced precisely the opposite sliding scale, wherein the percentage fee awarded for the marginal dollar increases as the size of the fund increases; their argument is that the increasing percentage approach incentivizes class counsel to fight for every last dollar and discourages quick and easy settlements that may not be in the best interest of the class.

Thus, in the *Newberg* treatise I report that while percentages do tend to be lower in large cases, that outcome is better achieved – and what one would expect – from constant application of a lodestar cross-check and not from randomly comparing percentages across cases. As I state there: "without a lodestar cross-check, a straight percentage award has no measuring stick by which to assess whether a particular percentage is or is not a windfall."[26]

c. *Wrong conclusion.* CEI states that "Rubenstein's own citations here confirm that the vacated 25% fee award here was excessive."[27] But when the proper approach to

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reasonable, including higher numbers. *See, e.g.,* Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little*?, 158 U. Pa. L. Rev. 2043, 2047 (2010) (arguing that they do).

[24] CEI Br. at 3 ("Attorneys' fees for megafunds tend to be awarded on a sliding scale so that counsel does not reap a windfall from valuable client claims.").

[25] The following paragraphs are adopted from my discussion of the sliding scale concept, 5 *Newberg on Class Actions* at § 15:80 (footnotes omitted); I make the same points with respect to the related mega-fund concept. *Id.* at § 15:81.

[26] *Id.* at § 15:81.

[27] CEI Brief at 7.

windfall is applied – the lodestar cross-check – the 20 cases in my rate study that CEI endorse actually show that the 25% here is entirely reasonable not excessive. As I stated in my initial Declaration, the mean multiplier across these 20 cases is 2.28.[28] Here, Class Counsel's initial lodestar multiplier was approximately 1.8, when the errantly double-counted hours were extracted it rose to 2.01, and even if the contract attorney hours are removed, it rises to 2.07.[29] It is thus well below the 2.28 average lodestar multiplier in the 20 cases in my hourly rate group. Moreover, empirical studies show that Class Counsel's maximal 2.07 multiplier is well below the average multiplier in large fund cases, which range from 3.18 in cases over $175.5 million in one study,[30] to 2.72 in cases over $67.5 million in a second study,[31] to 2.39 in cases over $44.6 million in a third study.[32]

8. In sum, comparing percentages across cases provides scant insight into the windfall question, while the lodestar multiplier provides a precise measurement of class counsel's profit and hence potential windfall. Here Counsel properly submitted that lodestar information in their fee papers, the Court properly reviewed it in initially approving the fee award, the Court understandably appointed a Special Master to re-review the lodestar when concerns about its accuracy arose, and now the Special Master has spent over a year analyzing the lodestar – all of which has led him to conclude that the 25%, $75 million fee award was fully

[28] *See* First Rubenstein Dec. (ECF No. 368, Ex. A) at ¶ 42. CEI's independent calculations find an even higher, 2.35, average multiplier across the 20 cases. *See* Declaration of M. Frank Bednarz in Support of the Center for Class Action Fairness's Memorandum Propounding an Appropriate Total Fee Award (ECF No. 522-1) at 9.

[29] Third Rubenstein Dec. (ECF No. 368) at ¶ 19.

[30] Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. Empirical Legal Stud. 248, 274 tbl.15 (2010).

[31] Theodore Eisenberg, Geoffrey Miller, and Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. Rev. 937, 967 tbl.13 (2017).

[32] 5 *Newberg on Class Actions* § 15:89 tbl 2.

justified in the circumstances of this case. Class Counsel's modest 2.07 lodestar multiplier provides strong support for that conclusion, is a far more meaningful data point than an abstract comparison of percentages across cases, and cannot fairly be characterized as a windfall.

December 17, 2018

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 11-cv-10230 MLW |
| ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20,<br><br>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,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 12-cv-11698 MLW |

**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP's**
**RESPONSE AND OBJECTIONS TO THE SPECIAL MASTER'S PARTIALLY REVISED REPORT AND RECOMMENDATIONS**

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Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this Response and Objections to the Special Master's Partially Revised Report and Recommendations, ECF No. 524 ("Revised Report").

## I. INTRODUCTION

The Revised Report contains no case law, new facts, or equitable principle that supports the Special Master's recommendation that Lieff Cabraser "disgorge," "forfeit," or have its fee reduced by, $3,593,765 – or roughly 24% of the $15,116,965.50 in fees the firm received in the State Street Action.[1] The Master seeks this penalty against Lieff Cabraser in addition to the $1,152,000 the firm has already spent on the Master's investigation, plus the $456,853 in additional costs and $2,552,669 in lodestar the firm has spent defending itself in this proceeding.

In the absence of any jurisprudence to support his recommendations or overcome Lieff Cabraser's objections, and in disregard of his own critical factual findings in his Report and Recommendations, ECF Nos. 357 and 357-1 ("Report"), the Master offers only platitudes about "equity" and "deterrence" and the "integrity of the legal process," despite the fact that he identifies no intentional or wrongful conduct by the firm. The Master also spills much ink mischaracterizing a sentence in Lieff Cabraser's fee declaration in a brand new effort to cast doubt on the accuracy of the declaration, only to acknowledge the inconsequence of his argument and recommend no economic remedy against the firm.

In further response to the Master's Report, and in response to his Revised Report, Lieff Cabraser makes the following essential points:

[1] All of the defined terms herein (identified by initial capitalization), are the same terms defined in Lieff Cabraser's Response and Objections to the Special Master's Report and Recommendations, ECF No. 367 ("Response and Objections").

- *Lieff Cabraser should not be required to disgorge or forfeit, or have its fee reduced by, any portion of the firm's inadvertently double-counted lodestar*.

- *In the event the Court requires Lieff Cabraser to disgorge or forfeit, or reduce the firm's fee award by, any portion of the firm's double-counted lodestar, that disgorgement or reduction should be commensurate with the firm's "relative" lesser role in the double-counting*.

- *Customer Class Counsel, including Lieff Cabraser, should not be required to treat the time of staff attorneys paid by an agency as a "cost" instead of including it as part of the aggregate lodestar for cross-check purposes*.[2]

- *Even if the Court agrees that the firm's agency lawyers should be treated differently than Lieff Cabraser's payroll staff attorneys for purposes of the lodestar cross-check, the Special Master's recommended disgorgement/forfeiture penalty should be rejected*.

- *The Master's criticism of a sentence in Lieff Cabraser's fee declaration was never raised during the Master's investigation, is factually baseless, and is, by the Master's own admission, inconsequential.*

## II. STATEMENT OF RELEVANT FACTS

### A. A Comprehensive And Accurate Statement Of The Factual And Procedural Background Of The State Street Action And The Master's Investigation Is Set Forth In Lieff Cabraser's Response And Objections.

The Master's Revised Report is highly selective in its reference to the factual record developed during the 14-month-long investigation, omitting or misstating a number of crucial

[2] Internally, Lieff Cabraser uses the term "staff attorneys" to refer to those licensed attorneys with relevant experience who work for the firm conducting document review, coding, and analysis, and who write related issue and/or witness memoranda (as necessary), in the firm's large, complex cases. Their specific tasks generally, and in the State Street Action specifically, are described in detail in Lieff Cabraser's Response and Objections at 9-13, 20-28. The term "staff attorneys" includes personnel paid directly by the firm and lawyers paid by an outside agency (which in turn bills the firm for those lawyers' services). *See* Response and Objections at 11-13.

facts. Indeed, the Master now claims he is "not bound by the factual findings in the Report."[3] It is all the more important, therefore, to remind the Court that a comprehensive and accurate statement of the factual and procedural background of the State Street Action, the Master's investigation, the Master's findings as to Lieff Cabraser, and the financial impact on the firm as a result of the investigation, is set forth in detail in Lieff Cabraser's Response and Objections at pages 9-66.[4]

### B. The Master's Characterization Of His Inability To "Reach An Agreement" With Lieff Cabraser Is Misleading.

In his Revised Report, the Master states that in late August 2018, he "took steps to determine if a global resolution with all firms was viable."[5] The Master writes that with the Court's approval, he invited "all firms to attend an all-day meeting in Boston to further explore the possibility of a global resolution."[6] The Master then advises the Court that he was "not able to reach an agreement with Lieff… consistent with his understanding of his responsibilities to the Court, and therefore, Lieff's… objections remain outstanding and require a response from the Special Master."[7] This characterization of events is misleading.

In August 2018, Lieff Cabraser learned that the Special Master was engaged in separate "settlement" or "resolution" discussions with Labaton, Thornton, and ERISA Counsel.[8] On

[3] Revised Report at 6. *See also* Revised Report at 15 (characterizing important factual findings as "general observations" and claiming they are "not binding findings of fact at this stage in the post-Report proceedings.")

[4] An updated account of the financial impact the Master's investigation has had and could have on the firm is set forth *infra* at Section IV.

[5] Revised Report at 2.

[6] *Id*.

[7] *Id*.

[8] The facts presented here are attested to in the accompanying Declaration of Richard M. Heimann in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein,

September 6, 2018, the Master informed the Court that the Master had invited all parties to a September 11, 2018 in-person meeting "to continue discussions and pursue a final resolution, if possible."[9] Between the time the firm learned about the Master's efforts at a "global resolution," and the September 11, 2018, in-person meeting in Boston, Lieff Cabraser had *no* settlement or resolution discussions with the Special Master or his counsel. At no time prior to the September 11 meeting did the Master make any offers of resolution of any kind to Lieff Cabraser.[10]

The first meeting Lieff Cabraser had with the Master and his counsel concerning potential resolution took place in the Boston office of JAMS on September 11, 2018, and lasted less than 30 minutes. During that encounter, the Master made it clear that his recommended disgorgement/forfeiture penalties concerning the firm's inadvertent double-counting of certain staff attorney lodestar and its use of agency/contract attorneys was non-negotiable. The Master was adamant that any agreed-upon resolution must include payment to the class by counsel of an amount equal to that which he had recommended in his initial Report. For its part, Lieff Cabraser advised the Master that it viewed the Master's proposed penalties against the firm as factually and legally unsupportable. The firm also advised the Master that it strongly disagreed with his position that he has a duty or responsibility to the Court to reallocate attorneys' fees paid to Customer Class Counsel, including Lieff Cabraser, to the class.[11]

Following the initial short meeting, the firm had a second brief conversation with the Special Master (without his counsel). During that discussion, the firm attempted to explain that if one entirely eliminated the lodestar of Lieff Cabraser's agency/contract attorneys, or simply

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LLP to the Special Master's Partially Revised Report and Recommendations ("Heimann Decl."), filed herewith, at paragraphs 2-6.

[9] ECF No. 463.

[10] Heimann Decl., ¶¶ 2-6.

[11] *Id.*

reduced their hourly rates, the resulting aggregate lodestar multiplier (as well as Lieff Cabraser's individual multiplier), measured against the original fee award, would not materially change. At the conclusion of that conversation, the Master requested that the firm calculate and present to him a summary of the impact on the lodestar multiplier if the agency/contract attorney time was reduced to a range of $50 through $250 hour, in $50 increments. The firm provided the Master with that information on September 13, 2018. The memoranda describing that analysis are attached as Exhibit A to the Heimann Declaration. The Master never responded to these memoranda, and neither they nor their content are mentioned in his Revised Report.[12]

Since the September 11, 2018 meeting, Lieff Cabraser has had no further discussions with the Special Master concerning resolution. Lieff Cabraser's objections to the Master's Report are ripe for adjudication by the Court.

## III. ARGUMENT

### A. Lieff Cabraser Should Not Be Required To Disgorge Or Forfeit, Or Have Its Fee Reduced By, Any Portion Of The Firm's Inadvertently Double-Counted Lodestar.

In his Report, the Special Master recommends that Labaton, Thornton and Lieff Cabraser disgorge or forfeit and "return" to the class $4,058,000 in double-counted staff attorney time, and that Lieff Cabraser pay one-third of that amount ($1,352,667).[13] In its Response and Objections, Lieff Cabraser emphasizes that, contrary to the Special Master's recommendation, which is not supported by any case law or other legal principle, the proper way to address the inadvertent double-counting issue is to remove the double-counted lodestar from the aggregate lodestar, and

[12] *Id.*

[13] Executive Summary at 49, Report at 364.

then determine whether the resulting aggregate multiplier of 2.0 (and Lieff Cabraser's individual multiplier of 1.69) is appropriate.[14] As Professor Rubenstein puts it:

> In a case where a court employs the percentage method to determine class counsels' fee, and uses the lodestar only for cross-check purposes, the reduction of an hour of time recalibrates the lodestar multiplier and requires further analysis of whether that lower amount can continue to sustain the requested percentage award. But it does not require the "repayment" of that hour of time since counsel was never "paid" for that hour of time; counsel were paid a percentage of the recovery.[15]

Given the proper analytic framework for addressing the inadvertently double-counted lodestar, the only question becomes whether the recalibrated lodestar multiplier can sustain the requested percentage award.[16] Here, removing the aggregate double-counted lodestar of $4,058,000 from the aggregate lodestar of $41,323,895.75, results in a corrected aggregate lodestar of $37,265,241.25. Applying that corrected lodestar as a cross-check against the aggregate fee award of $74,541,250 results in a 2.0 multiplier. Such a multiplier, used for lodestar cross-check purposes, is more than reasonable under controlling legal authority.[17] Moreover, in his Report, the Special Master finds that the aggregate multiplier of 1.8 (the lodestar multiplier based on the original fee submissions) to be "certainly within the reasonable range," and cites as support for that statement cases that applied multipliers ranging 1.987 up to 4.0.[18]

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[14] *Id.* at 71-73.

[15] Declaration of William B. Rubenstein in Support of Lieff Cabraser Heimann & Bernstein, LLP's Response and Objections to the Special Master's Report and Recommendations ("Rubenstein Declaration II"), ECF No. 368, at 20-21 and fn. 80 (noting that "[numerous] legal decisions have understood this distinction, after adjusting the lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remains reasonable" and citing several of those decisions).

[16] *Id*. at 17-21; Response and Objections at 71-73.

[17] *Id*. *See also* Expert Declaration of William B. Rubenstein at 30-34, ECF No. 368, Exhibit A ("Rubenstein Declaration I").

[18] *Id*.

Despite the clarity of the appropriate approach to addressing the inadvertent double-counting of staff attorney lodestar, the Master continues to maintain his position that the firm disgorge or forfeit one-third of the inadvertently double-counted lodestar ($1,352,667.67). In doing so, the Master again offers no case law, no legal principle, and no scholarship or legal commentary to support his view. Faced with the absence of a credible legal argument, the Master now claims that he is justified in recommending this penalty against Lieff Cabraser because it satisfies the "equitable tasks delegated to the Special Master," and "accomplishes a larger goal of rough justice."[19] The new rationale for the Master's recommended "equitable" remedy against Lieff Cabraser is meritless and should be rejected.

The Master's belated "equitable" arguments in support of his recommended disgorgement/forfeiture remedy are not presented in a clear and cohesive manner and are frequently at odds with the factual record.[20] In order to best respond to the Master's presentation, Lieff Cabraser organizes its reply as follows: (1) the Master's authority does not include the right to disregard controlling legal authority for the purpose of determining attorneys' fees in class actions; (2) the facts show the firm's double-counting of certain staff attorney lodestar was inadvertent and not material; (3) the Master's proposed disgorgement/forfeiture remedy for an inadvertent mistake that had no negative impact on the class is *not* equitable, it is punitive; (4) the Master's argument that disgorgement/forfeiture will "deter" future inadvertent mistakes in preparing future fee petitions is nonsensical; and (5) Lieff Cabraser has already been penalized significantly for its double-counting mistake.

[19] Revised Report at 9 and 10.

[20] Revised Report at 8-21.

### 1. The Master's Authority Does Not Include the Right to Disregard Controlling Legal Authority for the Purpose of Determining Attorneys' Fees.

Lieff Cabraser fully understands that the Court has vacated the original fee award.[21] The firm also appreciates that this Court has the discretion, consistent with controlling legal principles and the factual record, to award an aggregate attorneys' fee and to allocate that fee among counsel as it deems appropriate.[22] Lieff Cabraser does not, however, agree with the Master that the Court should reduce the firm's fee by any amount based on the inadvertent double-counting of certain staff attorney lodestar. Moreover, the firm does not agree with the Master that the Court should in effect disregard the application of lodestar cross-check principles.

The Master states that he is "not persuaded by Lieff that courts are constrained by the percentage-of-fund or lodestar methodology traditionally employed by the district courts [in] reviewing… a fee award for the first time."[23] It does not matter whether the Master is "persuaded" or not – the principles for determining attorneys' fees in class actions are well settled in the First Circuit.[24]

The fact that the Court has discretion and flexibility in applying the percentage-of-the-recovery/lodestar cross-check approach does not mean, as the Master seems to suggest, that the Court should now abandon the methodology for determining attorneys' fees the Court employed in determining a reasonable fee in this case.[25] Indeed, in exercising its discretion and flexibility

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[21] ECF No. 331; *see also* ECF No. 445 at n. 1; Revised Report at 7, 10-11.

[22] ECF 445 at n. 1.

[23] Revised Report at 10.

[24] *See* Customer Class Counsel's Memorandum of Law in Support of the Reasonableness of the Attorneys' Fee Award, filed December 18, 2018 ("Customer Class Counsel's Memo.") at 4-14; Response and Objections at 34-36, 68-73, 79-82.

[25] *See* Revised Report at 10-11.

in assessing the attorneys' fee, the Court is of course free to consider whatever lodestar it believes appropriate for cross-check purposes against a percentage-of-the-recovery award. Inadvertently double counted lodestar should, as has been made clear by Customer Class Counsel since the November 10, 2016 Goldsmith Letter, be eliminated from the aggregate lodestar the Court uses for cross-check purposes. It is for the Court to then determine whether the resulting multiplier is appropriate and justified.

The Master refuses to follow this analytic model because it results in what would still be a reasonable multiplier, and runs counter to his narrative that a substantial sum of money should be reallocated from Customer Class Counsel (including Lieff Cabraser) to the class.[26] As the Master puts it "if Lieff were correct that the Court should order disgorgement only upon a yield of an excessive multiplier, the Court's hands would be tied to redress any misstatements – no matter how egregious – absent a multiplier that registers as 'unreasonable' according to historical benchmarks. [Footnote omitted.] This result would render the Court's and the Special Master's review a mere formality," and would "fundamentally collide with the recognized need in the First Circuit for courts to be flexible when determining the scope of an appropriate fee."[27]

Lieff Cabraser has never argued that a court may order disgorgement only upon a yield of an excessive multiplier. Rather, the firm maintains, with support from Professor Rubenstein in line with all of the relevant case law, that when an adjustment, typically a reduction, is made to the lodestar submitted for cross-check purposes, the proper next step is to determine whether the resulting or corrected lodestar still supports the percentage-of-the-recovery awarded.[28] Intentional misstatements by counsel, including "egregious" misstatements, would be, as they

[26] *See id*.

[27] Revised Report at 11.

[28] *See* Response and Objections at 68-73, 91-94; Rubenstein Declaration I at 7-12, 30-34; Rubenstein Declaration II at 17-21.

always are, addressed under appropriate rules, including Rule 11 of the Federal Rules of Civil Procedure. The Special Master expressly found as a fact that Lieff Cabraser did not engage in any such sanctionable conduct. In short, by applying the basic lodestar cross-check rules and principles here, the Court's hands are in no way "tied."

**2. The Firm's Inadvertent Double-Counting of Certain Staff Attorney Lodestar Was Inadvertent and Was Not Material.**

As articulated in his Revised Report, the principal factual basis for the Master's punitive disgorgement/forfeiture remedy against Lieff Cabraser is that the firm contributed to, or played a part in, the double-counting of certain staff attorney time, and that Customer Class Counsel's original fee petition overstated Plaintiffs' Counsel's aggregate lodestar.[29] What is notable about the Master's focus on the *fact* of Lieff Cabraser's double-counting as the main basis for imposing substantial economic penalties on the firm is that there is *no* dispute that Lieff Cabraser mistakenly included $868,417 in staff attorney lodestar as part of Customer Class Counsel's original fee petition.[30] Indeed, Lieff Cabraser, along with the other Customer Class Counsel, informed the Court of the accidental double-counting in the November 2016 Goldsmith Letter, promptly after having become aware of the issue.[31] Customer Class Counsel, including Lieff Cabraser, told the Court in the Goldsmith Letter that the double-counting was accidental and inadvertent, and after his exhaustive investigation, the Master found that to be true, in particular as to Lieff Cabraser.[32]

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[29] *See* Revised Report at 8, 9, 10, 12 and 18.

[30] Response and Objections at 3, 7, 38, 66, 75, 77, 99. It bears noting that in an apparent reference to Lieff Cabraser mistakenly including $868,417 in staff attorney lodestar as part of the fee petition, the Master mistakenly multiplies that number by a factor of almost 10, referring to "the $8,670,000 mistake [Lieff Cabraser] made." Revised Report at 14, n.15. Clearly, even the Master is capable of making a numerical mistake—even a reasonably obvious one.

[31] Response and Objections at 39-40.

[32] Executive Summary at 14-15; Report at 363.

Although the Master states repeatedly that Lieff Cabraser contributed to the inadvertent double-counting, he offers no facts from the record that support translating that simple fact into a multi-million dollar penalty. Perhaps sensing the weakness in his position, in the Revised Report, the Master now maintains that Lieff Cabraser's inadvertent double-counting was "material" and was an error of particular "magnitude."[33] These findings or characterizations are not supported by the factual record, and are directly contradicted by the Master's original findings of fact. Indeed, the following facts undermine the Master's position that the fact of the double-counting itself warrants the imposition of a stiff economic penalty:

- Lieff Cabraser had 18 staff attorneys who worked on the State Street Action.[34]
- In early 2015, Lieff Cabraser agreed to share and or host six staff attorneys that would be partially or fully paid for by Thornton.[35]
- This arrangement was used due to Thornton's limited physical facilities and so that Thornton could bear an appropriate share of the costs of the document review and analysis Customer Class Counsel was then engaged.[36]
- It was clearly understood by Lieff Cabraser that Thornton would include the lodestar of the staff attorneys it paid for in any later fee request.[37]
- Two of the staff attorneys Lieff Cabraser "shared' with Thornton were on Lieff Cabraser's payroll and both continue to work for Lieff Cabraser to this day.[38]
- For roughly a nine week period between February and April 2015, Lieff Cabraser invoiced Thornton, and Thornton paid Lieff Cabraser, for the work performed by these attorneys.[39]
- Two other staff attorneys Lieff Cabraser shared with Thornton worked in Lieff Cabraser's San Francisco office and were paid by an agency.[40]

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[33] Revised Report at 10, 13.

[34] Response and Objections at 24-28, and Appendices A and B thereto.

[35] *Id.*

[36] *Id*. at 29.

[37] *Id*.

[38] *Id*.

[39] *Id.*

- From February to mid-April 2015, Thornton paid an agency directly for the legal services of these two attorneys as part of its arrangement with Lieff Cabraser.[41]

- Two additional staff attorneys were hired through and paid by an agency, which in turn was paid directly by Thornton, while they worked physically in Lieff Cabraser's San Francisco office between February and June 2015.[42]

- On November 8, 2016, Lieff Cabraser learned that a reporter from the Boston Globe had inquired about the appearance of certain attorneys on more than one of Customer Class Counsel's Lodestar Reports (as part of their fee application).[43]

- Upon learning of that inquiry, the firm promptly identified time and lodestar included in the firm's Lodestar Report that was also included as part of the Thornton fee submission.[44]

- The firm's internal review showed that two of the staff attorneys who had split time performing work for both Lieff Cabraser and Thornton showed no duplicative time on Lieff Cabraser's or Thornton's reports.[45]

- Two other staff attorneys who split time between Lieff Cabraser and Thornton did have time that was inadvertently duplicated in Lieff Cabraser's Lodestar Report.[46]

- These two attorneys worked for Lieff Cabraser and were paid directly by the firm before, during and after their brief stints for Thornton, and therefore regularly submitted their contemporaneous time records to the firm on a daily basis.[47]

- The inadvertent duplication of their time on Lieff Cabraser's Lodestar Report occurred because the time these two attorneys lodged with Thornton between February 9, 2015 and April 14, 2015 was mistakenly not removed from Lieff Cabraser's timekeeping records after the firm's accounting department invoiced and received payment for those hours from Thornton. This was an inadvertent bookkeeping error.[48]

- The two attorneys who were hired through an agency that was paid directly by Thornton, should not have entered any time summaries into Lieff Cabraser's

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[40] *Id*. at 30.
[41] *Id*.
[42] *Id*.
[43] *Id*. at 36.
[44] *Id*.
[45] *Id*. at 37.
[46] *Id*.
[47] *Id*.
[48] *Id*.

timekeeping system.[49] They did so, however, during the time they worked in Lieff Cabraser's San Francisco office from March to June 2015 by emailing their time summaries directly to the firm's word processing department (consistent with typical staff attorney practice), while also reporting their time to both their employing agency and to Thornton.[50]

- After these errors were discovered on November 9, 2016, Lieff Cabraser's accounting department was directed to remove all of the erroneously recorded hours that had in fact been Thornton's financial responsibility from Lieff Cabraser's timekeeping records.[51]

- Lieff Cabraser then provided its "corrected lodestar" figures – a reduction from $9,800,487.50 to $8,932,070.50, a difference of $868,417 (or 8.8%) – to Labaton and assisted in the drafting and submission two days later of the November 10, 2016 Goldsmith Letter.[52]

- Lieff Cabraser was not responsible for assembling or reviewing the lodestar reports from all Plaintiffs' Counsel as part of the fee application process (that was Lead Counsel's responsibility), neither Thornton's, nor any other firm's Lodestar Reports, as the final fee submission, were shared with Lieff Cabraser before they were filed.[53]

- The portion of the double-counted lodestar attributable to Lieff Cabraser ($868,417) is only 2% of the total aggregate lodestar originally submitted to the Court, and only 1.16% of the aggregate fee awarded by the Court.

Lieff Cabraser recounts these facts (provided with even greater detail in the firm's Response and Objections) to assure the Court that the Master was correct when he concluded that the firm's double-counting was inadvertent.[54] These facts also serve to refute the notion raised in the Revised Report that Lieff Cabraser's double-counting mistake were "material" or of a "magnitude" that warrants the imposition of the penalty advocated by the Master.

After his exhaustive investigation, the Master found:

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[49] *Id*. at 37-38.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*. at 33, 76.
[54] *Id.* at 61-62 (citing Executive Summary at 14-15; Report at 363).

> Each of the three firms bears different degrees of responsibility for the double-counting and, accordingly, the firms' respective roles are addressed *seriatim* here.
>
> Lieff… has acknowledged that it made a mistake in claiming the hours of the staff attorneys and agency attorneys loaned to Thornton on its lodestar. Contemporaneous evidence also indicates that Lieff anticipated that [certain of] its staff attorneys would be included on Thornton's petition. Notwithstanding this error, Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting. Lieff had, early in this litigation, agreed to the "loaning" of [certain of] its staff attorneys and agency attorneys to Thornton as a means of sharing the costs and risks of employing these attorneys and the litigation as a whole. While the agreement to "loan" the staff and agency attorneys to Thornton was, perhaps, an ill-considered judgment since the cost-sharing of this case could have been achieved in other ways, *it cannot be said that the agreement to share costs through this mechanism was a significant cause of the double-counting.* Thus, while Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent.[55]

Lieff Cabraser made an honest mistake – one that it acknowledged and corrected well before the Master was appointed, let alone before the Master's investigation commenced. Nothing about the firm's inadvertent double-counting, however, warrants the punitive disgorgement/forfeiture or fee reduction sought by the Master.

### 3. The Master's Proposed Disgorgement/Forfeiture Remedy for an Inadvertent Mistake That Had No Negative Impact in the Class is *Not* Equitable.

The Master argues that his recommendation "that the $4.1 million, representing the overstated lodestar, be paid back to the class as an equitable remedy [is] tailored to make the class whole…."[56] The Master made similar arguments in his Report. In the firm's Response and Objections, the firm challenged the notion that any of its attorneys' fees should be "returned to

[55] *Id*. (Emphasis added)

[56] Revised Report at 8-9.

the class" and emphasized that the Special Master had identified no harm to the class that justifies such a remedy.[57] The fact that the Master has now couched his argument in terms of equity does not change the fact that the inadvertent double-counting has had *no negative impact* on the class. Indeed, the Master does not and cannot explain how shifting more than $1.3 million in attorneys' fees from Lieff Cabraser to the class will make the class "whole."

Again, the factual record, as well as the Master's own findings, undercut his proposal to "return" a significant portion of Lieff Cabraser's fees to the class. The Master found that the $300 million settlement Plaintiffs' Counsel achieved on behalf of the class was an "excellent result," particularly in light of the difficult risks and challenges presented by the novel legal theories advanced in the State Street Action, and given the skill and resources of State Street's attorneys.[58] In his Report, the Master recognizes that the class received significant economic benefits as a consequence of the "highly dedicated and professional skilled work of the class's law firms."[59] Class members were informed of the financial benefits they had received from the settlement, and were told that class counsel would seek a fee up to approximately 25% of the amount recovered.[60] Not one class member of the sophisticated class of institutional investors opted out of the certified settlement class or objected to the settlement or the proposed fee award.[61] The class received exactly what it was notified it would receive, and what it unanimously agreed to.

As explained in detail in the concurrently filed Customer Class Counsel's Memo concerning the reasonableness of the Court's original fee award, the approximately 25% of the

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[57] *See* Response and Objections at 73-74.
[58] *Id*. at 34-36, 57-61, 73-74.
[59] *Id*.
[60] *Id*.
[61] *Id*.

recovery fee awarded to Plaintiffs' Counsel was fully consistent with First Circuit authority.[62] Further, as explained in that brief, in Lieff Cabraser's Response and Objections, and above, and even as acknowledged by the Special Master, a multiplier of 2.0 (or around 2.0) supports the 25% percentage-of-the-recovery in a lodestar cross-check.[63] The Master identifies no harm suffered by the class as a consequence of the double-counting that justifies paying "back to the class" any amount of its well-earned attorneys' fees.

**4. The Master's Argument That Its Recommended Disgorgement/Forfeiture Remedy Will "Deter" Future Inadvertent "Mistakes in Preparing Future Fee Petitions" is Nonsensical.**

In his Revised Report, the Master offers a new rationale for ignoring the appropriate method of eliminating inappropriate lodestar for cross-check purposes: deterrence. The Master recommends that Lieff Cabraser disgorge or forfeit $1,352,667.67, in part, to "deter further mistakes,"[64]; "deter firms from making such material mistakes in preparing future fee petitions"[65]; "address the magnitude of the error and need for deterrence"[66]; "serve[ ] as a deterrence against future mistakes"; and "serve[ ] as a substantial deterrent against putting themselves in positions fraught with such risk in the future;"[67] and, "discourage Lieff and its counterparts from entering into similarly perilous arrangements in the future and to nullify any financial benefit conferred upon it by its own imprecision and poor judgment."[68]

In short, the Master recommends more than $1.3 million in the form of a punitive sanction against Lieff Cabraser in order to (a) deter it from making inadvertent

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[62] *See* Customer Class Counsel's Memo at 4-14.

[63] *Id.*; Response and Objections at 41-49, 61, 64-66, 71-73; Report at 245-246.

[64] Revised Report at 9.

[65] *Id*.

[66] *Id*. at 10.

[67] *Id*. at 12.

[68] *Id*. at 14.

timekeeping/accounting mistakes in the future, and (b) not to again enter into cost/personnel sharing arrangements with co-counsel. As to the first point, it is of course nonsensical to extract more than $1.3 million from Lieff Cabraser in order to deter it from again making an accidental bookkeeping mistake. Lieff Cabraser has been in the business of litigating class actions and complex cases for more than 46 years, and during that time the firm has handled as lead counsel, and participated in as additional counsel, hundreds of class action fee applications.[69] The State Street Action is the first time, and the only time, the firm has had to revise a fee petition and to withdraw inappropriately included lodestar. The firm requires no patronizing lectures or financial penalties to "deter" it from making bookkeeping mistakes in the future.

Second, it is abundantly clear that the Master disapproves of the cost/personnel-sharing arrangement between Lieff Cabraser and Thornton (and presumably the cost-sharing agreement between Labaton and Thornton).[70] That displeasure does not make it unlawful or even improper, and the Master does not contend otherwise. In his Report, even as he criticized the cost-personnel-sharing agreement, the Master finds that "*it cannot be said the agreement to share costs through this mechanism was a significant cause of the double-counting.*"[71]

The arrangement between Lieff Cabraser and Thornton made sense in the context of the litigation and the longstanding relationship between the firms.[72] There is and was nothing untoward about the arrangement which was designed as an accommodation to co-counsel, not as a vehicle for enhancing Lieff Cabraser's lodestar or fee request.[73] And the firm rejects the Master's suggestion that the arrangement reflected "poor judgment" (termed less pejoratively in

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[69] Response and Objections at 9-10.

[70] Revised Report at 9-14.

[71] Executive Summary at 14-15.

[72] Response and Objections at 28-30.

[73] *Id.*

the Report as "perhaps, an ill-considered judgment").[74] All that said, as the Master notes, the firm has not previously entered into such an arrangement and has no intention of doing so again. Calling on the firm to surrender $1.3 million of attorneys' fees to deter it from engaging in a lawful business arrangement, but one that it has no track record of engaging in before and no intention of repeating, is again, nonsensical, and is unnecessarily punitive.

**5. Lieff Cabraser Has Already Been Penalized Significantly for Its Double-Counting Mistake.**

The Master maintains that "inadvertence does not guarantee the Customer Class firms a free pass."[75] In a similar vein, the Master accuses Lieff Cabraser of attempting to "brush aside the double-counting mistakes."[76] Of course, Lieff Cabraser has hardly had a free pass or been able to "brush aside" the consequences of its inadvertent double-counting.[77] The Master's investigation has thus far required the firm to spend $1.152 million for the fees and expenses of the Special Master and his team. Moreover, the firm has also incurred an additional $456,853 in out-of-pocket costs, and $2,552,669 in firm lodestar, to defend itself during the investigation and in response the Master's advocacy. *See* discussion *infra* at Section IV.

Despite the financial impact on the firm of the Master's investigation and advocacy, the Master baselessly claims that the disgorgement he seeks is "proportionate to the significant monetary recovery realized by Lieff."[78] According to the Master, "the forfeiture of

[74] Executive Summary at 14-15; *see also* Report at 363.
[75] Revised Report at 8.
[76] *Id*. at 13.
[77] *See* Response and Objections at 98-100.
[78] *Id*. at 14.

$1,352,666.67 amounts to a disgorgement of 8.9% [footnote omitted] of Lieff's recovery – hardly an excessive penalty."[79] The facts do not support the Master's views.

Based on the factual record, the Master properly concluded that Lieff Cabraser's double-counting was inadvertent. The Master made no finding that Lieff Cabraser engaged in any professional or intentional misconduct. Further, the Master concluded that the firm bears the least amount of responsibility for the accidental double-counting of lodestar of four staff attorneys, an unintentional overstatement of $868,417, a fraction of the aggregate lodestar and of the ultimate fee award. *See* discussion at Section III.A.2, *supra*. For that mistake, *which caused no harm to the class*, the Special Master recommends that Lieff Cabraser "return" to the class $1,352,667. There is absolutely nothing proportionate about the Master's punitive recommendation in this regard – it is unquestionably "an excessive penalty."

### B. In the Event the Court Requires Lieff Cabraser to Disgorge or Forfeit Any Portion of the Firm's Inadvertently Double-Counted Lodestar, That Disgorgement Should be Commensurate with the Firm's "Relative" Role in the Double-Counting.

In its Response and Objections, Lieff Cabraser states that in the event the Court overrules the firm's objection to the imposition of any "remedy" for the double-counting, the firm objects to the Special Master's recommendation that the appropriate result is "disgorgement by all three firms in equal amounts" of the $4,058,000 in inadvertently double-counted time (i.e., $1,352,667 each).[80] Lieff Cabraser objects to this recommendation because such an outcome is inconsistent with the factual record and the Special Master's own substantive findings.[81]

In its Response and Objections, Lieff Cabraser contends that, based on the firm's limited fee interest in the State Street Action (24% among Customer Class Counsel and 20.3% among all

[79] *Id.*
[80] *Id.* at 67-76.
[81] *Id.*

plaintiffs' counsel), the actual amount of the lodestar the firm inadvertently double-counted ($868,417 or 2% of the total aggregate lodestar submitted for cross-check purposes), the relatively small percentage of the total double-counted amount that can be attributed to Lieff Cabraser (21%), and given the Special Master's findings that the firm was the least responsible for failing to catch and correct the inadvertent double-counting, if the Court requires any disgorgement, the firm should be obliged to pay significantly less than an "equal share" of the total double-counted lodestar (i.e., not 33 1/3%).[82]

As to the "relative responsibility of Lieff Cabraser for the double-counting, the Master found in his Report that "each of the three Customer Class law firms bears widely varying degrees of responsibility," and "[e]ach of the three firms bears different degrees of responsibility for the double-counting."[83] In his Report, the Master finds that "Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting."[84] The Master concludes in his Report that "while Lieff bears some responsibility for the double-counting, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent."[85]

In his Report, the Master compares Lieff Cabraser's relatively minor (i.e., "some") share of responsibility for the double-counting with Thornton's "significant responsibility for the double-counting," and Labaton's "ultimate responsibility."[86] Despite describing the relative roles of the firms in the inadvertent double-counting and finding Lieff Cabraser the least

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[82] *Id.*

[83] Executive Summary at 10, 13 and 14. *See* Response and Objections at 75-77.

[84] Executive Summary at 14. *See* Response and Objections at 75-77.

[85] Executive Summary at 15. *See* Response and Objections at 75-77.

[86] Executive Summary at 15-19.

responsible, the Master nevertheless recommends "disgorgement in equal amounts" of the total double-counted lodestar.[87]

Instead of acknowledging his factual findings that *minimize* Lieff Cabraser's role in the double-counting, in the Revised Report the Master offers several new justifications for penalizing the three Customer Class Counsel firms equally: (1) the Master is not bound by its prior factual findings; (2) the existence Lieff Cabraser-Thornton cost and personnel sharing arrangement mandates equal remedial treatment with Labaton and Thornton; (3) the November 2016 Clawback Agreement suggests that Lieff Cabraser anticipated the Master's May 2018 recommended disgorgement/forfeiture against the firm; and, (4) the firm was expected to pay one-third of the Master's fees and expenses, and is partly responsible for the extraordinary costs of the Master's investigation because it "prolonged" the investigation.

### 1. The Master is Bound by the Factual Record and the Factual Findings in his Report.

In his Revised Report, the Master makes no effort to explain the inconsistency between the factual findings of Lieff Cabraser's lesser responsibility for the inadvertent double counting and his proposed remedy. Instead, the Master doubles down, characterizing its prior factual findings as mere "general observations," and stating, incredibly, that those observations, "in any event, are not binding findings of fact at this stage in the post-report proceedings."[88] Lieff Cabraser objects to the Master's contention that he is not bound by his own findings of fact.

The Master was appointed by this Court investigate and prepare a report and recommendations concerning a range of issues regarding the attorneys' fees sought by and

[87] Executive Summary at 59. *See* Response and Objections at 75-77.

[88] Revised Report at 15. *See also* Revised Report at 6, where the Master states: "The Special Master, of course, is not bound by the factual findings in the Report."

awarded to Plaintiffs' Counsel.[89] After 14 months and millions of dollars spent on an "extensive investigation of the underlying facts and circumstances,"[90] the Master issued his Report containing one hundred and thirty pages of "findings of fact."[91] While the firm does not quarrel with the authority of the Master to revise his Report in light of any *new* facts (or law) that have emerged since he filed his Report, or question the Master's right to revise his Report based on the firm's objections to the Report, Lieff Cabraser is aware of no directive from this Court or any legal authority that allows the Master to ignore or disregard the factual record, including those findings of fact contained in his Report. Surely, Lieff Cabraser, along with all the other participants to this proceeding, as well as this Court, are entitled to rely on, or attempt to refute, the Master's findings.

In his Revised Report, the Master does not present any new facts regarding Lieff Cabraser's inadvertent double-counting. Rather, the Master ignores his prior factual findings of Lieff Cabraser's lesser degree of responsibility for the double-counting, and exaggerates Lieff Cabraser's mistake, while ignoring other inconvenient parts of the factual record. For example, whereas in his Report the Master concluded that "Lieff bears some responsibility for the double-counting" and compared that "degree" of accountability to the "significant" and "ultimate" responsibility borne by Thornton and Labaton, respectively, the Master now states, based on no new facts, that "Lieff attorneys played a substantial role" and that the firm's contribution to the accidental double-counting was "significant."[92] This change in the Master's findings regarding Lieff Cabraser's conduct is not borne out by the facts (*see* discussion *supra* at Section III.A.2),

[89] Exhibit 163 to Report, ECF No. 173, at 2-3.

[90] Revised Report at 8.

[91] *See* Report at 8-138.

[92] Revised Report at 15 and 20.

and seems offered now solely in an effort to justify the Master's proposed remedy. That is a tactic of a litigation adversary, not a Rule 53-appointed Special Master.

**2. The Lieff Cabraser-Thornton Cost/Personnel Sharing Arrangement is Not a Basis for Treating the Three Customer Class Counsel Firms Equally if a Penalty or Fee Reduction is Imposed for the Inadvertent Double-Counting.**

The Master claims that Lieff Cabraser's cost/personnel sharing arrangement with Thornton warrants the imposition of his recommended disgorgement/forfeiture penalty equally among Customer Class Counsel.[93] The Master criticizes the arrangement's "unusual existence," the fact that the arrangement was not committed to writing (although its terms were perfectly clear to Lieff and Thornton), and the fact that the firm did not explain or describe the cost and personnel sharing arrangement in its fee petition (not that it was required or necessary). Yet, as explained above, there is nothing inappropriate or unlawful about the arrangement between Lieff Cabraser and Thornton (*see* discussion *supra* at Section III.A.4), and in his Report, the Master concludes that "*it cannot be said that the agreement to share costs through this mechanism was a significant cause of the double-counting.*"[94] The Master's findings of fact are directly at odds with his argument that Lieff and Thornton's cost and personnel sharing arrangement is itself a basis for penalizing Lieff Cabraser equally for the inadvertent double-counting. The Master's argument should be rejected.

**3. The November 2016 Clawback Agreement is Not A Basis for Treating the Three Customer Class Counsel Firms Equally if a Penalty or Fee Reduction is Imposed for the Inadvertent Double-Counting.**

The Master argues that Lieff Cabraser should be penalized equally with the other Customer Class Counsel firms for the inadvertent double-counting by bizarrely contending that

[93] *See* Revised Report at 15-18.

[94] Executive Summary at 14-15; Report at 363; Response and Objections at 61-62. Emphasis added.

the firm's participation in the November 2016 Clawback Agreement among all Plaintiffs' Counsel indicates that the firm should have anticipated the Master's proposed disgorgement/forfeiture penalty and its equal application to the firm.[95] The Clawback Agreement, described in the firm's Response and Objections at 40-41, was agreed to by all Plaintiffs' Counsel after the Goldsmith Letter, but before the Court responded or reacted to that Letter, to assure Lead Counsel (Labaton) that if the Court reduced the aggregate fee award after the disbursement of the court-awarded fees, all Plaintiffs' Counsel (including ERISA counsel) would return their *pro rata* share of those fees into the Lead Counsel Escrow Account. It was a reasonable precaution, but in no way an admission or concession that a fee reduction would be appropriate.

At that time, in November 2016, Lieff Cabraser could not have contemplated that four months later the Court would appoint a special master, and that 14 months after that the Master would make his disgorgement/forfeiture recommendations based on Customer Class Counsels' inadvertent double-counting. By virtue of agreeing to the Clawback Agreement, Lieff Cabraser *did not* anticipate or contemplate the Master's recommendation that the firm be penalized $1.3 million for its bookkeeping mistake, or that it would be penalized equally with Labaton and Thornton.

#### 4. Lieff Cabraser Has Paid 24% (Not One-Third) of the Master's Fees and Expenses, and It Did Nothing to "Prolong" the Master's Investigation.

In his Revised Report, the Master attempts to dismiss the firm's argument that it has already been meaningfully penalized for its inadvertent double-counting by virtue of the $1.152 million it has spent on the Master's investigation, along with the additional $456,853 in costs and

[95] *See* Report at 18-19.

$2,552,669 in lodestar it has expended responding to the Master's investigation and advocacy. *See* discussion *infra* at Section IV.[96]

The Master first maintains that he has "consistently taken the position that the three Customer Class firms should share equally in the cost of the investigation."[97] Lieff Cabraser is unaware of any communications from the Master in which he has ever, let alone "consistently," taken such a position. But more importantly, it is not and never has been up to the Master how the firms share in the costs of the investigation. Indeed, Customer Class Counsel have from the outset of the Master's investigation shared the attendant costs based on the same percentage they shared in the fees awarded by the Court. This means that Lieff Cabraser has paid 24% of the Master's expenses.[98] The Master's recommendation that Lieff Cabraser pay one-third of the penalty for the inadvertently double-counted lodestar is disproportionate to its 24% share of the Master's fees and expenses and its 24% fee interest in the State Street Action (among all Plaintiffs' Counsel Lieff Cabraser's fee interest is 20.3%).

The Master responds further to Lieff Cabraser's argument that it has already paid enough as a consequence of its inadvertent double-counting by asserting that the "prolongment of the investigatory phase, after emails referencing Damon Chargois came to light, was as much Lieff's responsibility as it was Labaton's and Thornton's."[99] The Master complains that the firm did not take any steps to bring Chargois to the attention of the Special Master of its "own volition or in response to the Master's discovery requests" prior to August 2017, which, without further

[96] *See also* Responses and Objections at 98-100; Revised Report at 20-21.

[97] Report at 20.

[98] *See* Responses and Objections at 41, 64-66.

[99] Revised Report at 20.

explanation, the Master states "contributed to the prolongment of the investigation."[100] Once again, this rendition of events is inconsistent with the factual record.

As Lieff Cabraser was misled about Chargois's role (believing him to be a legitimate local counsel for Labaton and Lead Plaintiff), and otherwise had no relationship with Chargois, Lieff Cabraser had no reason to bring the matter to the Master's attention.[101] Further, Lieff Cabraser did not produce any discovery that would have identified Chargois or his purported role in the State Street Action earlier than it did because none of the Special Master's discovery requests called for the production of such information.[102] In his Report, the Special Master specifically concedes as much: the Master "does not conclude that the non-disclosure constitutes discovery misconduct."[103] And, beginning in August 2017, at the Master's behest Lieff Cabraser responded repeatedly to the same inquiries concerning Chargois, including in written discovery responses, depositions, supplemental written submissions and experts for discovery.[104] The Master does not explain how starting that discovery exercise sooner would have minimized the costs of his investigation (the vast majority of which did not concern Lieff Cabraser).

The Master's final argument in support of its position that Lieff Cabraser somehow brought the financial burden of the Master's investigation upon itself criticizes the firm and its

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[100] *Id*.

[101] *See* Response and Objections at 96-98 (and internal citations).

[102] *See* Response and Objections at 49-56, N.227. The Annotated and Revised Document Request Interrogatories to Lieff Cabraser dated May 23, 2017 specifically eliminated Former Request No. 20, which sought all "documents and/or communications relating to or evidencing discussions between and among the Law Firm, the Plaintiffs' Law Firms and/or ERISA counsel, regarding the allocation of a certain percentage of the Fee Award among counsel, including but not limited to agreements to pay ERISA counsel a fixed percentage of the total Fee Award." That withdrawn request is the only request issued to Lieff Cabraser that would have concerned Chargois. Meanwhile, no interrogatory directed to LCHB sought details concerning the specific fee allocations between and among Plaintiffs' Counsel.

[103] Report at 119, n. 98

[104] *See* Response and Objections at 49-56.

experts for arguing and litigating "extensively the Customer Class Counsel firms were under no obligation to inform the Court or Class of the [Chargois] payment."[105] This argument turns the record on its head. Lieff Cabraser had no choice but to respond to the extensive and repetitive interrogatory, document and deposition discovery propounded by the Master as part of his Chargois investigation.[106] It is more than passing strange that the Master now accuses Lieff Cabraser of prolonging his investigation by responding fully and accurately to his discovery requests.

Even more perplexing is the Master's contention that there was something inappropriate or wasteful about Lieff Cabraser offering expert reports by Professor Rubenstein and Massachusetts attorney Timothy Dacey *in response* to the Master's expert, Professor Stephen Gillers. That expert initially opined that all Customer Class Counsel, including Lieff Cabraser, were obligated to disclose the Chargois Arrangement to the Court and to the class under federal judicial precedent and pursuant to Massachusetts ethical rules. Indeed, Gillers specifically opined that Lieff Cabraser's failure to disclose the arrangement with Chargois was a violation of law and Massachusetts rules of preferred conduct.[107] Gillers, of course, recanted that opinion as to Lieff Cabraser during his deposition and in his Supplemental Report – as a direct result of litigation by Lieff Cabraser and the testimony of the firm's experts, all necessitated by the Master's strategy, decisions and arguments. In the end, the Special Master found as fact that Lieff Cabraser was misled and uninformed about the nature and details of the Chargois

[105] Revised Report at 20.

[106] *See* Response and Objections at 49-56.

[107] *See* Response and Objections at 53-55.

Arrangement, and was not required to disclose the Arrangement or anything else about Chargois under the federal law or Massachusetts ethical principles.[108]

### C. Lieff Cabraser Should Not Be Required To Treat The Firm's Staff Attorneys Paid Through An Agency As A "Cost" Instead Of Including Them In Its Lodestar As Part Of The Aggregate Lodestar Cross-Check.

In his Report, the Special Master recommends that the time of Lieff Cabraser's seven staff attorneys who were paid by an agency for at least a portion of their time on the case be treated as an expense, and not as a component of lodestar for cross-check purposes.[109] In its Response and Objections, Lieff Cabraser objects to this recommendation on the following grounds: (1) the controlling and relevant case law, including from within the First Circuit, has expressly *rejected* the Special Master's unsupported opinion that the time of the firm's agency lawyers should be treated as a cost; and (2) the purported "factual" distinctions the Special Master attempts to draw between the firm's staff attorneys on payroll and those paid by an agency are either insignificant or not supported by a fair reading of the record.[110]

In his Revised Report, the Master "continues to recommend that contract or agency attorneys employed by third-party staffing companies be billed as an expense."[111] Consistent with his original Report, in the Revised Report the Master cites no case in which a court has ever held that the time of the firm's "agency" attorney must be treated as a cost. As Professor Rubenstein has observed, the federal courts are

> unanimously opposed to the Special Master's Report's approach. Numerous courts have explicitly rejected the argument that contract attorneys must be billed as a cost [footnote omitted] and many other courts – far too numerous to enumerate – have approved fee petitions that include contract attorneys and counsels' lodestar or lodestar cross-check

[108] *See* Report at 106, 109-113, 287-289, 301-302, 331, 350-352; Executive Summary at 26.
[109] Report at 367-68.
[110] Response and Objections at 77-90.
[111] Revised Report at 21-25.

> submission. [Footnote omitted.] By contrast, I am not aware of a single court in the United States that has ever held that contract attorneys must be billed to the client as a cost rather than included in the lodestar at an attorney rate. [Footnote omitted.][112]

In Lieff Cabraser's Response and Objections, the firm identifies numerous cases, including the leading case from a district court in the First Circuit, which specifically reject the argument that contract attorneys be treated as an expense instead of being included as part of lodestar. *See e.g.*, *In re Tyco Intern. Ltd. Multi-District Litigation*, 535 F. Supp. 2d 249, 271-273 (D.N.H. 2007) ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney," and it is "therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar"); *In re Citigroup, Inc. Securities Litigation*, 965 F.Supp.2d 369, 394 (S.D.N.Y. 2013) (rejecting treating as a cost "attorneys who were not permanent employees of the law firm, are hired largely from outside staffing agencies, are not listed on counsel's law firm website or resume, are paid by the hour, and are hired on a temporary basis to complete specific projects related to a particular action."); *City of Potomac General Employees' Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276, 280 (S.D.N.Y. 2013) (acknowledging that "it is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm"); *In re AOL-Time Warner Shareholder Derivative Litig.*, No. 02-CIV-6302 (CM), 2010 WL 363113 at *25 (S.D.N.Y. Feb . 1, 2010) (rejecting an objector's argument that contract attorneys should be treated as an expense, finding that the "contract attorneys here were not mere clerks, but

[112] Rubenstein Declaration I at 12. *See also*, Rubenstein, Newberg on Class Actions at §15:41 n5 (listing cases rejecting the argument that contract attorneys must be billed as a cost).

exercised judgment typically reserved for lawyers, under the supervision of the firm's regular attorneys.").[113]

The Special Master attempts to dismiss the unanimous directive of existing case law (and entirely ignores Professor Rubenstein's opinions), claiming that the firm's reliance on the unequivocal jurisprudence on the subject amounts to "an overly simplistic observation of current trends," and "Lieff boldly argues that Federal Courts are, instead, unanimously opposed to the Master's position that contract attorneys be billed at costs rather than marked-up as a legal fee."[114] There is nothing overly simplistic about the firm's (or Professor Rubenstein's) reading of and presentation of the law. Contrary to the Master's suggestion, there is no "current trend" to treat agency/contract attorneys' time submitted for lodestar cross-check purposes as a cost. Moreover, there is no suggestion in this case that Lieff Cabraser's agency/contract attorneys be "marked-up as a legal fee." Rather, consistent with applicable case law, Lieff Cabraser included the lodestar of its agency/contract attorneys as part of the lodestar submitted on behalf of all Plaintiffs' Counsel (including ERISA Counsel) for purposes of an aggregate lodestar cross-check. That, contrary to the Master's idiosyncratic view, is entirely consistent with controlling law.

Faced with the fact that *no case law supports his position*, and that *an abundance of authority specifically rejects his opinion*, in his Revised Report the Master relies on four equally weak and unpersuasive positions to rationalize his novel view. *First*, the Master claims that he has "waded" more "deeply" than any other Court into the issue of how to treat contract/agency lawyers in the context of a lodestar cross-check analysis. Therefore his opinion on the purported factual distinctions between Lieff Cabraser's staff attorneys on the firm payroll and those who

[113] *See* cases cited and analysis at pages 79-85 of the Response and Objections.

[114] Revised Report at 21.

were paid by an agency is better informed than the unanimous conclusions of every federal court that has addressed the issue.[115] *Second*, the Master justifies "parting ways" with those courts by contending that their analyses are flawed or incomplete. *Third*, the Master maintains that including agency/contract attorney lodestar as part of the lodestar cross-check in this case implicates the "integrity of the legal process and public confidence in how attorneys are compensated." And, *further*, the Master suggests that the firm's decision to use agency/contract attorneys in the State Street Action was somehow improper, requiring that their time be treated as a cost.[116] Each of these positions must be rejected.

**1. The Master's Opinion That There Are Meaningful Factual Distinctions Between the Firm's Staff Attorneys on Payroll and Those Paid Through an Agency Is Contrary to the Factual Record, and Is Irrelevant to the Question of Whether the Agency/Contract Attorneys' Time Must Be Treated as a Cost.**

In his Report, the Special Master acknowledged that there was *no distinction* between staff attorneys on the firm's payroll and the firm's agency/contract attorneys as to the work actually performed in the State Street Action. For example,

- In his Report, the Special Master recognizes the staff attorneys' stellar educational and professional backgrounds, and repeatedly praises the quality and value of their work in the State Street Action, without regard to which, if any of those staff attorneys, were paid by an agency.[117]
- In his Report, the Master finds that the hourly rates for Lieff Cabraser's staff attorneys (mostly $415 per hour), and the number of hours worked by those attorneys, were reasonable based on the nature and quality of their work, which the Master equates to that of a junior to mid-level associate, without to regard to whether the attorney was on Lieff Cabraser's payroll or paid through an agency.[118]

[115] Revised Report at 21-25.

[116] *Id*.

[117] Response and Objections at 57-61 and 87, and Appendices A and B thereto.

[118] *Id*.

- And in his Report, the Master concedes that there is no distinction between payroll staff attorneys and agency staff attorneys as to the actual work performed for the benefit of the class, finding that there "is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary."[119]

Despite these findings, the Master claims that differences in the relationship between Lieff Cabraser and its staff attorneys on payroll and those hired through an agency – employment status, continuity with the firm, the availability of benefits, etc. – support his opinion that the agency/contract attorneys should be treated as a cost. As explained at length in its Response and Objections, not only are the Master's personal views unsupported by any authority, they rely on a mischaracterization of the facts regarding the firm's relationship with its agency/contract attorneys.[120]

Now, in his Revised Report, rather than make any effort to address Lieff Cabraser's fact-based response, the Master merely restates the same erroneous arguments contained in his Report and pejoratively characterizes Lieff Cabraser's agency/contract attorneys as "temporary workers" and "rented."[121] In order to highlight the significant flaws in the Master's reasoning, Lieff Cabraser provides below a summary of the actual facts concerning the firm's "agency" attorneys, which are described more fully in the Response and Objections and in Appendices A and B thereto:

- Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast number of documents produced in these massive cases.[122]
- The firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and document review and analysis in

[119] Report at 183; Response and Objections at 87.

[120] Response and Objections at 86-90.

[121] Revised Report at 22-23, 27-28.

[122] Response and Objections at 11.

complex cases, and have made the lifestyle and career choice to work a more limited number of hours than do traditional law firm partners and associates.[123]

- The firm's staff attorneys are paid directly by the firm and may receive benefits provided by the firm.[124]

- Given the large number of complex cases the firm handles at one time, Lieff Cabraser sometimes has the need for attorney document review and analysis support beyond the firm's available staffing. When such need arises, the firm retains the services of "agency" or "contract" attorneys.[125]

- Frequently, as was the case for four of the seven staff attorneys who worked on the State Street Action, attorneys who start working for the firm while paid by an agency transition to direct employment by the firm.[126]

- The firm staff attorneys, whether on payroll or paid through an agency, all performed substantially the same document review, analysis and litigation support functions, and all utilized, to varying degrees, the firm's infrastructure and resources.[127]

- The hourly rates, including for Lieff Cabraser staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for lawyer services, primarily in the San Francisco and New York marketplaces.[128]

- Of the 18 Lieff Cabraser staff attorneys who worked on the State Street Action, seven spent at least part of their time working on the Action while being paid through an agency.[129]

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[123] *Id*. at 11-12.

[124] *Id*. The benefits include the right to participate in the firm's health insurance plan, and the right to participate in the firm's retirement plan. Of course, whether an employee takes advantage of those benefits is solely up to that person. Not surprisingly, a number of firm employees, including staff attorneys, do not participate in either Lieff Cabraser's health or retirement plans.

[125] *Id*.

[126] *Id*.

[127] *Id*. at 12-13.

[128] *Id*. at 14. *See* Response and Objections at 13-15 for description of how Lieff Cabraser's hourly rates are set and that they are routinely approved by Courts.

[129] Response and Objections at 24-28 and 86-88, and Appendices A and B thereto. These Appendices provide narrative biographical information about each of Lieff Cabraser's 18 staff attorneys who worked on the State Street Action.

- Four of the seven were paid initially through an agency (which billed the firm directly for their services), *but became payroll employees of the firm in January 2015*, during the pendency of the State Street Action. Three of these put in substantial hours in both the BNY Mellon Action and the State Street Action. Two performed their tasks on the State Street Action while working in Lieff Cabraser's San Francisco offices; two worked remotely in San Francisco. Three remain with the firm as full-time staff attorneys.[130]

- Three of the seven were compensated by an agency throughout their work on the Action. Two devoted substantial amount of time to the BNY Mellon Action. One, working remotely, also recorded hundreds of hours in the State Street Action (including producing sophisticated issue memoranda) and continues to work for the firm on an agency basis. Two worked in Lieff Cabraser's San Francisco office, but contributed only modest hours to the State Street Action for the firm, 24 and 58, respectively.[131]

- The firm incurred overhead expenses with respect to all seven of these attorneys, including: the use of physical office space by four; the use of information technology support for all seven, both in San Francisco and remotely; the use of firm administrative support (e.g., human resources on employment matters or dealing with an agency, accounting services, for payroll or interaction with an agency, and word processing for the submission of time records and the production of memoranda); assistance for all from the firm's litigation support department for training on Catalyst and as needed while performing their tasks; and, supervision of all by firm partners, senior associates and senior staff.[132]

- All seven of these attorneys were covered by the firm's legal malpractice insurance during their tenure on the State Street Action.[133]

- All seven of these lawyers, while on payroll and paid through an agency, were expected to abide by, and were the beneficiaries of, the firm's written rules and practices, including those relating to behavioral conduct.[134]

In his Revised Report, the Master does not meaningfully address any of these facts – the actual relationship between Lieff Cabraser and the agency/contract attorneys who worked on the State Street Action. Instead, the Master offers only his generic opinion that the "role of staff and contract attorney differ greatly in compensation, employment status, benefits, job security, and

[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

firm responsibility," and that "firm does not assume the same financial, administrative, and employment overhead" for agency/contract attorneys as for staff attorneys on payroll.[135]

As described above, although there were obviously "differences" in the relationship between Lieff Cabraser and staff attorneys and agency/contract attorneys in the State Street Action, those differences do not support the Master's conclusion that the agency/contract attorneys' time must be treated as a cost. Indeed, as the facts show, the agency/contract lawyers each had essentially the same responsibilities in the Action; all had quality educational and professional backgrounds; all performed at a junior to mid-level associate level; all required the firm to incur varying degrees of overhead expenses (just as full-time associates and partners have different degrees of overhead requirements); four of the seven became payroll employees of the firm in the midst of the State Street Action, and three remain with the firm today as staff attorneys; one continues to work for the firm through an agency, but has been performing high level work for the firm for years; two of the agency-only attorneys are no longer with the firm, but contributed a very small number of hours to the State Street Action; and, the amount of compensation received by the staff attorneys on payroll and the agency attorneys for the same work was not appreciably different.[136]

One cannot seriously dismiss Lieff Cabraser's agency/contract lawyers in the State Street Action as mere "rented workers." Given the Master's disregard of the actual relationship between Lieff Cabraser and its agency/contract lawyers in the Action, it cannot be said that the he has "waded" more "deeply" into the issue than other courts.

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[135] Revised Report at 21-22; 24.

[136] *See* Response and Objections at 48-49, 86-88.

### 2. The Master Errs in "Parting Ways" With the Relevant and Controlling Legal Authority.

Even though the unambiguous case law rejects the idea of treating agency/contract attorneys as a cost, even though some of those courts have determined that the market rates for agency/contract lawyers should be lower than comparable permanent lawyers, and even though courts that have considered the issue have found that the lodestar of agency/contract attorneys should be multiplied as part of a cross-check analysis, the Special Master "parts ways with these courts."[137] The Master's wholesale rejection of the case law is based on a combination of a misreading of the relevant decisions and a desire by the Master to forge new ground with his own idiosyncratic personal views.

The Master claims that "only one court has squarely addressed the difference *among* the various types of non-associate or 'contract' positions, such as the staff and contract attorneys utilized in the State Street case," citing *Citigroup, Inc. Bond Litigation*, 988 F.Supp.2d 371, 376-378 (S.D.N.Y. 2013). According to the Master, courts have "routinely focused their discussion on the generic label of 'contract attorneys,' without specifying whether this term included or excluded other non-associate attorneys who may have more permanent employment arrangements."[138] *In fact*, the courts have repeatedly addressed differences between permanent associates, staff attorneys and contract attorneys hired through outside agencies. *See e.g.*, *Tyco*, 535 F.Supp.2d at 272 (observing that "an associate with steady employment" and a "contract attorney whose job ends upon completion of a particular document review project" should be treated similarly for determining their applicable market rates); *Citigroup*, 965 F.Supp.2d at 394 (specifically rejecting treating as a cost attorneys who are "hired largely from outside staffing

[137] Revised Report at 24. *See* Response and Objections at 79-85, 91-93.

[138] Revised Report at 22 and 24.

agencies," who are "hired on a temporary basis to complete specific projects relating to a particular action"); *In re AOL Time Warner Shareholder Derivative Litigation*, No. 02-civ-6302 (CM), 2010 WL363113 at *25 (S.D.N.Y. Feb. 1, 2010) (focusing on the work and judgment exercised by contract attorneys hired from outside agencies and rejecting the argument that those attorneys should be treated as an expense); *City of Potomac General Employees Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276, 280 (S.D.N.Y. 2013) (stating that it is "beyond cavil" that a law firm may seek more for a contract attorney's services that these "services directly cost the law firm"); *In re Petrobras Securities Litigation*, 317 F.Supp.3d 858, 874-876 (S.D.N.Y. 2018) (treating "staff and contract attorneys" similarly for purposes of addressing their appropriate market rates).[139]

According to the Special Master, "[n]one of the cases cited by Lieff discuss the various factors that should be considered in evaluating whether a non-associate attorney should be included on the lodestar but focus exclusively on addressing contract attorneys vis-à-vis their associate counterparts."[140] In fact, all of the relevant cases, including those cited above, identify and discuss the only factors that matter – the nature and quality of the work performed by the attorneys and the prevailing market rates of those attorney services. The fact that these courts do not dwell on the factual distinctions between staff attorneys and agency attorneys proffered by the Master here does not mean that the entire body of case law is flawed. Rather, it shows that the Master's views on the topic are the outlier.

Similarly, the Master complains that the "vast majority of cases commenting on contract attorney rates," do not "discuss the import of having hourly employees on the validity of overall

[139] *See* Response and Objections at 79-85, and 91-93.

[140] Revised Report at 24.

fee that should be granted in a class action case."[141] Again, the Master misses the key point. How an attorney is compensated – through a draw, a salary, or an hourly rate paid by the firm or an agency – does not matter for determining whether the time of an attorney should be included in the lodestar considered by a court in awarding fees in a class action. Again, what matters is the nature and quality of the work performed by the attorney.

As Professor Rubenstein has observed, law firms today enter into a variety of "flexible arrangements with associates and staff attorneys," including, for example, allowing for reduced hours and working remotely. Rubenstein writes: "To the best of my knowledge, private firms nonetheless continue to bill these attorneys at market rates, not as costs. Firms similarly bill summer law students – for whom they generally do not pay healthcare and retirement benefits – to their clients at market rates. These factual questions are complex and involve the court in inquiries irrelevant to the key concern – whether or not legal services are being provided to the client."[142]

### 3. The Inclusion of Time of Lieff Cabraser's Staff Attorneys Paid Through An Agency as Part of the Firm's (and All Plaintiffs' Counsel's) Lodestar Does Not Pose a Threat to the "Integrity of the Legal Process and Public Confidence in How Attorneys Are Compensated."

Faced with a body of law that explicitly rejects his view that the agency/contract attorneys in the State Street Action should be treated as a cost, the Master maintains, without any citation to case authority or academic literature that the issue "goes directly to the integrity of the legal process and public confidence in how attorneys are compensated."[143] This is utter nonsense. None of the numerous federal courts that have addressed the issue of whether to treat

[141] Report at 24.

[142] Rubenstein Declaration II at 15.

[143] Revised Report at 21.

agency/contract attorneys as a cost or include their time in lodestar at prevailing market rates have ever considered the issue in such an over-the-top way. Literally no authority has ever been suggested that the use of agency/contract attorneys threatens the integrity of the legal process or puts in jeopardy public confidence in how attorneys are compensated. The fact that the *Boston Globe* published an article or two about the fee application in the Action (which even the Master acknowledged contained some erroneous reporting) does *not* make the issue "far reaching and significant," and most certainly does *not* have "ramifications beyond this case."[144] The Master's desire to forge new ground here has led him to make a mountain out of mole-hill.

**4. Lieff Cabraser's Use of Agency/Contract Attorneys in the State Street Action Was in No Way Inappropriate.**

Left with nothing else, the Master seeks to justify his argument that the agency/contract attorneys should be treated as a cost by attacking plaintiff-side law firms, Customer Class Counsel, and Lieff Cabraser. The Master asserts, again without citation to any legal or other support, that, "Customer Class Counsel, and other similarly situated firms, should not be rewarded for skirting their responsibilities and obligations inherent in a full employment relationship by relying on temporary attorneys to staff its cases."[145] There is no evidence in the extensive record of the Master's investigation, or any other source of information to support the notion, that Lieff Cabraser or any other plaintiff-side firm in the State Street Action has "skirted" any responsibilities or obligations under any principle of law or ethics by utilizing contract/agency attorneys, and they most certainly have not been "rewarded" for such behavior. As the abundance of case law described above and in the firm's Response and Objections illustrates, the inclusion of agency/contract attorneys as part of lodestar is a long-standing,

[144] *Id*.

[145] Revised Report at 22.

normal practice. Doing so is in no way contrary to the law or public policy, and is absolutely not, as the Master disparagingly maintains, a "farce to the court, the class, and the public at large."[146] The Master's insulting statements in this regard are entirely baseless.

The Master claims, without any evidence, that Lieff Cabraser's use of agency/contract attorneys is harmful to those attorneys. This is a particularly galling comment given that the Master has completely ignored the facts of the relationship between Lieff Cabraser and the agency/contract attorneys generally and in the State Street Action specifically. The Master makes the extraordinary comment that the "use of agency/contract attorneys directly harm[s] the attorneys at the center of the scheme." Aside from the obvious fact that there is no "scheme," rather than being harmed, these attorneys, many of whom prefer the flexibility of an agency/contract arrangement, are provided with a job and the resources to be productive and successful.[147] And, even though there is absolutely nothing inappropriate about Lieff Cabraser's use of agency/contract attorneys in the State Street Action, four of the seven such lawyers used by Lieff Cabraser in the Action became full-time staff attorneys during the pendency of the Action. *See* discussion *supra* at Section III.C.1

Finally, citing no legal authority or relevant scholarship, the Master maintains that it "should be goal of law firms, such as Lieff, to fully employ the attorneys they trust to handle

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[146] Revised Report at 22-23.

[147] In support of his peculiar assertion that the use of agency/contract attorneys is a "farce to the court," and a "scheme" the Master cites *Schwann v. FedEx Ground Package System, Inc.*, 2017 WL4169425, at *4 (D. Mass. 2017). This case is completely inapposite here, as it concerns the denial of a motion for summary judgment under the Independent Contractor Law of Massachusetts. The case has to do with an alleged deprivation of benefits enjoyed by employees through their misclassification as independent contractors, and has nothing to do with agency/contract attorneys, prevailing market rates for their services, or class action attorney's fees.

such high level work… rather than profit off of their status as temporary workers."[148] Again, the federal courts have been crystal clear that there is nothing inappropriate about using agency/contract attorneys for document analysis purposes and including their time (at a reasonable hourly rate) in lodestar submissions. *See* discussion *supra* at Section III.C.2. And, to state the obvious, Lieff Cabraser, like all law firms, is in the business of attempting to make a fair "profit." To the extent that any court, including this Court, has a concern that the inclusion of contract/agency attorneys as part of the lodestar used to support a class action attorneys' fee constitutes or could lead a "windfall," courts may limit the attorneys' hourly rates and adjust fee awards when a lodestar multiplier is excessive. In the end, it is not the place of the Master to tie his views on law firm management to the punitive outcome he recommends.

### D. Even If The Court Agrees That The Firm's Agency Attorneys Should Be Treated Differently Than The Staff Attorneys On Firm Payroll For Purposes Of The Lodestar Cross-Check, The Master's Recommended Disgorgement/Forfeiture Penalty Should Be Rejected.

In his Report, the Special Master recommends that Lieff Cabraser "disgorge" and "return" to the class the difference between: (a) the total of the firm's agency attorneys' lodestar, multiplied by 1.8, and (b) $50 per hour for the agency lawyers' time ($2,241,098.40) [149] In its Response and Objections, Lieff Cabraser objects to this recommendation by the Special Master because: (1) the Special Master's recommendation is contrary to controlling law in that it miscomprehends or ignores the "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (2) the inclusion of Lieff Cabraser's agency lawyers in the cross-

[148] Revised Report at 23.

[149] Report at 367-68.

check caused no harm to the class; and (3) penalizing Lieff Cabraser for adhering to controlling legal principles and having committed no violation of law or ethics is blatantly unjust.[150]

In its Responses and Objections, Lieff Cabraser also points out that all of the courts that have considered the appropriate hourly rates for agency or "contract" attorneys for cross-check purposes have refused to treat those lawyers' time as a cost, but have in some cases applied a lower hourly rate for the lodestar cross-check. *See e.g., Citigroup,* 965 F. Supp. 2d at 393-399 (because the contract/agency attorneys provided their document review services *after* the settlement of the case, the court reduced the contract/agency lawyers' rates for cross-check purposes); *In re Petrobras Securities Litigation,* 317 F.Supp.3d 858, 875–76 (S.D.N.Y., 2018) (reducing the hourly rates of "staff and contract attorneys" for cross-check purposes in light of the "considerable time spent by these attorneys on low level document review). *See also* Rubenstein Declaration II at 16 (observing that "some courts have treated the question as one of degree not type, adjusting the pertinent hourly rate but rejecting the argument that the contract attorneys must be passed through as a cost"). Indeed, at his request, Lieff Cabraser provided the Master with a schedule showing how reducing the hourly rates of the agency lawyers would have impacted the lodestar multiplier for cross-check purposes in the State Street Action; a schedule and an argument the Master has ignored in his Revised Report.[151]

In its Response and Objections, Lieff Cabraser also describes those cases that have rejected the opinion of the Master that the lodestar of agency/contract attorneys should not be multiplied as part of a lodestar cross-check analysis. *See, e.g.*, *In re Citigroup*, 965 F.Supp.2d at 394-95 (rejecting the argument that a lodestar multiplier cannot be applied to contract attorneys' time); *AOL Time Warner*, 2010 WL 363113 at *26 (rejecting an objection to allowing a

[150] Response and Objections at 77-96.

[151] *See* Heimann Decl., Exhibit A.

multiplier on contract attorney time, concluding: "It is with respect to risk, in particular, that the objection loses its allure. Counsel not only paid for the services of the contract lawyers, but also dedicated the time of their regular personnel to supervision. Because the risk is ultimately financial, counsel's recoupment risk in employing contract attorneys is no less than certain that relating to the salaries paid to their regular employees"); *In re Petrobras Securities Litigation*, 317 F.Supp.3d 858, 875–76 (S.D.N.Y., 2018) (including staff attorney and contract lawyer lodestar in awarding class counsel multiplier). *See also* Rubenstein Declaration II at 17 ("[C]ourts have explicitly rejected the argument that contract attorney time cannot be multiplied" and note 71.

Even if the Court agreed to treat the time of the firm's agency attorneys as a cost, the proper way to address the matter would be to remove those attorneys' lodestar from the aggregate lodestar used in the cross-check of the 25% fee award, and then determine whether the resulting aggregate multiplier of 2.07 (and resulting individual multiplier of 1.99 for Lieff Cabraser) is appropriate.[152] Lieff Cabraser submits that it is. *See* discussion *supra* at Section III.A.[153]

Finally, and perhaps most importantly, in his Revised Report, the Special Master offers *no rationale* to support his position that Lieff Cabraser should be required to disgorge or forfeit the lodestar associated with the agency/contract lawyers, let alone a multiplier of that lodestar. The Master has entirely ignored that portion of the firm's Response and Objections (pages 90-96). This is not surprising given that in his Report, the Master offers no legal or factual rationale

[152] Response and Objections at 68-74, 92-93.

[153] *Id.*

(just opinion) for his punitive disgorgement recommendation.[154] The Master's recommended remedy must be rejected.

### E. The Master's Criticism Of Lieff Cabraser's Fee Declaration Was Never Raised During The Master's Investigation, Is Factually Baseless, And Is, By The Master's Own Admission, Insignificant.

The Special Master now, and for the first time in these proceedings, argues a new issue "relating to the accuracy of Lieff's [fee] petition."[155] Seizing on a remark in Thornton's objections to his Report, the Master calls into question "Lieff's representation that attorneys employed by third-party staffing agencies, and included on Lieff's lodestar and in the fee petition, were 'employees' of the firm, as stated in Lieff's declaration supporting the fee petition."[156] It is hard to overstate how false, misleading and disingenuous it is for the Master to have inserted this issue into these proceedings. Tellingly, having raised doubt about the accuracy of representations Lieff Cabraser made to the Court, the Master himself ultimately recommends no remedial or economic penalty against the firm. Even though the Master basically says "never mind" after questioning the firm's veracity, Lieff Cabraser feels obliged to set the record straight.

As explained in its Response and Objections, Lieff Cabraser partner, Daniel P. Chiplock prepared a declaration on behalf of the firm in support of Plaintiffs' Counsel's Motion for an Award of Attorneys' Fees and Expenses (the "Chiplock Declaration").[157] In paragraph 4 of that Declaration, Mr. Chiplock states:

> The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's currently billing rates. For personnel who are no longer employed by my firm, the lodestar

[154] Report at 367-68.

[155] Revised Report at 3.

[156] *Id*.

[157] *See* Response and Objections at 33-34.; Exhibit 89 to Report, ECF No. 104-17.

> calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule is prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request. Additionally, any personnel who billed fewer than 5 hours in the litigation have not been included in my firm's total.[158]

In questioning the second sentence of paragraph 4 of the Chiplock Declaration, the Master justifies raising the issue now because the Thornton firm mentions it in its objections to the Master's Report: "In its written objections, Thornton points out that the contract attorneys listed on Lieff's fee petition were not employed by Lieff, and, in light of this fact, insinuate that the Chiplock Declaration is not entirely accurate."[159] The Master's paraphrasing of Thornton is misleading. In challenging the Master's criticism of Garret Bradley's fee declaration, Thornton suggests, wrongly, that the Chiplock Declaration, "under the Special Master's hyper-technical reading, also appear[s] to be false. The Lieff affidavit, for instance, lists as Lieff Cabraser 'employees' attorneys who were actually 'contract' or 'agency' attorneys with whom Lieff Cabraser did not have an employer-employee relationship."[160] For the reasons stated below, Thornton's characterization of the second sentence of the fourth paragraph of the Chiplock Declaration, as well as the Master's parroting of Thornton's presentation, is false and misleading.[161]

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[158] Chiplock Declaration, ECF No. 104-17, at 3 and Exhibit A thereto.

[159] Revised Report at 6.

[160] *See* Thornton Law Firm's Objections to the Special Master's Report and Recommendations ("Thornton Objs."), ECF No. 361, at 47-48.

[161] Moreover, notwithstanding Thornton's clumsy effort to absolve itself of responsibility for Garrett Bradley's misstatements, Thornton itself acknowledges that "it seems to be fairly common practice to list contracts attorneys as 'employees' or 'attorneys' of the firm on lodestars, even though such attorneys are technically not employees." Thornton Objs. at 47 n. 31. In other words, Thornton did not view the language used in paragraph four of the Chiplock Declaration as significant or unusual.

The representations in paragraph 4 of the Chiplock Declaration, along with the fact that several of our staff attorneys were hired and paid via agencies during some of the State Street Action was known to the Special Master from the beginning of and throughout his investigation.[162] At no time during the Master's investigation, including in the early informal meetings with the firm, in interrogatories, document requests, or depositions (including the two depositions of Chiplock) did the Master ask a single question or raise any concern about the use of words "employed" or "employment" in the Chiplock Declaration. Neither was the issue addressed at all in the Master's Report and Recommendation. Clearly, the Master did not think this was important.

Contrary to what the Master now states, Lieff Cabraser did *not* represent that attorneys employed by the firm through third-party staffing agencies were "employees" (or "members") of the firm. Rather, the Chiplock Declaration states that the "schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates."[163] Exhibit A then lists all such attorneys and professional support staff-members, and identifies each timekeeper's status (P for partner, A for associate, OC for of counsel, SA for staff attorney, LC for law clerk, PL for paralegal, I for investigator, RA for research analysts/litigation support.[164] Each timekeeper's hourly rate, total hours to date, and total lodestar to date is then listed.[165]

The Chiplock Declaration goes on to provide an explanation for the calculation of certain billable rates: "For personnel who are no longer employed by my firm, the lodestar calculation is

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[162] *See* Responses and Objections at 43-48.

[163] Chiplock Declaration, ECF No. 104-17, at 3 and Exhibit A thereto.

[164] *Id*.

[165] *Id.*

based upon the billing rates for such personnel in his or her final year of employment by my firm."[166] These are the only two references to "employment" in the Chiplock Declaration. The clear, real-world purpose of this language is simply to say that for personnel no longer working at the firm or under the firm's direction, the lodestar calculation is based on the billing rates for such personnel in his or her final year with the firm. Nothing here suggests an effort to deceive the Court about who was or was not an "employee" of the firm. Indeed, it is worth noting that obviously neither the partners nor of counsel listed in Exhibit A to the Chiplock Declaration are "employees" of the firm, yet they are included in the same discussion as all of the other timekeepers. Surely the Master does not believe Mr. Chiplock was intending to misrepresent the employment status of those attorneys.

To underscore the absurdity of the Master's questioning the accuracy of paragraph 4 of the Chiplock Declaration, it bears mentioning that as of the date the Declaration was filed, in September 2016, 15 of the staff attorneys listed in Exhibit A were in fact on Lieff Cabraser's payroll, two agency attorneys listed were no longer with the firm, and only one agency attorney remained working for the firm. So the Master's concern seems to be centered on one agency attorney who has worked for the firm continuously since 2014.[167] These facts are all readily available in the record.

The actual facts surrounding paragraph 4 of and Exhibit A to the Chiplock Declaration beg the question why the Master even raised the issue in the first place. The pettiness in raising it is all the more apparent given the way the Master ultimately dismisses the entire issue, stating,

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[166] *Id.*

[167] *See* Response and Objections, Appendices A and B; *see also* Exhibit A to the Decl. of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations ("Fineman Decl."), ECF No. 369-1, at 18-42.

"although perhaps sloppy in its use of loose language to describe the relationship, the statements in Chiplock's Declaration do not, in the Special Master's estimation, rise to the level of out-right, blatant misrepresentations of multiple facts. Accordingly, the Special Master does not recommend discipline for this, and believes that a simple admonishment from the Court to be more careful in the future would suffice."[168] In other words, after implying that the firm may have misled the Court, apparently realizing there is nothing to the issue at all, the Master essentially says, never mind. No action by the Court, including any "admonishment to be more careful in the future," is necessary.

## IV. CONCLUSION – THE FINANCIAL IMPACT OF THE SPECIAL MASTER'S INVESTIGATION AND RECOMMENDED PENALTIES AGAINST LIEFF CABRASER ARE UNJUST AND WILDLY DISPROPORTIONATE TO THE FIRM'S CONDUCT.

At pages 64-66 of its Response and Objections, Lieff Cabraser provides the Court with an accounting of the actual and potential costs to the firm resulting from the Special Master's investigation. Since that time, Lieff Cabraser has incurred significant additional expenses associated with the investigation and the Master's advocacy against the firm. Below is an updated summary of the financial impact of the Master's investigation and recommendations on Lieff Cabraser.

Consistent with the firm's fee interest in the State Street Action relative to the other Customer Class Counsel, Lieff Cabraser has borne 24% of the direct costs of the Special Master's investigation.[169] Customer Class Counsel have paid a total of $4,800,000 to fund the

[168] Revised Report at 27.

[169] Response and Objections at 7, 64.

Special Master's investigation, and Lieff Cabraser's 24% share of that total paid is $1,152,000.[170]

In addition to the amount of money it has paid to finance the Special Master's investigation, Lieff Cabraser has also incurred an additional $456,853 in out-of-pocket costs to represent and defend itself during the investigation.[171] And the firm's representation of itself has involved a substantial amount of time from firm partners and Lieff Cabraser support staff. The aggregate lodestar devoted by the firm to the Special Master's investigation and advocacy from February 6, 2017 through the date of this filing, is more than $2,552,669 (calculated at 2018 hourly rates).[172] Therefore, the total cost to the firm resulting from the Master's investigation and advocacy (to date) has been more than $4,161,522. It is worth pausing to note that, incredibly, this amount is actually *more* than the total amount of inadvertently double-counted lodestar submitted by all of the firms which precipitated this investigation.

In addition to that extraordinary figure, the Special Master recommends that Lieff Cabraser disgorge or forfeit an additional $3,593,765, reflecting (i) an equal share of Customer Class Counsel's aggregate inadvertently double-counted lodestar ($1,352,667), plus (ii) the difference between (a) the lodestar attributed (for cross-check purposes) to Lieff Cabraser's "agency" staff attorneys, plus a 1.8 multiplier on that lodestar, and (b) $50 per hour for each hour worked by those "agency" attorneys, or $2,241,098.40.[173]

The firm received $15,116,965.50 in attorneys' fees (reflecting its 24% interest in fees allocated to Customer Class Counsel and 20.3% of the total fee awarded to Plaintiffs' Counsel). Based on its corrected lodestar (i.e., subtracting $868,417.00 in inadvertently double-counted

[170] Heimann Decl., ¶¶ 7-8.

[171] *Id*.

[172] *Id*.

[173] Response and Objections at 65; Revised Report at 5-6.

staff attorney lodestar, resulting in a total lodestar of $8,932,070.50), Lieff Cabraser's *corrected* effective multiplier on its individual fee is 1.69 – substantially less than the aggregate multiplier averaged across all counsel, and indeed less than the 1.8 aggregate lodestar multiplier that the Court *originally found to be reasonable*.[174]

When subtracting from the firm's fee award the $1,152,000 it has paid to date toward the Special Master's investigation, the firm's award is reduced to $13,964,965.50, resulting in a lowered effective multiplier of just 1.56 on the firm's corrected lodestar. And after deducting from the firm's fee award the additional costs and lodestar the firm has spent on the investigation ($3,009,522), Lieff Cabraser's effective fee award is reduced to $10,955,444 (or fee reduction of $4,161,522), for a reduced multiplier of approximately 1.23. If, after all of that, the Special Master's recommendations for the disgorgement or forfeiture of $3,593,765 of Lieff Cabraser's fees is also implemented, the firm's fee award would be further reduced to approximately $7,361,679, for an end multiplier of 0.82 – i.e., a *negative multiplier*, and a reduction of the firm's fee by $7,755,287, or more than half of the firm's original award.

The financial impact of the Special Master's investigation and recommended penalties against Lieff Cabraser are unjust and wildly disproportionate to the firm's conduct. Having found that Lieff Cabraser engaged in no intentional or professional misconduct and violated no rule of law or ethics, the Special Master's proposed penalties against the firm are strictly punitive and must be rejected.

Dated: December 18, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP

By: */s/ Richard M. Heimann*
Richard M. Heimann (*pro hac vice*)

[174] Response and Objections at 65-66.

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 11-cv-10230 MLW |
| ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20,<br><br>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,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 12-cv-11698 MLW |

**DECLARATION OF RICHARD M. HEIMANN IN SUPPORT OF THE RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S PARTIALLY REVISED REPORT AND RECOMMENDATIONS**

Richard M. Heimann declares and says:

1. I am a Partner of, and Lead Counsel for, Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this Declaration on behalf of Lieff Cabraser in support of the Response and Objections of Lieff Cabraser Heiman & Bernstein, LLP to the Special Master's Report and Recommendations ("Report").

**A. Response to the Special Master's Description of His Steps to Determine If a Global Resolution Was Possible.**

2. In his Partially Revised Report and Recommendations ("Revised Report"), the Master states that in late August 2018, he "took steps to determine if a global resolution with all firms was viable."[1] The Master writes that with the Court's approval, he invited "all firms to attend an all-day meeting in Boston to further explore the possibility of a global resolution."[2] The Master then advises the Court that he was "not able to reach an agreement with Lieff… consistent with his understanding of his responsibilities to the Court, and therefore, Lieff's… objections remain outstanding and require a response from the Special Master."[3]

3. In August 2018, I learned that the Special Master was engaged in separate "settlement" or "resolution" discussions with Labaton, Thornton, and ERISA Counsel. On September 6, 2018, the Master informed the Court that the Master had invited all parties to a September 11, 2018 in-person meeting "to continue discussions and pursue a final resolution, if possible."[4] Between the time I learned about the Master's efforts at a "global resolution," and the September 11, 2018, in-person meeting in Boston, Lieff Cabraser had *no* settlement or resolution discussions with the Special Master or his counsel. At no time prior to the September

[1] Revised Report at 2.
[2] *Id*.
[3] *Id*.
[4] ECF No. 463.

11 meeting, did the Master make any offers of resolution of any kind to Lieff Cabraser.

4. The first meeting I (and my Partner, Steven E. Fineman) had with the Master and his counsel concerning potential resolution took place in the Boston office of JAMS on September 11, 2018, and lasted less than 30 minutes. During that encounter, the Master made it clear that his recommended disgorgement/forfeiture penalties concerning the firm's inadvertent double-counting of certain staff attorney lodestar and its use of agency/contract attorneys was non-negotiable. The Master was adamant that any agreed-upon resolution must include payment to the class by counsel of an amount equal to that which he had recommended in his initial Report. For my part, I advised the Master that I viewed his proposed penalties against the firm as factually and legally unsupportable. I also advised the Master that I strongly disagreed with his position that he has a duty or responsibility to the Court to reallocate attorneys' fees paid to Customer Class Counsel, including Lieff Cabraser, to the class.

5. Following the initial short meeting, Mr. Fineman and I had a second brief conversation with the Special Master (without his counsel). During that discussion, I attempted to explain that if one entirely eliminated the lodestar of Lieff Cabraser's agency/contract attorneys, or reducing the hourly rates, would not materially change the aggregate lodestar multiplier (as well as Lieff Cabraser's individual multiplier), measured against the original fee award. At the conclusion of that conversation, the Master requested that the firm calculate and present to him a summary of the impact on the lodestar multiplier if the agency/contract attorney time was reduced to a range of $50 through $250 hour, in $50 increments. We provided the Master with that information on September 13, 2018. The memoranda describing that analysis are attached as Exhibit A. The Master never responded to these memoranda, and neither they nor their content are mentioned in his Revised Report.

6. Since the September 11, 2018 meeting, Lieff Cabraser has had no further discussions with the Special Master concerning resolution.

**B. The Firm's Expenses and Lodestar Incurred in Responding to the Special Master's Investigation**

7. The firm has spent $1,608,853 in out-of-pocket expenses in this matter since February 6, 2017, during which time it has responded to the Court's inquiries, the Special Master's investigation, and the Special Master's Report, among other things. These costs include the firm's share of the Special Master's fees and expenses, and the firm's expert witness and travel costs, among other case and investigation-related expenditures.

8. As of today's date, Lieff Cabraser has spent at least $2,552,669 in lodestar (at the firm's 2018 rates) since February 6, 2017 on this matter, including but not limited to responding to the Court's inquiries, the Special Master's investigation, and the Special Master's Report.

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

Executed on this 18th day of December, 2018.

*/s Richard M. Heimann*

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# EXHIBIT A

**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**
**(New York City)**

**MEMORANDUM**

**PRIVILEGED AND CONFIDENTIAL:**
**ATTORNEY WORK PRODUCT**

**TO:** Hon. Gerald Rosen (Ret.) **CLIENT-MATTER NO.:** 3344-0002

**FROM:** Lieff Cabraser Heimann & Bernstein, LLP

**DATE:** September 13, 2018

**RE:** Effect of Agency Attorney Rates on Lodestar Multiplier

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You requested that we calculate and present a summary of the impact on the effective lodestar multiplier for LCHB if "agency attorney" time was billed in this matter at $50, $100, $150, $200, or $250 per hour. In the attached memorandum, we have done so, but have also included a summary of the same calculations as applied to the total lodestar for all counsel in the case, since the hours and lodestar contributed by "agency attorneys" factored into the Court's finding that a collective lodestar multiplier of 1.8 for all counsel combined (including ERISA counsel) was reasonable.[1] We do this also because LCHB was not the only firm to include "agency attorney" time in its lodestar—Thornton Law Firm did as well (specifically, attorneys Wintterle, Ten Eyck, Weiss and McClelland were all agency attorneys).[2] This remains true after any inadvertently duplicative staff attorney hours are properly accounted for and removed. As also detailed in the attached memo, 4,779.1 total non-duplicative agency attorney hours were correctly listed by LCHB (2,899.2 agency hours) and Thornton (1,879.9 agency hours). These include the hours for attorneys Weiss and McClelland (agency attorneys who were shared and

[1] *See* Response and Objections by Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations (ECF No. 367) ("Response") at 35 *and* 96 n. 321.
[2] *Id.* at 30, 36-38.

correctly allocated from the get-go by Thornton and LCHB) and Ten Eyck and Wintterle (agency attorneys who were paid exclusively by Thornton, but whom LCHB erroneously included in its initial lodestar report). The Special Master's Report and Recommendations ("Report"), in recommending the disgorgement of fees associated with the employment of agency attorneys, focuses solely on the non-duplicative agency attorney hours reported by LCHB (for Weiss, McClelland, Butman, Bloomfield, Nutting, Leggett and Sturtevant), and ignores the non-duplicative agency attorney hours (for Wintterle, Ten Eyck, Weiss, and McClelland) reported by Thornton.

In presenting these various scenarios, LCHB maintains, as set forth in its Response, that any recommended disgorgement of fees by LCHB based on its employment of "agency attorneys" would be totally erroneous as a matter of law.[3] The same would hold true as to any disgorgement of fees by Thornton on the same grounds (although, as stated above, the Report overlooked the fact that Thornton employed agency attorneys). As stated at length in its Response and in the supporting declaration by Prof. William Rubenstein, and indeed by the Court at the final approval hearing before this investigation even began, Class Counsel's lodestar was used in this case solely as a cross-check to determine if the percentage fee award being contemplated (in this case, just under 25%) was reasonable.[4] As the attached calculations illustrate, even adjusting all of the "agency attorney" time down to as low as $50 per hour (which lacks support given the overwhelming weight of authority and the facts presented here)[5] adjusts the effective lodestar multiplier for all counsel by only a modest amount, and results in an effective lodestar multiplier for LCHB of less than 2, an eminently reasonable (indeed, modest)

[3] Response at 1-7, 34-35, 67-74, 77-85, 90-96.
[4] *Id*. at 34-35, 67-74.
[5] *Id.* at 77-90.

multiplier given the results obtained, risk undertaken, and efforts expended by counsel.[6] Further, as described in LCHB's Response, this multiplier does not take into account the significant costs LCHB has borne for the Special Master's investigation and the attorney time LCHB has expended in that effort, including for discovery related to the Chargois issue for which LCHB bears no responsibility.[7]

[6] *Id.* at 61-66, 93. Indeed, the Special Master cannot disagree that a multiplier in the neighborhood of 2.0 is reasonable, as his own recommendations (if adopted) would have at least one ERISA firm achieve a multiplier of more than 3.0. *Id.* at 66 n. 289.

[7] *Id*. at 64-66.

**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP**
**(New York City)**

**MEMORANDUM**

**PRIVILEGED AND CONFIDENTIAL:**
**ATTORNEY WORK PRODUCT**

**TO:** Hon. Gerald Rosen (Ret.) **CLIENT-MATTER NO.:** 3344-0002

**FROM:** Lieff Cabraser Heimann & Bernstein, LLP

**DATE:** September 13, 2018

**RE:** State Street – Revised multipliers using different agency attorney rates

Following is an analysis of the effective lodestar multipliers in this matter for LCHB and all other counsel assuming "agency attorneys" were billed at $50/hour, $100/hour, $150/hour, $200/hour, $250/hour, or the full hourly rates that were actually used by class counsel. These calculations assume that the Court's originally-awarded fee of just under 25% of the $300 million settlement amount remains in place.

**A. Using originally reported rates for agency attorneys ($415 to $515/hour)**

| Firm(s) | Fee collected | Lodestar | Effective multiplier |
|---|---|---|---|
| All counsel | $74,541,250.00 | $37,265,241.25[1] | 2.00 |
| LCHB | $15,116,965.50[2] | $8,932,070.50[3] | 1.69 |

[1] This corrected lodestar number is calculated by removing the inadvertently double-counted hours for certain Staff Attorneys, including agency lawyers Ten Eyck and Wintterle (who were the only agency lawyers for whom time was inadvertently duplicated by LCHB and Thornton).

[2] Based on the actual fees disbursed by Labaton in accordance with counsel's agreements on fee-splitting.

[3] This corrected lodestar number for LCHB is arrived at by subtracting $868,417 in LCHB Staff Attorney lodestar that was duplicative of lodestar that was also included in Thornton Law Firm's lodestar report. $551,719.50 of this amount was attributed to agency attorneys Wintterle and Ten Eyck in LCHB's initial (uncorrected) lodestar report.

**B. Assuming $50/hour for agency attorneys**

| Firm(s) | Fee collected | Adj. Lodestar[4] | Effective multiplier |
|---|---|---|---|
| All counsel | $74,541,250.00 | $35,379,906.25 | 2.11 |
| LCHB | $15,116,965.50 | $7,751,442.50 | 1.95 |

**C. Assuming $100/hour for agency attorneys**

| Firm(s) | Fee collected | Adj. Lodestar | Effective multiplier |
|---|---|---|---|
| All counsel | $74,541,250.00 | $35,618,861.25 | 2.09 |
| LCHB | $15,116,965.50 | $7,896,402.50 | 1.91 |

**D. Assuming $150/hour for agency attorneys**

| Firm(s) | Fee collected | Adj. Lodestar | Effective multiplier |
|---|---|---|---|
| All counsel | $74,541,250.00 | $35,857,816.25 | 2.08 |
| LCHB | $15,116,965.50 | $8,041,362.50 | 1.88 |

[4] The Adjusted Lodestar totals for "All counsel" below are arrived at by applying the various adjusted rates described herein to the 4,779.1 total non-duplicative agency attorney hours that were correctly listed by LCHB (2,899.2 agency hours) and Thornton (1,879.9 agency hours). These include the hours for attorneys Weiss and McClelland (agency attorneys who were shared by Thornton and LCHB) and Ten Eyck and Wintterle (agency attorneys who were paid exclusively by Thornton). The Adjusted Lodestar totals for LCHB on a standalone basis are arrived at by applying the below-listed adjusted rates to the 2,899.2 non-duplicative agency attorney hours correctly listed by LCHB specifically (for attorneys Weiss, McClelland, and Butman, as well as a portion of the hours (predominantly from 2013) worked by attorneys Bloomfield, Nutting, Leggett, and Sturtevant, who by 2015 had transitioned to non-agency status).

**E. Assuming $200/hour for agency attorneys**

| Firm(s) | Fee collected | Adj. Lodestar | Effective multiplier |
|---|---|---|---|
| All counsel | $74,541,250.00 | $36,096,771.25 | 2.07 |
| LCHB | $15,116,965.50 | $8,186,322.50 | 1.85 |

**F. Assuming $250/hour for agency attorneys**

| Firm(s) | Fee collected | Adj. Lodestar | Effective multiplier |
|---|---|---|---|
| All counsel | $74,541,250.00 | $36,335,726.25 | 2.05 |
| LCHB | $15,116,965.50 | $8,331,282.50 | 1.81 |

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 11-cv-10230 MLW |
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| THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated,<br><br>v.<br><br>STATE STREET BANK AND TRUST COMPANY,<br><br>Defendant. | No. 12-cv-11698 MLW |

**LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S**
**(1) RESPONSE TO THE COURT'S INQUIRY ABOUT WHY THE SPECIAL MASTER IS CORRECT THAT THE HOURLY RATES OF THE FIRM'S STAFF ATTORNEYS ARE REASONABLE, AND (2) RESPONSE TO THE COMPETITIVE ENTERPRISE INSTITUTE'S CHALLENGE TO THE REASONABLENESS OF THOSE RATES**

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**Cases**

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this (1) Response to the Court's Inquiry About Why the Special Master Is Correct That the Hourly Rates of the Firm's Staff Attorneys Are Reasonable; and (2) Response to the Competitive Enterprise Institute's Challenge to the Reasonableness of Those Rates.

## I. INTRODUCTION

In his Report and Recommendations (and Executive Summary thereto), ECF No. 357 and 357-1 ("Report"), the Special Master concludes that the hourly rates for Lieff Cabraser's attorneys, including its staff attorneys, are reasonable and accurate. During the November 7, 2018 conference in this matter, the Court directed Lieff Cabraser to "address in this instance why the Master was right . . . why a reasonable rate was used for the staff attorneys."[1]

For the reasons stated in the Report, in Lieff Cabraser's Response and Objections to the Special Master's Report, ECF No. 367 ("Response and Objections"), and in this Response, the Master was correct in finding that Lieff Cabraser's staff attorneys' hourly rates were reasonable and appropriate under the circumstances of the State Street Action.[2] The factual record supports the reasonableness of $415 per hour for the time of 13 staff attorneys and $515 per hour for the time of three staff attorneys, for a blended rate of $433.67 per hour.

Unlike the thorough factual and legal analysis the Special Master conducted regarding the reasonableness of the hourly rates of Lieff Cabraser's (and Labaton's and Thornton's) staff attorneys, the Competitive Enterprise Institute ("CEI") challenges those rates by variously ignoring and misrepresenting the factual record. Instead of basing its opinion on the actual factual record, CEI would have the court adapt an alternative and fictional account of the staff

[1] ECF No. 519 at 102.

[2] All of the defined terms herein (identified by initial capitalization), are the same terms defined in Lieff Cabraser's Response and Objections.

attorneys and the work they performed in the State Street Action. For the reasons stated below, CEI's argument should be rejected.

## II. THE SPECIAL MASTER WAS CORRECT IN FINDING THAT THE HOURLY RATES OF LIEFF CABRASER'S STAFF ATTORNEYS WERE "REASONABLE."

### A. The Special Master Conducted A Thorough Investigation Of The Reasonableness Of The Hourly Rates Attributed To The Staff Attorneys.

The Special Master's investigation included a variety of topics concerning the Court's award of attorneys' fees in the State Street Action, including an inquiry into the reasonableness of the hourly rates of Lieff Cabraser's (and Labaton's and Thornton's) lawyers in the State Street Action, including their staff attorneys.[3] Set forth below is a summary of the Master's relevant investigation.[4]

#### 1. The "Informal" Phase of the Investigation.

The Special Master's investigation began with an "informal" phase. After providing the Special Master with all settlement approval and fee request documentation, the Master invited each of the Plaintiffs' Counsel firms to meet with him in informal fact-gathering sessions. Lieff Cabraser met with the Special Master on April 5, 2017 at the New York offices of JAMS.[5]

During Lieff Cabraser's April 5, 2017 meeting with the Special Master and his team, the firm provided the Master with a 67 page written presentation which framed and guided much of

[3] *See* Response and Objections at 41-43. Rather than provide the relevant citations to the Report, Exhibits to the Report, or other documents in the record, all citations herein are to the relevant pages of the firm's Response and Objections. On those pages the Court will find the appropriate citations and references to the underlying record.

[4] The summary of the Master's complete investigation is described in Lieff Cabraser's Response and Objections at 41-64.

[5] *Id*. at 43-45.

that multi-hour interview.[6] That Presentation addressed, among other topics: How Lieff Cabraser staffs large, complex cases, including those involving large document productions; how Lieff Cabraser sets hourly rates, including for staff attorneys; the educational and professional backgrounds of Lieff Cabraser's staff attorneys who worked on the State Street Action; the role of Lieff Cabraser's staff attorneys in the Action; the hourly rates applied to Lieff Cabraser's staff attorneys who worked on the Action; the hourly rates of Lieff Cabraser staff attorneys previously paid by clients; and the history of Lieff Cabraser's staff attorneys routinely being included in, and their rates approved in, class action fee awards.[7]

The essential facts as they relate to the propriety of the hourly rates applied to Lieff Cabraser's staff attorneys were included in the April 5, 2017 Presentation, were discussed during that meeting with the Special Master, and were later reiterated throughout the formal written and deposition discovery period. What the Master learned from Lieff Cabraser about these topics is discussed below.

**2. <u>The "Formal" Phase of the Investigation.</u>**

In May 2017, the Special Master, through his counsel, propounded on Lieff Cabraser 35 document requests and 64 interrogatories.[8] This written discovery included numerous interrogatories and requests for documents that concerned the hourly rates (and how they were determined), and the backgrounds and work performed in the State Street Action by the firms'

[6] *See* Response and Objections at 43-45; *see also* Exh. A to the Decl. of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations ("Fineman Decl."), ECF No. 369-1.

[7] *See id.*

[8] *Id*.

staff attorneys.[9] Lieff Cabraser responded to the Special Master's written discovery between May 26, 2017 and July 10, 2017.

Between June 5, 2017 and July 17, 2017, the Special Master took 39 depositions of personnel from the Plaintiffs' Counsel firms.[10] The Special Master, and his counsel, took depositions of nine representatives from Lieff Cabraser, including firm partners Richard M. Heimann, Steven E. Fineman, and Daniel P. Chiplock; five staff attorneys; and, the firm's litigation support manager.[11] The deposition testimony of Lieff Cabraser's attorneys and staff included information relevant to the hourly rates of the firm's staff attorneys – e.g., the manner in which the firm uses staff attorneys generally; how the firm sets hourly rates for staff attorneys; the educational and professional backgrounds of the staff attorneys; and the work performed by the staff attorneys in the State Street Action.[12]

On July 5, 2017, the Special Master made a request for a supplemental submission from Customer Class Counsel, inviting Counsel to address, among other things, "topics which have arisen during the course of the Special Master's investigation."[13] On August 1, 2017, Customer Class Counsel submitted a Consolidated Response to the Special Master's July 5, 2017 request. In its Response, Customer Class Counsel specifically addressed the specific topics identified by the Special Master, including regarding the hourly rates of the staff attorneys, all with citations to the written discovery responses and deposition testimony to date.[14] The Response was augmented by an accompanying July 31, 2017 Expert Declaration of William B. Rubenstein, the

[9] *See, e.g.*, Response and Objections at 24-28 (and internal citations therein).
[10] *See* Response and Objections at 46-47; Appendix C to the Response and Objections.
[11] *Id.*
[12] *See* Response and Objections at 46-47.
[13] *Id.* at 47-49.
[14] *Id.*

Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular, ECF No. 368, Ex. A ("Rubenstein Declaration I").[15]

In their Consolidated Response, Customer Class Counsel stated, among other things, that the hourly rates for staff attorneys who worked on the State Street Action were based (just as for any other type of attorney, whether an associate or a partner) on the firms' understanding of appropriate market rates for the legal services rendered, and that based on the work performed by those staff attorneys, the hourly rates submitted as part of the lodestar cross-check against the percentage of the fee recovery were appropriate.[16] Counsel advised the Master that this approach is consistent with the general practice of the marketplace and applicable case authority, and that hourly rates for staff attorneys are not dependent on what they are actually paid, in the same way that billing rates for associates and partners are not dependent on what they are actually paid.[17]

### B. What the Master Learned: Lieff Cabraser Uses Staff Attorneys In Complex Civil Cases For Sophisticated Document Analysis and Litigation, And Sets Their Hourly Rates Based On Prevailing Market Conditions.

Based on its extensive investigation, the Master learned that Lieff Cabraser uses staff attorneys in complex litigation for sophisticated documents analysis and litigation. The Master also learned that the firm sets their hourly rates based on prevailing market conditions. A summary of these facts is provided below.

#### 1. Lieff Cabraser's General Use of Staff Attorneys.

Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast

[15] *Id*. at 47.
[16] *Id*. at 48-49.
[17] *Id*.

number of documents produced in these cases.[18] In addition, Lieff Cabraser staff attorneys support all aspects of the firm's complex cases by identifying documents and frequently drafting issue, witness, and liability memoranda.[19] The work product generated by the firm's staff attorneys is used, for example, in support of class certification, in preparation for the conduct of fact and expert depositions, in opposition to motions for summary judgment, for settlement negotiations, and in other pre-trial and trial proceedings.[20]

As was the situation with respect to the staff attorneys who worked on the State Street Action, the firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and in document review and analysis in complex cases, and have made the lifestyle and career choice to work a more limited number of hours than do traditional law firm partners and associates.[21] Most of the firm's staff attorneys are paid directly by the firm and receive benefits provided by the firm.[22] Other firm staff attorneys work at the firm's direction, but are paid directly by agencies that bill the firm for those lawyers' services.[23]

All firm staff attorneys have comparable educational backgrounds and work experiences, and all perform substantially the same document review and analysis functions.[24] And, all utilize, to varying degrees, the firm's infrastructure and resources, including physical office space (for the majority working in firm offices instead of remotely); information technology support (both in the office and remotely); administrative support (e.g., human resources, accounting, and word processing); assistance from the firm's litigation support department;

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[18] *Id.* at 9-11.
[19] *Id*. at 11-13.
[20] *Id*.
[21] *Id*. at 11-13; Appendices A and B.
[22] *Id*.
[23] *Id*.
[24] *Id*.

supervision from firm partners and senior associates; and the cost to the firm for the staff attorneys' salaries and services.[25]

### 2. Lieff Cabraser's Hourly Rates, Including for Staff Attorneys, Are Market Driven and Routinely Approved.

Although the firm is compensated predominantly on a contingent fee basis, Lieff Cabraser's attorneys and litigation staff maintain contemporaneous time records that identify specific tasks performed and the amount of time devoted to those tasks.[26] The firm's contemporaneously recorded time, when multiplied by applicable hourly rates, generates what is known as "lodestar."[27] In certain class actions handled by the firm, aggregate lodestar is used as a "cross-check" to assure that the firm's fee in a "percentage-of-the-recovery" context is appropriate (i.e., that the multiplier on the lodestar is not excessive).[28] In other class actions the firm is compensated based on its lodestar plus an appropriate multiplier.[29] The firm also uses its established rates in cases for hourly rate paying clients.[30]

All Lieff Cabraser hourly rates, including those for staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for a lawyer's services, primarily in the San Francisco and New York market places.[31] The firm's management evaluates and adjusts hourly rates on an annual basis,

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[25] *Id*.

[26] Response and Objections at 13-15.

[27] *Id*.

[28] *Id*

[29] *Id.*

[30] *Id*. Both prior to and in the early stages of the Special Master's investigation, there was a question about whether Customer Class Counsel have bill-paying clients (in addition to contingent fee clients) who pay the firms' hourly rates. Lieff Cabraser has consistently and correctly reported to the Court and the Special Master that it periodically has bill-paying clients who pay the firm's hourly rates. *See* Response and Objections at 13, n. 3.

[31] *Id*.

based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys.[32] Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys (whether on the firm's payroll or employed through an agency), based on what the firm pays them (or for them).[33] Again, firm hourly rates are based on what is reasonable in the applicable market places for our services.[34]

For a number of years prior to 2016, hourly rates of the firm's staff attorneys were set to be consistent with the rates of "on-track" firm attorneys with the same or comparable levels of experience. However, as the firm's staff attorneys (payroll and agency) became increasingly experienced and senior, that approach began to result in rates the firm believed were too high.[35] Therefore, beginning in 2016, with limited exceptions, all firm staff attorneys were assigned an hourly rate of $415 per hour (then the equivalent of a fourth year "on-track" associate).[36] This rate was determined based on the firm's understanding of the market for staff attorneys performing document review, coding and analysis, and the preparation of issue and witness memoranda in the kind of large complex cases handled by Lieff Cabraser. The firm determined this to be a fair and appropriate rate, even though Lieff Cabraser's staff attorneys, by and large, have many more than four years of relevant experience.[37]

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[32] *Id*.
[33] *Id*.
[34] *Id.*
[35] *Id*.
[36] *Id*.
[37] *Id*.

The vast majority of fee awards in the firm's class action cases over the years have been awarded on a percentage of the recovery basis.[38] In recent years, however, courts have increasingly conducted a lodestar cross-check to determine that the percentage of the recovery award is not excessive.[39] And, in rare cases, courts have determined our class action fees on a lodestar basis.[40] In both the lodestar cross-check and lodestar fee award context, Lieff Cabraser's hourly rates, including the firm's staff attorney rates, have routinely been approved.[41] In addition, in those instances when Lieff Cabraser has represented plaintiffs on an hourly basis, the firm has been paid the applicable hourly rates for its attorneys, including its staff attorneys.[42]

### C. What the Master Learned: The Lieff Cabraser Staff Attorneys In The State Street Action Were Well-Educated, Professionally Experience And Skilled Lawyers Who Performed High Level Document Analysis And Produced Detailed Issue Memoranda.

#### 1. Lieff Cabraser's Staff Attorneys Were/Are Well-Educated, Professionally Experienced and Skilled Lawyers.

Attached as Appendix A to the firm's Response and Objections is narrative biographical information about each of Lieff Cabraser's 18 staff attorneys, who worked on the State Street Action. Attached as Appendix B is a chart summarizing key information about each of these firm staff attorneys. The 18 Lieff Cabraser staff attorneys who worked on the State Street Action are described in detail in Lieff Cabraser's Response and Objections at 24-28. In summary, however, during the investigation the Master learned the following critical facts about these lawyers.

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*

The Lieff Cabraser staff attorneys who worked on the State Street Action each attended good to excellent colleges and law schools.[43] They each had years of experience in civil litigation and in document review and analysis in complex cases for major American law firms.[44] For example, as of 2016, five of the staff attorneys who worked on the State Street Action had more than 15 years of experience, six had between 10 and 15 years of experience, and six had between five and 10 years of experience.[45]

Lieff Cabraser's staff attorneys who worked on the State Street Action were selected in large part from the pool of staff attorneys who had worked previously or simultaneously on the BNY Mellon Action, and who had acquired substantial relevant experience concerning custodial FX trading, pricing, and marketing.[46] Thirteen Lieff Cabraser staff attorneys worked on the BNY Mellon Action before and/or during the State Street Action.[47]

Five other Lieff Cabraser staff attorneys who were assigned to the State Street Action did not work on the BNY Mellon Action. Of these, three brought significant relevant litigation experience to their contributions to the State Street Action, including: a background in document review analysis in financial fraud cases for plaintiff-side litigation firms; extensive experience in financial and corporate transactions and documentation during an 18 year career with Baker & MacKenzie; and, significant experience in securities and financial fraud class actions while working for numerous major American law firms.[48] Two other staff attorneys also had

[43] Response and Objections at 24-28; Appendices A and B.
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.

meaningful prior experience in document review and analysis, but devoted only 24 hours each to the State Street Action.[49]

Of the 18 Lieff Cabraser staff attorneys who worked on the State Street Action, 11 were on the firm's payroll for the entire time they worked on the Action.[50] Four Lieff Cabraser staff attorneys were paid initially by an agency (which billed the firm directly for their services), but became payroll employees of the firm in January 2015, during the pendency of the Action.[51] Three Lieff Cabraser staff attorneys were paid by an agency throughout their work for the firm on the State Street Action.[52]

Consistent with the firm's rate setting policies, with the exceptions noted below, all of the Lieff Cabraser staff attorneys who worked on the State Street Action (payroll and agency) were billed at an hourly rate of $415.[53] That hourly rate was consistent with the rate of a fourth year associate at the firm in 2016. *See* discussion *supra* at 14. Two staff attorneys, who graduated law school in 1997 and 2000, had an hourly rate of $515 per hour, which was equivalent to the hourly rate of a firm attorney in the class 2008.[54] The hourly rates used for these two attorneys were their rates in 2015, the year in which they left the firm and the year before the firm set all staff attorney rates at $415 per hour.[55] A third staff attorney had a billing rate of $515 per hour (equivalent to a Lieff Cabraser attorney in the class of 2008).[56] This rate was deemed appropriate by firm management in light of this lawyer's educational background (Stanford Law

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[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id.*
[54] *Id.*
[55] *Id*.
[56] *Id*.

School), her graduation year (2004), and her extensive experience as a partner-track attorney at major law firms.[57]

**2. The Training of and Work Performed By Lieff Cabraser's Staff Attorneys.**

State Street produced more than nine million pages of documents potentially relevant to the issues and claims in the State Street Action. Consistent with Lieff Cabraser's practice in complex litigation document review, the firm's staff attorneys, along with staff attorneys from Labaton and staff attorneys paid for by Thornton, reviewed, issue-coded, analyzed, and prepared issue memoranda concerning State Street's documents.[58] The scope of that effort is described below.

All staff attorneys had access to the Catalyst document database hosted by Lieff Cabraser.[59] Online technical training on how to the use the database was provided by Lieff Cabraser's litigation support department Manager, in conjunction with the staff at Catalyst.[60] The documents maintained in the Catalyst database consisted of all those documents produced by the parties in the State Street Action.[61]

Before the staff attorneys began their review and analysis of the documents, they were instructed to review relevant pleadings in the State Street Action, including the operative class action complaint and plaintiffs' memorandum in opposition to State Street's motion to dismiss.[62] In addition, each staff attorney was provided with and expected to read and understand the State Street Document Review Protocol, including the Document Review Coding Fields Quick

[57] *Id*.
[58] *Id*. at 22-24.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*.

Reference Guide, in which issue codes were listed, followed by descriptions of their relevance to the case.[63] In addition to these materials, emails from supervising attorneys communicating assignments on proposed topics for the factual, legal and/or discursive memoranda to be prepared by staff attorneys (discussed further below) contained descriptions, context and/or explanations for the topics assigned.[64]

The staff attorneys' job responsibilities and tasks included reviewing and coding of all documents produced by State Street for relevance and/or strength or weakness in support of plaintiffs' theory of the case.[65] In addition, the staff attorneys identified specific issues and topics addressed by each of the documents so they could be sorted and searched by subject matter or issue at a later date.[66] Staff attorneys also had the ability to enter attorney notes to explain or clarify the decision behind their coding determinations.[67] There were more than 30 different issue or document type codes available for assignment by staff attorneys to the documents they reviewed.[68] The staff attorneys received appropriate supervision from Lieff Cabraser partners and senior staff to ensure the quality of their work.[69]

The review and coding of State Street's documents was largely completed by the end of April 2015, after which the staff attorneys were tasked with preparing detailed memoranda on approximately 18 selected themes, issues or witnesses to be further developed in depositions and follow-up discovery.[70] Each memorandum prepared by the staff attorneys contained hyperlinks

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[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.

to supporting documents from State Street's productions, with some of the memoranda exceeding 100 pages.[71] The memoranda were circulated to the supervising attorneys on a rolling basis as they were completed.[72] Had the mediation ended without resolution of the State Street Action, the memoranda and included documents would have formed the principal repository of knowledge for the supervising attorneys as they prepared for depositions and pretrial litigation.[73]

### D. Harvard Law School Professor William B. Rubenstein Provided His Expert Opinion In Support Of The Reasonableness Of The Hourly Rates Of Lieff Cabraser's Staff Attorneys.

As part of Lieff Cabraser's response to the Master's investigation, it submitted the Rubenstein Declaration I. Among the opinions expressed by Professor Rubenstein in that declaration is that the hourly rates for the staff attorneys who worked on the State Street Action were properly pegged to "market rates," and the rates employed were reasonable.[74] Further, based on his review of much of the same record that the Special Master considered, Professor Rubenstein found Lieff Cabraser's staff attorneys to be "skilled attorneys." As Rubenstein put it, the "fact that these lawyers are not on a partnership track, standing alone, says nothing about the qualifications or about the type of work they undertook… . It appeared clear to me that these attorneys were very well qualified. They typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often work on non-partnership track as a personal choice about how they wish their careers to proceed, not because they're unqualified for partnership-track jobs."[75]

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[71] *Id*.
[72] *Id*.
[73] *Id*.
[74] Rubenstein Declaration I at 2, 27-30.
[75] *Id*. at 27.

### E. The Master Properly Analyzed the Factual Record Under Relevant First Circuit Authority.

The Special Master analyzed the factual record in light of First Circuit law concerning the reasonableness of hourly rates for attorneys, including staff attorneys.[76] As the Master recognized in his Report, it is well-settled in the First Circuit that when calculating lodestar, the determination of reasonable rates "will vary depending on the nature of the work, the locality in which it is performed, the qualifications of the lawyers and other criteria." *Hutchinson ex rel. v. Patrick*, 636 F.3d 1, 16 (1st Cir. 2011). Most important in determining the reasonableness of hourly rates for lodestar purposes is the "market value of counsel's services." *U.S. v. One Star Class Sloop*, 546 F.3d 26, 40 (1st Cir. 2008); *see also*, *Hutchinson*, 636 F.3d at 16 ("[D]ata evidencing the prevailing market rate for counsel of comparable skill and experience provides helpful guidance"); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950-951, 955 (1st Cir. 1984) (reasonable fees are calculated according to the prevailing market rates in the relevant community for similar services by lawyers of comparable skill and experience). When setting forth these criteria, the First Circuit has never distinguished between different categories of lawyers, e.g., partners, associates, or staff or contract (agency) lawyers.

### F. The Special Master Correctly Found That The Hourly Rates Attributed To Lieff Cabraser's Staff Attorneys Were Reasonable.

Based on his analysis of the factual record in light of the applicable case law, the Special Master correctly found that the hourly rates attributed to Lieff Cabraser's staff attorneys were reasonable. In his Report, the Master made the following relevant, and *correct*, factual legal findings:

- *The hourly rates for, and the number of hours worked by, Lieff Cabraser's attorneys, including its staff attorneys, were reasonable and accurate*:

[76] Report at 146-181.

> The lodestar reports of Plaintiffs' Counsel charged partners at hourly rates ranging from $535 to $1000, and associates at hourly rates of $325 to $725 [footnote omitted]. As discussed below, we conclude that these rates are commensurate with partner and associate rates charged and approved in similarly complex class actions, and therefore are reasonable.[77]
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> The Special Master recommends that, for the reasons summarized above and set forth in great detail in the Report, with the minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar reports were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff.[78]
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> The fact that they were designated as "staff attorneys" or that they were tasked with "document review" should not indicate the work they did was routine or "paralegal" in nature. Both the work they performed and their professional qualifications and experience established them as more akin to lower-level and mid-level associates.[79]
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> * * *
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> The staff attorneys at the Labaton and Lieff firms did much more than "low-level" document review. The staff attorneys not only did first-level document review; they also digested complex information and prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore in depositions once witnesses were identified and also on areas that would require follow-up discovery and document discovery if the mediation were to end without a resolution.[80]
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> * * *
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> Contrary to the picture painted in the *Boston Globe* article, with the exception of Michael Bradley, whose work is discussed below, these staff attorneys did much more than "low level" document review. As noted, they all were attorneys with years of experience, and the majority of them

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[77] Report at 164 and 176; Response and Objections at 59.

[78] Executive Summary at 21-22 and 49-50, Report at 365-366; Response and Objections at 59.

[79] Report at 70-71; Response and Objections at 59.

[80] Report at 72; Response and Objections at 59.

had specialized knowledge or skills in FX/securities areas. A number of them had worked on BONY Mellon which raised similar issues to those in the *State Street* case. They all made substantive contributions to the case. They did not simply do first-level document review; they also digested complex information and prepared topical memoranda and witness memoranda for depositions – the same kind of work done by associates at large firms. Rather than referring to them as staff attorneys, it would be more accurate to refer to them as "non-partnership-track" attorneys.[81]

The *Boston Globe* article also took issue with the staff attorneys' billing rates as compared to what the staff attorneys were actually *paid*. The article reported that these attorneys were paid only $25 to $40 an hour. In fact, the vast majority of the staff attorneys were paid in the range of $40-$60 an hour, plus benefits. More importantly, there is nothing impermissible about marking up an attorney's billing rate above "cost" so long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed.[82]

* * *

The Special Master concludes the staff attorney billing rates in the lodestar fee petition are generally reasonable given that the staff attorneys were responsible for some 70% of the work billed on the case. These rates are particularly reasonable when compared to the relatively low number of hours billed by associates for the three Customer Class law firms (less than 2% of the total time billed). This can be attributed to the fact that the staff attorneys effectively did the work of lower- to mid-level associates. Thus, for purposes of the analysis here, the Special Master views the staff attorney work as associate-level work.[83]

- *The contemporaneous time records of Lieff Cabraser's attorneys, including its staff attorneys, were sufficiently and reliably detailed:*

  Lieff used a comparable electronic time keeping system to maintain accurate and contemporaneous time records for its attorneys.[84]

  * * *

  As described below, based on our review of the individual as well as firm-wide time entries recorded in this case, the time records produced by the

[81] Executive Summary at 22; Report at 176-177; Response and Objections at 59.

[82] Report at 177; Response and Objections at 59-60.

[83] Report at 180; Response and Objections at 60.

[84] Report at 203; Response and Objections at 60.

> firms participating in the *State Street* case sufficiently and reliably detail the firms' substantive, legal contributions to that case.[85]
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> * * *
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> Aside from the reasonableness of the aggregate tally, we conclude that the hours presented on the Fee Petition are reasonable for three additional reasons. First, the firms appropriately staffed the case, assigning lawyers to specific tasks commensurate with their experience and capabilities with a sensitivity to the costs ultimately passed on to the client, the class, through the common fund. Thus, the hours expended by each individual attorney accurately reflect the nature of the work assigned to him or her. Second, the narratives in the time records themselves capture the precise nature of these substantive contributions in detailed – and in some instances highly detailed – descriptions of the legal work performed within the individual records.[86]
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> * * *
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> Billing entries of Lieff attorneys, moreover, sufficiently conveyed the nature of the work – whether emails, meetings, drafting or reviewing – along with the salient details, such as with whom and the basic substance of each task.[87]
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> * * *

For all the reasons in the Master's Report, and Lieff Cabraser's Response and Objections, and above, the Master was *correct* in finding that Lieff Cabraser's staff attorneys' hourly rates were reasonable. Hourly rates of $415 per hour for 13 staff attorneys and $515 per hour for the time of three staff attorneys, or a blended rate of $433.67 per hour, was reasonable and appropriate under the circumstances of the State Street Action.

[85] Report at 209; Response and Objections at 60.

[86] Report at 210; Response and Objections at 60-61.

[87] Report at 211; Response and Objections at 61.

## III. CEI'S CHALLENGE TO THE HOURLY RATES ATTRIBUTED TO, AND THE NUMBER OF HOURS WORKED BY, LIEFF CABRASER'S STAFF ATTORNEYS IS FACTUALLY AND LEGALLY BASELESS AND SHOULD BE REJECTED.

In its "Memorandum Propounding An Appropriate Total Fee Award," ECF No. 522 ("CEI Memorandum"), CEI argues broadly that Plaintiffs' Counsel's fee award should be dramatically reduced, and that scores of hours worked by the firms' staff attorneys should be eliminated. Customer Class Counsel, including Lieff Cabraser, respond to those arguments in the contemporaneously-filed Customer Class Counsels' Memorandum of Law in Support the Reasonableness of the Attorneys' Fee Award, ECF No. 532.

Lieff Cabraser responds here to CEI's contention that the hourly rates of Lieff Cabraser staff attorneys are too high and should be reduced. CEI does not dispute that the appropriate method for determining whether the staff attorneys' rates are reasonable is by reference to "prevailing market rates."[88] However, without reference to any particular case authority, and in disregard of the factual record and the Master's findings, CEI argues that the "rates for contract and staff attorneys are exorbitant and should be brought in line with prevailing market rates."[89]

Unlike the thorough factual and legal analysis the Special Master conducted concerning the reasonableness of the hourly rates of Lieff Cabraser's (and Labaton's and Thornton's) staff attorneys, CEI challenges those rates by variously ignoring and misrepresenting the factual record. CEI's presentation is nothing more than an *ad hominem* attack untethered from the factual record. For the reasons stated below, CEI's argument concerning the hourly rates of Lieff Cabraser's staff attorneys should be rejected.

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[88] CEI Memorandum at 11. *See* Response and Objections at 79-80 and Lieff Cabraser's Response to the Special Master's Partially Revised Report ("Response to Revised Report"), ECF No. 533, filed contemporaneously herewith.

[89] CEI Memorandum at 11.

### A. The Hourly Rates For Lieff Cabraser's Staff Attorneys Were And Are Reasonable.

CEI asserts that the aggregate lodestar submitted by Plaintiffs' Counsel is overstated "because the staff attorneys' rates are exorbitant for document review."[90] CEI reaches this conclusion by misrepresenting the factual record and the Master's findings. In particular, CEI's argument is premised on the notion that the work done by the staff attorneys was "routine" or "rote" document review.[91] But, as the factual record clearly shows, and as the Master expressly found, the work of Lieff Cabraser's staff attorneys was neither "routine," nor "rote." Rather, the staff attorneys performed at a junior to mid-associate level in reading, coding, organizing, and analyzing millions of documents in this complex financial fraud case. *See* discussion *supra* at Section II.F. Moreover, most of the staff attorneys also prepared detailed issue memoranda, containing hyperlinks to key documents, that would have been used by more senior attorneys in depositions, summary judgment, and trial, had the Action not settled. *See id*. Based on these facts, the Special Master correctly determined that the firm's staff attorneys' hourly rates were reasonable. *Id*.

In arguing that the staff attorneys' hourly rates were too high, CEI misstates what the rates actually were, at least as to Lieff Cabraser. CEI repeatedly refers to Lieff Cabraser's rates as being $515 per hour or "up to $515 per hour."[92] In fact, the hourly rate of 15 of the 18 Lieff Cabraser staff attorneys who worked on the State Street Action was $415 per hour. *See* discussion *supra* at Sections I, II.B.2.[93] That hourly rate was consistent with the rate of a fourth

[90] *Id*. at 16.
[91] *Id*. at 16, 19.
[92] *Id*.
[93] *See* Response and Objections at 24-28; Appendix B thereto.

year associate at the firm in 2016. *See id*.[94] In light of the educational and professional backgrounds of these staff attorneys, their years of experience (all in excess of four years, and in many instances significantly more), and the high-level, sophisticated work they performed, $415 per hour was, as the Master found, reasonable. *See* discussion *supra* at II.F.[95]

CEI is fixated on the fact that the hourly rates of three of Lieff Cabraser's 18 staff attorneys who worked on the State street Action was $515 per hour, which as stated above was equivalent in 2016 to the hourly rate of a firm attorney in the class of 2008.[96] Again, CEI has largely misstated the facts. One of the staff attorneys with an hourly rate of $515 per hour was a 1997 graduate with more than 20 years of experience. She left the firm in 2015 and, as explained in the firm's fee declaration, her hourly rate in the year in which she left the firm was used for lodestar purposes here. In any event, this attorney worked only 24 hours on the State Street Action, and is hardly worth mentioning. *See* discussion *supra* at Section II.C.1.[97] Another Lieff Cabraser staff attorney with a billing rate of $515 graduated from Stanford Law School in 2004, has extensive experience as a partner-track attorney at major law firms, and devoted substantial time to the analogous BNY Mellon Action. *See* discussion *supra* at Section II.C.1. Her rate was reasonable.[98] The third Lieff Cabraser staff attorney that had a billing rate of $515 per hour, graduated from the University of Pennsylvania and then UCLA Law School in 2000. He left the firm in 2015 and therefore his rate from that year was used in the lodestar calculation, consistent with the explanation in the firm's fee declaration. Moreover, this attorney brought to the State

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[94] *Id*.

[95] *Id*. Even CEI acknowledges that for staff attorneys performing "more sophisticated roles in the case warrant a rate of $375 per hour, not far off from Lieff Cabraser's actual rates. *See* CEI Memorandum at 19.

[96] *See* Response and Objections at 24-28; Appendix B thereto.

[97] *See* Response and Objections at 24-28; Appendix B thereto.

[98] *Id*.

Street Action uniquely relevant experience having worked extensively on the similar BNY Mellon Action.[99] Lieff Cabraser therefore believes that his rate was reasonable.[100]

Finally, CEI argues that one should look to how Big Law firms, including State Street's counsel, WilmerHale, LLP, set their rates for staff attorneys in determining what reasonable rates should be here.[101] Of course, there is no factual basis for that comparison. Most Big Law firms use staff attorneys (or contract attorneys) for first-level document review, mostly devoted to determining whether documents are relevant and are privileged or should otherwise be withheld from production. This is an entirely different set of tasks than those performed by Customer Class Counsel's staff attorneys. As explained in detail above, those lawyers, acting akin to a junior to mid-level associate, were engaged in sophisticated document analysis and the preparation of issue and witness memoranda. *See* discussion *supra* at Sections II.C-F. There is simply no comparison, and CEI's arguments to the contrary should be dismissed.[102]

### B. The Hourly Rates For Lieff Cabraser's Agency/Contract Attorneys Were And Are Reasonable.

CEI makes two basic arguments in support of its position that the appropriate hourly rate for Lieff Cabraser's agency/contract attorneys is $50 per hour.[103] First, CEI argues generically

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[99] *Id*.

[100] The fact that this attorney may now have a lower billing rate at a different law firm does not mean that the hourly rate used by Lieff Cabraser was unreasonable. It just means that the lawyer's current firm has, apparently, assigned him a lower rate.

[101] *See* CEI Memorandum at 16-20.

[102] Without any factual or legal support, CEI maintains that the hourly rate of the head of Lieff Cabraser's litigation support department, and the manager of the Catalyst database used as the platform by all staff attorneys for viewing and coding the millions of pages of documents in this action should be reduced from $415 to $325 per hour. *See* CEI memorandum at 19-20. Kirti Dugar, who also has decades of financial fraud litigation experience, provided online technical training to all staff attorneys on how to use the database in conjunction with the staff at Catalyst. *See* Response and Objections at 22. Mr. Dugar's hourly rate was entirely reasonable.

[103] CEI Memorandum at 12. CEI does not agree with the Master that Lieff Cabraser's agency/contract lawyers should be treated as a cost. *See* CEI memorandum at 12, n.6.

that contract attorneys are "hired to do relatively unskilled document review work that discerning paying clients refuse to pay a premium for."[104] Second, CEI further maintains that contract attorneys are "hired to an expressly limited engagement and may be terminated within hours when no longer needed," and while they are "hired based in part on their past experience reviewing documents, contracting firms gain no benefit from further developing them," and therefore "contract attorneys receive no professional development investment."[105] CEI's arguments bear no relationship to the facts in the State Street Action.

The seven Lieff Cabraser staff attorneys who were paid through an agency, for at least part of the time they worked on the State Street Action, do not meet CEI's definition of contract attorneys. Rather, as explained above and in its Response and Objections, Lieff Cabraser's agency/contract attorneys, had the same "skill level," "experience," and performed exactly the same tasks as the firm's staff attorneys – that is, reading, coding, organizing, and analyzing millions of documents, and preparing detailed issue and witness memoranda at the junior to mid-level associate level. *See* discussion *supra*.[106] Indeed, the Master found no distinction between the firm payroll staff attorneys and agency/contract attorneys as to the actual work performed for the benefit of the class, finding that there "is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary."[107] To the extent CEI's argument that the hourly rates for Lieff Cabraser's agency/contract attorneys should be $50 per hour is based on the nature and quality of the work they performed, as well as their educational and professional backgrounds, that argument should be rejected.

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[104] *Id.*

[105] CEI Memorandum at 12 and 15.

[106] CEI Memorandum at 15. *See also* Response and Objections at 22-24, and Appendices A and B thereto.

[107] Response and Objections at 87.

CEI also contends that Lieff Cabraser's agency/contract attorneys should have an hourly rate substantially below the firm's staff attorneys based on perceived differences in the relationship between the firm and those lawyers and the firm and its staff attorneys (e.g., cost, investment, overhead).[108] For the reasons stated in Lieff Cabraser's Response and Objections and its Response to the Revised Report, ECF No. 533, there are no meaningful factual distinctions between the relationship between the firm and its staff attorneys and between the firm and its agency/contract attorneys.[109] Contrary to CEI's concern about contract attorneys being "terminated within hours when no longer needed," four of the seven agency/contract lawyers used by Lieff Cabraser in this Action transitioned to full-time staff attorneys in the midst of the Action, and another of those agency/contract attorneys continues to work on the firm's cases to this date while continuing to be paid through an agency.[110] It is simply incorrect for CEI to claim that the firm gains "no benefit from further developing them."[111] The firm has gained significant benefits from doing just that.

Although Lieff Cabraser submits that there is no reason to reduce the hourly rates applied to the firm's agency/contract attorneys, the firm has acknowledged that some courts that have considered the issue have applied lower hourly rates to agency/contract attorneys than the rates used in this Action.[112] However, in none of those cases was the approved hourly rate as low as $50 per hour, particularly for the kind of lawyering performed here. *See, e.g., In re Citigroup, Inc. Securities Litigation*, 965 F.Supp.2d 369, 393-399 (S.D.N.Y. 2013) (a case, unlike this one, where the agency/contract attorneys provided their document review services *after* settlement of

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[108] *See* CEI Memorandum at 15.

[109] *See* Response and Objections at 86-90; Response to Revised Report at 31-35.

[110] *Id*.

[111] CEI Memorandum at 15.

[112] *See* Response and Objections at 83-84, 92-93; Response to Revised Report at 42-44.

the case was reached, the court reduced those attorneys' hourly rate to $200 per hour); *In re Petrobras Securities Litigation*, 317 F.Supp.3d 858, 875–76 (S.D.N.Y. 2018) (reducing the hourly rates of contract attorneys of between $325 and $625 per hour by 20% in light of the "considerable time spent by these attorneys on low level document review"). Again, the actual work performed by the agency/contract attorneys in this Action was not low level document review conducted after resolution. It was junior to mid-level associate quality work which justifies the rates used, or at the very least, rates substantially above the $50 per hour recommended by CEI.[113]

## IV. CONCLUSION

For the reasons stated above, the Master was correct in finding that Lieff Cabraser's staff attorneys' hourly rates were reasonable. The factual record supports the reasonableness of $415 per hour for the time of 13 staff attorneys and $515 per hour for three staff attorneys, or a blended rate of $433.67 per hour.

CEI's challenge to those rates should be rejected. Instead of basing its opinions on the actual factual record, CEI offers generalities, platitudes and a deliberate (or very sloppy) misrepresentation of the factual record.[114]

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[113] The hourly rates for five of the seven agency/contract attorneys used by Lieff Cabraser in the State Street Action was $415 per hour. One of the other agency attorneys had an hourly rate of $515 per hour, but worked only 24 hours on the State Street Action. The third is described above, and Lieff Cabraser submits that this rate was appropriate for that attorney. *See also* Response and Objections at 24-28, Appendix B thereto.

[114] CEI identifies an "obvious data entry mistake," in Lieff Cabraser's lodestar submission, an entry for "45 hours" by a staff attorney on March 5, 2013. *See* CEI Memorandum at 36. This error is clearly the product of a missing decimal point and the entry should have been 4.5. That mistake is regrettable, but is immaterial in the context of the case in which over 76,000 hours were billed. Given the number of people who have reviewed those time entries, including personnel at Lieff Cabraser and the Special Master's expert, who found no other errors, Lieff Cabraser does not agree with CEI that this error "calls the reliability of the lodestar total into question." *Id*.

Dated: December 18, 2018

Respectfully submitted,

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