UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J. June 28, 2018

I. INTRODUCTION

On March 8, 2017, the court appointed Retired United States District Judge Gerald Rosen as a Master to investigate and submit

a Report and Recommendation concerning issues relating to the court's award of more than $75,000,000 in attorneys' fees in this class action to the firms that served as counsel for the plaintiff class and its class representatives, which included Arkansas Teacher Retirement System ("ATRS").[1] Pursuant to an October 24, 2017 Order, on May 14, 2018, the Master filed his Report and Recommendation, with an Executive Summary and referenced exhibits, under seal.

The court provided the parties an opportunity to move for redactions to the versions of Master's submissions to be made public. In response, Labaton Sucharow, LLP ("Labaton") and State Street Bank and Trust Company and State Street Global Markets, LLC (collectively, "State Street") moved for redactions to the Report and its Executive Summary (together, the "Report" or "R&R").[2] They and the other counsel for the class, Thornton Law Firm

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[1] ATRS represented the "Customer Class" of institutional investors. Other, individual plaintiffs and one employee-benefit plan represented the "ERISA Class." Labaton, Thornton, and Lieff represented the Customer Class and ATRS. McTigue, Keller, and Zuckerman represented the ERISA class and its representatives. Only the conduct of Customer Class counsel -- Labaton, Thorton, and Lieff -- raised the issues to be investigated by the Master.

[2] McTigue also moved to redact statements in the Report. See Docket No. 283 at 3. However, McTigue withdrew its requests for redactions from the Report after conferring with the Master regarding his objections to the proposed redactions. See June 22, 2018 Tr. at 13.

("Thornton"), Lieff, Cabraser, Heimann, and Bernstein, LLP ("Lieff), Keller Rohrback, LLP ("Keller"), Zuckerman Spaeder, LLP ("Zuckerman"), and McTigue Law, LLP ("McTigue"), moved for redactions to the exhibits referenced in the Report.

On June 22, 2018, the court held a hearing that was closed to the public to permit argument on the motions for redaction from the Report. For the reasons described in this Memorandum, Labaton's motions for redactions from the Report are being denied. State Street's motion for redactions is being allowed in part and denied in part. The Report, with limited redactions concerning the hourly rates charged for certain attorneys for State Street, is being unsealed.

In addition, the parties are being ordered to confer and, to the extent they can agree, by July 10, 2018, file for the public record versions of exhibits to the Report which have redactions that are consistent with the decisions concerning issues addressed in this Memorandum. The June 13, 2018 proposed redactions (Docket No. 297) based on issues not addressed in this Memorandum, not including any redactions the parties no longer seek, shall be included in the exhibits to be unsealed pending any necessary future decisions by the court.[3]

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[3] The court and the parties will have access to the complete, sealed exhibits, which are part of the record.

Pursuant to the May 16, 2018 Order at ¶4, any objections to the Report are due within seven days of the issuance of this Memorandum and Order.[4] In view of the July 4, 2018 holiday, any requests for a reasonable extension of this deadline will be granted.

I. APPLICABLE LAW

As the First Circuit has written:

> In Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), the Supreme Court acknowledged that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Id. at 597 (footnotes omitted). The privilege extends, in the first instance, to "materials on which a court relies in determining the litigants' substantive rights." Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir.1986).

F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987). This means that "the presumption that the public has a right to see and copy judicial records attaches to those documents which properly come before the court in the course of an adjudicatory proceeding and which are relevant to the adjudication." Id. at 412-13; see also Anderson, 805 F.2d at 13. Among other things,

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[4] If the parties are unable to file redacted versions of the exhibits before filing their objections, the memoranda in support of objections to the Report may cite and quote any portion of an exhibit not proposed for redaction in the June 13, 2018 consolidated submission, Docket No. 297. They may also quote any information that was subject to a redaction request denied in this Memorandum and Order. Any references to other information redacted from an exhibit may be included in memoranda filed, at least temporarily, under seal.

"[p]ublic access to judicial records and documents allows the citizenry to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system." Id. at 410; Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 70 (1st Cir. 2011)(same).

Nevertheless, "the public's right to inspect such records is not absolute." Standard Fin. Mgmt. Corp., 830 F.2d at 410. The court may impound records to "prevent [the records] from being 'used to gratify private spite or promote public scandal,' or to prevent the[] records from becoming 'reservoirs of libelous statements for press consumption' or...'sources of business information that might harm a litigant's competitive standing.'" In re Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005)(quoting Nixon, 435 U.S. at 598). "[P]rivacy rights of participants and third parties are [also] among those interests which, in appropriate cases, can limit the presumptive right of access to judicial records." United States v. Kravetz, 706 F.3d 47, 62 (1st Cir. 2013). "[W]here the public's right of access competes with privacy rights, it is proper for the district court, after weighing the competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document." Id. at 62.

However, in the "balancing of interests...the scales tilt decidedly toward transparency." Nat'l Org. for Marriage, 649 F.3d

at 70. Therefore, "[o]nly the most compelling reasons can justify non-disclosure of judicial records." Id. (quoting Standard Fin. Mgmt. Corp., 830 F.2d at 410). The First Circuit has repeatedly emphasized that "sealing of judicial documents 'must be based on a particular factual demonstration of potential harm, not on conclusory statements.'" Kravetz, 706 F.3d at 60 (quoting Standard Fin. Mgmt. Corp., 830 F.2d at 412; Anderson, 805 F.2d at 7).

III. LABATON'S MOTIONS

After considering any objections de novo, the court will decide whether to accept, reject, or modify the Master's findings, conclusions, and recommendations. See Fed. R. Civ. P. 53(f)(1), (3) & (4). Therefore, the Master's Report is a quintessential judicial record that the public has a presumptive right to see. See Nixon, 435 U.S. at 597; Standard Fin. Mgmt. Corp., 830 F.2d at 412-13; Anderson, 805 F.2d at 13. Labaton filed three motions seeking certain redactions. None present the compelling reasons required to overcome the presumption of public access to information in the Report that Labaton seeks to redact. Therefore, Labaton's requests for redactions from the Report are being denied.

A. Motion to Redact and Retain under Seal (Docket No. 254)

A major and disputed part of the Master's Report concerns the payment made after the award of attorneys' fees of $4,100,000 to

Damon Chargois, a lawyer in Texas who did no work on this case.[5] This payment resulted from the role of Chargois, and his partner Tim Herron, in introducing Labaton to ATRS, and Labaton's related promise to pay Chargois 20% of the fee it received in every class action in which it represented ATRS as Lead Counsel. The payment to Chargois was not disclosed to the class, the court, or, the Master found, to ATRS. The Master recommends that Labaton be ordered to disgorge $4,100,000 because of the undisclosed payment to Chargois. The Master also recommends that Labaton, and particularly Laurence Sucharow of Labaton, be deemed to have breached their duties to the class and court by failing to disclose to the court the payment to Chargois. The Master also recommends that the court find that the payment to Chargois was an impermissible fee for solicitation in violation of the Massachusetts Rules of Professional Conduct. In addition, the Master characterizes ATRS's position concerning the payment to Chargois as a "dereliction" of its duty to the class and suggests that ATRS should be removed as the representative of the class. Report at 257-58, n.206.

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[5] The "facts" in this Memorandum are drawn from the Master's Report. To the extent there are objections to these facts, the court will decide them de novo. The Master's version of the facts is recited here to explain the relevance of the information Labaton seeks to redact.

Labaton moved for redaction of all references to Labaton's agreement to pay Chargois 20% of its fee in every class action in which it represented ATRS. At the June 22, 2018 hearing, Labaton withdrew this request. See June 22, 2018 Tr. at 17.

Labaton continues to seek redaction of the references in the Report to its other clients who also served with ATRS as class representatives in cases for which Chargois was paid. In his Report, the Master wrote, among other things, that "the failure [of Chargois] to participate in any way in the State Street case --or any of the other eight cases for which Labaton paid Chargois a fee--is a fact of great significance" to his conclusion that Labaton's payment to Chargois was an impermissible fee for "solicitation" rather than a permissible "referral fee" for recommending a lawyer's service under the Massachusetts Rules of Professional Conduct. R&R at 270-72. The Master also relied on Labaton's efforts to keep ATRS from learning about its payments to Chargois in all eight cases to support his recommendations. Id. at 271.

Labaton argues, however, that the names of the plaintiffs it represented in addition to ATRS should be redacted because:

> these clients and cases are in no way involved with the matter at hand, [and the] references to the clients (or references to cases that can direct a reader to other clients), including their involvement in other litigation, could harm not only Labaton's relationship with the clients, but also cause unwarranted harm to the clients themselves, if their names arise in connection

> with these proceedings. [Decl. of Jonathan] Gardner [at] ¶23. The press has paid considerable attention to this case, has scrutinized public filings, and has investigated information disclosed in those public filings. If a member of the press were to reach out to a client after reading about them in the Special Master's Report, it would needlessly burden that client with an obligation to respond to the press inquiry, and detract from that client's mission and responsibilities, as well as potentially seriously harm Labaton's relationship with the client. Id. at 24.

Docket No. 261-1 at 9-10. These arguments do not provide the compelling reasons necessary to overcome the presumption of public access to information the Master deemed important to his conclusions and which are, in any event, relevant to issues the court will have to decide.

The fact that the media is scrutinizing public filings in this case, investigating the information they contain, and reporting on them is a manifestation of the public interest in monitoring judicial proceedings that the transparency of judicial records is intended to promote. See Nat'l Org. for Marriage, 649 F. 3d at 70. It is not a factor that weighs in favor of redaction.

The "privacy rights of...third parties" can sometimes overcome the public's interest in disclosure of certain information in court records. Kravetz, 706 F.3d at 62. However, the identity of the Labaton clients who served with ATRS as lead plaintiffs in cases for which Chargois was paid is a matter of public record in those cases. Labaton's statement that the media might burden their clients with unwelcomed inquiries if they are

identified in the public version of the Report is a speculative and conclusory contention that does not justify impoundment of their identities. See Kravetz, 706 F.3d at 60; Standard Fin. Mgmt. Co., 830 F.3d at 412. No client of Labaton has expressed such a concern to the court. In any event, discussion of a matter that is already public does not justify impoundment. See United States v. Salemme, 978 F. Supp. 364, 372-74 (D. Mass. 1997).

The claim that Labaton's relationship with clients who served with ATRS as class representatives may be harmed by their inclusion in the public report is also conclusory and speculative. As the First Circuit has written, "[t]he mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access." Siedle v. Putnam Inv., Inc., 147 F.3d 7, 10 (1st Cir. 1998). In addition, "[S]imply showing that the information would harm the company's reputation is not sufficient to overcome the strong common law presumption in favor of public access to court proceedings and records." Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983).

There are, however, particularly important reasons to honor the presumption of public access to the information concerning other cases in which Chargois was paid that Labaton seeks to have redacted. The Master raises serious questions concerning whether ATRS is an adequate representative of the class for the purpose of

the current proceedings. See, e.g., Report at 257-58 & n. 207. The questions are based in part on ATRS' position that Labaton's agreement with Chargois was not relevant to its duties as a class representative in this or other cases and, therefore, did not have to be disclosed to ATRS as representative of the class. See, e.g., May 30, 2018 Tr. at 72-73. A full understanding of this issue may be important to other class members in deciding whether they want to continue to be represented by ATRS, to seek to replace ATRS as class representative, or to advocate for disgorgement by Labaton for the benefit of the class.[6]

In any event, as the D.C. Circuit has written "even when there is "no question" that the class representative has adequately represented the class on the merits, "basic considerations of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment," including in post-judgment litigation over attorneys' fees. Nat'l Ass'n of Regional

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[6] At the March 7, 2017 hearing at which the Master was appointed, Colorado Public Employees Retirement Association, which claimed to be a member of the class, asked "that the proceedings of the special master be posted to ECF for this case so the class members can observe and comment if permitted to do so by the special master." Mar. 7, 2018 Tr. at 27. This request is an indication of the interest of the class in carefully monitoring, and possibly participating in, those proceedings.

Med. Programs, Inc. v. Mathews, 551 F.2d 340, 344-45 (D.C. Cir. 1976)(emphasis added). In this case the court must decide whether ATRS remains an adequate class representative. See R&R at 257-58 n. 207; May 25, 2018 Order at ¶3; May 30, 2018 Tr. at 8, 77-80. A full public record will permit the monitoring of how the court discharges that duty. See Nat'l Org. for Marriage, 649 F.3d at 70; Standard Fin. Mgmt. Corp., 830 F.2d at 408.

In addition, redaction of information concerning other ATRS cases in which Labaton paid Chargois would mask information concerning possible ethical violations by Labaton that might otherwise be investigated in other jurisdictions. According to the Master, "Massachusetts has a more lenient division-of-fee rule than most other states, including that it permits 'bare referrals' to be paid to lawyers who perform no work on a case and never appear in the case." R&R at 332. The Master's finding that Labaton violated Massachusetts' "more lenient" rule, suggests that Labaton may have violated the stricter ethical rules in other jurisdictions, which may wish to consider that question if they are informed of the issue by the Master's Report.

Labaton also seeks to redact a reference to one case, Bristol County Retirement System v. HCC Insurance Holdings, Inc., C.A. No. 07-00801 (S.D. Tex. Filed Mar. 8, 2007), in which Chargois did not receive a payment. See R&R at 90. However, the case, and the fact that Labaton and Chargois were co-counsel for the plaintiffs, are

matters of public record. HCC Holdings was the first case in which Labaton worked with Chargois and, therefore, relevant to understanding how their relationship began.

In view of the foregoing, Labaton's request for redaction of information concerning other ATRS cases in which Labaton paid or worked with Chargois is not meritorious.

Labaton also requests redaction of information in the Report relating to how, by double-counting the hours worked by certain attorneys, it overstated in its fee petition the number of hours Class Counsel worked on this case by about 9,000, improperly inflating its lodestar by approximately $4,000,000. See Report at 219; Docket No. 116 at 2. The proposed redactions are to information on pages 222 to 223 of the Report. It concerns Labaton's practices in sharing the costs of staff attorneys with other firms in other class actions. Labaton asserts that the information, while not "proprietary information," is nevertheless "not related to the double-counting error that occurred in this case, and it should be redacted." Docket No. 313 at 7. The Master, however, views the information as "highly probative of the duplicative billing errors that gave rise to the Special Master's appointment." Docket No. 340 at 8.

Labaton does not cite any authority to support the redaction of information from a judicial record merely because it is alleged to be irrelevant. The presumption of public access to irrelevant

information in a judicial record may deserve less weight than relevant information. See Oliver Wyman Inc. v. Eielson, 282 F. Supp. 3d 684, 707 (S.D.N.Y. 2017); Refco Grp., Ltd., LLC v. Cantor Fitzgerald, LP, 2015 WL 4298572, at *5 (S.D.N.Y. 2015). However, Labaton does not cite any authority holding that the presumption ceases to exist at all. In any event, Labaton's usual practice of sharing staff attorneys' costs in other cases is relevant to understanding how and why the lodestar was inflated in the fee petition in this case, in which Labaton deviated from its usual practices. It is not, therefore, being redacted from the Report.

B. The Motion to Redact and/or Strike Statements Regarding Class Funds (Docket No. 255)

Labaton filed a Motion to Redact and/or Strike Statements in the Special Master's Report Regarding Class Funds (Docket No. 255). The Master asserts, in essence, that at least some of the $4,100,000 that was paid to Chargois may have gone to the class if ATRS, ERISA counsel, and the court had been informed of the planned payment to Chargois, who performed no work on this case. Therefore, the Master states throughout his Report that Labaton took money from "class funds" to satisfy its pre-existing obligation to Chargois, which the Master concludes was "the sole obligation" of Labaton. See Exec. Summary at 2, 4, 28, 41, 44-45, 51; see also R&R at 7, 114, 119, 258, 263, 277, 287, 299, 304-06, 308, 310, 314, 346, 356, 358.

Labaton argues that these statements are "groundless and inflammatory"; "[t]he payment to the Texas law firm...was paid from the share of reasonable attorneys' fees that the Court had already awarded," not from "class funds," and Labaton did not "use[] the funds to pay its own obligations." Docket No. 255-1 (under seal) at 2. Labaton characterizes the Master's statements as "virtually...an allegation of theft" from the class fund, id. at 2, which "constitutes an accusation of a crime," June 22, 2018 Tr. at 28. The Master states that he "is not making an accusation of a crime." Id. at 33. Nevertheless, Labaton argues that "[t]he Court should not permit these accusations to be disclosed publicly until the Court has determined whether they have any basis in law or fact." Docket No. 255-1 (under seal) at 2; Docket No. 261-4 at 2-3. "Labaton then requests that ultimately, the Court should strike these groundless and inflammatory assertions from the Special Master's Submission entirely, or order that they will be sealed permanently." Docket No. 255-1 (under seal) at 3.

The First Circuit has stated that "[r]aw, unverified information should not be as readily disclosed as matters that are verified." Kravetz, 706 F.3d at 62. However, "a court may consider whether the nature of the materials is such that there is a fair opportunity for the subject to respond to any accusations contained therein." Id. The Master's Report, while not submitted under oath, results from a lengthy investigation, by a former federal judge,

and cites evidence in the voluminous record to support its recommended findings. Labaton was allowed to obtain discovery, depose the witness on whom the Master primarily relies in characterizing the payment to Chargois as coming from "class funds," and to argue its position to the Master before the Report was filed. In addition, Labaton now has an opportunity to object to the characterization of the payment to Chargois as coming from "class funds." Therefore, the usual presumption of public access with regard to judicial records applies with regard to this issue.

Disputed allegations of misconduct are often made public in civil complaints, motions, and petitions for attorney discipline on the basis of no more than "an inquiry reasonable under the circumstances." Fed. R. Civ. P. 11(b).[7] Indeed, in the complaint Labaton filed on the public record in this case, it was alleged that State Street "generated as much as $500 million in profits" though deceptive practices, and that "[t]his money is taken directly out of the pockets of State Street's customers," the class. Docket No. 1 at ¶4. As this court observed in In re Auerhahn:

> It is customary for motions to be filed before responses are submitted. To find temporary impoundment justified merely on the ground that the public record is at the moment incomplete would generally erode the presumption in favor of public access to judicial documents.

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[7] Disputed allegations of criminal conduct are also regularly made public in indictments issued upon a finding of probable cause in criminal cases.

650 F. Supp. 2d 107, 113 (D. Mass. 2009).

In Auerhahn, this court temporarily sealed a petition for attorney discipline until a judge who was not involved in the underlying case made a determination of probable cause to support the allegations, but denied the attorney's motion to seal the petition and close the proceedings concerning it until the court decided its merits. See 650 F. Supp. 2d at 113. In doing so the court noted that it was providing more confidentiality than was usually allowed because in Massachusetts, "pursuant to S.J.C. Rule 4:01, §20(1)(c), once a petition for [attorney] discipline is filed, the petition and all subsequent proceedings are public." Id. at 110.

The Master's report is being made public and redacted versions of the exhibits to it will be unsealed. These exhibits will include reports from an expert on whom the Master relied, Professor Stephen Gillers. They will also include the deposition of one of Labaton's experts, Professor William Rubenstein, who testified:

> I think it's an important distinction in a big case like that that there are these two phases; that the fee is set in the aggregate in the first phase. That's the important phase 'cause that's when the class' money is being taken from the class. And that's the key to the whole thing in my opinion. And then once the Court has decided that's a fair fee to take from the client, then the question of how the lawyers divide that fee up among themselves is what I refer to as the allocation phase which I think has less pertinence for the class in most cases.

Rubenstein Dep. Tr. 23-24 (Ex. 235 under seal to Special Master's Report and Recommendation). The Master discusses Rubenstein's conclusions extensively in his Report. See R&R at 254-55, 278-80, 306, 341-43. The public will soon have access to Rubenstein's report and to those of six other experts retained by class counsel, which are all exhibits to the Report. Id. at 247 n. 188. Accordingly, contrary to Labaton's contention, the references to the payment coming from "class funds" does not make this case comparable to United States v. Amodeo, where unsealing a document would have aired "anonymous, unverified" accusations without disclosing the bases for them. 71 F.3d 1044, 1047 (2d Cir. 1995). Rather, the presumption of public access to judicial records has not been overcome on this issue.

C. Motion to Strike Supplemental Report of Professor Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery (Docket No. 268).

Labaton also moves to strike the Supplemental Expert Report of Gillers, which is Exhibit 233 to the Report. The Master engaged Gillers as an expert on legal ethics to advise the Master on the implications of the Chargois agreement and what the Master characterizes as Labaton's failure to disclose it to ATRS, the class, and the court. The Master indicated during Gillers' March 21, 2018 deposition that he intended to ask Gillers to amend his expert report. See Mar. 21, 2018 Tr. (Docket No. 270-1) at 423. On

May 8, 2018, after being deposed and reading the reports of class counsel's rebuttal witnesses, "Gillers supplemented his Report to clarify previous opinions and identify new ones." R&R at 248 n. 188. His new opinions included, among other things, the conclusion that Labaton had violated Federal Rule of Civil Procedure 11. See R&R, Ex. 233 (Docket No. 224-238 under seal) at 94-96. However, Gillers completed the Supplemental Report more than two weeks after the Master wrote in an April 23, 2018 letter to the court, which was made part of the public record, that "[w]e were prepared to file under seal with the Court by today a hard copy of the Report and Recommendation, together with all exhibits," but needed until May 14, 2018 to finish the Executive Summary and put the submissions on a searchable disk. Docket No. 217-1. Therefore, class counsel did not have an opportunity to respond to Gillers' new opinions before the Master relied on them for some of his conclusions, including that Labaton may have violated Rule 11.[8] See Exec. Summary at 43-44; R&R at 4 (TOC), 309-318, 359.

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[8] Gillers concluded that Lawrence Sucharow of Labaton violated Rule 11 because he listed the law firms that filed appearances in this case, but not Chargois, as "Plaintiffs' Counsel," in Labaton's fee petition. He opines that the omission implied the listed firms were the only ones being paid from the attorneys' fee award. Although the Master wrote that Sucharow's statement was "technically accurate" because "Chargois is not 'Plaintiffs' Counsel," the Master wrote that the statement "created a subterfuge to camouflage the fact that Chargois received $4.1 million from class funds and that this payment was not being disclosed." R&R at 311. Therefore, the Master concludes that it was a "material and

Therefore, Labaton moves to strike the portions of the Report that rely on Gillers' Supplemental Report. In the alternative, it requests:

> an opportunity to respond to Prof. Gillers' late-breaking, significant opinions, specifically by (1) allowing Labaton's experts to rebut the Supplemental Gillers Report in brief supplemental reports of their own; (2) allowing Labaton's counsel to cross-examine Prof. Gillers on his new and changed opinions, modifications and omissions in a deposition; and (3) allowing Labaton's counsel to present its experts and cross-examine Prof. Gillers in an evidentiary hearing before the Court.

Docket No. 272 at 13. Labaton asserts, however, that the court should strike the portions of the Report stating that Sucharow may have violated Rule 11 because of the potential damage to his reputation. See June 22, 2018 Tr. at 51.

As explained earlier, public access to judicial records and documents is important, in part, because transparency allows the public to "monitor the functioning of our courts, thereby insuring quality, honesty, and respect for our legal system." See Nat'l Org. for Marriage, 649 F.3d at 70 (quoting Standard Fin. Mgmt. Corp., 830 F.2d at 410 and In Re Cont'l III Secs. Litig., 732 F.2d 1302, 1308 (1st Cir. 1987)). As the public will understand, the Master's recommendations are not findings of fact by the court. Labaton will have a full opportunity to contest Gillers' opinion

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intentional omission from Sucharow's Declaration," but does not conclude it violated Rule 11 because of a lack of First Circuit case law holding that an omission may do so. Id. at 317.

that Labaton and Sucharow violated Rule 11, see Fed. R. Civ. P. 53(f), and will do so vigorously. They will be able to present any evidence previously provided to the Master. See Fed. R. Civ. P. 53(f)(1); May 31, 2018 Order (Docket No. 237), ¶12. It is in the interest of the administration of justice that the public be allowed to monitor the resolution of this dispute, among others.

The court questions whether it is necessary for Labaton to depose Gillers again or cross-examine him in an evidentiary hearing. The court did not appoint Gillers as an expert witness, and it doubts that his opinions--or those of class counsel's rebuttal experts--should be considered expert testimony under Federal Rule of Evidence 702. Most of Gillers' opinions provide interpretations of ethical rules. However, "[e]xpert testimony on...purely legal issues is rarely admissible." Nieves-Villanueva v. Soto-Rivera, 133 F.3d 92, 99 (1st Cir. 1997); see also Pelletier v. Main St. Textiles, LP, 470 F.3d 48, 55 (1st Cir. 2006); Gomez v. Rodriguez, 344 F.3d 103, 114 (1st Cir. 2003); Marx & Co. v. Diners' Club, Inc., 550 F.2d 505, 512 (2d Cir. 1977). The "experts" on legal ethics may be more appropriately viewed as amici curiae or advisors whose views the parties may incorporate in their legal arguments. See Conservation Cong. v. U.S. Forest Serv., 2015 WL 300754, at *1 (E.D. Cal. 2015) ("District courts frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved

or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.").

Nevertheless, because the Master and the law firms have to date treated Gillers and the law firms' experts as fact witnesses, the court is allowing Labaton to depose Gillers again and to submit supplementary responses from its experts. The proper remedy, if any, for the late disclosure of Gillers' opinion concerning Rule 11 is not, however, redaction of the Report.

II. STATE STREET'S MOTIONS (Docket Nos. 252 and 291-1)

State Street moves to redact references in the Report to statements it asserts its counsel made, and information it asserts was produced, during the mediation of the underlying case. The First Circuit has not decided whether to recognize a federal mediation privilege. However, assuming such a privilege exists, neither it nor the Massachusetts privilege would apply to the information State Street requests be deemed privileged and redacted.

In the underlying case, the parties hired a mediator, who held several mediation sessions between October, 2012 and January, 2015. While they were mediating the case, the parties conducted extensive discovery. See R&R at 39-42. State Street requests redactions of statements on pages 33-34 of the Report that it "threatened...during the course of mediation" to "file contractual

counterclaims against [members of the class who were clients of State Street] based on indemnification clauses in their custody contracts."

There is a Massachusetts mediation privilege that protects "[a]ny communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person." Mass. Gen. Laws Chapter 233, §23C. The courts that have recognized a federal common-law mediation privilege have appropriately given it a scope similar to the Massachusetts privilege. They have held that the federal privilege applies to "communications to which a mediator was personally privy, communications that were directly made at a mediator's explicit behest, or communications undertaken with the specific intent to present them to a mediator for purposes of mediation are protected by the federal [common law] mediation privilege." ACQIS, LLC v. EMC Corp., 2017 WL 2818984, at *2 (D. Mass. 2017); see also In re: RDM Sports Grp., Inc., 277 B.R. 415, 431 (Bankr. W.D. Ga. 2002)(applying the privilege to "communications made to the mediator, between the parties during the mediation, or in preparation for the mediation"). However, "[s]ettlement negotiations in which a mediator is not actively and directly involved that follow a formal mediation are not protected by the mediation privilege, even when they contain information learned during the mediation or where they occurred in light of

mediation, and such communications must therefore be produced barring any other applicable rules." Id.

State Street has provided no evidence or argument that the threat to file counterclaims against class members was made only "during a mediation session, with the mediator present," and not during a private settlement discussion or in other circumstances to which a Massachusetts or federal mediation privilege would apply. See ACQIS, 2017 WL 2818984, at *2; Mass. Gen. Laws Chapter 233, §23C. The statement in the Report that the threat occurred "during the course of mediation" is general and conclusory, not the particularized factual demonstration necessary to justify redacting relevant information from a judicial record. Kravetz, 706 F.3d at 60.

Based on another claim of mediation privilege, State Street also seeks redaction of the statement on page 46 of the Report that the "agreement [] to allocate 9% of the total fee awarded (if successful) to ERISA Counsel [] was based largely on the premise that the total ERISA case volume comprised five to nine percent of the total FX [or 'foreign exchange'] trading volume." District of Massachusetts Local Rule 16.4(c)(2)(F) states that:

> Any communication related to the subject matter of the dispute made during the mediation by any participant, mediator, or any other person present at the mediation shall be a confidential communication to the full extent contemplated by Fed. R. Evid. 408. No admission, representation, statement, or other confidential communication made in setting up or conducting the

> proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery.

Id. (emphasis added). The court in Sheldone v. Pa. Tpk. Comm'n, relying on a similar local rule, determined that "the most compelling reason for recognizing the mediation privilege is the Plaintiffs' lack of entitlement to any admission of the Defendant that, but for the mediation process, would not have come into being," and "that the mediation privilege does not protect from disclosure any evidence otherwise and independently discoverable merely because it was presented in the course of the mediation." 104 F.Supp.2d 511, 517 (W.D. Pa. 2000). This principle is equally applicable in this case.

While State Street contends in its unsworn memorandum that the "percentages of [the ERISA] FX volume...was prepared and communicated as part of a confidential mediation communication during the mediation," Docket No. 312-2 (under seal) at 4, it provides no evidence that the information was produced solely for mediation, with the understanding that it would not be used for litigation.[9] Rather, the parties agreed that information produced

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[9] At the June 22, 2018, counsel for State Street stated that the information was provided "as part of the mediation," but did not state that it provided for a mediation session between plaintiffs and State Street. He suggested it was provided to the Securities and Exchange Commission and the Department of Labor, as well as the plaintiffs, to devise the plan to allocate the agreed-upon settlement fund among the class members. See June 22, 2018 Tr. at 78-80. In any event, his representations concerning the FX trading

in discovery would be used to litigate the case if the mediation was unsuccessful. See Nov. 19, 2012 Lobby Conf. Tr. (Docket No. 20) at 20-21; Nov. 19, 2012 Protective Order, ¶¶2, 11 (Docket No. 61)(providing that discovery would be used "for purposes of litigating" the case and "in any proceeding in [the case], including, if otherwise permissible, as evidence at any hearing or trial, in open court, or on appeal"). State Street has not shown, therefore, that this information was "not otherwise discoverable or obtainable." L.R. 16.4(c)(2)(F); Sheldone, 104 F.Supp.2d at 517. Therefore, it has not shown that any mediation privilege applies to it.

State Streets' threat to assert counterclaims is relevant to the Master's discussion of the challenges class counsel faced and the appropriate amount of the fee award. The FX trading volume is relevant to the Master's recommendation that a portion of Labaton's fee be given to counsel for the ERISA class instead. State Street has not identified any competitive disadvantage that will be caused if the information were made public. Therefore, State Street has not made the required "particular factual demonstration of [the] potential harm" flowing from disclosure of its threat to bring a

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volumes were not supported by an affidavit as required by the May 31, 2018 Order, ¶2.

counterclaim or the FX trading volume information from the Report. Kravetz, 706 F.3d at 60.

In contrast, the request of State Street's counsel, Wilmer Cutler Pickering Hale and Dorr, LLP ("WilmerHale"), to redact the hourly rates it charges for partners, counsel, and associates at its firm, see R&R at 167 & 174, is meritorious. A firm's "confidential pricing information is routinely given trade secret protection" because its disclosure can put the firm at a competitive disadvantage when competing with other firms for clients. EMC Corp. v. Pure Storage, Inc., 2016 WL 7826662, at *6 (D. Mass. 2016); see also Bruno Int'l Ltd. v. Vicor Corp., 2015 WL 5447652, at *12 (D. Mass. 2015); Aggreko, LLC v. Koronis, 2013 WL 6835165, at *4 (D. Mass. 2013); Oliver Wyman, 282 F.Supp.3d at 706.

The Master relied in part on the range of rates State Street paid its attorneys in determining that "that the hourly rates billed on the [class counsel's] Fee Petition for partners and associates were reasonable." R&R at 176. The Master's counsel stated that "[o]ne of the best comparisons in a case such as this" for class counsel's hourly rates "is what the defense is paying its staff attorneys." June 22, 2018 Tr. at 74. The Master states in the Report that the ranges of hourly rates for WilmerHale attorneys is consistent with the ranges used by Class Counsel in their fee petition and the average hourly rates for Boston, New

York City, San Francisco, and Washington, D.C., which the Report recites. See R&R at 167. More precise information concerning WilmerHale's ranges is not necessary for the public to understand or evaluate the Master's findings.

WilmerHale has a legitimate interest in keeping information concerning its hourly rates confidential. WilmerHale has provided an affidavit that states it keeps its rate information confidential and disclosure of it "would prejudice both WilmerHale and State Street by putting [them] at a disadvantage relative to other law firms when negotiating rates." Docket No. 291-3 at ¶3. The Master acknowledged that hourly rate information is "proprietary" to firms and not frequently disclosed. R&R at 162. The argument for redaction of WilmerHale's rates from the Report is enhanced by the interest of the public and judicial system in encouraging law firms to disclose such information to assist courts in determining reasonable hourly rates for the purpose of awarding fees. At the June 22, 2018 hearing, counsel for the Master explained that "finding ground truth on the rates is very, very difficult. We commissioned a NALFA survey; and to say that we did not get great participatory response would be an understatement." June 22, 2018 Tr. at 74. These considerations outweigh the public interest in disclosure of the exact ranges of rates WilmerHale charged State Street. Therefore, the request to redact this information is meritorious.

State Street also requests that parts of the depositions in these proceedings that are not relevant to the Master's findings or conclusions, or the parties' arguments concerning them, not be made part of the public record. As indicated earlier, the public's interest in the disclosure of information that "does not appear necessary or helpful in resolving" an issue is less weighty than its interest in information on which a court relies in resolving disputes. Refco Grp., 2015 WL 4298572, at *5; see also Oliver Wyman, 282 F. Supp. 3d at 707. Although irrelevance alone does not justify sealing information in a judicial record, State Street asserts that the irrelevant portions of the depositions contain sensitive information, such as information covered by the mediation privilege, and that it would be expensive and time consuming to redact it from the depositions.

It is customary to file only the relevant parts of a deposition transcript when requesting judicial action. See, e.g., L.R. 26.6 (requiring parties to file only "the pertinent parts" of a deposition transcript with a motion for summary judgment). In view of the volume of the deposition testimony produced in this case, line-by-line redactions would indeed be an expensive and protracted process. Doing so would delay the public filing of the exhibits. Therefore, the court is ordering the parties to submit versions of the deposition transcripts for the public record that contain only the pages cited in the Report and their necessary

context, as well as any other excerpts the parties deem relevant to the resolution of the issues in these proceedings, with appropriate redactions. The complete transcripts of depositions that are exhibits to the Report will remain part of the record for decision.

III. REQUESTS TO TEMPORARILY RETAIN THE MASTER'S SUBMISSIONS UNDER SEAL (Docket No. 229, ¶10, Docket No. 289, ¶5, and Docket No. 297, ¶8)

As indicated earlier, Customer Class counsel request that the Master's submissions remain under seal until the court decides whether to adopt, modify, or reject the Master's findings of facts and conclusions of law, see Fed. R. Civ. P. 53(f)(3) & (4), or at least until they file their objections, which are due seven days after the unsealing of the Report. See May 16, 2018 Order at ¶4. However, they have not provided any persuasive reason to depart in these proceedings from the "customary [practice that] motions [are] filed [publicly] before responses are submitted." Auerhahn, 650 F. Supp. 2d at 113. Moreover, "to find temporary impoundment justified merely on the ground that the public record is at the moment incomplete would...erode the presumption in favor of public access to judicial documents." Id. Accordingly, immediate disclosure of the redacted Report and Executive Summary is most appropriate. The court is also ordering the unsealing of the exhibits when appropriate redactions are made.

IV. ORDER

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

1. Labaton's Motion to Redact and Retain under Seal (Docket No. 254) is DENIED with respect to the information it seeks to redact from the Report. Labaton's reply in support of the motion (Docket No. 313) is UNSEALED.

2. Labaton's Motion to Redact and/or Strike Statement in the Special Masters Report Regarding Class Funds (Docket No. 255) is DENIED and UNSEALED.

3. Labaton's Motion to Strike Supplemental Report of Professor Stephen Gillers and Related Portions of Master's Report and Recommendations, or, in the Alternative, to Allow Additional Expert Discovery (Docket No. 268) is DENIED in part and ALLOWED in part. Gillers' supplemental report and references to it in the Report shall not be sealed or struck. However, Labaton may depose Gillers again concerning the conclusions in his supplemental report and submit supplementary responses from its own experts. The redacted versions of the motion and Labaton's memoranda and affidavit in support of it (Docket Nos. 271, 272, 273, and 323) are UNSEALED.

4. State Street's Motion to Seal (Docket No. 251-1) is ALLOWED in part and DENIED in part. The information concerning WilmerHale's hourly rates shall be redacted from the version of the Report that is being unsealed. State Street's redacted

memoranda in support of its motions (Docket Nos. 291-1 and 312-1) are UNSEALED.

5. The Special Master's redacted responses to the foregoing motions (Docket Nos. 339-42) are UNSEALED.

6. In the absence of a meritorious objection, the court will unseal the unredacted versions of the parties' memoranda and affidavits in support of their proposed redactions after they file the redacted exhibits to the Report for the public record. If a party contends that an unredacted submission should remain sealed, it shall explain its position when the redacted exhibits are filed.

7. The June 26, 2018 Motion of Customer Class Counsel for Process Associated With Release of Report Before Release of Exhibits (Docket No. 349) is ALLOWED in part and DENIED in part. The request to defer unsealing the redacted Report and Recommendation to permit simultaneous filing of the objections to it is DENIED. The request to reference or quote in the objections information in the sealed exhibits as to which no party has requested redactions is ALLOWED.

8. The Report and Recommendation with the redactions authorized by this Memorandum and Order shall be unsealed forthwith.

9. The Master and the law firms shall promptly confer in an attempt to reach an agreement on a redacted form of the exhibits to the Report that conforms to the decisions in this Memorandum

and Order. The redacted form of exhibits shall include each of the June 13, 2018 proposed redactions (Docket No. 297) to information which: (a) the court has not ordered be made public; and (b) the parties have not agreed to make public. If the parties have reached an agreement, the Master shall, as soon as possible but in any event by July 10, 2018, file the redacted exhibits for the public record. If the Master and the law firms have not agreed on the redactions to any exhibit(s) that conform to this Memorandum and Order, they shall, by July 10, 2018, file under seal their respective versions of the proposed redactions and explain the reasons for their respective positions.

10. If the parties are unable to file a redacted version of the exhibits before filing their objections, the memoranda in support of objections to the Report may cite and quote from any portion of an exhibit not proposed for redaction in the June 13, 2018 consolidated submission, Docket No. 297. The memoranda may also quote any information that was subject to a redaction request denied in this Memorandum and Order. Any references to other information redacted from an exhibit may be included in memoranda filed, at least temporarily, under seal.

11. Class counsel may further depose Stephen Gillers, by Skype or its equivalent, or if deemed necessary by them in person at a location convenient for Gillers, for up to six hours on July 10, 11, 12, 16, or 18, 2018.

12. Class counsel shall, by July 26, 2018, file any supplement to their objections to the Report and include with it any supplemental reports of their experts on which they rely.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff, **No. 11-cv-10230-MLW**
Hon. Mark L. Wolf

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs, **No. 11-cv-12049-MLW**

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs, **No. 12-cv-11698-MLW**

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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I. INTRODUCTION

This investigation, conducted in the post-settlement phase of the case, has raised a number of significant issues that are important to the conduct and administration of large class actions generally and this case in particular. Among these issues are the appropriate rules and policies governing attorney fee petitions, the approach plaintiffs' counsel use in their fee petitions -- including appropriate billing rates -- and the obligations of lead counsel to act with candor and transparency toward their clients, the class, the court, and co-counsel, in general, and as to any financial obligation that will be paid from class funds in particular. After a lengthy investigation, the Special Master finds that in several significant areas, the Court was not provided accurate and reliable information in the fee petitions and at the fairness hearing and, unfortunately, these failings had profound and adverse ramifications throughout the fee approval process. The redress the Special Master recommends at the conclusion of the Report is intended, to the extent possible, to remedy these failings.

At the outset, the Special Master makes two observations. First, the Special Master recognizes the important role class actions and plaintiffs' class action attorneys play in protecting and enforcing the rights of consumers, injured parties and the public in general. To adequately fulfill this role, class action plaintiffs require sophisticated, well-resourced attorneys who should be compensated at rates comparable to those of the large, sophisticated, well-resourced defense firms who will in the vast majority of cases be opposing them. Second, an equally important part of the class action framework is ensuring the integrity of the fee petition process. Because the fee petition process is often

non-adversarial, as it was in this case, for the system to work properly, honesty, reliability and transparency are essential to enable the Court to adequately fulfill its assigned gatekeeping and fiduciary responsibilities to class members. This case and the evidence adduced during the Special Master's investigation fully exemplifies the importance of both of these policy objectives.

The underlying case here was a class action alleging unfair and deceptive practices in conducting complex foreign exchange transactions and required highly skilled and sophisticated counsel. After much work, dedication and exceptional effort in the discovery and mediation process, the parties ultimately reached a $300 million settlement. Given the risks, complexities and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by skilled and dedicated plaintiffs' counsel, was an excellent result for the class. The Court approved the settlement on November 2, 2016. Of the $300 million, plaintiffs' counsel were awarded $74,541,250.00 in attorneys' fees and $1,257,699.94 for expenses. By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved.

Unfortunately, this investigation has shown that all other things were not equal. Almost immediately after approval of the settlement, the laudable result obtained for the class became tainted when questions began to arise as a result of media inquiries concerning the fee award which, in turn, caused the Court to appoint a Special Master to

investigate and prepare a Report and Recommendations concerning all issues relating to the attorneys' fees, expenses and service awards the Court had approved in the case. The Special Master's investigation has spanned a period of some fourteen months and encompassed written discovery, the production of 200,000 pages of documents, 34 witness interviews and 63 depositions. Beyond this, the law firms that were the subject of the investigation were given extensive opportunities to contribute to the legal and factual record through briefing, providing expert opinions and oral argument, input which was helpful to the Special Master in obtaining a more complete view of the factual, legal and ethical issues raised in the investigation.

The investigation is now complete. The Special Master's Report and Recommendations detail a mixed narrative of good intentions, great talent, and undeniable accomplishment and result, undermined by serious albeit inadvertent mistakes compounded by a troubling disdain for candor and transparency that at times crossed the line into outright concealment of important material facts, including the payment of an enormous amount of money from class funds to a lawyer who never appeared in the case, did no work on the case, and whose identity was intentionally hidden from the clients, the class, co-counsel and the Court.

Exacerbating matters is the fact that this payment grew out of an obligation that long pre-existed the *State Street* case and was the sole obligation of one law firm -- an obligation that this law firm shifted to the class and its co-counsel.

In short, this Report chronicles a lamentable and dismaying tale of a great result achieved by fine and highly effective lawyering that became tainted and entangled in a

web of concealment and highly questionable ethical practices by experienced attorneys who should have known better.

Having heard and considered the testimony of the witnesses, many of whom were designated as experts, and the arguments of counsel, and having reviewed and considered the parties' interrogatory responses, the documents they produced, and their supplemental submissions, the Special Master now makes the following Findings of Fact, Conclusions of Law, and Recommendations to the Court. To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that any Conclusions of Law constitute Findings of Fact, they are so adopted.

II. FINDINGS OF FACT

A. BACKGROUND

This litigation involves three separately-filed class action complaints against State Street Bank and Trust Company ("State Street") that were subsequently consolidated for pre-trial purposes. The three consolidated cases are:

Case Number	Plaintiffs	Class Representatives	Attorneys
11-cv-10230	Arkansas Teachers Retirement System ("*ATRS*")	ATRS (George Hopkins, Executive Director)	Thornton Law Firm (f/k/a Thornton & Naumes, LLP); Labaton Sucharow LLP; and Lieff Cabraser Heimann & Bernstein, LLP
11-cv-12049	Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland (collectively the "*Henriquez* Plaintiffs")	Arnold Henriquez, Michael T. Cohn, William R. Taylor, and Richard A. Sutherland	McTigue Law LLP (formerly McTigue & Veis, LLP); Beins, Axelrod, P.C.; Richardson Patrick Westbrook & Brickman LLC (succeeded by Zuckerman Spaeder, LLP)
12-cv-11698	The Andover Companies Employee Savings and Profit Sharing Plan, and James Pehoushek-Stangeland (collectively the "*Andover* Plaintiffs")	Alan Kober and James Pehoushek-Stangeland	Keller Rohrback, L.L.P.

In total, Plaintiffs alleged that State Street, which served as the custodial bank for public and private pension funds, mutual funds, and investment funds, engaged in unfair and deceptive practices in conducting "indirect" or "standing instruction" foreign currency exchange ("FX") transactions on behalf of its customers, without disclosing mark-ups to clients that ultimately inured to State Street's benefit. Specifically, that State Street executed FX transactions -- which required converting or "exchanging" foreign investments to/from foreign currencies -- either at the high end (when buying), low end (when selling), or outside the range of currency fluctuation for a particular day.

1. Background to the State Street Litigation

This litigation had its genesis in a California *qui tam* action filed under seal on April 14, 2008 by "Associates Against FX Insider Trading," on behalf of California public pension funds. [EX. 1]. The relators were represented by the Thornton Law Firm ("Thornton") and Lieff Cabraser Heimann & Bernstein, LLP ("Lieff" or "Lieff Cabraser").[1] *See* 9/15/16 Declaration of Lawrence Sucharow in Support of Motion for Final Approval of Class Settlement, MAD No. 11-cv-10230, Dkt. # 104, ¶ 24 [EX. 3]; *see also* Thornton 6/19/17 Dep., pp. 35:22 – 36:14 [EX. 2].[2] The *qui tam* lawsuit was unsealed on October 20, 2009, when the California Attorney General filed a Complaint-in-Intervention charging State Street with misappropriating more than $56 million from California's two largest public pension funds: the California Public Employees' Retirement System ("CalPERS") and the California State Teachers' Retirement System ("CalSTRS"). *See People of the State of California, ex rel. Edmund G. Brown, Jr. v. State Street Corporation, et al.,* Cal. Super. Ct. No. 34-2008-00008457-CU-MC-GDS

[1] The relators in the California *qui tam* action had been referred to the Thornton Law Firm by Harry Markopolos, an individual who "makes his living by referring whistleblowers to law firms to bring actions." Thornton 6/19/17 Dep., p 37:9-24. [EX. 2].

[2] Michael Thornton testified that he asked Lieff Cabraser to join Thornton in the California *qui tam* action because of Thornton's long-time relationship with Bob Lieff and Richard Heimann:

> [W]e've known them for a long time. I can't tell you exactly when we started. I've known Bob Lieff. I've known Richard Heimann for a long time. From, I'd say the eighties and we got to know each other better because they were heavily involved in the tobacco litigation in the nineties. Unlike us, they represented several states so they were known. And I had an opportunity to work with and become friends with Bob Lieff and Richard Heimann and Elizabeth Cabraser. And I thought they were good lawyers and they're nice people, people to work with.
>
> So, when we were filing something in California, we obviously needed California counsel. None of my firm were members of the California bar, and we asked if they would join us and they did.

Thornton 6/19/17 Dep., pp. 36:17 – 37:8. [EX. 2].

[EX. 1]; *see also* Sucharow Decl., ¶ 25 [EX. 3]; Thornton 6/19/17 Dep., p. 40:1-9 [EX. 2]. The Complaint-in-Intervention was the first public indication of State Street's allegedly unfair and deceptive practices concerning indirect FX and the first largescale action concerning FX practices. Sucharow Decl., ¶ 25 [EX. 3]; Thornton 6/19/17 Dep., p. 41:11-17 [EX. 2].

After the allegations against State Street became public, George Hopkins, the Executive Director of the Arkansas Teacher Retirement System ("ATRS"), became interested in the issue since State Street was ATRS's custodial bank. Hopkins 6/14/17 Dep., pp. 37:11 – 38:15. [EX. 4]. ATRS then retained Labaton Sucharow LLP ("Labaton"), which was serving as one of its "monitoring counsel,"[3] to investigate potential class and individual claims that could be brought against State Street on behalf of ATRS and its members. Sucharow Decl., ¶ 26. [EX. 3]. This was Labaton's first foray into FX litigation. Therefore, with ATRS's approval, Labaton teamed with Thornton and Lieff, given, among other considerations, their knowledge gained from their representation of the relators in the California *qui tam* action, and began an investigation. *Id*. *See also* George Hopkins Declaration, Dkt. # 104-1, ¶ 8 [EX. 5]; Thornton 6/19/17 Dep., pp. 43:13 – 44:4. [EX. 2].

After investigating and researching potential claims against State Street, on February 10, 2011, Labaton filed a class action complaint on behalf of ATRS (superseded

[3] "Monitoring counsel" refers to lawyers who review the performance of securities held by institutional investors to ensure their investments are handled appropriately and are not the subject of fraud or other illegal activity. *See* Eisenberg, Jonathan, *Litigating Securities Class Actions,* § 1.02(1)(d), "Portfolio Monitoring" (Lexis/Nexis 2017).

by an Amended Complaint on April 15, 2011) alleging that State Street had violated the Massachusetts Consumer Protection Act, and making several common law claims. *See Arkansas Teacher Retirement System v. State Street Corp., et al.*, MAD No. 11-cv-10230, Dkt. # 1 [EX. 6], 10.[4] [EX. 7]. The ATRS complaint was the first indirect (or "standing instruction") FX class action brought in any court. Sucharow Decl., Dkt. # 104, ¶ 35.[5] [EX. 3].

Although in investigating the claims, counsel worked essentially from a clean slate, after the ATRS complaint was filed, counsel had the benefit of a substantial amount of information they learned in the course of a subsequently-filed multi-district FX case brought against the Bank of New York Mellon, *In re The Bank of N.Y. Mellon Corp. Forex Transactions Litig*., SDNY No. 12-MD-2335 ("*BONY Mellon*").[6] The *BONY Mellon* MDL proceeded in the Southern District of New York at the same time that the *State Street* case was being litigated (and mediated) in this Court. *BONY Mellon* was settled before this case, in September 2015, for $335 million in recovery to the class of custody clients, plus fines and penalties paid to various government agencies. *See*

[4] The complaints also originally named State Street Corporation ("SSC"), State Street's parent corporation, and the separate subsidiary State Street Global Markets LLC ("SSGM LLC") as party-defendants. On May 8, 2012, the Court entered an Order dismissing all claims asserted against SSC and SSGM LLC.

[5] In "indirect" FX trades, custody clients and investment managers do not negotiate individual transaction rates with their custodian bank, nor does the bank quote rates for a given transaction. Rather, as the name suggests, custody clients (or their investment managers) engage their custodian bank to provide ongoing custody FX services in accordance with standing instructions, and rely upon the bank to execute those FX trades on their behalf. Sucharow Decl., Dkt. # 104, ¶ 17. [EX. 3].

[6] The first of the various complaints comprising the *BONY Mellon* MDL was filed in November 2011, nine months after the *ATRS* complaint was filed.

9/24/15 Order and Final Judgment, SDNY No. 12-MD-2335, Dkt. # 638.[7] [EX. 8]. Lieff Cabraser was co-lead counsel for the nation-wide consumer class in the case. Chiplock 6/16/17 Dep., pp. 23:25 – 24:4; 25:12-22. [EX. 10]. The Thornton Law Firm, McTigue Law, and Keller Rohrback also were involved in the case. Thornton 6/19/17 Dep., 85:18-21 [EX. 2]; McTigue 7/7/17 Dep., 9:23 – 10:11; 12:22 – 13:4. [EX. 11].

Like this case, the *BONY Mellon* case was ultimately resolved by way of a mediated settlement, but unlike this case, the *BONY Mellon* case was vigorously litigated for three years prior to mediation. Chiplock 6/16/17 Dep., pp. 29:23 – 30:15. [EX. 10]. ("It was a very, very hard-fought litigation." *Id.*) That case involved intense discovery: more than 120 depositions were taken and more than twenty million documents were produced and reviewed. *Id.* As Dan Chiplock of Lieff Cabraser testified, the attorneys' experience in *BONY Mellon* allowed counsel to develop a baseline of familiarity and expertise that they brought to the *State Street* case. *Id.*, p. 27:11-17.

B. THE PARTIES, ATTORNEYS, AND COMPLAINT HISTORY

1. The Customer Class Complaint

The first of the complaints comprising the *State Street* litigation was filed by the ATRS on February 10, 2011 (the "Customer Class Complaint"). *See Arkansas Teacher Retirement System v. State Street Corp., et al.*, MAD No. 11-cv-10230, Dkt. # 1. [EX. 6].

ATRS is a cost-sharing, multi-employer defined-benefit pension plan, based in Little Rock, Arkansas, that provides retirement benefits to public school and other public

[7] Of the $335 million settlement, the attorneys in *BONY Mellon* were awarded $83,750,000 in fees and $2,901,734.19 in total expenses. SDNY No. 12-MD-2335, Dkt. # 637. [EX. 9].

education-related employees in the State of Arkansas. *ATRS* Amended Complaint, ¶ 14, MAD No. 11-cv-10230, Dkt. # 10 ("the *ATRS* Complaint"). [EX. 7]. ATRS was established in 1937 as an office of the Arkansas state government for the purpose of providing retirement benefits for employees of any Arkansas school or other educational agency participating in the system. *Id.* According to George Hopkins, the Executive Director of the ATRS Board, ATRS is a $16 billion pension plan with 75,000 active members and 45,000 retirees. Hopkins 6/14/17 Dep., pp. 10: 20-21; 13:18; 14:8-9, 14-15. [EX. 4].

Like many institutional investors, ATRS invests some of its pension assets in foreign securities, referred to by ATRS as "Global Equity" securities. *See ATRS* Amended Complaint, ¶ 15. [EX. 7]. Global Equity investments are ATRS's single largest investment asset class. *Id.* State Street has been ATRS's exclusive custodian bank since 1998. *Id.*; Hopkins 6/14/17 Dep., pp. 38:14-15; 45:7-8. [EX. 4].

ATRS is a sophisticated, institutional plaintiff that has been involved in a number of securities and securities-related actions in recent years. George Hopkins testified that since he became Executive Director of ATRS in December 2008, ATRS has been lead or co-lead plaintiff in approximately 30 class actions. *Id.*, p. 32:9-13. Hopkins explained that shortly after he took over as Executive Director, some Arkansas state legislative leaders summoned him to the Capitol and told him they thought ATRS ought to be involved in securities litigation: "[T]he other [State] Retirement System was, and they thought we ought to be, too." Hopkins 9/5/17 Dep., p. 17:12-17. [EX. 12].

Q: And did the legislators that called you over indicate why they were interested in securities litigation?

A [by Hopkins]: I got the idea that, you know, they understood the Retirement System had a lot of, you know, financial issues. I mean, obviously, we did -- when I got there, our system was in deep trouble both operationally, I think politically because they thought that the system didn't have a strong board, didn't have strong leadership, and we were, obviously, in trouble actuarially, you know, when you have those kind of losses, and I think they thought, you know, part of my duty was to bring in all the money I could. That was sort of the message I got.

Id., p. 18:4-19.

ATRS and the Customer Class are represented in this action by Labaton Sucharow, Lieff Cabraser, and Thornton. Shortly after filing the *ATRS* Complaint, Labaton moved for, and was subsequently appointed, Interim Lead Counsel for the proposed class. *See* Dkt. # 7-8 [EX. 13; EX. 14]; 28.[8] [EX. 15]. Thornton was designated as liaison counsel, and Lieff was designated as additional counsel for the proposed class. *See id.*

Labaton has represented many pension funds and other institutional investors, and has extensive securities class action experience. *See generally* Sucharow 6/14/17 Dep., pp. 10:13-14, 12:10-13 [EX. 16]; Belfi 6/14/17 Dep., pp. 9:16-20. [EX. 17]. Labaton also had a pre-existing relationship with ATRS and its Executive Director, George Hopkins, having served since 2008 as one of ATRS's monitoring counsel, and also having represented ATRS in at least two full-scale securities class actions prior to the *State Street* matter. *Id.*, p. 13:16-20.

[8] "Plaintiff's Assented to Motion for the Appointment of Interim Lead Counsel for the Proposed Class" and supporting brief were filed on April 7, 2011 [Dkt. # 7; 8] [EX. 13; EX. 14] but not ruled upon by the Court until January 12, 2012 [Dkt. # 28.] [EX. 15].

Lieff Cabraser has represented plaintiffs in many large class actions involving securities or financial fraud. *See* Fineman 6/6/17 Dep., pp. 8: 23-25, 9: 2-8. [EX. 18]. It is considered by many to be one of the preeminent plaintiffs' class action law firms in the nation. The firm also has had substantial FX experience having represented, along with Thornton, the relators in the California *qui tam* action, and served as co-lead counsel in *BONY Mellon*. *Id.*, pp. 10:24-25, 11:2-18; 12:2-24; Heimann 7/17/17 Dep., p. 32:3-6. [EX. 19]. Thornton, the smallest of the three firms representing the Customer Class,[9] was also involved in the *BONY Mellon* case and, as indicated, also represented the relator in the California *qui tam* action. Thornton 6/19/17 Dep., pp. 32:17-20; 36: 8-14; 37:9-11 [EX. 2]; Lesser 6/19/17 Dep. pp., 16:20-24, 17:1. [EX. 20].

In its initial Complaint, ATRS alleged that State Street engaged in unfair and deceptive acts and practices in connection with indirect FX transactions. Its principal theories of recovery were violation of the Massachusetts Consumer Protection Act, Mass. Gen. Laws, ch. 93A, §§ 2, 11,[10] and breach of duty of loyalty. *See Arkansas Teacher*

[9] Michael Thornton testified that the firm has only 18 lawyers. Thornton 6/19/17 Dep., p. 32:15-18. [EX. 2]. By contrast, the Labaton and Lieff firms each have 50-60 full-time lawyers. *See* www.labaton.com; www.lieffcabraser.com.

[10] The Massachusetts Consumer Protection Act, Mass. Gen. Laws, ch. 93A, § 2, provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Mass. Gen. Laws, ch. 93A, §2(a).

Section 11 of Chapter 93A extends the protections of the statute to businesses. In relevant part, Section 11 provides:

> Any person who engages in the conduct of any trade or commerce and who suffers any loss of money or property, real or personal, as a result of the use or employment by another person who engages in any trade or commerce of an unfair method of competition or an unfair or deceptive act or practice declared unlawful by section two . . . may, as hereinafter provided, bring an action . . . , whether by

Retirement System v. State Street Corporation, MAD No. 11-10230, Dkt. # 1. [EX. 6]. The Amended Complaint added a new claim for relief under Section 9 of Chapter 93A. *See id.*, Dkt. # 10.[11] [EX. 7]. The Amended Complaint also alleged class claims of breach of duty of trust and negligent misrepresentation, and a separate claim for breach of contract on behalf of ATRS, individually. *Id.*

State Street is the nation's second-largest custodian bank, with $21.5 trillion in assets, including $4.7 trillion in pension assets, under custody and administration as of December 31, 2010. *ATRS* Compl., ¶ 2. [EX. 7]. As part of its array of ancillary custodial services, State Street executed "FX" transactions on behalf of its clients in order to facilitate clients' purchases or sales of foreign securities or the repatriation of foreign currency into U.S. dollars. *Id.*, ¶ 3.

Pension funds and other institutional investors have increasingly looked to overseas companies and securities markets in order to diversify their holdings and maximize investment returns. *Id.* The necessity for pension funds, in particular, to invest

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way of original complaint, counterclaim, cross-claim or third-party action for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

Mass. Gen. Laws, ch. 93A, § 11.

[11] Section 9 of Chapter 93A provides, in relevant part:

(1) Any person . . . who has been injured by another person's use or employment of any method, act or practice declared to be unlawful by section two . . . may bring an action . . . whether by way of original complaint, counterclaim, cross-claim or third-party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper.

(2) Any persons entitled to bring such action may, if the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated and if the court finds in a preliminary hearing that he adequately and fairly represents such other persons, bring the action on behalf of himself and such other similarly injured and situated persons. . . .

Mass. Gen. Laws, ch. 93A, § 9.

in foreign securities in order to properly diversify and meet their funding requirements is well-known to and appreciated by custodians such as State Street, as pension funds' investment guidelines are publicly and readily available. *Id.*

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

In support of its theories of recovery, ATRS alleged in its Amended Complaint that it reposed a high degree of trust in State Street and authorized State Street to execute FX transactions under conditions in which State Street controlled all aspects of FX trades, including the cost. *Id.*, ¶ 5. ATRS further alleged that it depended upon State Street not only to execute FX trades honestly, but also to accurately report the FX rate and generally carry out the trades in a manner consistent with its custodial services contracts ("Custodian Contracts") and State Street's other written representations. *Id.*

ATRS's Custodian Contracts expressly provided that State Street would execute FX transactions for no additional fees above the substantial annual flat fee ATRS paid for custodial services. *Id.*, ¶ 6. In successive "Investment Manager Guides" made available to its custodial clients and their outside investment managers, State Street explained that the pricing of FX trades is "based on the market rates at the time the trade is executed." *Id.*, ¶7. Thus, State Street assured its custodial clients, including ATRS and the Class, that FX rates would reflect only the execution price, without additional fees or mark-ups. *Id.*

ATRS alleged, however, that despite these express provisions in the Investment Manager Guides and Custodian Contracts charging custodial clients annual flat fees, State Street engaged in the unfair and deceptive practice of charging its custodial clients inflated FX rates when buying foreign currency for them, and likewise reporting deflated FX rates when selling foreign currency, pocketing the difference between the actual and reported rates. *Id.*, ¶ 8. This maximized State Street's profit at the direct expense of ATRS and the Class members. In this regard, State Street allegedly charged ATRS and the Class incorrect and often fictitious FX rates, unrelated to the market-based rates State Street actually paid or received in executing the FX trades. *Id.*

Though the theory was novel, Customer Class Counsel were quite confident of the merit of their claims, particularly their Chapter 93A claims. According to Dan Chiplock of Lieff Cabraser, who developed the Chapter 93A theory and advocated the claim as being "solid" throughout the litigation, Counsel viewed Chapter 93A as "a very powerful statute for consumers . . . , a great vehicle for obtaining relief, and it also seemed to present a very promising vehicle for class certification." Chiplock 6/16/17 Dep., pp. 15:17-18, 16:4, 17:9-14. [EX. 10]. He explained:

> [T]he case law and commentary in Massachusetts describes Chapter 93A as *sui generis*, it sort of stands on its own, it's neither contract nor tort theory, it's basically an all-encompassing theory that's meant to address unfair or deceptive conduct, and it applies not only to individual consumers, but it can also apply to businesses who are victimized, for lack of a better word, by that type of conduct in their inter-business dealings. It offers double or treble damages if the conduct is found to be willful or intentional, and it also allows for prejudgment interest, which I forget the exact number, but I think it's fairly generous. So it's a powerful statute.

Id., pp. 17:17-18:8.

As defined in the *ATRS* Complaint, the class broadly encompassed:

> all institutional investors in foreign securities, including but not limited to public and private pension funds, mutual funds, endowment funds and investment manager funds, for which State Street served as the custodial bank and executed FX trades on a "standing-instruction" or "non-negotiated" basis between January 2, 1998 and December 31, 2009, inclusive (the "Class Period"), and which suffered damages as a result of the deceptive acts and practices and other misconduct alleged herein.

ATRS Compl., ¶ 22. [EX. 7].

This broad definition included a number of both public and private pension and investment funds; however, no ERISA claims were alleged in either the original Complaint or the Amended Complaint.

2. The ERISA Complaints

As Carl Kravitz, co-counsel for the ERISA Plaintiffs, observed, "The class definition of the consumer people technically covered our clients. There was definitely a faction on the consumer side that said 'we represent these people.' . . ." Kravitz 7/6/17 Dep., p. 28:20-23. [EX. 21]. *See also* 11/15/12 Lobby Conference Tr., Dkt. #64, Remarks of Customer Class Counsel Michael Thornton, p. 16:23-25 ("[T]he ERISA claims are included in the class definition. So, we also have [an ERISA] claim.") [EX. 22]. However, as noted, no ERISA claims were alleged in the *ATRS* Complaint.[12]

[12] Carl Kravitz testified that ERISA Counsel considered intervening in the Customer Class Action. He explained:

> [T]hey didn't assert ERISA claims and, as it turned out, it was important that we did. And I think it was important to the outcome.
>
> But there was a risk that we were going to be somehow shunted to the side. And that was a big risk that we considered in terms of our taking the case. . . .
>
> And I will also tell you that we seriously considered the procedural issue of whether we needed to intervene in the consumer [case]. And we did fairly extensive research on that, and we may have even drafted a motion. We did not end up filing it because, as things started to play out, we were able to participate in the mediation. But that was a significant risk.

Therefore, on the heels of the filing of the *ATRS* Complaint, two separate class action complaints alleging ERISA violations were filed. The two sets of plaintiffs in these actions represented institutional private ERISA plans whose assets were managed by State Street (the "ERISA Class"). *See The Andover Companies Savings and Profit Sharing Plan, et al. v. State Street Bank and Trust Co.,* MAD No. 12-11698, Dkt. #1, 9 (the "*Andover* complaint") [EX. 23], and *Henriquez, et al. v. State Street Bank and Trust Co.*, MAD No. 11-12049, Dkt. Nos. 1, 24 (the "*Henriquez* complaint"). [EX. 24].

a. The *Andover* Complaint

The *Andover* Complaint, filed in the United States District Court for the District of Massachusetts on September 12, 2012, was brought on behalf of two employee-benefit plans -- The Andover Companies Employees' Savings and Profit Sharing Plan (the "Andover Plain") and The Boeing Company Voluntary Investment Plan. *See The Andover Companies Savings and Profit Sharing Plan, et al., v. State Street Bank and Trust Co., et al.*, MAD No. 12-11698, Dkt. # 1, 9. [EX. 23]. The Complaint asserted claims for breach of duties of prudence and loyalty under Section 404 of ERISA, 29 U.S.C. § 1104, and prohibited transactions under Section 406 of ERISA, 29 U.S.C. § 1106, on behalf of a class of State Street custody clients that are ERISA plans. *See id.*

The Andover Plan is an ERISA-qualified defined contribution plan established for the benefit of the employees of Merrimack Mutual Fire Insurance Company ("Merrimack") and its sister companies, Cambridge Mutual Fire Insurance Company, and

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Kravitz 7/6/17 Dep., pp. 28:24 - 29:19. [EX. 21].

Bay State Insurance Company, which, together with Merrimack, comprise the "Andover Companies." [MAD No. 12-cv-11698, Amended Class Action Complaint, ¶¶ 16-17, Dkt. # 9.] [EX. 23]. Alan Kober served as vice-president of the Andover Companies and an individual trustee of the Andover Plan from 2000 until June 1, 2014. Kober 7/6/17 Dep., pp. 7:4-5, 8:15-21 [EX. 25]; *Andover* Amended Compl., ¶ 16. [EX. 23]. Upon his retirement from the Andover Companies on June 1, 2014, Mr. Kober was succeeded by Janet Wallace. Kober 7/6/17 Dep., p. 10:11-15. [EX. 25].

During the Class Period, the Andover Plan offered its participants investments in several State Street-sponsored commingled funds, including international equity funds such as State Street's International Growth Opportunities Securities Lending Class A Fund, and the SSgA Daily International Alpha Select fund. *Andover* Amended Compl., ¶ 18. [EX. 23]. State Street served as both a Trustee for the Andover Plan and as an Investment Manager for the Andover Plan investments from 2001 through approximately 2009. *Id.* at ¶ 19.

As Trustee for the Andover Plan, State Street was required to exercise power and authority over the investment accounts for which it had express investment management discretion, or upon the direction of the Investment Manager. *Id.* at ¶ 20. Pursuant to the Master Trust Agreement, the investment power of the Trustee included the power to "purchase and sell foreign exchange and contracts for foreign exchange, including transactions entered into with State Street Bank and Trust Company, its agents or its subcustodians." *Id*.

By separate contract, State Street also served as investment manager for the Andover Plan's assets, invested in State Street's proprietary commingled funds. *Id.* Pursuant to the Investment Manager Agreement, State Street acted as both a discretionary investment manager and a designated ERISA fiduciary pursuant to Section 3(38) of ERISA with respect to all cash, securities, or other property designated by the Andover Plan. *Id.*

The other named plaintiff in the *Andover* action is James Pehoushek-Stangeland. Stangeland, a resident of Seattle, Washington, is an employee of the Boeing Company and a participant in The Boeing Company's 401(k) Voluntary Investment Plan ("the Boeing Plan"). *Id.* at ¶ 22; Stangeland 7/6/17 Dep., pp. 9:21-23. [EX. 26]. Like the Andover Plan, the Boeing Plan is an ERISA-qualified defined contribution plan established for the benefit of the employees of the Boeing Company, a multinational aerospace and defense corporation headquartered in Chicago, Illinois. *Andover* Amended Compl., ¶ 23. [EX. 23]. As a participant in The Boeing Plan, "Plaintiff Pehoushek-Stangeland has standing to bring suit on behalf of The Boeing Plan for losses to the Plan due to breaches of fiduciary duty pursuant to ERISA sections 409 [29 U.S.C. § 1109] and 502(a)(2) [29 U.S.C. § 1132(a)(2)]." *Id.* ¶ 22. State Street served as Trustee for The Boeing Company Employee Savings Plans Master Trust ("Boeing Master Trust"). *Id.* at ¶ 24.

During the Class Period, the Boeing Plan offered its participants investment options in several State Street-sponsored commingled funds. *Id.* at ¶ 25. Among the international equity funds offered were the Global All Cap Equity ex-US Index Non-

Lending Series Fund Class A ("Global Non-Lending Fund"), which Boeing designated as the "International Index Fund." *Id.* During the relevant time period, the Boeing Plan held approximately $1.9 billion in Plan assets in the International Index Fund. *Id.* at ¶ 26. These investments constituted approximately 6% of the Boeing Plan investments. *Id.* The International Index Fund invests in an index comprised of globally developed and emerging-country stocks from outside the U.S. *Id.*, p. 27. Its international investments require exchange of participants' U.S. dollars into various foreign currencies. *Id.*; Stangeland 7/6/17 Dep., p. 10: 3-7. [EX. 26].

The *Andover* Plaintiffs were represented by Keller Rohrback LLP ("Keller Rohrback").[13] Keller Rohrback is a sophisticated law firm with significant experience in complex commercial and ERISA class action litigation. Sarko 7/6/17 Dep., pp. 10: 20-25, 11:1-14. [EX. 28]. Keller Rohrback also represented ERISA plan members in the parallel *BONY Mellon* case. *Id.* at p. 13:1-2. In fact, the firm, in its own estimation, had been involved in almost every major ERISA class action brought in the United States in the last fifteen years. *Id.*, p.11:8-11.

Keller Rohrback, and in particular, Lynn Sarko, who served as Lead Counsel for his firm in the *State Street* litigation, maintained a strong professional relationship with the Department of Labor ("DOL"), which had oversight responsibilities for ERISA plans

[13] Keller Rohrback was assisted by local counsel Theodore Hess-Mahan of Hutchings Barsamian Mandelcorn LLP. As local counsel Mr. Hess-Mahan filed the initial *Andover* complaint and a number of other pleadings, handled service of process issues, and was the local point of contact for the Court, State Street Bank's defense counsel Wilmer Hale, the Boston Department of Labor office, and the press for matters pertaining to the *Andover* ERISA case. Keller Rohrback's Responses to Second Supplemental Interrogatories, Response No. 2. [EX. 27].

and was actively monitoring the *State Street* litigation. *Id*., p. 16:12-15. Sarko testified that the DOL was concerned about the *State Street* litigation and was encouraged by the fact that Keller Rohrback had become involved in the action. *See id.*, pp. 14-17.[14]

b. The *Henriquez* Complaint

A second ERISA action against State Street, initially filed on October 12, 2011 in the United States District Court for the District of Maryland, also joined the consolidated action. *See Henriquez v. State Street Bank and Trust Co., et. al.*, MDD No. 11-cv-02920, Dkt. # 1. [EX. 29]. In that case, the plaintiff, Arnold Henriquez, brought suit on behalf of the Waste Management Retirement Savings Plan and its participants and beneficiaries. *Id.* The *Henriquez* Complaint, on behalf of ERISA plans for whom State Street was a custodian, asserted a variety of claims under ERISA, including that State Street engaged in self-interested prohibited transactions under Section 406, 29 U.S.C. § 1106; breached its duties of prudence and loyalty under Section 404, 29 U.S.C. § 1104; and breached its co-fiduciary duties under Section 405, 29 U.S.C. § 1105. *See id.*

The *Henriquez* complaint in Maryland, however, was voluntarily dismissed shortly after it was filed, *see id.*, Dkt. # 7-8 [EX. 30; EX. 31]; it was later re-filed in this

[14] Sarko explained:

> The Department of Labor had good professional relationships with us, with me and some of the other lawyers. They thought we did a good job and knew the law. And this was a case that some people at the Department of Labor, lawyers, were concerned about. . . .
>
> . . . However, the Department of Labor has a limited budget, and they're very careful about what cases they come into, and they pretty much have the attitude that if the cases are being handled by, you know, competent, professional ERISA counsel, they will [be able to] use their resources other places.

Sarko 7/6/17 Dep., pp. 24:12-17, 24-25; 25:1-5. [EX. 28].

Court on November 18, 2011 as a "related case" to the *ATRS* case. *See Henriquez v. State Street Bank and Trust Co., et al.,* MAD No. 11-12049, Dkt. # 1. [EX. 24]. It was thereafter amended on February 24, 2012 to add three additional plaintiffs: Michael T. Cohn, a participant in the Citigroup 401(k) Plan, and William R. Taylor and Richard A. Sutherland, participants in the Retirement Plan of Johnson & Johnson. *See id.* Dkt. # 24 ("*Henriquez* Complaint"). [EX. 24].

Plaintiff Arnold Henriquez, a resident of Frederick, Maryland, is employed by Waste Management Company and a participant in the Waste Management 401(k) Retirement Savings Plan ("WM Plan"), an ERISA-covered plan. Amended Class Action Complaint, MAD No. 11-cv-12049, ¶¶ 1, 10, Dkt. # 24 [EX. 24]; Henriquez 7/7/17 Dep., pp. 6:11-12, 15; 7:14-15. [EX. 32]. Henriquez invested in the "International Equity Fund" sponsored by State Street and offered by the WM Plan. *Henriquez* Amended Compl., ¶ 10. [EX. 24]. He also invested in other funds sponsored by State Street and offered by the Plan during the Class Period, including the Large Cap Equity Fund, the Small Cap Equity Fund, the Conservative Asset Allocation Fund, the Moderate Asset Allocation Fund, the Aggressive Allocation Fund, the Bond Market, and the SSgA Target Retirement 2030 Fund. *Id.*

Plaintiff Michael Cohn, a disability retiree, is a resident of Highland Park, Illinois and a participant in the Citigroup 401(k) Plan ("Citi Plan"), which is also an ERISA-covered plan. *Henriquez* Amended Compl., ¶ 1, 11 [EX. 24]; Cohn 7/7/17 Dep., pp. 6:5, 14-17; 8:15-23. [EX. 33]. From January 2005 through August 2007, Cohn was invested in the "Aggressive Focus Fund" offered by the Citi Plan. *Henriquez* Amended Compl., ¶

11. [EX. 24]. The Aggressive Focus Fund was a "fund of funds" managed by State Street. *Id.* In September 2007, the Citi Plan changed its investment options, and Cohn invested in a newly offered "Emerging Market Equity" collective investment fund. *Id.* State Street managed this Emerging Market Equity fund since it was first offered to the Citi Plan in 2007. *Id.*

Plaintiffs William Taylor and Richard Sutherland are Johnson & Johnson retirees, and are participants in the Johnson & Johnson Pension Plan ("J&J Plan"), an ERISA-covered plan. *Id.* at ¶¶ 12-13; Taylor 7/7/17 Dep., pp. 8:7-9, 23-25; 9: 1, 7-11. [EX. 34]. Mr. Sutherland is also a participant in the J&J 401(k) Plan. McTigue 7/7/17 Dep., p. 19:18-20. [EX. 11]. Taylor resides in Aston, Pennsylvania. *Id.*, p. 7:17-20; *Henriquez* Amended Compl., ¶ 12. [EX. 24]. Sutherland resides in Albuquerque, New Mexico. *Id.*, ¶ 13. At all times relevant to this action, State Street served as the trustee and custodian of both the J&J Plan and the Johnson and Johnson Pension and Savings Plan Master Trust in which the J&J Plan was wholly invested. *Id.*, ¶¶ 12-13. The J&J Plan holds foreign investments in international securities that cannot be purchased on a domestic exchange and without foreign currency. *Id.* These holdings require FX transactions.

The *Henriquez* Plaintiffs were represented by McTigue Law LLP ("McTigue") and Zuckerman Spaeder LLP ("Zuckerman Spaeder").

McTigue has extensive experience litigating ERISA class actions. McTigue 7/7/17 Dep., p. 9:1-7. [EX. 11]. McTigue, led by named attorney Brian McTigue, also had some experience in FX cases prior to *State Street*, having represented ERISA plan participants in the *BONY Mellon* case. *Id.*, p. 10:6-13. Zuckerman Spaeder is a boutique

litigation firm with extensive trial experience. Kravitz 7/6/17 Dep. p. 10:10-13, 21-22. [EX. 21]. Carl Kravitz of Zuckerman Spaeder, like Sarko, was very involved with the negotiations with the DOL: Sarko dealt principally with the DOL headquarters in Washington and Kravitz dealt with the Boston DOL office. Sarko 7/6/17 Dep., pp. 50:14 – 51:5.[15] [EX. 28].

None of the firms representing the ERISA Class was ever appointed "lead counsel" or to any other official capacity by the Court. (Later, however, Brian McTigue of McTigue Law, attempted, albeit unsuccessfully, to secure appointment as lead counsel for the ERISA class members. *See* TLF-SST-052975 – 2980 [EX. 35]; TLF-SST-054020 – 4022 [EX. 36]; Sarko 9/8/17 Dep. p. 97:12-21 [EX. 37]; Sucharow 9/1/17 Dep., p. 93:17-23.)[16] [EX. 38].

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[15] Two other firms -- Beins, Axelrod, P.C. ("Beins Axelrod") and Richardson Patrick Westbrook & Brickman LLC ("Richardson Patrick") -- partnered with McTigue as co-counsel for the *Henriquez* Plaintiffs during the course of this litigation. These firms also had significant relevant experience. Beins Axelrod has represented a number of unions and pension and health and welfare funds. Axelrod 7/7/17 Dep., pp. 8-9:1-18. [EX. 39]. Richardson Patrick has a breadth of trial experience, including in litigating large class actions throughout the country. Brickman 7/7/17 Dep., pp. 8:22-25, 9:1-15. [EX. 40].

Beins Axelrod came into the case as McTigue's local counsel for the filing of the *Henriquez* complaint in Maryland, and stayed on as co-counsel for the Plaintiffs after the Maryland complaint was dismissed and refiled in Massachusetts, until September 30, 2013. Axelrod 7/7/17 Dep., pp. 10:25; 11:1-4; 14:15-17. [EX. 39].

Anticipating the amount of work that would be required in litigating a complex ERISA case that involved the pension plans of four major national/international companies, in early 2012, McTigue also asked Richardson Patrick to join the case. Brickman 7/7/17 Dep., pp. 10:13-15; 11:3-5. [EX. 40]. Richardson Patrick joined the case in March 2012 but only stayed on for six months, until September 2012. *Id*., pp. 19: 21-25 – 20:1-9. Michael Brickman testified that Richardson Patrick's participation in the *Henriquez* case ended because he had a large trial scheduled in another case, to which he and his firm needed to devote a substantial amount of time in August and September 2012 and, therefore, could not give McTigue the time he thought was needed on *Henriquez*. *Id*., pp. 24:10-25, 11:1-2. Zuckerman Spaeder replaced Richardson Patrick as of September 2012. Axelrod 7/7/17 Dep., p. 23:13-16 [EX. 39]; Kravitz 7/6/17 Dep., p. 11:10-12. [EX. 21].

[16] Labaton, Lieff, and Thornton, however, viewed the ERISA plaintiffs as their clients and Labaton as lead counsel for all class members, including ERISA class members. *See* Chiplock 9/8/17 Dep. pp. 93:24 – 94:2 ("We had a responsibility as class counsel to the class. And that included ERISA plans."); 97:3- 10 ("I felt that customer class counsel had a responsibility to the entire customer class with no distinctions. We didn't discriminate in our class definition. We didn't see the need to when we filed our case.") [EX. 41]. Goldsmith 9/20/17 Dep., pp. 42:11-14 ("[W]e did not assert an ERISA claim in our complaint, but we did allege a class which was broad enough to encompass ERISA governed assets."); 61:11-14 (How much of the settlement would go to ERISA clients "was

C. CHALLENGES, RISKS, AND INTERNAL TENSIONS

Bringing these actions presented numerous risks and challenges to the various plaintiffs and their counsel.

First, there was the novelty of bringing an action against one's custodian bank. As Dan Chiplock of Lieff explained,

> [T]his is not something that was done generally. Custody customers generally like their custodian, they have longstanding relationships with them. It is also not easy to change custodians, you have to go through a process, and it's not something that pension funds in particular, who have limited resources, relish doing.
>
> So it was not easy to bring people along to that theory, even if they felt that they may have been overcharged on some of their services. So that was [a] challenge to the case overall.

Chiplock 6/16/17 Dep., p. 105:3-24. [EX. 10]. *See also* Sarko 7/6/17 Dep., pp. 28:25 – 29:10. [EX. 28].

Customer Class Counsel had further concerns about the ability to certify a nationwide class under Chapter 93A: "There aren't a whole lot of cases out there where a nationwide class has been certified under one state's consumer protection laws in federal court." Chiplock 6/16/17 Dep., p. 57:17-25. [EX. 10].

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something that [DOL] were focused on. Of course, we were focused on it as well because they were our clients.") [EX. 42]. *See also* colloquy at 11/15/12 Lobby Conference:

> MICHAEL THORNTON: I just want to clarify one thing of Mr. Rudman's [State Street's attorney's] excellent summary that we might differ on. There are two clear ERISA cases, Henriquez and Andover, and in the third case, Arkansas, um, the ERISA claims are included in the class definition. So we also have a claim.
>
> ***
>
> ROBERT LIEFF: . . . There is an overlap, that's all we're trying to say. We represent the same people.
>
> THE COURT: You do represent the same people?
>
> MR. LIEFF: Yes.

[11/15/12 Lobby Conference Tr., Dkt. # 64, pp. 16-17]. [EX. 22].

Class certification on the facts of the case presented a further significant challenge for the Customer Class: State Street's various clients had separate custody contracts with the bank and no two contracts were exactly alike. *Id.*, p. 64:17-25. "[T]he fact that individual contracts varied potentially presented problems on class certification." *Id.*, p. 65:11-15; G. Bradley 6/19/17 Dep., p. 28:17-21 ("We looked at a significant amount of contracts. They could argue that one contract was different.") [EX. 43]; Sarko 7/6/17 Dep., pp. 32:19 – 33:4 ("[93A] is based as misrepresentation, sort of fraud-like claims, which … based on issues where you have different contracts can be a challenge…. So, … class certification for the customer class was huge." *Id.*) [EX. 28].

On the ERISA side, counsel had their own concerns about class certification. As Lynn Sarko explained:

> This case, I thought, was a no-brainer on class certification for ERISA, bringing it as a single case. The risk came whether you could bring what's called a class of plans case. Was it -- could you bring a case where State Street was the fiduciary for a plan on behalf of all plans that State Street was the fiduciary for. . . .
>
> So that was to me the class certification risk here.

Id., p. 28:10-23.

Class certification was but one of the legal hurdles facing counsel. The various contracts each included different choice of law provisions, which presented yet another challenge. Chiplock 6/16/17 Dep., p. 64:20-21. [EX. 10]. Further, the issue of ERISA preemption loomed large over the claims alleged by the Customer Class. *Id.*, pp. 65:19 – 66:12; Kravitz 7/6/17 Dep., p. 26:16-21 [EX. 21]; Sarko 7/6/17 Dep., p. 56:4-18 ("Their

whole argument was built on they were covered by 93A. And I think there's a very high chance it would be preempted." *Id.*) [EX. 28].

The various legal theories under which the Plaintiffs were proceeding also presented significant risks. A particular challenge was whether Class Counsel could establish that a custodian bank had any fiduciary responsibility for the transactions at issue. Dan Chiplock explained:

> So the relationship between a custodian and its customer was normally considered one of a fiduciary and the beneficiary of the fiduciary relationship. However, when it came to ancillary services like foreign exchange, custody foreign exchange, standing instructions foreign exchange, that relationship could become more attenuated under the law and under the various contracts in play.

Chiplock 6/16/17 Dep., p. 106:7-17. [EX. 10]. This was an equally risky issue for the ERISA plaintiffs:

> [T]here was an issue of whether or not the bank was actually an ERISA fiduciary. The issue of whether an entity like the bank is a fiduciary. It would turn on a number of things, but in particular whether it exercised discretion in what it did. That was a major factor.
>
> So that was one issue. And, obviously, if we didn't establish that the bank was an ERISA fiduciary, that would have been significant, both as to breach of fiduciary duty claim but also the prohibited transaction claim.

Kravitz 7/6/17 Dep., pp. 25:22 – 26:8. [EX. 21].

Counsel's concerns about the fiduciary duty issue and Plaintiffs' other substantive claims were borne out by a very unfavorable decision handed down by Judge Coté in the Southern District of New York in a factually similar case that

was brought against another custody bank, J.P. Morgan.[17] In a lengthy opinion, Judge Coté ruled against the plaintiffs in that case on just about every legal issue concerning the *State Street* Plaintiffs. Chiplock 6/16/17 Dep., p. 58:18 – 59:5. [EX. 10].

> . . . [E]ssentially what she held was, as these banks always argued, that banks have a right to take a markup on services, just like any other vendor, that it was not difficult, in her view, for a customer to look and find a pattern, if they cared to look, that showed, you know, where their prices were falling on average over the course of time in foreign exchange trades.
>
> . . . [S]he also knocked down the breach of fiduciary duty theory, holding that although a custody bank in general is to be considered a fiduciary when providing custody to a client's securities and resources, they are not acting as a fiduciary when they provide ancillary services, like standing instructions foreign exchange trading or indirect foreign exchange trading. So -- in other words, the fiduciary relationship ends when they start providing ancillary services like that.
>
> She also held, to top it off, that sophisticated customers of a custody bank, when receiving a service like this, were not consumers as that term was understood under consumer protection law.

Id., pp. 59:5 – 60:5.

Although the *J.P. Morgan* case was decided under New York law, the decision challenged equally the ERISA and Customer Class Counsel because it provided State Street with a road map for how to challenge the claims in this case. *Id.*, p. 60:13-15.

Beyond the legal hurdles and challenges, this case presented substantial financial risks for both the Customer Class Counsel and the ERISA Counsel. Litigating this case was going to take many years and be very expensive. *Id.*, p. 128:2-5; G. Bradley 6/19/17

[17] *See Louisiana Mun. Police Employees' Retirement Sys. v. J.P. Morgan Chase & Co.*, 2013 WL 3357173 (S.D.N.Y. July 3, 2013) ("*J.P. Morgan* case").

Dep., p. 29:18-21 [EX. 43]; Sarko 7/6/17 Dep., p. 36:3-12. [EX. 28]. With the regulatory agencies hovering over the case, another layer of financial risk was added. In particular, the DOL monitoring, oversight, and potential intervention presented a financial risk to the Plaintiffs and Class Counsel alike. Chiplock 6/16/17 Dep., p. 80:2-18. [EX. 10]. If the DOL were to intervene, Plaintiffs risked facing an automatic reduction of any settlement amount: DOL would take 10% of any settlement off the top, and that money would go to the general Treasury, not the clients. Sarko 7/6/17 Dep., pp. 35:17 – 36:2. [EX. 28].

And, of course, as all the firms took the case on a contingent-fee basis, they risked not being paid anything in the end. Chiplock 6/16/17 Dep., p 137:6-7 [EX. 10]; G. Bradley 6/19/17 Dep., p. 43:6-8 [EX. 43]; Kravitz 7/6/17 Dep., p. 33:5-7 ("When we're looking at the risk of the case. . . we could get in the case, expend fairly significant amount of time, and not end up with anything at the end." *Id.*) [EX. 21].

It was not just expending a great amount of time and financial resources that presented a challenge for the Plaintiffs and their attorneys; it was also that Plaintiffs were up against a "powerful institution" and very good, "Class A" defense firm, Wilmer Cutler Pickering Hale and Dorr, LLP. G. Bradley 6/19/17 Dep., p. 29:17-18 [EX. 43]; Kravitz 7/6/17 Dep., p. 27:17-18. [EX. 21]. In addition to concerns about an inevitable motion to dismiss, counsel were concerned that defense counsel would follow the "strong-arm" tactics of the defendants in *BONY Mellon* and file contractual counterclaims against their clients based on indemnification clauses in their custody contracts. *See* Chiplock 6/16/17 Dep., pp. 63:3 – 64:12. [EX. 10]. Counsel for State Street, in fact, threatened to do so

during the course of mediation, creating a tension that constantly loomed over the proceedings. *Id.*, p. 64:7-9.

Beyond the threats of opposing counsel that created tension in the case, there was also a fair degree of internal tension between and among Customer Class Counsel and ERISA Counsel -- tensions inherent in conflicting theories and potentially conflicting results. Kravitz 7/6/17 Dep., p. 46:5-12. [EX. 21]. As Kravitz testified, "There was definitely a faction on the consumer side that said 'we represent these people, what are you doing in the case?'" *Id.*, pp. 28:21-24. Although Kravitz believed it was important that the ERISA parties entered the case and that the ERISA claims were raised, "There was a risk that we were going to be somehow shunted aside." *Id.,* pp, 28:24 – 29:3. Kravitz explained, "Consumer people did not want us coming in and taking a chunk of their case." *See id.*, pp. 32:16-17; 45:6-17. "Every extra dollar that went to ERISA came out of the Consumer side." *Id.*, p. 51:18-20.

The tension between the Customer Class and the ERISA Class was manifested during the hybrid mediation and discovery process: ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class. Sarko 7/6/17 Dep., p. 44:2-25. [EX. 28]. Nor were ERISA Counsel allowed access to the Customer Class's database. *Id.,* p. 45:1-23. Compounding the tension was the fact that there was never an order appointing leadership in the ERISA cases. *Id.,* pp. 42:24 – 43:3. As a consequence, the ERISA lawyers organized themselves. *Id.* at p. 42:1-2.

D. EARLY LITIGATION

During most of 2011-2012, litigation in these three cases principally involved motion practice and, in particular, briefing and argument of Rule 12(b)(1) and Rule 12(b)(6) motions to dismiss filed by State Street in the *ATRS* and the *Henriquez* cases.[18]

In moving to dismiss the *ATRS* Complaint, State Street argued that ATRS's breach of fiduciary duty claim and its individual breach of contract claim lacked legal merit because the applicable contracts defined and limited the scope of the parties' relationship, which State Street contended was not fiduciary in nature. *See* 6/3/11 Memorandum in Support of Defendants' Motion to Dismiss, Dkt. # 19. [EX. 44]. State Street further argued that the contracts did not require it to execute FX transactions, to do so at a particular rate, or to disclose its margin on FX transactions. *Id.* Rather, State Street argued, the contracts required it only to hold assets and provide administrative services to ATRS. *Id.*

State Street also argued that ATRS's claims under Chapter 93A and for negligent misrepresentation lacked merit because there is nothing unfair or deceptive when the buyer or seller of a commodity does not disclose its margin on a purchase or sale. *Id.* It also claimed that, as a sophisticated investor, ATRS could not plausibly contend that its investment managers were unaware that the rates charged for ATRS's FX transactions were marked up from market rates. *Id.* Additionally, State Street asserted a statute of

[18] At the time of motion practice, the *Andover* case had not yet been filed.

limitations argument seeking to bar all of Plaintiffs's claims seeking relief for events dating back to 1998. *Id.*

Finally, State Street argued that all claims asserted against State Street Corporation ("SSC"), the parent corporation and its separate subsidiary, State Street Global Market LLC ("SSGM LLC"), should be dismissed because these entities had no interaction with ATRS, did not enter into any contracts with ATRS, and did not conduct FX transactions. *Id.*

The motion was fully briefed by both parties and the Court heard argument on the motion on May 8, 2012. During the hearing, the parties agreed to the dismissal of SSGM LLC as a party-defendant. *See* 5/8/12 Hearing Tr., Dkt. # 36, p. 80:8-10. [EX. 45]. Then, at the conclusion of the hearing, the Court entered an Order granting the motion to dismiss with respect to ATRS's claims against SSC, the parent corporation, but denied Defendant's motion in all other respects. *See* 5/8/12 Order, Dkt. # 33. [EX. 46]. The Court further directed counsel to meet to discuss the possibility of settlement and, if settlement could not be reached, to report back whether they wished to pursue mediation, either privately or before a magistrate judge. *Id.*

In the meantime, on August 8, 2012, State Street also moved to dismiss the *Henriquez* Complaint arguing that the Complaint should be dismissed for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).[19] State Street argued that the conduct challenged in the Complaint did not amount to an injury-in-fact to the *Henriquez*

[19] Again, the *Andover* complaint had not yet been filed.

Plaintiffs and the Plaintiffs, therefore, lacked standing to bring claims on behalf of pension plans other than their own, or on behalf of collective funds in which their own plans did not invest. *See* 8/10/12 Memorandum in Support of Defendants' Motion to Dismiss, Case No. 11-12049, Dkt. # 59. [EX. 47]. State Street also argued that the *Henriquez* Complaint should be dismissed pursuant to Rule 12(b)(6) for failure to state a claim because the Plaintiffs did not plead an adequate factual basis to show that State Street acted as a fiduciary or that it engaged in a foreign exchange scheme. *Id.* State Street further argued failure to plead fraud with particularity. *Id.*

The *Henriquez* Plaintiffs did not file a written response. Instead, they filed their own motion arguing that they were unable to adequately respond to State Street's Motion to Dismiss without first obtaining some discovery. *See* Motion for Order for Discovery, Dkt. # 43, 57. [EX. 48; EX. 49]. State Street, of course, opposed Plaintiffs' request for discovery. *See* Memorandum in Opposition, Dkt. # 61. [EX. 50].

No substantive decision was ever rendered on either of these motions. Instead, on November 15, 2012, at the request of counsel, the Court conducted an on-the-record conference with all counsel in the lobby of its chambers (the "Lobby Conference") to discuss further proceedings. *See* 11/15/12 Lobby Conference Tr., Dkt. # 64 [EX. 22]. By this time the *Andover* Complaint had also been filed, and counsel for the *Andover* Plaintiffs also participated in the Lobby Conference.

1. Consolidation of the Cases

During the November 15, 2012 Lobby Conference, counsel informed the Court of their unsuccessful attempt to settle the *ATRS* case separately, and proposed that the three

cases -- *ATRS, Henriquez*, and *Andover* -- proceed in tandem in a "hybrid" mediation during which the parties and counsel could continue to pursue a mediated global settlement while at the same time engaging in "informal" document discovery. 11/15/12 Lobby Conference Tr., Dkt. # 64, pp. 10:15-18; 15:19-25. [EX. 22]. Counsel also proposed that they withdraw the then-pending motions in *Henriquez*, *id.*, pp. 24:22-25; 25:1-2, and that all further motion practice be "back-burnered." *Id.* at 15:6-7.

The Court agreed with counsel's proposals and, accordingly, ordered that the three actions be consolidated for all pre-trial purposes. *Id.*, pp. 10, 22, 24; Order to Stay, Dkt. # 62 [EX. 51]; Electronic Order Consolidating Cases, Dkt. # 63. [EX. 52]. The Court further granted the parties' request to engage in informal discovery while mediating the matter. *See* 11/15/12 Lobby Conference Tr., p. 22:2-10. [EX. 22]. The proceedings were stayed in all other respects during the "hybrid" mediation process. *See* Order to Stay, Dkt. # 62. [EX. 51].

E. THE HYBRID MEDIATION

After the Court substantially denied State Street's Motion to Dismiss the *ATRS* Amended Complaint in May 2012, ATRS and State Street agreed to participate in private mediation. Sucharow Declaration, ¶ 87. [EX. 3]. The parties retained Jonathan B. Marks as mediator. *Id.*, ¶ 89. Between August and October 2012, in preparation for mediation, Marks held preparatory conference calls with the parties, separate half-day, in-person meetings with representatives of each side, and a full-day in-person session with both sides. *Id.*, ¶ 90. These initial efforts culminated in a two-day in-person mediation in Boston on October 23-24, 2012, attended by counsel and party representatives, including

George Hopkins of ATRS and the Chief Legal Officer of State Street. Sucharow Decl., ¶ 91 [EX. 3]; Jonathan Marks Declaration, Dkt. # 104-5, ¶ 14. [EX. 53].

No settlement was reached at the October mediation, but the parties developed a framework for exchanging discovery and managing the cases, which the Court endorsed at the November 15, 2012 Lobby Conference. Sucharow Decl., ¶ 92 [EX. 3]; 11/15/12 Lobby Conference Tr., Dkt. #64, p. 22. [EX. 22].

Thereafter, between January 2013 and June 2015, Marks conducted fourteen additional mediation sessions with the parties and their attorneys in Boston, New York City, and Washington, D.C. The mediation sessions included extensive exchanges of views on the merits, including PowerPoint presentations by both sides on legal issues, such as class certification, liability, and damages, as well as a detailed presentation by a cost accounting expert engaged by State Street. Sucharow Decl., ¶ 94 [EX. 3]; *see also* Marks Decl., ¶¶ 23-24. [EX. 53].

1. Discovery and Document Review

The mediation sessions were conducted in tandem with, and informed by, substantial discovery. In response to ATRS's requests, State Street produced more than nine million pages of documents. Sucharow Decl., ¶ 96. [EX. 3]. Further, in response to State Street's requests, ATRS produced more than 3,500 documents, exceeding 73,000 pages, concerning the full scope of ATRS's custodial relationship with State Street as well as its relationship with relevant investment managers ("IMs") and a consultant responsible for overseeing the IMs. *Id.*, ¶ 97. The ERISA Plaintiffs also collectively

produced more than 3,600 pages of documents relevant to their relationship with State Street. *Id.*

Review of these documents was performed throughout the course of the hybrid mediation. To assist in the document review, the Customer Class law firms enlisted the help of their staff attorneys ("SAs").[20]

While the *BONY Mellon* case was being actively litigated in 2013 and 2014, Lieff assigned at most five staff attorneys to review documents produced by State Street. Chiplock 6/16/17 Dep., pp. 107:15 – 108:12. [EX. 10]. During this early time, Labaton also allocated no more than five staff attorneys to review and analyze documents for the *State Street* case. Rogers 6/16/17 Dep., p. 57:7-10.[21] [EX. 54]. As the hybrid mediation progressed, State Street produced discovery related to the *Hill* case,[22] a significant production consisting of approximately 10 million pages. Rogers 6/16/17 Dep., pp. 68:25 – 69:11 [EX. 54]; Chiplock 6/16/17 Dep., p. 88:2-21. [EX. 10]. The *Hill* production added considerably to the total volume of documents that had yet to be reviewed by Customer Class Counsel.

By January 2015, Customer Class Counsel began to view discovery with greater urgency, informed in part by the favorable resolution in the *BONY Mellon* case and also

[20] "Staff attorneys" here were licensed attorneys with relevant experience hired specifically to perform large-scale document review.

[21] Michael Rogers recalls that, in 2013, Labaton assigned Todd Kussin, the staff attorney "team leader" in the *State Street* case, and four staff attorneys to perform document review during 2013 and 2014. Rogers 6/16/17 Dep., p. 57:7-10. [EX. 54].

[22] *Hill v. State Street Corp., et. al.*, MAD No.1:09-cv-12146-GAO.

by the fact that the parties had been in mediation for over two years without reaching an agreement to resolve the case. Chiplock 6/16/17 Dep., p. 111:8-13 [EX. 10]; Dugar 6/16/17 Dep., p. 85:9-16. [EX. 55]. As a result, Labaton and Lieff (which had then recently freed up thirteen staff attorneys previously assigned to the *BONY Mellon* case, as discovery in that case was coming to a close) expanded their respective document review teams by adding additional staff attorneys to review and analyze the unreviewed material accumulated in the *State Street* case. *See* Chiplock 6/16/17 Dep., pp. 109:16 – 110:2 [EX. 10]; Rogers 6/16/17 Dep., pp. 69:8-14; 74:11-13. [EX. 54]. Between January and March 2015, Labaton bolstered its document review team, maintaining fifteen to twenty different staff attorneys on the *State Street* case at any given time; Lieff acted similarly, assigning fifteen staff attorneys -- thirteen staff attorneys who transitioned directly from the *BONY Mellon* document review and two agency "contract" attorneys[23] -- to complete the review. Kussin 6/5/17 Dep., p. 17:6-13, 70:8-9 [EX. 56]; Dugar 6/16/17 Dep., p. 87:16 – 88:11, 23-24 [EX. 55]; Lieff Cabraser Response to June 1 Interrogatories, No.19. [EX. 57].

All staff attorneys reviewing documents in the *State Street* case received a binder of documents providing an overview of the case; the binder contained the *ATRS* Complaint and related pleadings, an outline of the case theory, and a list of key terms, search criteria, topics and categories to guide the staff attorney review. Goldsmith

[23] These "contract" attorneys were employed by an outside staffing agency rather than by the Lieff firm itself. *See* Lieff Cabraser's Response to Special Master's First Set of Interrogatories, No. 19. [EX. 57]. Lieff later retained two additional "contract" attorneys to work on the *State Street* case. *Id.* *See also* Chiplock 6/16/17 Dep., p. 112:12-22. [EX. 10].

7/17/17 Dep., pp.77:23 – 78:8 [EX. 58]; Rogers 6/16/17 Dep., p. 63:3-7 [EX. 54]; Lesser 6/19/17 Dep., p. 40:12-13. [EX. 20]. Michael Lesser of Thornton also drafted emails outlining important information for the staff attorneys to consider during their review. Lesser 6/19/17 Dep., pp. 40:10 – 41:4. [EX. 20].

The Labaton and Lieff staff attorneys were well-qualified and well-equipped to analyze the documents, which related to complex FX trading patterns and other financial issues raised in the case. *See* Rogers 6/16/17 Dep, pp. 58:12 – 59:7 (Staff attorneys hired by Labaton had experience in "complex litigation, [the] financial industry, . . . banking, mutual funds, certainly currency trading, or experience legally on what I would call a financial industry case.") [EX. 54]. One Labaton staff attorney, David Alper, had extensive experience in FX trading itself, having worked in the industry for twenty years. *See infra.* Several of the Lieff staff attorneys had, in the words of Chiplock, "been through war in *Bank of New York Mellon*, and [] [we]re extremely well-versed in the issues." Chiplock 6/16/17 Dep., pp. 109:20-25; 117:16-25. [EX. 10]. These staff attorneys not only performed sophisticated document review; they also prepared substantive memoranda on subject matters and potential witnesses critical to development of the legal theories. Chiplock 6/16/17 Dep. p. 32:12-20 [EX. 10]; Zaul 6/6/17 Dep., pp. 24:4 – 25:5 [EX. 59]; Alper 6/5/17 Dep., p. 17:14-16 [EX. 60]; Oh 6/6/17 Dep., p. 21:20-25 [EX. 61]; *see also* TLF-SST-005245 – 5270 (Memorandum by Maritza Bolano). [EX. 62].

2. Staff Attorney Cost-Sharing Agreement

Because Thornton did not have staff attorneys of its own, or the facilities to hire and house new attorneys solely to work on the *State Street* document review, Labaton, Lieff, and Thornton entered into an agreement to "allocate" the costs of certain staff attorneys employed by and working at Labaton and Lieff's offices to Thornton. At times, this was referred to as the "10/10/10 agreement[24] -- designating an equal number of SAs to each firm. The purpose of the cost-sharing agreement was to share the cost and risk burdens of the litigation among the three Customer Class firms. Chiplock 6/16/17 Dep., pp. 127:23 – 128:5; 131:23 – 133:15 [EX. 10]; Belfi 6/14/17 Dep, pp. 51:8 – 53:12. [25] [EX. 17]. While the exact number of staff attorneys fluctuated over the course of the agreement, Thornton, in essence, agreed to pay Labaton and Lieff for five staff attorneys each. G. Bradley 6/19/17 Dep., p. 43:10-13. [EX. 43]. Thornton did not meet, interview, select, house, or supervise the staff attorneys allocated by Labaton or Lieff. *See* Hoffman 6/5/17 Dep., pp. 62:21, 63:7-17, 64:6-9, 65:3-6 [EX. 63]; *see also* Chiplock 6/16/17 Dep., pp. 134:17 – 135:19. [EX. 10]. Nor did it matter to Thornton which staff attorneys it paid for. *See* G. Bradley 6/19/17 Dep., p. 43:10-13. [EX. 43]. Pursuant to

[24] The concept of the "10/10/10 agreement" was introduced at the beginning of the Special Master's discovery, and while not all Customer Class Counsel were familiar with that exact terminology, they affirmed that the purpose of the cost-sharing agreements between Labaton and Thornton and between Lieff and Thornton, was to allocate costs and risks equally among all firms. This was accomplished by Labaton and Lieff each assigning approximately five staff attorneys to Thornton, so that each firm would bear the cost of ten staff attorneys. *See* G. Bradley 6/19/17 Dep., p. 42:5-13 [EX. 43]; Chiplock 6/16/17 Dep., p. 133:12-15. [EX. 10].

[25] Allocating the staff attorneys was not only a means for Thornton to equalize the costs and burdens, but was also, as Garrett Bradley of Thornton admitted, "the best way to jack up the load star [sic]…the best way for us [Thornton] to increase our load star [sic] and make it comparable to the other two firms… I was absolutely concerned about Thornton's load star [sic] vis-à-vis the other two firms." G. Bradley 6/19/17 Dep. p. 67:4-13 [EX. 43]; TLF-011124 - 11126. [EX. 64].

this cost-sharing arrangement, Labaton and Lieff internally designated certain staff attorneys to Thornton, and then billed Thornton periodically for the out-of-pocket cost of the staff attorneys and, in Lieff's case, for the contract attorneys "allocated" to Thornton, as well. *Id.*; *see also* Hoffman 6/5/17 Dep., p. 63:2-7. [EX. 63].

Thornton's collection of staff attorney hours was conducted piecemeal, coordinated largely by Evan Hoffman, then an associate and the most junior member of the Thornton team, with the assistance of firm administrative staff, rather than directly between the attorneys privy to the details of the staff attorney cost-sharing agreement: Garrett Bradley for Thornton, Belfi and Rogers at Labaton, and Chiplock at Lieff Cabraser. On the Lieff side, Lieff's accounting department prepared and forwarded invoices for staff attorneys employed by Lieff to Hoffman and Thornton's business administrator on a regular basis; Hoffman collected the names and hours for the case. Lieff Response to Interrogatory No. 38 [EX. 57]; Hoffman 6/5/17 Dep., pp. 57: 11–18; 61: 21-62:5. [EX. 63]. He also kept track of the contract attorneys housed at Lieff but employed by a staffing agency. For those individuals, the staffing agency invoiced Thornton directly for the work performed. Hoffman 6/5/17 Dep., p. 62: 6-9. [EX. 63].

Hoffman was also charged with tracking staff attorneys working at Labaton. At Labaton, the firm's accounting office prepared and forwarded monthly invoices reporting the hours performed by the firm's staff attorneys designated to Thornton to Garrett Bradley's attention, also copying Thornton administrators. Labaton Response to Special Master's First Set of Interrogatories, No. 37 [EX. 249]; *see* LBS003775 - 3776 (4/9/15 Ng Email to G. Bradley attaching April 2015 Invoice). [EX. 65].

Thornton further tracked the hours performed by Michael Bradley, the brother of Thornton managing partner Garrett Bradley, who worked for neither a firm nor a staffing agency but was hired by Thornton to perform document review in the case. Michael Bradley reported his hours to Hoffman by email on a weekly or biweekly basis. Hoffman 6/5/17 Dep., pp. 107: 24-108:7. [EX. 63].

At the time Labaton and Lieff agreed to this arrangement, both firms were concerned primarily with spreading the costs -- and risks -- of the litigation; neither firm focused on what information would be reported in a potential fee petition. Belfi 6/14/17 Dep., p. 53:10-12. [EX. 17]. Nevertheless, Thornton later listed all of the staff attorneys allocated to it under the cost-sharing agreement in its lodestar fee petition, accounting for 71.5% of all Thornton hours reported. *See* Dkt. # 104-16.[26] [EX. 66]. No explicit agreement to allow Thornton to claim the Labaton and Lieff staff attorneys on Thornton's lodestar has been disclosed during the Special Master's investigation.[27]

[26] Thornton also claimed 406.4 hours of staff attorney time for Michael Bradley, who was not affiliated with the firm but performed document review on a contingent basis during the *State Street* case. M. Bradley 6/19/17 Dep., pp. 28:20-23; 70:13-15. [EX. 67]. Bradley worked from his own office and performed document review in his free time; he was not supervised by Labaton or Lieff lawyers. M. Bradley 6/19/17 Dep., pp. 49:7-16; 52:3-18, 54:15 – 55:3. [EX. 67]. Unlike the Labaton and Lieff staff attorneys, Bradley did not prepare any memoranda. *Id*, at p. 46:21-23. The record reveals no written work product created by Michael Bradley.

Bradley worked on a contingent basis; he would only be paid if the class recovered a settlement entitling counsel to fees. M. Bradley 6/19/17 Dep., p. 70:13-15. [EX. 67]. After the Court approved the request for attorneys' fees, Bradley received a payment of $203,200, equal to the numbers reported at $500 per hour. *Id.*, p. 70:18-23.

[27] Some of the attorneys from Labaton, Lieff, and Thornton, however, independently made assumptions based on the circumstances that Thornton would claim those staff attorneys' time on its lodestar. *See e.g.*, G. Bradley 6/19/17 Dep., p. 48:1-5 ("We just assumed -- I just assumed where the local counsel were on the papers, we're litigating the case, we're putting the fee up, why wouldn't we put the people up that we were paying for?") [EX. 43]; Chiplock 6/16/17 Dep., p. 136:10-19 ("I would say it was completely understood by me when I talked with Garrett that that would be how it worked, because it was obvious to me that if you pay for the work that is being done, then, just as with any other employee when you're paying them, that you include their hours in your lodestar when you report it at the end of the day.") [EX. 10]; Rogers 6/16/17 Dep., pp. 91:18 – 92:16 ("I certainly assumed [Thornton] would [claim the SA time on their fee petition] . . . They were paying for it up-front, I assume they wanted to get paid on the back end.") [EX. 54]; Hoffman 6/5/17 Dep., p. 58:12-16 ("My understanding was that for attorneys who

F. ERISA FEE ALLOCATION

While the hybrid mediation-discovery process was ongoing in mid-2013, Customer Class Counsel and ERISA Counsel negotiated among themselves an agreement for the allocation of attorneys' fees between the two groups. Sarko 7/6/17 Dep. p. 57:18-23. [EX. 28]. That agreement -- to allocate 9% of the total fee awarded (if successful) to ERISA Counsel -- was based largely on the premise that the total ERISA case volume comprised five to nine percent of the total FX trading volume. Sarko 7/6/17 Dep., pp. 26:15-16 [EX. 28]; 59:14-22; Kravitz 7/6/17 Dep., p. 50:10-16. [EX. 21].

At the time of negotiations -- and more so at the end of the case -- ERISA Counsel did not view 9% as commensurate with the ERISA trading volume (which it was later learned was actually about 12-15% of the total trading volume) or the value they added to the *State Street* case. Sarko 7/6/17 Dep., p. 64:3-11 [EX. 28]; Kravitz 7/6/17 Dep., p. 54:7-11.[28] [EX. 21]. Nonetheless, rather than create friction with Customer Class Counsel over fees,[29] Lynn Sarko, often a liaison between ERISA and Customer Class Counsel, advocated for, and all other ERISA Counsel ultimately agreed to make, a "practical decision" to accept 9% of the fee total. *See* Sarko 7/6/17 Dep., p. 59:18-25.

Thornton was financially responsible for, they would be included on whatever the ultimate fee petition that Thornton would submit.") [EX. 63]; *see also* TLF-SST-011206 (6/29/15 email from Mike Lesser of Thornton to Dan Chiplock of Lieff) [EX. 68]; LCHB-0048939-48940 (3/9/15 Chiplock email regarding Lieff staffing to K. Dugar and N. Diamond: "[R]emember that whoever we choose Thornton is paying for them via the same arrangement we have for Jon Zaul and Chris Jordan.") [EX. 69].

[28] During oral argument, counsel for Labaton indicated that the trading volume for the ERISA funds was in a range of 9% to 10%. However, the record evidence on this point is incomplete.

[29] As noted above, from the beginning of the mediation, there was already fair degree of tension between and among Customer Class Counsel and ERISA Counsel.

[EX. 28]. The decision was intended to serve the dual goals of "mak[ing] the pie bigger" for the class members and promoting cooperation and teamwork across all counsel. Sarko 7/6/17 Dep., p. 59:18-25 [EX. 28]; *see also* Kravitz 7/6/17 Dep., p. 61:18-24. [EX. 21].

From August to December 2013, Customer Class Counsel and ERISA Counsel exchanged drafts in an attempt to memorialize their agreement to respectively share the fee award 91/9. *See* KR00000006 – 09 (8/30/13 Sarko email to Lieff (proposing draft agreement to capture the 91/9% split)) [EX. 70]; KR00000010 – 18 (9/11/13 Chiplock email to Sarko and Gerber (circulating redlined edits to proposed agreement)).[30] [EX. 71]. Early drafts of the fee allocation agreement included a provision nullifying the 91/9 allocation if the *ATRS* case, the *Andover* case, or the *Henriquez* case resulted in no recovery; that provision was later struck. *See* KR00000024 – 28 (8/30/13 Draft, Fee Allocation Agreement). [EX. 73]. Also removed was a provision stating that counsel's division of fees was "consistent with the relative volume of FX trading by ERISA and non-ERISA plans as reflected in the data produced by State Street and the prospects of recovery on the various claims alleged, and is therefore reasonable and appropriate." *Id*.

Four months later, on December 11, 2013, Counsel finally memorialized their 91/9 understanding in writing. Sarko 7/6/17 Dep., p. 60:4-14 [EX. 28]; s*ee also* KR00000045

[30] While there were several iterations of the agreement, each draft alluded to the fact that the *ATRS* Complaint filed by Customer Class Counsel was brought on behalf of "all institutional investors in foreign securities, including public and private pension funds, *ERISA-qualified plans*, mutual funds, endowment funds and investment manager funds, for which State Street served as the custodial bank" (emphasis added). *See* KR00000003 – 05 (8/29/13 Draft, "Agreement Between Counsel for Consumer and ERISA Plaintiffs Regarding Division of Attorneys' Fees" (the "Fee Allocation Agreement"). [EX. 72].

– 50 (Final Fee Allocation Agreement) [EX. 74]; Settlement Agreement, Dkt. # 89, ¶ 21 [EX. 75]; McTigue, 7/7/17 Dep., pp. 44:23 – 46:18 [EX. 11]; Thornton 6/19/17 Dep., p. 57:12-16. [EX. 2]. As part of that written agreement, ERISA Counsel and Customer Class Counsel represented that they had "disclosed and explained this Agreement to their respective clients and that their clients have consented to the Division of Fees and other terms herein." *See* Fee Allocation Agreement at ¶ 5. [EX. 72].

Although the terms of that agreement allocated just 9% to ERISA Counsel, that percentage was increased to 10%, at the suggestion of Customer Class Counsel, as counsel finalized the jointly filed Fee Petition. Thornton 6/19/17 Dep., pp. 57:17 – 58:1 [EX. 2]; Sarko 7/6/17 Dep., p. 60:15-17, 60:24-61:12 [EX. 28]; Kravitz 7/6/17 Dep., p. 59:17-19. [EX. 21]. While the Fee Allocation Agreement itself was not amended to reflect the change, the 10% increase was memorialized in an email circulated by Nicole Zeiss, Settlement Counsel for Labaton, confirming the itemization of fees and expenses for both ERISA and Customer Class attorneys. *See* ZS000027 – 28 (11/23/16 Sarko email to Kravitz ("I spoke with Labaton folks yesterday. They didn't want to put it in the formal letter but agreed to send us an email putting the numbers in and confirming the 10 percent."). [EX. 76]. ERISA Counsel welcomed the increase in percentage. *See* ZS000029 – 30 (11/23/16 Kravitz email to McTigue). [EX. 77]

G. SETTLEMENT AND NOTICE TO THE CLASS

1. Involvement of Government Agencies

The hybrid mediation spanned a period of two-and-a-half years. During that time, discovery proceeded but settlement discussions were ongoing. In addition to State Street

and Plaintiffs' counsel, three government agencies -- the DOL, the Securities and Exchange Commission ("SEC"), and the Department of Justice ("DOJ") -- were involved in, and integral to, the negotiations. Each agency independently investigated State Street's alleged misconduct, and each agency reached its own settlement with State Street in furtherance of its respective enforcement goals. *See* Dkt. # 104, ¶¶ 8, 38 [EX. 3]; *see also* Sarko 7/6/17 Dep., p. 41:9-14 [EX. 28]; Kravitz 7/6/17 Dep., pp. 56:25 – 57:4. [EX. 21]. In particular, the DOL -- charged with overseeing administration of the ERISA statute -- paid particular attention to the settlement of the claims of the ERISA plan participants, ensuring that the settlement recovery amount was adequate and commensurate with the agency's own evaluation of the case. Sarko 7/6/17 Dep., p. 79:6-15. [EX. 28]. Sarko was the lawyer principally responsible for negotiating with the DOL. State Street, in turn, made it very clear that a global settlement with all private class members and all government agencies was a necessary condition to its willingness to reach a settlement. Sarko 7/6/17 Dep., pp. 36:24 – 37:11; *see also* 11/2/16 Hearing Tr., p. 17:8-23. [EX. 78].

2. Preparation and Filing of Settlement Documents

After a multi-year discovery, mediation and negotiation, on June 30, 2015, the parties reached an agreement-in-principle to settle the consolidated class actions for $300 million. Sucharow Decl., ¶ 101. [EX. 3]. The terms of a final Term Sheet were negotiated and signed on September 11, 2015. Sucharow Decl., ¶ 104. [EX. 3]. *See also*, Zeiss 6/14/17 Dep., p. 13:10-22. [EX. 79].

Over the ensuing months, Labaton, as Lead Settlement Counsel, assumed responsibility for preparing the formal settlement documentation. Zeiss had primary responsibility for drafting the settlement documents, including the Settlement Agreement and exhibits thereto, the Preliminary Approval (motion, brief, and proposed order), the Plan of Allocation, the judgment, and the long-form Notice of Pendency of Class Action and Summary Notice ("Notice").[31] Zeiss 6/14/17 Dep., pp. 13:10-22, 15:5-6.[32] [EX. 79]. Draft versions of the Notice were circulated among, and reviewed by, Customer Class Counsel and ERISA Counsel.[33] Zeiss also prepared the Omnibus Declaration and Brief in support of Lead Counsel's Motion for Attorneys' Fees and Expenses, and for payment of service awards. *Id*., p. 16:2-6.

The Settlement and Fee Petition documents made clear that Labaton was representing both the Customer Class members and the ERISA Class members with respect to the settlement of the case. These documents, and in particular the Notice, all of which Labaton authored in whole or in part, were triple-captioned; bear the case names and numbers of all three class actions, including the ERISA actions; and provide notice to

[31] These documents and related filings submitted as part of the final approval process are referred to herein as "settlement" and "fee petition" documents, respectively.

[32] Rather than have a litigation team member handle settlement, Labaton has delegated that part of its practice to a specialized attorney (Zeiss), and in that compartmentalization, it created a separate "settlement counsel" position with responsibility for negotiating and documenting all issues related to memorializing and finalizing settlements. Zeiss 6/14/17 Dep., p. 10:24 – 11:12 [EX. 79]; Keller 10/13/17 Dep., p. 79:18-20. [EX. 80]. With respect to the *State Street* case, this compartmentalization contributed to some of the problems giving rise to the Special Master's investigation, in particular the failure to discover the "double-counting" of staff attorneys allocated to Thornton and the failure to disclose to the Court Labaton's fee arrangement with Texas attorney, Damon Chargois. These matters are discussed *infra.*

[33] In March 2017, at the request of the Special Master, the Customer Class and ERISA firms each produced a complete record of time entries performed in the *State Street* matter. These time records indicate that Customer Class Counsel reviewed the Notice and other settlement documents circulated by Zeiss.

members of the "Settlement Class" that a Class Settlement of $300 million has been entered into "by and among (i) plaintiffs Arkansas Teacher Retirement System ("ARTRS"), Arnold Henriquez, Michael T. Cohn, William R. Taylor, Richard A. Sutherland, The Andover Companies Employees Savings and Profit Sharing Plan and James Pehoushek-Stangeland (collectively "Plaintiffs"), on behalf of themselves and each Settlement Class Member, by and through their counsel, and (ii) State Street Bank and Trust Company (the "Settling Defendant" or "SSBT")." *See* Notice, MAD No. 11-cv-10230, Dkt. # 95-3, filed on August 10, 2016. [EX. 81]. The Notice further defines the "Settlement Class" as

> All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 21, 1998 through December 31, 2009, inclusive.

Id.

H. FEE PETITION REQUESTING ATTORNEYS' FEES AND EXPENSES

1. Fee Negotiations Among Customer Class Counsel

At the inception of the case, Customer Class Counsel had agreed to a fee-sharing arrangement pursuant to which Labaton, Lieff, and Thornton would each be entitled to 20% of any fee award, with the remaining 40% to be distributed at the end of the litigation, commensurate with each firm's contributions to the case. *See* TLF-SST-033911 – 33913 (5/4/11 letter agreement, p. 2) [EX. 82]; Keller 10/25/17 Dep., pp. 414:14 – 420:10. [EX. 83]. *See also*, TLF-SST-040631 (8/28/15 email exchange

among Larry Sucharow, Dan Chiplock, Garrett Bradley, M. Thornton, and Bob Lieff regarding the 20-20-20/40 agreement). [EX. 84].

Around the time the parties reached an agreement-in-principle, Customer Class Counsel engaged in discussions about how to allocate the anticipated fee award among themselves. It is apparent from these discussions that with regard to balancing fees, Lieff and Thornton considered their respective roles in the *BONY Mellon* litigation, a fact wholly unrelated to the value added in this case. Dan Chiplock conceded at deposition, as did Garrett Bradley, that the *State Street* and *BONY Mellon* fee discussions became intertwined. Chiplock 9/8/17 Dep., pp. 22:7 – 23:13 [EX. 41]; Garrett Bradley 9/14/17 Dep., pp. 114:23 – 125:16. [EX. 85]. Contemporaneous emails, discussed *infra*, also reflect the intertwining of the fee negotiations in the two cases.

In August 2015, Dan Chiplock expressed an interest in determining the appropriate allocation of the remaining 40% of the anticipated fee award. *Id.* Garrett Bradley of Thornton resisted, opining that the final distribution should wait until the Court made a total fee award. *Id.*[34] What became apparent to Chiplock was that Thornton viewed any allocation of *State Street* fees as tied to the as yet undecided *BONY Mellon* fee award. *Id.*[35] ("Not to be difficult but [this is a] very different situation, in other words, from BNYM, (which I know doesn't involve you Larry, but seems to be coloring this discussion.") *See also* TLF-SST-053087 (8/28/15 email from Sucharow to

[34] By this time, Bradley was also serving as "of counsel" for Labaton. The potential significance of this is discussed *infra*.

[35] The settlement in *BONY Mellon* would be finalized the following month, September 2015.

Chiplock ("I believe there are other cases and other agreements which are influencing people's desire to either reach agreement now or later.")). [EX. 86].

Garrett Bradley pressed for an agreement that Lieff share some portion of its allotment in *BONY Mellon* with Thornton in recognition of the fact that Thornton had developed the initial FX concept, and refused to settle on an allocation in *State Street* until he saw that Thornton was treated "fairly" in *BONY Mellon.* Chiplock 9/8/17 Dep. pp. 22:8 – 23:13 [EX. 41]; TLF-SST-031166 - 31173 (G. Bradley 8/28/15 email to Bob Lieff ("…I have not agreed that it would be equitable to split the balance of the forty percent the way you described below. What I have said is that may be a fair approach depending on the outcome of our fee in the Mellon matter. If we are treated fairly there, then we will do all we can to treat you fairly in the state street matter…) [EX. 87]; *see also* 8/28/15 email from Bradley to Chiplock of the same date, *id.* ("What I am pointing out is the inequities of our different positions. In Mellon… when we had created that case by developing the fx case *all that we got was some work that resulted in $1.5 million in time*… Now contrast that to state street where you had no client and no concept… Once we have an idea of what our Mellon number looks like then we can discuss how to approach the balance of the 40% with Labaton.") (emphasis added).

Dan Chiplock, the lead attorney in *BONY Mellon*, took exception to the implication that Lieff was not treating Thornton fairly in that case. He pushed back, reminding Bradley in an email two days later that Lieff's role in creating the result in *BONY Mellon* "doubled the value of State Street." *Id.* (8/30/15 email from Chiplock to Bradley). He further reminded Bradley, "I also gave your firm more assignments than

others at the outset in BNYM until it became clear that the work simply wasn't getting done." *Id.* Bradley asked what Chiplock meant when he said Thornton did not "get the work done." *Id.* "That has never been specified and really should [not] be to be deemed credible." *Id.* Chiplock agreed to provide Bradley with emails showing the assignments given to Thornton. *Id.*

The discussion turned to lodestar reporting in *State Street*, with Chiplock warning Bradley not to include unwarranted hours in Thornton's fee petition:

> In the meantime, while we're on the subject of credibility, I want to point out that we need to be consistent and credible with our lodestar reporting in State Street. We are gathering final lodestar reports now, but I heard third-hand that Mike [Thornton] recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million. That number does not comport with the hours Mike Lesser told me for Thornton as of June 29 (around 12,750), which makes more sense given what we know about the work that was done. I am hopeful that Mike T simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf … Also recognize that your [document] reviewers were all housed outside your firm and their respective overhead and facilities expenses were paid for by others, which we were happy to do as a courtesy. Thanks.

Id.

2. **Submission of the Fee Petition**

Customer Class Counsel's discussions about fee-sharing were put on hold as *State Street* settlement negotiations wrapped up, and in advance of the hearing on final approval of the settlement, Labaton, as Lead Settlement Counsel, prepared a motion for attorneys' fees and expenses and for payment of service awards (the "Fee Petition"). Nicole Zeiss, Labaton's Settlement Counsel, was tasked with that responsibility. Zeiss 6/14/17 Dep., pp. 15:18-25 – 16:1-18. [EX. 79]. The Fee Petition consisted of the

Omnibus Declaration[36] and Brief and nine individual declarations submitted by each law firm that had filed an appearance in the case.[37] Labaton posted the Omnibus Declaration, complete with exhibits, to the settlement website making relevant case information available to the class members.[38] The individual declarations described the work performed by each firm and the basis for its fee request. Attached to each declaration was a chart ("Exhibit A") summarizing each firm's respective lodestar through August 30, 2016. *See* Exhibit A to Dkt. # 104-15 [EX. 88], 104-16 [EX. 66], 104-17 [EX. 89], 104-18 [EX. 90], 104-19 [EX. 91], 104-20 [EX. 92], 104-21 [EX. 93], 104-22 [EX. 94], 104-23. [EX. 95]. In most instances, the narrative descriptions and chart outlines were taken verbatim from a template provided by Labaton. *See* Zeiss 6/14/17 Dep., pp. 16:10-16; 21-24. [EX. 79]. Zeiss drafted the template for the small fee declarations, circulated it to the other firms, and worked with them on completing their declarations and exhibits. *Id*., pp. 16:14-16, 20:18-19. Zeiss explained her role:

> . . . I sent out the template to all the firms, and asked them to complete the templates and send me drafts.
>
> Eventually everybody sent me a draft back, and I -- in general I reviewed each of them. There was kind of a -- each one had an individual,

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

[37] The Omnibus Fee Petition listed ten firms, each of which submitted a lodestar calculation identifying the names and rates of individual attorneys and staff at their respective firms. *See* Labaton Sucharow (Dkt. # 104-15) [EX. 88]; the Thornton Law Firm (Dkt. # 104-16) [EX. 66]; Lieff Cabraser Heimann and Bernstein (Dkt. # 104-17) [EX. 89]; Keller Rohrback, LLC (Dkt. # 104-18) [EX. 90]; Hutchings, Barsamiam Mandelcorn, LLP (Dkt. # 104-18) [EX. 90]; the McTigue Law Firm (Dkt. # 104-19) [EX. 91]; Zuckerman Spaeder, LLP (Dkt. # 104-20) [EX. 92]; Feinberg, Campbell & Zack, P.C. (Dkt. # 104-21) [EX. 93]; Beins, Axelrod, P.C. (Dkt. #104-22) [EX. 94]; and Richardson, Patrick, Westbrook, and Brickman, LLC (Dkt. # 104-23) [EX. 95].

[38] Available at http://www.labaton.com/en/cases/State-Street-Corp.cfm (Last visited on April 17, 2018).

more detail than usual, narrative of what each firm's role was, which we wanted here because there were so many different firms in different roles.

So I reviewed that, and asked David, I believe -- Goldsmith -- to make sure that comported with his recollection of what everybody did.

I reviewed the lodestar exhibits for form, to make sure everybody was reporting . . . all the information we needed.

So sometimes firms forget to put in hourly rates, sometimes the formatting is, you know, off, and hard for somebody to follow.

So reviewing for form to make sure all the information was actually there, that's really all I can do because I don't have people's time records.

It's not the practice to exchange time records, but, you know, sometimes if there's a timekeeper that says, you know, .2 hours, we just have sort of a practice where we like to cut that, so I might ask, you know, "Can you just report timekeepers with five hours?"

So that's pretty much what I do on the lodestar tables. . . .

***

[However, i]t wasn't my practice to put them next to each other and compare them. . . .[39]

Id., pp. 21:4 – 23:9 (emphasis added).

Nicole Zeiss was not aware of the staff attorney allocation agreement between Labaton, Lieff, and Thornton. Zeiss 6/14/17 Dep. p. 80:21-24. [EX. 79]. Her involvement in the *State Street* case was "strictly as settlement counsel." *Id*., p. 79:5-9. As Zeiss testified, Labaton has taken the negotiating of settlements out of the hands of the litigators, *id.,* p. 10:24 – 11:17, resulting in one group of attorneys working on a case not knowing what other attorneys working on the same case were doing. This is an example of the compartmentalization of work Labaton practices, which that contributed greatly to the problems experienced in this case.

[39] The failure to perform a side-by-side comparison of the lodestar reports of the three Customer Class firms contributed to the failure to catch and correct the double-counting errors as to the staff attorneys, discussed *infra*.

The Labaton template included several paragraphs describing the source of the lodestar calculations and billing rates. In particular, it included a generic description of the basis for the hourly rates listed in the lodestar calculation. With the exception of three ERISA firms -- McTigue Law,[40] Zuckerman Spaeder,[41] and Beins Axelrod [42] -- the Customer Class Counsel and the other ERISA Class Counsel adopted the template language in its entirety. Specifically, Labaton provided counsel with the following language:

- "The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request." (Dkt. # 104-15, ¶ 6 [EX. 88]; 104-16, ¶ 3 [EX. 66]; 104-17, ¶ 4 [EX. 89]; 104-18, ¶ 3 [EX. 90]; 104-21, ¶ 3 [EX. 93]; 104-23, ¶ 3) [EX. 95].)

[40] The McTigue Law Firm's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." Dkt. #104-18, ¶ 20. [EX. 90].

[41] Zuckerman Spaeder's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions and are charged to clients paying us currently by the hour." Dkt. #104-20, ¶ 4. [EX. 92].

[42] Beins Axelrod's individual fee declaration states that "[t]he hourly rates charged by the Timekeepers are the Firm's regular rates for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters. Based on my knowledge and experience, these rates are also within the range of rates normally and customarily charged in Washington, D.C. by attorneys of similar qualifications and experience in cases similar to this litigation, and have been approved in connection with other class action settlements. The Firm has charged, and received, an hourly rate of $525.00 in litigation involving fiduciary breach by a former trustee and service providers. The Firm does charge a lower rate to longstanding Fund clients in non-contingency matters and to its Union clients. To serve the public interest, the Firm has also charged reduced rates to individual employees with employment discrimination claims. Dkt. # 104-22, ¶ 8. [EX. 94].

- The hourly rates for the attorneys and professional support staff in my firm [] are the same as my firm's regular rates charged for their service, which have been accepted in other complex class actions." (Dkt. # 104-15, ¶ 7 [EX. 88]; 104-16, ¶ 4 [EX. 66]; 104-17, ¶ 5 [EX. 89]; 104-18, ¶ 4 [EX. 90]; 104-21, ¶ 4 [EX. 93]; 104-23, ¶ 4) [EX. 95].)

While, as noted, several of the firms changed the template language in their declarations in support of their own small fee petitions,[43] Garrett Bradley did not do so in his sworn Declaration in support of Thornton's fee petition. Rather, Bradley's Declaration included the following statements:

- Exhibit A is a summary of time spent by attorneys and professional support staff members "of my firm."
- The billing rates for the SAs are "based on my firm's current billing rates."
- For personnel "who are no longer employed," the lodestar is based on their rates for the "final year of employment."
- The hourly rates "are the same as my firm's regular rates charged for their services."[44]
- These rates "have been accepted in other complex class actions."

See Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP, Dkt. # 104-16. [EX. 66].

All of these statements are factually untrue and have no support in the record.[45]

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[43] *See* discussion, *supra*.

[44] As to both Thornton and Labaton, the use of the word "charged" in stating that the hourly rates shown for the firm's employees "are the same as *my firm's regular rates charged* for their services" is something of a misnomer and could readily cause confusion as neither Thornton nor Labaton has hourly clients. For these firms, it would be more accurate to simply say that these are "rates previously used in fee petitions that have been approved by the courts."

[45] *See* discussion *infra* in Part III.

In addition to the above statements, the statement in Bradley's Declaration that the schedule was prepared from "contemporaneous daily time records regularly prepared and maintained by my firm," as to Garrett Bradley and Michael Thornton, raises troublesome issues. Materials produced to the Special Master raise questions about contemporaneous record keeping.[46] Additionally, daily time records of many of the staff attorneys on Thornton's lodestar schedule were not kept by Thornton. Rather, they were kept by Labaton and Lieff.

Bradley testified in his deposition that he did not read his declaration closely before signing it; rather, using Labaton's model fee-declaration template, Mike Lesser of his firm, with the assistance of Evan Hoffman, drafted his Declaration and brought him the final version, which he signed. *See* G. Bradley 6/19/17 Dep., pp. 83:17 – 84:24. [EX. 43]. However, testimony shows that Bradley had ample opportunity to give the declaration the "close read" that was required. Evan Hoffman testified that using the template supplied by Labaton, the firm "put in all the hours that we had kept track of, I along with our accounting department and [Thornton Office Manager] Anasthasia put in the expenses and then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15. [EX. 63].

At the March 7, 2017 hearing, Garrett Bradley acknowledged the inaccuracy of the information in his Declaration, characterizing the information as "unclear" and admitting

[46] The Special Master, however, is unable to conclude that this statement is untrue.

that it "should have been clarified me at the time" it was prepared, but "it was not." 3/7/17 Hearing Tr., p. 88:14-19 [EX. 96]; *see* also p. 91:4-6. At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway. *See e.g.*, 3/7/17 Hearing Tr., p. 87:13-14; 88:2-9; 14-18; 91:5-7; 92:3-8.[47] [EX. 96].

The factual misrepresentations of Garrett Bradley in his sworn Declaration contributed to the double-counting in the fee petitions. Had Bradley accurately and fully described the true status of the Labaton and Lieff staff attorneys, it is probable that a diligent attorney such as Nicole Zeiss would have been alerted to the discrepancy and would likely have caught the double-counting in the three Customer Class declarations. Beyond this, truthful and accurate statements may also have alerted the Court in its review that something was amiss, because the practice of a law firm putting a different law firm's attorneys on its lodestar petition would have been highly unusual, and the Court may well have made detailed inquiries that would have led to the discovery of the double-counting. Because Bradley's Declaration statements were wholly misleading, no one was alerted to the possibility of irregularities.

[47] Although Bradley acknowledged that he "should have clarified" the information in his Declaration, he failed to do so at any time in the four months after the Declaration was filed on September 15, 2016 -- until called to task by the Court on March 7, 2017. In those intervening four months, Bradley could have taken the opportunity to "clarify" his Declaration at the Final Approval hearing which he attended on November 2, 2016. He could have done so immediately after the *Boston Globe*'s inquiry (discussed *infra*); he could have done so in the November 10, 2016 letter to the Court, which he was involved in drafting; he could have done so after the *Globe* article was published on December 17, 2016 or after receiving the Court's February 6, 2017 Order directing counsel to show cause why a Special Master should not be appointed to investigate the accuracy of their lodestar petitions. Bradley took no advantage of any of these opportunities to "clarify" his Declaration and never did so until called upon to do so by the Court on March 7, 2017.

The Omnibus Declaration and Fee Petition, along with all of the small fee declarations and lodestar report exhibits, were filed with the Court together with the parties' Assented to Motion for Final Settlement Approval on September 15, 2016. *See* Dkt. # 104. [EX. 3].

As represented in the Omnibus Declaration and the small fee declarations, Class Counsel sought an award of fees to compensate them for the work they did during the more than six years of investigation, litigation and mediation of this action, which, collectively, included:

- Factual investigation, including researching and reconstructing FX price movements for major currencies for institutional customers of State Street;
- Researching and drafting proposed class claims for inclusion in the Complaints;
- Researching and briefing responses to Defendants' motion to dismiss;
- Preparing for and attending Court hearings, including the hearing on Defendants' motion to dismiss;
- Preparing for and attending mediation sessions held in this Action;
- Participating in numerous phone calls between and among Plaintiffs' counsel, Defense counsel, government regulators, and State Street's counsel; in-person meetings between and among the same; and strategy sessions among Plaintiffs' counsel;
- Drafting discovery and information requests to State Street;
- Researching and arguing the merits of class certification in the context of mediation discussions;
- Analyzing State Street's recorded margins on indirect FX trades throughout the proposed class period, including total volumes attributable to registered investment companies ("RICs"), ERISA plans, and public pension plans;
- Reviewing and analyzing more than nine million pages of documents and data produced by State Street, in preparation for deposition discovery and trial;
- Negotiating terms of the global settlement;
- Drafting the term sheet and eventual settlement; and
- Briefing preliminary and final approval of the Settlement.

See generally Sucharow Decl., Dkt. # 104, ¶¶ 27 - 31, 89 - 100, 104 – 106 [EX. 3]; Chiplock Decl., Dkt. # 104-17, ¶ 3. [EX. 89].

3. The Lodestar Reports of Class Counsel

For their time, the eight law firms[48] representing the plaintiffs in this matter collectively sought an award of fees in the total amount of $74,541,250.00. In support of this sum, the firms submitted lodestar reports reflecting the hours and lodestar of partners, associates and staff attorneys[49] in the following amounts:

FIRM[50]	PARTNERS	ASSOCIATES	STAFF ATTORNEYS
LABATON	5,130.2 hrs.	653.4 hrs.	31,526.4 hrs.
	$4,417,753.50	$367,162.50	$11,684,111.00
LIEFF	1,996.3 hrs.	28.8 hrs.	17,066.1 hrs.
	$1,378,897.50	$12,449.00	$7,474,896.50
Thornton	3,864.8 hrs.	328.3 hrs.	10,537.9 hrs.
	$2,683,552.00	$147,735.00	$4,508,837.00
KELLER ROHRBACK	2,039.4 hrs.	416.6 hrs.	
	$1,858,087.20	$19,460.00	

[48] Excluding local counsel firms Hutchings Barsamian Mendelcorn LLP, and Feinberg, and Campbell & Zack, P.C, which each had total lodestar figures below $10,000.00.

[49] The hours for the staff attorneys include both attorneys employed directly by Labaton and Lieff and attorneys retained by the firms from staffing agencies (separately referred to herein as "contract attorneys").

[50] *See* Lodestar Reports at Dkt. # 104-15 – 104-23. [EX. 88; EX. 95].

McTIGUE	3,624.18 hrs. $2,210,831.00		
ZUCKERMAN	1,313.65 hrs. $1,155,383.50		
RICHARDSON	245.2 hrs. $135,575.00		
BEINS AXELROD	387.8 hrs. $187,712.00		

The various lodestar reports of Plaintiffs' Counsel listed partners billing at hourly rates ranging from $535 to $1,000, and associates billing at hourly rates of $325 to $725: Labaton's report showed nine partners working on the case with billing rates of $800 - $925 an hour, and six associates with billing rates of $340 - $725 an hour. *See* Declaration of Lawrence Sucharow on Behalf of Labaton Sucharow LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. # 104-15, Ex. A. [EX. 88]. Lieff had ten partners with billing rates of $575 - $1,000 on the case, and two associates with billing rates of $425 and $435 an hour. *See* Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. # 104-17, Ex. A. [EX. 89]. Thornton's Lodestar report listed four partners at $535 - $850 an hour, and one associate at $450 an hour. *See* Declaration of Garrett J. Bradley, Esq. on Behalf of

Thornton Law Firm LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. # 104-16, Ex. A. [EX. 66].

ERISA Counsel's range of hourly rates for partners and associates was similar: Keller Rohrback's lodestar report listed fourteen partners with hourly billing rates ranging from $550 to $925 and five associates with billing rates of $400 to $525 an hour. *See* Declaration of Lynn Sarko, Dkt # 104-18, Ex. A.[51] [EX. 90]. Zuckerman Spaeder listed five partners billing at $650 to $990 an hour. *See* Declaration of Carl Kravitz, Dkt. #104-20, Ex. A. [EX. 92]. McTigue's lodestar report listed seven attorneys (none specifically designated as "partner" or "associate") with hourly billing rates of $325 to $725. *See* Declaration of J. Brian McTigue, Dkt. # 104-19. [EX. 91]. Richardson Patrick showed three partners working on the case whose billing rates ranged from $500 to $800 an hour, *see* Declaration of Kimberly Keevers Palmer, Dkt. # 104-23, Ex. A [EX. 95], and Beins Axelrod listed two attorneys billing at $455 and $525 an hour. *See* Declaration of Jonathan G. Axelrod, Dkt. # 104-22, Ex. A. [EX. 94].

Customer Class Counsel's lodestar reports also included requests for fees for "staff attorneys." Labaton listed twenty-five staff attorneys: three were billed at $410 per hour; four were billed at $390 per hour; one was billed at $375 per hour; seven were billed at $360 per hour; and 10 were billed at $335 per hour. Sucharow Decl., Dkt. #

[51] As noted, Keller Rohrback also retained a firm, Hutchings Barsamian Mendelcorn LLP, as local counsel, which appeared on Keller Rohrback's pleadings. Keller Rohrback was advised by Nicole Zeiss not to have Hutchings Barsamian file a lodestar petition because the firm's lodestar was under $10,000. *See* KR00001192-98 (Zeiss 8/31/16 email to Keller Rohrback and other ERISA counsel.) [EX. 97]. However, Keller Rohrback identifies the firm as its local counsel in its own fee petition. *See* Dkt. # 104-18, p. 4. [EX. 90].

104-15, Ex. A. [EX. 88]. Lieff's Report listed twenty staff attorneys, five of whom were billed at $515 per hour, while fifteen were billed at $415 per hour. Chiplock Decl., Dkt. # 104-17, Ex. A. [EX. 89]. Thornton listed twenty-four staff attorneys, twenty-three of whom were billed at $425 per hour, while one -- Michael Bradley -- was billed at $500. G. Bradley Decl., Dkt. # 104-16, Ex. A.[52] [EX. 66].

a. Counsel's Billing Rate-Setting Practices

Labaton does not generally take on "billable" work; however, it does set uniform attorney billing rates for use in all class action fee petitions. Sucharow 6/14/17 Dep., 47:17-18; 50:3-8. [EX. 16]. As to how the rates for partners, associates, and staff attorneys are determined, Ray Politano, Labaton's Chief Operating Officer, testified that Labaton has a billing rates subcommittee comprised of three or four persons -- Politano and two or three partners -- who meet annually and make billing rate recommendations for the firm for the upcoming year. *See* Politano 6/14/17 Dep., pp. 35:25 – 36:3. [EX. 98]. Politano testified that before the subcommittee meets, he has a paralegal gather billing rate information from a number of sources – Westlaw, Lexis, Law 360, fee petitions that were filed in other cases, and bankruptcy filings – all publicly available sources. *Id.*, pp. 38:13 – 39:4. Both plaintiff and defense firm rates are included. *Id.*, p. 40:13-19. In this process, Politano flags particular firms as competitors or

[52] Included among the staff attorneys in the lodestar reports of Lieff and Thornton were four "contract" attorneys hired by Lieff through one or more outside staffing agencies. Two of the contract attorneys, Ann Ten Eyck and Rachel Wintterle, were contracted by Lieff but "allocated" to Thornton, and Thornton paid the agency directly for the time of these two contract attorneys. Two other Lieff contract attorneys, Virginia Weiss and Andrew McClellan, were allocated only part of the time to Thornton, but Lieff paid the agency for the entire time these two attorneys worked on the *State Street* case. The billing rates for contract attorneys are discussed in greater detail, *infra*.

contemporaries that are most analogous to Labaton's practice. *Id.*, p. 39:6-19. On the plaintiffs' side, Politano said primarily firms that do class action work are identified. *Id.*, 41:22-23. Although occasionally he will look at an attorney's rates in another venue, the information provided to the subcommittee is principally information about New York firms' rates. *Id.*, p. 41:3-7.

Politano also provides the subcommittee members with the current billing rates of Labaton attorneys. *Id.,* 37:14-16. The subcommittee reviews and analyzes the Labaton attorney rates in light of the other information Politano has provided the members and then makes billing rate recommendations to the firm's Executive Committee. *Id.*

The Executive Committee reviews all the information again. *Id.*, 37:20-23. Based upon the review and comments from the Executive Committee, changes are made or the billing rates as recommended by the subcommittee are approved. *Id.,* 37:23-25. Politano then informs accounting, the records department, and everyone else who would need to be informed of those new rates. *Id.*,38:4-7.

Lieff has a similar process for setting attorney rates annually. *See* Fineman 6/6/17 Dep., pp., 56:23 – 57:1. [EX. 18]. Steve Fineman, Lieff's managing partner, explained the rate-setting procedure at his firm:

> [A]t the beginning of the year I get in touch with the director of our operations, Joe Dragicevic, and the communication with Joe will be what do you know about what's going on in the market, the billable rate market, and we'll talk about if there is [sic] any new surveys out, sometimes you get the surveys from American Lawyer, who does the survey that publishes all the big law firms, and we'll look at those.
>
> We'll look at whatever other publicly available surveys might be available on rates, we'll discuss it.

> I will ask him if he heard anything in his world, which is sort of law firm management world.
>
> We'll see if there is anything we can find publicly about our competitors' rates. Now, firms in my business, typically because we're not billable rate law firms, you don't usually see our firms in the surveys and we don't respond to the survey questions generally.
>
> So you have to find publicly available fee applications in order to see what people are doing, you can't, you know, as the judge knows, you can't go asking other leaders of other law firms how much they're charging for rates because then we get ourselves in all kinds of trouble.
>
> So we don't do that; we look at what's publicly available and then I make a proposal based on that conversation. . . .
>
> I'll send that proposal early in the year to the executive committee and then the executive committee generally -- what happens is at the following executive committee meeting it will be on the agenda, we will discuss it, it will be approved, and that will become the rates for the year.

Id., pp. 58:5 – 60:12. *See also* Heimann 7/17/17 Dep., pp. 60:13 – 66:13. [EX. 19].

Lieff does not only have class action/contingent fee clients; the firm also has clients it bills on an hourly basis. Fineman 6/6/17 Dep., pp. 68:3 – 70:25. [EX. 18]. These hourly clients are billed largely at the same rates claimed by Lieff in this case. *Id.*

ERISA Counsel also testified that their firms also have a formalized annual rate-setting process. Lynn Sarko, the managing partner of Keller Rohrback, testified that his firm uses a three-part process: First the executive committee gathers twenty to twenty-five fee applications filed during the year by other plaintiffs' firms, including some competitor firms, which are publicly available through PACER. Sarko 7/6/17 Dep., pp. 94:16 – 95:7. [EX. 28]. They then gather the rates of defense firms they litigate against, which are also publicly available from bankruptcy filings. *Id*., pp. 95:9-15. The third part of the process involves analyzing Keller Rohrback's expense and income statements

to determine how much the firm's expenses for the year have gone up. *Id.*, p. 95:16-20. From all this information, the executive committee sets rates for the firm's attorneys for the coming year. *Id.*, p. 95:18-20.

Carl Kravitz testified that Zuckerman Spaeder's rate-setting system is similar. Kravitz testified that at his firm, rates are also set annually, Kravitz 7/6/17 Dep., p. 115:24 [EX. 21], and, as at Keller Rohrback, the rate-setting process is directed by the managing partner and the three-or-four-member executive committee. *Id.*, p. 115:16-21. Kravitz, who has served on the firm's executive committee, said that, in setting rates for the firm's attorneys, they look at what their competitors charge and also review market data from studies performed by Citigroup or Wells Fargo. *Id.* at p. 116:4-25. Rates are decided upon and are distributed to partners to see whether anybody disagrees or has comments. *Id.*, p. 115:24 – 116:1. Then they are returned for approval by the executive committee and the partnership board. *Id.*, p. 116:1-3.

Keller Rohrback and Zuckerman Spaeder have both hourly clients and class action/contingent fee clients. Sarko 7/6/17 Dep. pp. 95:23 – 96:7 [EX. 28]; Kravitz 7/6/17 Dep., p. 88:19-25. [EX. 21]. The same rates annually set by their firms' executive committees are used for billing both sets of clients. Sarko 7/6/17 Dep., pp. 96:22 – 92:5 [EX. 28]; Kravitz 7/6/17 Dep., 117:1-5. [EX. 21].

Richardson Patrick, a 100% contingent fee firm, also sets its attorney rates annually. Brickman 7/7/17 Dep., pp. 41:21 – 43:3. [EX. 40]. Michael Brickman of Richardson Patrick testified:

> In our firm, we have an attorney who is referred to as the business manager of the firm. And on approximately an annual basis, he looks at our rates, he talks to a number of attorneys and gets information as to what other firms are charging, best he can tell. We also collect data -- and I can't tell you where it comes from -- as to -- you know, there are a number of sources where you can find out rates firms are charging and we use that. He then compiles a list, sends it around to all the partners. . . . And they then review it and tweak it. And that's how we come up with our list pretty much on an annual basis.

Id., pp. 42:14 – 43:3.[53]

Unlike the other firms, Thornton does not have any established mechanism for determining its attorneys' billing rates. *See* M. Thornton 6/19/17 Dep., p. 82:21-22 ("Because we are a contingent fee firm, we never, virtually never charge anybody by the hour.") [EX. 2]; Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master's First Set of Interrogatories, Response No. 49 ("TLF performs the majority of its work on a contingency basis, and very rarely uses annual or hourly billing rates. When it does use such rates, whether for attorneys or non-attorney staff, those rates are based on the experience of the individual, in accordance with what is common to the industry and/or has been accepted by courts in other actions.") [EX. 99]; *see also* Garrett Bradley 6/19/17 Dep., p. 64:12-15 (explaining that the $500 per hour rate reported for his brother, Michael Bradley, was tethered only to "the fact of how many years he was an attorney, what he had recently billed to an hourly client, and the fact that he took it on contingent.") [EX. 43].

[53] Because their firms are very small, both Brian McTigue and Jonathan Axelrod testified that they do not annually determine their billing rates. *See* McTigue 7/7/17 Dep., pp. 84-85 [EX. 11]; Axelrod 7/7/17 Dep., p. 48. [EX. 39].

The unempirical nature of Thornton's billing rates was particularly evident with regard to the "staff attorneys." For each of the staff attorneys listed on Thornton's lodestar report (except Michael Bradley), Thornton simply used the $425 per hour billing rate previously used for staff attorneys in the *BONY Mellon* case. *Id*., pp. 48:20 – 49:4; Hoffman 6/5/17 Dep., p. 59:5-12. [EX. 63].

4. Staff Attorneys

As indicated, the staff attorney fees accounted for nearly 70% of the Customer Class attorneys' total lodestar. *See* Chart in Section 3, *supra*; *see also* Labaton's, Lieff's, and Thornton's Lodestar Reports, Dkt. # 104-15 [EX. 88], 104-16 [EX. 66], and 104-17 [EX. 89]; *see also* Master Chart of Lodestars & Expenses, Dkt. # 104-24. [EX. 100]. As explained, these attorneys were tasked with doing document-by-document review, looking for documents that would help build the plaintiffs' case as well as those that might support State Street's defense. *See* Chiplock 6/16/17 Dep., p. 31:6-11. [EX. 10].

The fact that they were designated as "staff attorneys" or that they were tasked with "document review" should not indicate that the work they did was routine or "paralegal" in nature. Both the work they performed and their professional qualifications and experience establish them as more akin to lower-level and mid-level associates. They were all attorneys with years of relevant legal experience, *e.g.*, Christopher Jordan (11 years' experience), Jordan 6/6/17 Dep., pp. 6-7 [EX. 101]; Jonathan Zaul (6 years' experience), Zaul 6/6/17 Dep., pp. 6-7 [EX. 59]; David Alper (28 years' experience), Alper 6/5/17 Dep., pp. 9-14 [EX. 60]; Comfort Orji (11 years' experience), Orji 6/5/17 Dep., pp. 7-10 [EX. 102]; Maritza Bolano (25 years' experience), Bolano 6/5/17 Dep.,

pp. 7-14 [EX. 103], and graduates of some of the top law schools in the nation, *e.g.*, Stanford (Christopher Jordan; Marissa Oh); Harvard (Leah Nutting); UCLA (Joshua Bloomfield); University of California Hastings College of Law (Ryan Sturtevant). A number of them were former judicial law clerks. *See e.g.*, Zaul 6/6/17 Dep., p. 6:22-23 (law clerk for a California Superior Court judge) [EX. 59]; Bolano 6/5/17 Dep., p. 7:18-21 (law clerk for two different Federal judges in the Southern District of New York and the Eastern District of New York). [EX. 103]. Several of them were former associates at major law firms, *see e.g.*, Jordan 6/6/17 Dep., p. 6:24-25 [EX. 101]; Bolano 6/5/17 Dep., p. 7:22-25 [EX. 103]; Kussin 6/5/17 Dep., p. 8:9-13 [EX. 56]; Oh 6/6/17 Dep., p. 8:3-17 [EX. 61].

Beyond this, the majority of the staff attorneys had specialized knowledge or skills in FX, securities, or financial areas. For example, David Alper, a Labaton staff attorney for eight years prior to working on the *State Street* case, had 20 years' experience in the financial services industry working as an interdealer trader where he handled FX transactions.[54] Alper 6/5/17 Dep., pp. 9:15 – 12:15. [EX. 60]. Maritza Bolano had a background in commercial litigation and contract law. Bolano 6/5/17 Dep., pp. 7:22-25; 12:9-20. [EX. 103]. Bolano also had been a procurement officer for the City of New York where she oversaw the city's major health care plans, prepared RFPs when they came in, and then prepared the contracts. *Id.* She also had prior FX experience working with a large banking institution. *Id.*, p. 14:10-14. Kelly Gralewski had a background in

[54] It might well be said that Alper's experience in FX transactions made him more valuable to the Labaton team than attorneys billed at much higher rates.

international business. Gralewski 6/6/17 Dep., p. 6:21-24. [EX. 104]. Tryphena Greene had her own practice, a significant part of which involved consumer fraud cases and financial litigation involving FX transactions. Greene 6/5/17 Dep., p. 8:14-19. [EX. 105]. Marissa Oh spent several years as an associate at a major San Francisco law firm where she worked on securities litigation. Oh 6/6/17 Dep., p. 8:3-17. [EX. 61]. As noted, a large number of the staff attorneys had also worked on *BONY Mellon* before working on *State Street*. *See* Jonathan Zaul 6/6/17 Dep., p. 11:21 [EX. 59]; Christopher Jordan 6/6/17 Dep., p. 11:10-18 [EX. 101]; Kelly Gralewski 6/6/17 Dep., p. 8:16-19 [EX. 104]; Marissa Oh 6/6/17 Dep., p. 8:4-6 [EX. 61]; Tanya Ashur 6/6/17 Dep., p. 12:15-20. [EX. 106]. This experience made their work on the *State Street* case considerably more valuable.

With the exception of Michael Bradley, whose work is discussed separately, *infra*, the staff attorneys at the Labaton and Lieff firms did much more than "low-level" document review. The staff attorneys not only did first-level document review; they also digested complex information and prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore in depositions once witnesses were identified and also on areas that would require follow-up discovery and document discovery if the mediation were to end without a resolution. Chiplock 6/16/17 Dep. p. 32:12-20 [EX. 10]; Zaul 6/6/17 Dep., pp. 24:4 – 25:5 [EX. 59]; Alper 6/5/17 Dep., p. 17:14-16 [EX. 60]; Oh 6/6/17 Dep., p. 21:20-25 [EX. 61]; *see also* TLF-SST-005245-5270 (Memorandum prepared by Maritza Bolano). [EX. 62]. Most of these staff attorneys were paid in the range of $40 - $60 an hour, plus benefits. *See* Oh 6/6/17 Dep.,

p. 11:16 [EX. 61]; Ashur 6/6/17 Dep., p. 18:19 [EX. 106]; Gralewski 6/6/17 Dep. p. 26:14-17 [EX. 104]; Alper 6/5/17 Dep., p. 30:2 [EX. 60]; Jordan 6/6/17 Dep., p. 15:2 [EX. 101]; Zaul 6/6/17 Dep., p. 39:17:20. [EX. 59].

In all, the staff attorneys of Labaton and Lieff were highly qualified professionals who performed sophisticated and important work that contributed greatly to the successful settlement. In this sense, labeling them "staff attorneys," and differentiating from the perhaps more prestigious title of "associate," is something of a misnomer. It would be more accurate to characterize them as "non-partnership-track" associates who performed lower- and mid- level associate work. This is particularly so since many of them had chosen this track for personal reasons.

a. Michael Bradley

Thornton also sought reimbursement of fees for another outside "staff attorney" document reviewer, Michael Bradley. In contrast to the other staff attorneys who worked on the *State Street* case, Michael Bradley worked entirely on a contingent basis. The terms of the agreement were clear: Michael Bradley would be compensated for his work only if, and when, Plaintiffs successfully settled or prevailed in the case. M. Bradley 6/19/17 Dep., pp. 28:20-23; 70:13-15. [EX. 67]. According to Michael Bradley's deposition testimony, he requested that he receive $500 per hour for this work. *Id*. at 28:23-24, 29:1-5.[55] As part of the Fee Petition, Thornton submitted a lodestar assigning

[55] Garrett Bradley testified that he and his brother had a conversation about his fee when Michael began the document review and recalls his brother telling him that he previously billed $450 in one case. Later, nearer to the time when they were preparing the Fee Petition in 2016, Garrett determined that $500 would be an appropriate hourly rate for his brother. *See* G. Bradley 6/19/17 Dep., p. 56:7-15. [EX. 43]. Emails between Bradley and Thornton attorneys Mike Lesser and Evan Hoffman indicate that it was initially contemplated that Michal Bradley

to Michael Bradley a rate of $500 per hour for 406.4 hours, for a total of $203,200.00 in fees. *See* Thornton's Lodestar Report, Ex. A to Garrett Bradley's Declaration, Docket #104-16. [EX. 66]. Thornton has already paid Michael Bradley the entirety of this amount. M. Bradley 6/19/17 Dep., p. 70: 18-19. [EX. 67].

Michael Bradley is a solo practitioner licensed to practice in Massachusetts. *See* Michael Bradley CV. From March 2013 until June 2015, Bradley performed approximately ten hours per week of document review, on average, in the *State Street* case. *Id.*, pp. 26:16-17, 30:8, 48:12, 51:16-20. Michael Bradley does not currently work as an associate, staff attorney, or contract attorney for Lieff, Labaton, or Thornton, nor had he previously. Michael Bradley's only connection with any of those firms -- outside of the *State Street* case -- is his brother, Garrett Bradley, of Thornton. *Id*. at pp. 26:16 – 27-5, 29:11-14.[56]

During his involvement in the *State Street* case, Michael Bradley owned and operated his own law firm based in Quincy, Massachusetts. Prior to that time, Bradley worked briefly, from 2005 to 2007, as an Assistant District Attorney in the Norfolk County District Attorney's Office. *Id*., pp. 11:9-11; 12:6-7. After leaving the DA's Office, Bradley opened his solo practice. Within a few months, he took a position as executive director of the Underground Economy Task Force -- a newly created task force

be billed at an hourly rate less than $500 (i.e., $400 an hour) but at Bradley's instruction, this was increased to $500. *See* TLF-SST-007843-7844 (7/28/15 emails to and from Garrett Bradley, Michael Lesser and Evan Hoffman). [EX. 107].

[56] In fact, the Customer Class attorneys outside Thornton had never heard of Michael Bradley. *See e.g.*, Zeiss 6/14/17 Dep., pp. 68:15 – 70:5, 71:5-10 [EX. 79]; Goldsmith 7/17/17 Dep., pp. 87:17 – 88:17 [EX. 58]; Sucharow 6/14/17 Dep., pp. 62:24 – 63:7 [EX. 16]; Rogers 6/16/17 Dep., p. 97:7-22. [EX. 54].

charged with scrutinizing Massachusetts employment practices to identify routine violators of state and federal employment and wage laws. *Id*. at pp. 22:8-20; 23:6-8. In this position, Bradley oversaw interagency efforts but did not personally conduct any investigations. *Id*. at pp. 23: 6-8, 11-24. He served in this role from 2008 through 2011. *Id.*, pp. 11:16 – 12:8.[57]

After leaving the Underground Economy Task Force, Michael Bradley returned to private practice as a solo practitioner. *Id*., p. 12:7-9. While Bradley has represented clients in personal injury, probate, and employment/labor matters, the vast majority of his practice is public and private criminal defense. *Id*., p. 12:16-19. On the private side, Bradley represents clients in OUI cases, domestic violence cases, and other matters in district court. *Id*. at 15:8-9; *see also* SSSM_MB_000257-000258. [EX. 108]. Bradley is also a member of the Norfolk County Bar Advocate Program. M. Bradley 6/19/17 Dep., pp. 12:18-20, 22-24, 13:1-2. [EX. 67]. As a bar advocate, Bradley represents clients in a range of cases from minor driving infractions to serious felonies such as assault and battery with a dangerous weapon. *Id*., p. 21:6-11.

Michael Bradley did not have any background relevant to securities cases or the FX market. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 3. [EX. 109]. Nor did he possess any technical

[57] Garrett Bradley testified that Michael Bradley's work in this position provided experience that was relevant to the document review work in this case. In fact, this experience appears to have little, if any, relevance to the work required in the *State Street* case. This finding is not intended to diminish Michael Bradley's work experience, but merely to state that it was not relevant to the work required in the *State Street* case -- and certainly not as relevant as that of the Lieff and Labaton staff attorneys.

expertise with the Catalyst document review system to facilitate review. M. Bradley 6/19/17 Dep., p. 25:6-9. [EX. 67].

For over two years, Michael Bradley's contribution to the *State Street* case consisted exclusively of reviewing and coding documents in the Catalyst system. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6 [EX. 109]; M. Bradley 6/19/17 Dep., pp. 47:8-10; 50:6-8. [EX. 67]. While there is no clear evidence of this, Bradley testified that he recorded comments on a "handful" of documents. *See id.*, pp. 39:7-13; 47:20-24; 50:19-24, 51:1-5. This is consistent with his recollection that, in over two years, he found only a "handful" of highly relevant documents. *Id*., p. 48:21-24. He did not produce any substantive memoranda or other work product. *Id*., 46: 21-24; Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6. [EX. 109].

As agreed to upfront, Michael Bradley operated off-site, independently of the other staff attorneys. M. Bradley 6/19/17 Dep., p. 49: 6-9. [EX. 67]. He worked from his own office and performed the *State Street* document review in his free time; he was not supervised by Labaton or Lieff lawyers. *Id.*, 49:7-16; 52:3-18; 54:15 – 55:3. After receiving a basic onboarding from Thornton, Bradley's contact with the firm was limited to submitting weekly or bi-weekly emails tallying his hours or raising technical concerns about the software. *Id*., p. 10:24; Hoffman 6/5/17 Dep., pp.107:9 – 108:7. [EX. 63]. His review, moreover, was beyond the purview of Todd Kussin and Kirti Dugar, the on-site staff attorney supervisors at Labaton and Lieff. Kussin 6/5/17 Dep., pp. 63:20-23; 79:22-25, 80:1-2 [EX. 56]; Dugar 6/16/17 Dep., pp. 103:8-16; 104:9-14. [EX. 55].

5. Service Awards

In their fee petition, Plaintiffs' counsel also requested payment of service awards for the named plaintiff class representatives: $25,000 for ATRS and $10,000 for each of the six named ERISA Plaintiffs -- Arnold Henriquez, Michael Cohn, William Taylor, Richard Sutherland, James Pehoushek-Stangeland, and the Andover Companies Employee Savings and Profit Sharing Plan. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, MAD No. 11-cv-10230, Dkt. # 102. [EX. 110]. These institutional and individual class representatives were very involved in the litigation.

George Hopkins, Executive Director of ATRS, spent extensive time and effort in acting on behalf of ATRS in this case. Prior to assuming the ATRS Executive Director position, Hopkins served as an Arkansas state senator for 14 years, during which time he served as the co-chair of the Senate Retirement Committee. Hopkins 6/14/17 Dep., pp. 10:8-11; 11:5-18. [EX. 4]. It was Hopkins who initially spotted the potential for bringing the case and spoke with Labaton about it. *Id.*, pp. 37:25 – 40:8. He was present at all of the hearings and at the lobby conference, *id.*, pp. 62:22 – 63:7, and he attended a number of the mediation sessions, *id.*, p. 65:18-20. He personally spoke directly with the State Street executives who attended the mediation sessions, *id.*, pp. 66:22 – 68:3, and directed and facilitated ATRS's production of documents. *Id.*, p. 104:7-15. Hopkins estimates that with all the lengthy evening calls with counsel, meetings with State Street,

meetings with experts and attorneys, the mediation sessions, and "think time," he spent several "hundreds of hours" on this case. *Id.*, pp. 102:3 – 102:5.[58]

Arnold Henriquez, one of the named ERISA plaintiffs, testified that he spent 25 to 30 hours on this case. Henriquez 7/7/17 Dep. p. 17:11. [EX. 32]. Although he did not attend any hearings or any mediation sessions, he testified that he reviewed pleadings, produced documents pertaining to his 401(k) and the statements and letters he received from the companies he was investing in, and was in continuous communication with his attorney about the case via phone calls, emails and texts. *Id*. at pp. 10:25 – 11:7; 14:1 – 15:14. Henriquez testified that he was never promised a service award, but that money was not what motivated him in being involved in the case; it was about righting what he believed was a wrong committed by the managers of his pension money. *Id.*, pp. 19:5 – 20:15.

Michael Cohn, another ERISA plaintiff, is disabled, but he estimates that he spent more than 50 hours searching through the "dozens and dozens" of boxes of records he stored in his basement for documents pertaining to his 401(k) needed by his lawyer. Cohn 7/7/17 Dep., pp. 23:8-17, 25:2-8. [EX. 33]. He explained:

> . . . I had dozens and dozens of boxes of records in my basement that required me go through all of those. And it's not like I sat down in one sitting. But it certainly was numerous hours. You know, more so for me being disabled than it probably would be for someone who doesn't have my

[58] The service award ultimately granted to Mr. Hopkins did not go to him personally; the entire award went to the Arkansas Teacher Retirement System fund. Mr. Hopkins merits special mention and commendation for his myriad contributions to the case. However, other aspects of his work as the Executive Director of ATRS -- the class representative in *State Street* -- discovered during this investigation present some complicated and potentially troublesome context for his role as the leader of the class representative. This is discussed *infra*, in the context of what Labaton told ATRS and Hopkins about an arrangement with Texas attorney Damon Chargois, and what Hopkins instructed Labaton attorneys not to share with him.

> physical issues. But it was hours and hours of going through those documents.

Id., p. 23:8-17.

Cohn also spent a significant amount of time reading the "hundreds of pages" of documents his lawyer sent him to review. *Id.*, p. 23:18 – 24:1. Like Mr. Henriquez, Cohn testified that a monetary service award was not a motivating factor in his decision to be a class representative, but, in retrospect, he did not think $10,000 was adequate for the amount of work he had to do on the case. *Id.*, pp. 24:23 – 25:5 ("[I]f money were the motivating factor, the answer would be no. If looking back on this case and if I were doing it for the money with the expectation of $10,000, in my personal case, no, I wouldn't do it. It's not worth it to me. To somebody who has a different background and different financial resources, the answer is probably yes.")

William Taylor is also a disability retiree, and though he did not attend any mediation sessions or hearings, like Cohn, Taylor estimates that he spent some 20 to 50 hours on the case gathering documents, reading pleadings, and discussing the case with his lawyers. Taylor 7/7/17 Dep., pp. 17:16 – 18:5; 12:18 – 13:7. [EX. 34]. He testified that his lawyers frequently sent him letters and emails and called him to keep him apprised of the proceedings. *Id.*, pp. 16:20 – 17:7. ("A lot of phone calls. I can tell you that." *Id.*, pp. 17:25 – 18:1). In his opinion, the $10,000 service award he received was fair compensation for the work he put into the case. *Id.*, p. 19:13-16.

James Pehoushek-Stangeland estimates that he spent more than 50 hours working with his lawyers on this case. Stangeland 7/6/17 Dep., p. 19:16-18. [EX. 26]. He also

provided his lawyers with documents, and during the life of the litigation he read and approved pleadings and was kept up-to-date with the proceedings by his lawyers primarily via email and telephone. *Id.*, pp. 12:12-14; 13:14 – 14:2; 17:8-17; 24:4 – 25:10.

Alan Kober, former vice-president of The Andover Companies, the only institutional ERISA plaintiff in this action, was unable to estimate the total amount of time he and his assistants spent on this case. ("I wished I had kept a logbook or a journal. Not only [of] my hours. Janet [Wallace]'s hours. Joline Pomerleau, who gathered all the documents and stuff. You know, there's a lot of hours involved and a lot of different pay rates, too." Kober 7/6/17 Dep., pp. 34:22 – 35:4). [EX. 25]. He testified that for this case, he compiled and supplied to the lawyers documents they requested and was kept abreast of what was going on in the case through various phone conversations and emails with the lawyers. *Id.*, p. 10:4-9.[59]

Taken individually and together, the class representatives provided substantial value to this case and the result ultimately achieved.

I. COURT APPROVAL OF THE SETTLEMENT AND AWARD OF FEES

1. Provisional Class Certification and Preliminary Approval of the Settlement

On August 8, 2016, the Court conducted a Preliminary Class Settlement Hearing after which it granted preliminary approval of the class settlement,[60] provisionally

[59] As with George Hopkins, the service award to Kober/Wallace did not go to them personally; it went into The Andover Companies' pension fund.

[60] As explained by Goldsmith during the August 8 hearing, "the reason why [class certification is] preliminary and not final is because class members do have a constitutional right to object to class certification if they see fit to do so." 8/8/16 Tr., Dkt. # 93, p. 6:11-15. [EX. 111].

certified the Settlement Class (as defined in the Notice of Pendency of Class Actions), approved the long-form Notice and Summary Notice, and appointed Labaton Sucharow LLP as Lead Counsel for the Settlement Class. *See* MAD No. 11-cv-10230, Dkt. #97. [EX. 112].

As indicated, the Notice defined the Settlement Class as

> All custody and trust customers of SSBT (including customers for which SSBT served as directed trustee, ERISA Plans, and Group Trusts), reflected in SSBT's records as having a United States tax address at any time during the period from January 2, 1998 through December 31, 2009, inclusive, and that executed one or more Indirect FX Transactions with SSBT and/or its subcustodians during the period from January 21, 1998 through December 31, 2009, inclusive.

See Notice, MAD No. 11-cv-10230, Dkt. # 95-3. [EX. 81].

David Goldsmith of Labaton appeared on behalf of the Settlement Class at the Preliminary Class Settlement hearing. 8/8/16 Tr., Dkt. # 93, pp. 4-6. [EX. 111]. Michael Thornton and Garrett Bradley of Thornton, Dan Chiplock of Lieff Cabraser, as well as attorneys from the three ERISA firms, also attended the hearing. *Id.*, pp. 2-4; *see also* Garrett Bradley time records for 8/8/16 (noting "attend preliminary approval hearing in front of Judge Wolf; meetings with co-counsel before and after to discuss strategy, crafting language responsive to Judge Wolf's suggestions") (corroborated by David Goldsmith who in his time records names Garrett Bradley as part of the discussions on that day).

On behalf of all counsel, Goldsmith addressed plaintiffs' request for preliminary class certification for settlement purposes, which involved meeting a two-prong test to show that class representatives and class counsel adequately represented the class

members. *Id.*, pp. 7:24 – 8:7. In response to the Court's inquiry whether Labaton could adequately represent both the ERISA and Customer classes, Goldsmith responded that Labaton was "adequate"; he argued that the Court had "no reason to depart" from its initial adequacy findings in the January 11, 2012 Memorandum and Order appointing Labaton as interim class counsel. *Id*., p. 8:18-22. The Court acknowledged, and Goldsmith agreed, that a class member may opt out of the settlement if he or she "feels that its [sic] interests justify a different path." *Id*., p. 11:6-13.

The Court further asked Goldsmith to explain why the $300 million private settlement was reasonable, and specifically addressed the role of the DOJ, SEC, and DOL in the settlement process. *Id.*, p. 13:2-7. The Court showed a clear interest in ensuring that the global settlement was fair to all participants: "if what I'm being asked to approve is going to affect something you've negotiated at arm's length with the [DOJ] and something you've negotiated with the SEC and something you've negotiated with the [DOL], I think that goes into both the reasonableness of the settlement and the fairness of the settlement." *Id*., p. 18:13-22. Goldsmith affirmed that the reasonableness of the settlement was evidenced, in part, by the fact that DOL signed off on it. *Id*., p. 18:2-6.

2. <u>Final Approval</u>

A hearing on the Motion for Final Approval of Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and for Payment of Service Awards was held on November 2, 2016. David Goldsmith of Labaton, accompanied by Nicole Zeiss, Labaton's Settlement Counsel, again represented the "plaintiffs and settlement class." 11/2/16 Hrg. Tr., Dkt. # 114, pp. 3:7-9, 10-11. [EX. 78]. Dan Chiplock of Lieff Cabraser

and Carl Kravitz of Zuckerman Spaeder also attended the hearing. *See id*., pp. 2-3. Garrett Bradley and Mike Thornton of Thornton also were in attendance. *See* G. Bradley 9/14/17 Dep., pp. 152:19 – 153:11.[61] [EX. 85]. During the hearing, the Court approved the settlement, explaining that its approval was based, in part, on its finding that counsel on both sides "vigorously represented their clients' interest." *Id.*, p. 21:1-5. The Court also found the proposed Plan of Allocation, dividing the settlement among the ERISA and Customer Class plaintiffs, to be fair. *See id.*, p. 22:16-21. The Court further noted the importance of the parties having reached a global settlement, including settlement with the federal regulators, in particular the DOL and SEC. *Id.* at pp. 17:8-23, 38:12-20.

Leading up to the hearing, counsel strategized how best to present the fee award to the Court, nothing that, "Courts have expressed concern about the adversary system breaking down in the fee context and Judge Wolf specifically noted that [issue] at the last hearing." TLF-SST-032617-2620 [EX. 203]. In considering the reasonableness of the attorneys' fees requested, the Court inquired whether the plaintiffs' fee agreement was disclosed to the class members "at the outset" of the case, to which Goldsmith responded only that the fee agreement was "consistent with the fee [plaintiffs were] seeking here." *Id.* p. 26:12-13. In a colloquy with the Court, Goldsmith argued, "[W]e produced a $300 million settlement…. So I think … a fee of some substance would be in order, frankly." *Id.*, p. 28:16-20. The Court acknowledged that the $74 million in fees requested by

[61] There is nothing in the record evidence indicating that any other attorneys from Labaton, Lieff, Thornton, or any of the ERISA firms were in attendance at the final approval hearing.

counsel "is of some substance," *id*, p. 28:21-25, but noted that none of the class representatives had objected to that fee request. *Id*., p. 34-8-9.

At the conclusion of the hearing, Judge Wolf stated that he was "relying heavily on the submissions and what's been said today," and approved the $300 million gross settlement, as well as approving a roughly 25% award of attorneys' fees in the amount of $74,541,250.00, plus expenses in the amount of $1,257,699.94.[62] *Id*., p. 35:7-8. In making this fee award, the Court considered the lodestar as a check on the percentage-of-common-fund method. *Id*., p. 35:12-13. The lodestar here was approximately $41.3 million, and the award was 1.8 times the lodestar, which the Court found reasonable. *Id.* at pp. 31:7-8, 36:1-2. The Court also approved service awards totaling $85,000 -- $25,000 for ATRS and $10,000 for each of the six ERISA plaintiffs. *Id.* at pp. 33:4-6, 35:9-12. Judgment was entered accordingly. *See* Order and Final Judgment, Dkt. # 110. [EX. 113]. The Judgment became final on December 2, 2016.

J. DISTRIBUTION OF SETTLEMENT AND ATTORNEYS' FEES

As provided in the Plan of Allocation approved by the Court at the Final Settlement Hearing, $60 million of the $300 million gross settlement was allocated to the ERISA class plaintiffs, providing ERISA plan participants with a recovery ratio of roughly $2 to every $1 of loss to the class. *See* Sucharow Decl., Dkt. # 104, ¶ 134. [EX. 3]. The Plan of Allocation further provided that a maximum of $10.9 million of the

[62] The Court calculated that the fee award amounted to 24.48% of the Settlement, and when including the amount for expenses the percentage awarded to the attorneys amounted to 25.27% of the Settlement. *See* 11/2/16 Hearing Tr., Dkt. # 114, pp. 35:15-16. [EX. 78].

approximately $75 million in total attorneys' fees could be paid out of the ERISA Class' recovery for attorneys' fees.[63] This allocation was negotiated and agreed to by Customer Class Counsel and ERISA Counsel after the parties reached the agreement-in-principle on the $300 million settlement, *See* Sucharow Decl., Dkt. # 104, ¶ 139 [EX. 3]; *see also* Kravitz 7/6/17 Dep., pp. 54:25 – 55:1; 59:11-12 [EX. 21]; Sarko 7/6/17 Dep., p. 48:19 [EX. 28]; McTigue 7/7/17 Dep., p. 43:10-11. [EX. 11]. In accordance with the Plan of Allocation and the ERISA fee allocation previously agreed upon among the Customer Class Counsel and ERISA Counsel, ERISA Counsel collectively received approximately 10% of the total fee award -- a sum of $7.5 million -- with the remaining $3.4 million under the agreed-upon $10.9 million ERISA fee cap being paid to Customer Class Counsel instead of to ERISA Counsel. *See* Sucharow Decl., ¶¶ 134-139. [EX. 3].

1. Payment of Fees and Expenses

On September 2, 2016, State Street paid the gross settlement sum of $300 million into a Class Settlement Fund Escrow Account -- an escrow account maintained by Labaton, as Lead Settlement Counsel, with Citibank -- where the funds remained pending entry of Judgment. *See* Stipulation and Agreement of Settlement, Dkt. # 89 [EX. 114]; Zeiss 9/14/17 Dep., pp. 122:15, 124:9-11, 130:21-23 [EX. 115]; *see also* LBS041692 (Citibank Escrow Account Statement). [EX. 116]. Under the terms of the Stipulation, Labaton agreed that, once Judgment became final, it would "in good faith promptly

[63] The $10.9 million cap on attorneys' fees from the ERISA class recovery was negotiated by DOL. Sarko 9/8/17 Dep., p. 66:1-8 [EX. 37]; Kravitz 9/11/17 Dep., p. 66:8-23 [EX. 117]; *see also* TLF-SST-052694 – 52696 (8/21/15 email correspondence between Customer Class Counsel and ERISA Counsel related to negotiations with DOL regarding fees) [EX. 118]; TLF-SST-052697 – 52698 (8/26/15 email from Lynn Sarko to Customer Class Counsel and ERISA Counsel regarding negotiated deal with DOL) [EX. 119].

distribute any award of attorneys' fees and/or payments of litigation expenses among *plaintiffs' counsel*." Dkt. # 89 ¶ 21 (emphasis added). [EX. 114].

After the Court issued its Order awarding fees, the total sum of the fee award was transferred by Labaton into a Lead Counsel Escrow Fund, also held by Citibank. Zeiss 9/14/17 Dep., pp. 124:16-23; 125: 3-4. [EX. 115]. On December 8, 2016, after Judgment became final, Labaton instructed the bank to disburse the fees, expenses, and service awards approved by the Court. *Id.*, p. 125:13-21. The fees and expenses were disbursed by the bank directly to Lieff, Thornton, McTigue, Keller Rohrback, and Zuckerman Spaeder. Zeiss 9/14/17 Dep., p. 125:13-21. [EX. 115]. Labaton also instructed the bank to transfer approximately $34 million to its firm's IOLA account, out of which Labaton that same day paid the service awards, obligations to "of counsel" attorneys,[64] and approximately $4.1 million -- 5.5% of the total Fee Award -- to Damon Chargois of Chargois & Herron, LLP ("Chargois"), who practices in Houston, Texas. *Id.*, pp. 140:21 – 141; 143:4-8.[65]

[64] "Of counsel" here refers to Goldman Scarlato & Penny. Goldman Scarlato & Penny performed work on the case and is reflected in the lodestar report Labaton submitted to the Court. Zeiss 9/14/17 Dep., pp., 143:17-20; 144:6-7. [EX. 115].

[65] Chargois initially instructed Labaton to direct the $4.1 million payment to an account held by "K&D Consulting & Investments." *See* LBS030625 (12/5/16 Chargois email to Belfi and Keller). [EX. 120]. Belfi and Keller expressed concerns that while the "fees will be received by lawyers," transferring money to K&D Consulting would make it "look[] like [Labaton] [was] sending part of [its] fee to an account that is not clearly a law firm." *Id.*; LBS028053 (Belfi and Keller12/5/16 emails). [EX. 121].

2. Previously Undisclosed Fees Paid to Chargois & Herron LLP

The $4.1 million payment to Chargois was discovered during the course of the Special Master's investigation.[66] (Chargois and his relationship with Customer Class Counsel is discussed in detail in Section K, *infra*.) Chargois never filed an appearance in the *State Street* case, nor did he or his firm, Chargois & Herron, submit any declaration or lodestar report as part of the *State Street* Fee Petition. *See* Dkt. # 104 [EX. 3], 104-15 [EX. 88], 104-16 [EX. 66], 104-17 [EX. 89], 104-19. [EX. 91]. All parties concede Chargois performed no work on the case.

The names Chargois and/or Chargois & Herron appear nowhere in the Omnibus Fee Petition, Labaton's or any other firm's small fee petition, nor in any lodestar or any exhibits. *See id.*[67] All parties concede that the Court was never informed about Chargois or the payment of $4.1 million to his firm. *See* Belfi 9/5/17 Dep., pp. 87:24-88:11; 89:1-17; 90:7-12; 122:23-123:5 [EX. 122]; Goldsmith 9/20/17 Dep., p. 112:10-14 [EX. 42]; G. Bradley 9/14/17 Dep., pp. 152:19-153:16. [EX. 85].

[66] This payment of fees to Chargois first came to light in a batch of emails on August 8, 2017, through emails produced by Thornton in June 2017, and gave rise to several additional months of depositions and written discovery. Neither Labaton nor Lieff produced any emails related to Chargois in response to the Special Master's initial requests for production of documents. After the Chargois relationship was disclosed by the Thornton-produced emails in response to the Special Master's initial document requests, both Labaton and Lieff produced a significant number of emails and documents pertaining to the Chargois relationship and payment in response to subsequent document requests by the Special Master specifically related to Chargois.

[67] It is significant to note that while the $4.1 million payment to Chargois for doing no work on the case appears nowhere in any fee petition or lodestar, Labaton saw fit to include in its lodestar a significantly smaller payment of $331,000 to another non-Labaton "of counsel" attorney, Paul Scarlato, who, in contrast to Chargois, *did* perform work on the *State Street* case. *See* Zeiss 9/14/17 Dep., pp. 137:4-11, 143:9 – 144:7 [EX. 115]; *see also* Labaton Citibank Bank statements, LBS041983 [EX. 254]; LBS041839 [EX. 255]. Scarlato was paid out of Labaton's fee award. *Id.* The only lawyer to receive class funds who did not appear in Labaton's Declaration or any of the small fee declarations is Damon Chargois.

The Special Master finds that the failure to include the payment to Chargois in the Fee Petition, or anywhere else in the settlement documents, was a material omission.

The fees to Chargois, Customer Class Counsel and ERISA Counsel, plus interest, were paid by Lead Counsel Labaton on December 8, 2016 as follows:

FIRM	FEES	INTEREST ON FEES	EXPENSES	TOTAL
Labaton	$29,604,057.44	$20,079.07	$258,666.85	$29,882,803.36
Thornton	$18,266,333.31	$12,389.21	$295,315.50	$18,575,038.02
Lieff	$15,116,965.50	$10,253.14	$271,944.53	$15,399,163.17
Keller Rohrback	$2,484,708.33	$1,685.26	$342,766.63	$2,829,160.22
McTigue	$2,484,708.34	$1,685.26	$50,176.39	$2,536,569.99
Zuckerman	$2,484,708.34	$1,685.26	$38,670.29	$2,525,063.88
Chargois	$4,099,768.75	$2,780.68	-0-	$4,102,549.43
TOTAL	**$74,541,250.00**	**$50,557.88**	**$1,257,540.19**	**$75,849,348.07**[68]

The $4.1 million payment to Chargois was the fourth largest payment made from the total fee award, and significantly more money than was paid to any ERISA firm. *See* Labaton's 8/11/17 Response to Special Master's Supp. Interrog. No. 2 [EX. 123]; *see also* Master Chart of Lodestars, Litigation Expenses and Plaintiffs' Service awards, Dkt. # 104-24. [EX. 100]. In coordinating the payment to Chargois, Zeiss instructed Labaton's accounting department to remit payment from the firm's IOLA if "it will be a rush" to pay Chargois. LBS032881 – 32883 (2/7/16 Zeiss Email to Ng). [EX. 124]. Unlike payments from settlement escrow funds -- governed by escrow agreements -- payments made from Labaton's IOLA account did not require two additional signatures for disbursement. *See* Zeiss 9/14/17 Dep., p. 120:9-23. [EX. 115]. Chargois testified

[68] *See* Labaton's 8/11/17 Response to Special Master's Supp. Interrog. No. 2. [EX. 123].

that it did not matter to him when, or from which account, the payment was made. Chargois 10/2/17 Dep., pp. 304:9-10; 305:3-10. [EX. 125].

K. DAMON CHARGOIS' INVOLVEMENT WITH LABATON AND ATRS

1. Labaton's Introduction to ATRS

The $4.1 million payment to Chargois merits separate and extensive factual discussion and findings.

Labaton represented ATRS throughout the *State Street* case, serving as Lead Counsel throughout the litigation. ATRS was headed by Executive Director George Hopkins. Hopkins had succeeded Paul Doane, the previous Executive Director, on December 29, 2008. Hopkins 9/5/17 Dep. p. 14:10-22.[69] [EX. 12].

Labaton's relationship with ATRS began in or about 2007. Around that time, Labaton -- which frequently acts as monitoring counsel[70] for its clients -- was looking to expand its securities monitoring practice and form new relationships with potential pension fund clients in the Southwest. Keller 10/13/17 Dep., p. 21:1-22 [EX. 80]; Sucharow 9/1/17 Dep. pp. 15:3-16:19 [EX. 38]; Chargois 10/2/17 Dep., p. 32:3-22. [EX.

[69] After Paul Doane resigned, for a brief period of time ("three or four months") ATRS was headed by an interim director, Gail Bolden, Doane's deputy director. Hopkins 9/5/17 Dep., p. 14:14-22. [EX. 12]. Hopkins succeeded Gail Bolden. *Id.*, p. 14:18-20.

[70] *See infra*. As monitoring counsel, Labaton uses sophisticated in-house investigators and analysts to oversee a client's portfolio of securities investments for signs of possible securities law violations. If Labaton believes a client's portfolio may have been involved in a securities violation that could lead to a viable case, Labaton may ask the client whether it would be interested in serving as lead plaintiff in a potential class action litigation based on those violations. *See* http://www.labaton.com/en/practiceareas/Institutional-Investor-Protection-Services.cfm (last visited April 2018). Because Labaton's representation is contingent on the occurrence and detection of securities violations, it "takes a while for people … to understand [Labaton's work] to the point where it can be useful to them." Keller 10/13/17 Dep., p. 24: 20-23. [EX. 80].

125]. In an effort to "mak[e] inroads" in the Arkansas community, Labaton sought the assistance of Damon Chargois, a lawyer admitted to practice in Arkansas and Texas (and who at the time maintained law firms under the name Chargois & Herron in each state.)[71] Labaton had previously retained Chargois to serve as its local counsel in *HCC Holdings,*[72] a securities fraud class action case filed in federal court in Houston.

Chargois recalls meeting Eric Belfi of Labaton in late 2006 or early 2007 when Labaton was looking for local counsel for the *HCC* case:

> A lawyer in our [Houston] office, Kamran Mashayekh, put us together -- not sure -- basically he had spoken to them before me.
>
> Then Eric Belfi I believe called me directly and asked if I'd be interested in working on a case called *HCC Holdings* that was on file in Houston.
>
> I asked [him to] tell me a bit about it and what you would expect of me, and he said essentially filing documents, and you may have to sign off on a *pro hac vice* for any lawyers that are not authorized to appear in the case.

Id., p. 17:7-18.

Chargois understood he was acting as local counsel in the *HCC* matter, and did, in fact, appear at several hearings, sponsored several attorneys' *pro hac vice* applications, and attended a mediation. *Id*., p. 18:8-17.[73] Chargois also met Chris Keller of Labaton while working on the *HCC* matter. *Id*., p. 19:8-14.

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[71] Chargois & Herron's Arkansas office was closed in late 2009 or early 2010. Chargois 10/2/17 Dep., p. 31:15-17. [EX. 125].

[72] *In re HCC Insurance Holdings, Inc. Securities Litig.*, SDTX No. 07-00801.

[73] In contrast to this case, in *HCC Holdings,* Chargois filed an Affidavit in support of the Application for an Award of Attorneys' Fees and Reimbursement of Expenses, which included a lodestar report of his firm, Chargois & Herron LLP. *See In re HCC Insurance Holdings, Inc.*, SDTX No. 07-00801, Dkt. # 71-3.

Chargois recalled Belfi asking him in 2007 to introduce him and his partner Chris Keller to institutional investors in Arkansas, as Labaton was interested in creating client relationships with institutional investors in that region. *Id.*, p. 20:4-17. Chargois readily admitted that, at that time, he had no knowledge of any "institutional investors." *Id.* at p. 20:20.[74] Chargois' then partner, Tim Herron, did not have any relationships with institutional investors either. *Id.*, p. 27:16-19. However, Herron was friends with an Arkansas state senator, Steve Farris, who at the time served on the Arkansas legislature's Joint Committee on Public Retirement and Social Security which had an oversight role with respect to ATRS. Hopkins 9/5/17 Dep., p. 35:6 – 36:8. [EX. 12]. Farris suggested to Herron that they might want to try to contact Paul Doane who had then just recently taken over as Executive Director of the Arkansas Teacher Retirement System. Chargois 10/2/17 Dep., p. 33:16-21. [EX. 125]. Herron told Chargois, and Chargois called Doane. *Id.*, p. 33:24-34:1.

Chargois explained to Doane who he was and why he was calling, saying that he was working with a New York law firm that specialized in institutional investors and asked if Doane would meet with him, Belfi, and Keller, and Doane agreed. *Id.*, p. 34:1-

[74] Belfi's testimony that he had known Chargois longer, having gotten to know him working on an American Express case in 2004, and that it was Chargois who raised the idea of him introducing Labaton to institutional investors, is not credible given the credible testimony of Chargois that he did not even know what an institutional investor was when Belfi broached the subject. Belfi testified:

> He [Chargois] had a firm . . . . They do some litigation, but mostly what they do is find clients and refer it [sic] to other law firms such as ourselves.
>
> So he approached me and said he had some opportunities to introduce us to pension plans in the Texas, Arkansas, and Oklahoma region because him and his partner had contacts down there.
>
> So I asked him to proceed.

Belfi 9/5/17 Dep., p. 13:5-13. [EX. 122].

35:3. Within a week or so, a meeting took place in Little Rock. Chargois 10/2/17 Dep., p. 35:8-16. [EX. 125]. At that initial meeting, "Eric Belfi presented all the services that Labaton has available and what their -- what they could do and presented as a courtesy that they could do this monitoring of the portfolio." Chargois 10/2/17 Dep., p. 36:13-16. [EX. 125]. Doane later came to New York for another meeting with Belfi and Keller at Labaton's offices; Chargois was not present. Belfi 9/5/17 Dep., p. 38:2-6. [EX. 122]. At this meeting, Labaton conducted a presentation for Doane as to what services the firm could provide. According to Belfi, "[O]nce we did the presentation, we were kind of put on their radar. So, at some point later when they did the RFQ [Request for Qualifications of prospective monitoring counsel], they sent an RFQ for us to respond to." Belfi 9/5/17 Dep., p. 37:17-22. [EX. 122].

2. The Chargois "Arrangement"

As consideration for Chargois' efforts, Belfi and Keller agreed to pay Chargois' firm, Chargois & Herron, a maximum 20% of any attorneys' fees received by Labaton in any litigation involving an institutional investor for whom Chargois had facilitated the introduction, including ATRS (hereinafter "the Chargois Arrangement").[75] Chargois 10/2/17 Dep., pp. 50:18-25; 53:10-17 [EX. 125]; Keller 10/25/17 Dep., pp. 315:21-24,

[75] On the ERISA side, Keller Rohrback used Hutchings Barsamian, a Massachusetts firm familiar with the practices and procedures of the District Court, as local counsel in filing the *Andover* Complaint. Unlike Chargois, Hutchings Barsamian was counsel of record in the case. Keller Rohrback, apparently with the consent of all class counsel, compensated Hutchings Barsamian out of Keller Rohrback's portion of the joint fee award ($2,484,708.33, with interest). At Labaton's request, Keller Rohrback did not submit a separate lodestar petition for its local counsel, who incurred a lodestar of less than 0.017. *See* Keller Rohrback's Response to Special Master's 2d Supplemental Interrogatories, Nos. 1-4. [EX. 27].

316:11-14.[76] [EX. 83]. Both Chargois and Belfi understood that it was the mere introduction by Chargois to potential institutional investors or potential antitrust clients that was the basis of the agreement to pay Chargois 20% of any legal fee Labaton earned on any cases in which Labaton was lead counsel or co-lead counsel and the client was lead or co-lead plaintiff.[77] Chargois 10/2/17 Dep., p. 50:18-24 [EX. 125]; Belfi 9/5/17 Dep., pp. 19:6-21:21. [EX. 122]. Chargois explained:

> Q. Okay. As a result of your having made this introduction of Labaton to Arkansas Teachers, did you come to an agreement or contract or something formal or informal with respect to your ongoing relationship with Labaton?
> A. Yes, sir.
> Q. Could you tell us about that?
> A. Sure. If the -- the agreement as they presented it to me was if ultimately they are selected to represent any institutional investor that I facilitated an introduction to, if they are successful in obtaining a recovery, they would split their attorneys' fees with my firm 80 percent/20 percent.

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[76] Labaton had previously entered into an agreement to pay Thornton approximately 20% of its total fee in cases where Thornton (and, in particular, Thornton partner Garrett Bradley) interacted with local pension fund clients. As Christopher Keller of Labaton explained:

> [W]e had a very, sort of, good, productive relationship with the Thornton Law Firm and -- where, you know, we would -- we would jointly get retained by, you know, funds in the Northeast area, which was their sort of area of -- they had lots of relationships within the area. And we, you know, had an understanding they would get, sort of, let's say, up to 20 percent. And the understanding was that, it was going to be somewhat of a, I call it, a turnkey, but I'm using a -- what I mean is we didn't have to do any heavy lifting up in the -- up in the area, because there's a lot -- I mean, we're a national firm. Think about this, so we have over 200 pension fund clients, we may have one within driving distance of our office, okay. So we maintain a national practice and -- but without offices all over the nation. So it's very important, any time that we can leverage others who -- who are ready and willing and able to do the heavy lifting locally, we're happy to sort of let that happen, and, of course, pension funds feel much more comfortable with people they know or people who are close by or were introduced through someone they know, so we made that a -- a -- this is how Labaton was going to build more business.

Keller 10/13/17 Dep., pp. 43:3-44:19. [EX. 80].

[77] While Chargois understood that he would receive 20%, as Keller testified, Labaton believed that it was only obligated to pay Chargois a percentage of fees proportional to ATRS's share of the contributory losses incurred by all lead plaintiffs. By way of example, if ATRS was named co-lead counsel with another plaintiff in a successful litigation, Chargois' payment would not be 20% of Labaton's fee, but would reflect ATRS's pro rata portion of the total loss amount, offsetting the full 20% figure.

Q. So you would receive 20 percent of the attorneys' fees?
A. Yes, sir.
Q. And they would receive 80 percent?
A. Yes, sir.
THE SPECIAL MASTER: Was that in all cases in which they would be counsel to a party that you helped to facilitate a relationship with?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Not limited to Arkansas?
THE WITNESS: Correct.

Chargois 10/2/17 Dep., pp. 50:11 – 51:12. [EX. 125].

This agreement was negotiated at the very outset of the Labaton request that Chargois make introductions for Labaton, not after any introduction such as that to Paul Doane was made. *Id.*, p. 52:1-7.

Under this arrangement, Chargois was not expected to file an appearance, perform any work, assume any role in any of the resulting litigation, or even interface with the client. Chargois 10/2/17 Dep., pp. 56:19-24; 57:1-6 [EX. 125]; Keller 10/25/17 Dep., p. 323:2-4. [EX. 83].

While Chargois and Keller attempted on numerous occasions over the years to reduce this agreement to writing, and exchanged several drafts to which they both agreed in large measure, no formal agreement was ever put together; it was wholly "an email relationship." Chargois 10/2/17 Dep., p. 59:8-10 ("Only e-mails. There's no four-corner document that -- in ceremony and signed or anything. It's just an e-mail relationship.") [EX. 125]. Chargois was very clear that his understanding was that this was not a "referral fee" arrangement, nor was he "local counsel"; it was just an "agreement":

THE SPECIAL MASTER: What is your understanding of the relationship? And if it evolved from something to something else --
THE WITNESS [Mr. Chargois]: Right.

THE SPECIAL MASTER: -- we'd be very interested in that.
THE WITNESS: At the very beginning I thought I would be local counsel. I was not.
. . . .
When Eric informed me that [the Joint RFQ Response] had been kicked back, I needed to withdraw, ever since then I've only referred to this as an agreement. I don't have a client so ...
THE SPECIAL MASTER: Just an agreement?
THE WITNESS: Just an agreement.
THE SPECIAL MASTER: Not a referral fee arrangement?
THE WITNESS: No, sir.
THE SPECIAL MASTER: Not a local counsel arrangement?
THE WITNESS: No, sir.
THE SPECIAL MASTER: Not a forwarding fee arrangement?
THE WITNESS: I'm not sure what forwarding fee means.
MR. SINNOTT: Neither are we.
THE SPECIAL MASTER: We weren't either. I was going to follow up on that and ask you if you've ever heard the term.
THE WITNESS: I have not.
THE SPECIAL MASTER: So just a fee arrangement or just an arrangement?
THE WITNESS: I've always referred to it as our agreement.

Chargois 10/2/17 Dep. pp. 62:10-64:5. [EX. 125].

While Labaton's relationship with Chargois began with Chargois & Herron serving as "local counsel" in the *HCC Holdings* Texas class action, it is clear that the relationship evolved over time. *See* Chargois 10/2/17 Dep., pp. 17:19-21; 38:23-24, 39:1 [EX. 125]; Sucharow 9/1/17 Dep., p. 81:16-20. [EX. 38]. As a result, the terminology used to describe the Chargois Arrangement varies greatly between individuals. Some attorneys have labeled Chargois as "local counsel," or "the local," while on other occasions describing the Chargois Arrangement as based in "referral" or a "referral obligation." *See, e.g.,* LBS027776 (4/24/13 Bradley email to others) [EX. 126]; M. Thornton 9/1/17 Dep., p. 38:13-15 [EX. 127]; Chiplock 9/8/17 Dep., pp. 68:4-7, 102:3-8 [EX. 41]; Keller 10/13/17 Dep., pp. 45:11-16; 71:24-72: 4; 96:16-18; 212:5-12. [EX.

80]. In yet other instances, the Chargois Arrangement is characterized as a "forwarding obligation." Sucharow 9/1/17 Dep., pp. 59:13-19; 86:8-12. [EX. 38]. Finally, Sucharow testified that he considered Chargois a "joint venturer" working with Labaton to find pension clients. Sucharow. 9/1/17 Dep., p. 16:1-3. [EX. 38]. Regardless of the title used, it is undisputed that Chargois' sole contribution to -- and only role in -- the *State Street* case was facilitating an introduction between Labaton and ATRS -- years before the *State Street* case was even contemplated. Sucharow 9/1/17 Dep., p. 82:7-10. [EX. 38].

a. Labaton's Compartmentalization of Knowledge of the Chargois Arrangement

While the initial discussions about partnering with Chargois included only Keller and Belfi of the Labaton firm, Larry Sucharow -- Co-Chairman and, in effect, managing partner of Labaton[78] -- learned of the firm's obligation to pay Chargois (a "referring attorney") a portion of the total attorneys' fees by 2015.[79] Sucharow 9/1/17 Dep., p.18:2-11; 20-13. [EX. 38]. Sucharow, who acted as the "lead negotiator and lead strategist" in the *State Street* case, knew of Chargois' entitlement for which he did not perform any substantive work or bill any time on the case. Sucharow 9/1/17 Dep., p.86:18- 87:1.

[78] In 1982, Sucharow was named partner of the firm. Sometime thereafter, he became managing partner. He served in that role for "many years" until his appointment as Chairman of the firm. As Chairman, Sucharow assumed duties of both the Chairman and managing partner. Sucharow 6/14/17 Dep., p. 10:18-11:4. [EX. 16]. Sucharow currently is Co-Chairman of the firm. *See* http://www.labaton.com/en/ourpeople/Lawrence-Sucharow.cfm (last visited April 16, 2018).

[79] Sucharow testified that "[it] may be that I *should have known* [prior to 2015] because I know we had some ongoing relationship with him, but it was nothing that was in the forefront of my mind." Sucharow 9/1/17 Dep., p.18:3-6. [EX. 38]. While the full nature of the Chargois Arrangement -- payment for performing no work on the case -- was not initially disclosed to Sucharow, he learned firsthand that Chargois did not work on the case after becoming involved in the settlement process. Sucharow 9/1/17 Dep., 18:24-19:1. [EX. 38].

[EX. 38]. At least as of 2015, Sucharow knew that Chargois had no role in the *State Street* case beyond the initial introduction to ATRS. *See id.*

But beyond Belfi, Keller, and Sucharow, other Labaton lawyers, including those who worked on the *State Street* case, knew little or nothing about Damon Chargois and his fee arrangement with the firm, in large part due the substantial compartmentalization of Labaton's practice. Although according to Christopher Keller, this compartmentalization was an effort to modernize and improve efficiency, *see* Keller 10/13/17 Dep., p. 79:18-20 [EX. 80], the end result was that attorneys in one department were generally unaware of decisions made or work done by attorneys in another department, even where the same client or lawsuit was involved. *See supra*. For example, Nicole Zeiss, who worked exclusively in Settlements, was not privy to decisions made by attorneys in the Litigation department or by the Relationship attorneys. Zeiss 6/14/17 Dep., p. 79:5 - 80: 24. [EX. 79]. Her involvement in the *State Street* case was "strictly as settlement counsel." *Id*., p. 79:5-9. Similarly, litigators such as David Goldsmith were not privy to client agreements entered into by the firm's Relationship counsel. *See* Goldsmith 9/20/17 Dep., pp. 112:10 – 113:9 [EX. 42]; *see also* Keller 10/13/17 Dep., p. 77:13-17 ("The client -- the client, you know, development, is a very kind of a siloed thing within the firm. They -- they -- they operate, you know, a lot on the road, amongst themselves.") [EX. 80]. As a consequence, the arrangement Eric Belfi, Labaton's "Relationship" counsel, and Christopher Keller agreed to with Damon Chargois to pay him a percentage of fees in *State Street* was not shared with the Labaton attorneys who were involved with the litigation and settlement of the case.

David Goldsmith, who was Labaton's principal litigator in *State Street*, never knew about Damon Chargois or his fee arrangement until November 21, 2016 -- several weeks after the *State Street* settlement had been approved by the Court. Goldsmith 9/20/17 Dep., pp. 111:13 – 113:9. [EX. 42] Nicole Zeiss, who appeared with Goldsmith at the Final Approval Hearing before Judge Wolf, testified that in her role as settlement counsel, she had a "general understanding" that Chargois and his firm had worked with Labaton "to develop relationships with clients in different cases," but she did not have any knowledge of the details of the firm's relationship with him. Zeiss 9/14/17 Dep., p. 19:17-21. [EX. 115].

3. The ATRS Request For Qualifications (RFQ)

Chargois' efforts got Labaton the "foot in the door" it wanted and needed with ATRS. In mid-2008, ATRS issued a Request for Qualifications ("RFQ") to Labaton, among other firms. Chargois 10/2/17 Dep., p. 37:19-22. [EX. 125]. On July 30, 2008, Labaton responded by submitting a "joint proposal" on behalf of Labaton and Chargois & Herron. LBS017738 – 17755 (7/30/08 Joint Response by Labaton Sucharow LLP & Chargois & Herron, LLP) [EX. 128]; *see also* Belfi 9/5/17 Dep., p. 37:20-23. [EX. 122]. Labaton, through Belfi, received ATRS's response to Labaton's response to the RFQ on October 13, 2008 by email from ATRS Chief Counsel Christa Clark. *See* LBS017455 - 17456 (10/13/08 email from C. Clark). [EX. 129].

Clark advised Belfi that Labaton had been selected as an additional monitoring counsel for ATRS, but that Chargois & Herron was *not* approved as part of the proposal. *Id.* Clark indicated that while there was no requirement to use Chargois & Herron,

Labaton could use Chargois & Herron on a "case by case basis" if they were "a necessary and appropriate expense." *Id.* Specifically, Clark's email to Belfi stated in relevant part:

> I am pleased to inform you that subject to final approval of the Attorney General's ATRS has selected Labaton Sucharow as an additional monitoring counsel for our system.
>
> I would like to speak to you regarding the additional firm on your submission Chargois & Herron. This is a little awkward, but since your firms are not legally affiliated, we are unable to process the state contract form with both firms listed.
>
> If your firm is doing the monitoring and providing the financial backing for the cases, I think it is most appropriate that we add your firm independently to the list of approved firms. Your firm *may affiliate that firm or use them as independent contractors, if you deem is* [sic] *appropriate on a case by case basis. There would be no requirement that you use them if it was not a necessary and appropriate expense of a case.* I don't know how to best handle this point but the state procurement process is not conducive to a joint proposal.

See LBS017456 (10/13/08 email from C. Clark) (italics added). [EX. 129].

Chargois understood that his firm was not accepted as part of the RFQ process. Chargois 10/2/17 Dep., pp. 48:15-49:1. [EX. 125].

At no point either before or after receiving Clark's email did Labaton inform Ms. Clark or Mr. Doane (or his successor, Mr. Hopkins) of the pre-existing Chargois Arrangement generally, or that it was obligated to pay Chargois a portion of any fees that might be awarded in its representation of ATRS in the *State Street* matter.[80] Belfi, 9/5/17

[80] In response to a specific question in the RFQ, inquiring about fee agreements with other law firms, Labaton did not mention the Chargois obligations, even though the Chargois Arrangement had already been agreed upon by Labaton. [EX. 128].

Dep. pp., 23:5-16; 115:17-21; 118:16-19 [EX. 122]; Keller 10/25/17 Dep., p. 297:14-16.[81] [EX. 83].

4. ATRS's Lack of Knowledge of the Chargois Arrangement

Beginning in 2008, Labaton served as monitoring counsel for ATRS.[82] Belfi 9/5/17 Dep., p. 18:6-7. [EX. 122]. Shortly thereafter, George Hopkins replaced Paul Doane as Executive Director of ATRS. *Id*., p. 27:16-18. Belfi explained that Hopkins was a much more direct person, who only wanted to deal with Belfi. Belfi 9/5/17 Dep., pp. 27:18-28:7, 56:22-57:10. [EX. 122].

Hence, the relationship between Chargois and ATRS shifted with Hopkins' appointment. Belfi 9/5/17 Dep., p. 57:11-24. [EX. 122]. Labaton no longer needed Chargois to facilitate communications with ATRS. Nevertheless, Labaton continued to remit payments to Chargois under their previous agreement to avoid litigation by

[81] Belfi testified that after receiving ATRS's October 13, 2008 email response to the RFQ, he had a telephone conversation with Christa Clark in which he discussed with Ms. Clark Labaton working with Chargois & Herron:

> A. I had a follow-up call with Christa after I got this e-mail, and we had a conversation concerning that, you know, we would be working with Chargois & Herron, but we would be the ones that would go on the contract.
> Q. And did you tell her that Chargois & Herron would be a necessary and appropriate expense?
> A. The issue at this point is this is like eight years ago, and I -- I can't spell out the conversation. I just know I had a follow-up conversation with Christa concerning the fact that they were going to be involved in the relationship. As far as being able to decipher anything else that happened in that conversation, I couldn't tell you.

Belfi 9/5/17 Dep., pp. 117:20 – 118:10. [EX. 122]. Nothing in Belfi's testimony, however, indicates that Clark was informed that because of the pre-existing Chargois Arrangement, Labaton was obligated to pay Chargois & Herron a portion of any fees it might be awarded in any class action lawsuit brought on behalf of ATRS.

[82] Labaton continues to serve as one of five firms "on retainer" to ATRS, responsible for monitoring ATRS's investment portfolio and alerting ATRS to potential misappropriation or unexpected monetary loss. Hopkins 6/14/17 Dep., pp. 29:9-22; 30:3-5. [EX. 4].

Chargois that would likely be filed in Chargois' home state, Texas. Belfi 9/5/17 Dep., 58:1-7, 10-15. [EX. 122].

George Hopkins worked closely with Labaton in deciding to file the *State Street* lawsuit, and he remained very involved in the case, including in the mediation process, spending "hundreds of hours" working on the case during its five-year history. Hopkins 6/14/17, p. 102:35. [EX. 4].

Labaton sought Hopkins' approval before partnering with Lieff and Thornton in the class action litigation. However, Labaton did not seek Hopkins' approval to share information with or remit payments to Chargois. Hopkins, in fact, was never informed of the existence of Damon Chargois nor of any agreement between Labaton and Chargois, much less one that entitled Chargois to 20% of any attorney fee recovered by Labaton on behalf of ATRS. *See* Hopkins 9/5/17 Dep., pp. 21:5-10, 64:4-67:11 [EX. 12]; Belfi 9/5/17 Dep., pp. 18:9-20:17; 24:6-20.[83] [EX. 122].

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[83] Hopkins testified that he "had no idea" that Chargois had introduced Belfi and Keller to ATRS before his tenure. In fact, Hopkins had never even heard of Damon Chargois or Chargois & Herron prior to their disclosure during the Special Master's investigation in August 2017. Hopkins 9/5/17 Dep, pp. 20:22-21:10; 64:4-65:24. [EX. 12]. Hopkins testified regarding his knowledge of Chargois as follows:

> Q. Were you aware that members of a law firm with a Little Rock office had introduced individuals that you would later come to know as Eric Belfi and Chris Keller to influential Arkansas officials in an effort to secure legal work with the state?
> A. I had no idea.
> Q. Are you familiar with the firm name Chargois & Herron?
> A. As of about two weeks, ten days ago.
> Q. But you never encountered them to the best of your recollection years ago?
> A. I had never heard of that firm before.

Hopkins 9/5/17 Dep, pp. 20:22-21:10. [EX. 12].

In a Declaration sent to the Special Master on March 17, 2018 -- eight weeks before the filing of this R&R -- George Hopkins confirmed that he had no knowledge of the Chargois agreement, but states that he "did not want to know the specifics of fee allocations between Labaton and other attorneys," and purports to "ratify that [the Chargois] agreement." Hopkins 3/15/18 Declaration, ¶¶ 7, 10, 16. [EX. 130]. *See* further discussion of Hopkins' Declaration, *infra*.

It is apparent from Labaton's email correspondence with George Hopkins that Labaton took pains at every turn not to reveal Damon Chargois, Chargois & Herron, or their 20% interest in ATRS cases to Hopkins. For example, rather than include Chargois as a co-addressee or cc him on email correspondence concerning ATRS cases in which Chargois & Herron had an interest, Eric Belfi of Labaton either blind-copied Chargois or Herron or separately forwarded the emails to them, the effect of both being the same -- to not reveal Chargois & Herron to Hopkins. *See, e.g.,*

- LBS018439 (Chargois and Herron bcc'd on 5/10/10 email from Belfi to Hopkins re: "Blue Ribbon" report for *Goldman Sachs* litigation) [EX. 131];
- LBS017505 (Tim Herron bcc'd on 5/6/10 email from Belfi to Hopkins updating status of *The Hartford* securities litigation) [EX. 132];
- LBS018437 – 18438 (5/15-16/10 email chain from Hopkins to Belfi re: potential joint filing of a case with Nix Patterson, forwarded by Belfi to Chargois) [EX. 133];
- LBS020417 – 20418 (5/14/10 letter from Belfi to Hopkins re: *Colonial BancGroup* case, forwarded to Chargois on 5/17/10) [EX. 134];
- LBS017822 (Chargois bcc'd on 5/2/13 email from Belfi to Hopkins re: motion to dismiss filed in the *Facebook* case) [EX. 135];
- LBS017824 (10/23/13 email from Belfi to Hopkins re: *Facebook* securities litigation, w/attachments, forwarded to Chargois) [EX. 136];
- LBS017825 – 17826 (Chargois bcc'd on 7/24/13 email from Belfi to Hopkins re: *Goldman Sachs* trial). [EX. 137].

See also Belfi 9/5/17 Dep., pp. 110:5 – 113:5 [EX. 122]; Keller 10/25/17 Dep., pp. 353:14-354:17; 358:1-24; 463:2-464:2. [EX. 83].

Nor did the Retention Agreement in *State Street* signed by Hopkins disclose the Chargois Arrangement. The Retention Agreement provided, in relevant part, only that ATRS agreed that Labaton "may divide fees with other attorneys for serving as local or liaison counsel, as referral fees, or for other services performed in connection with the Litigation." LBS011060-11062 (2/8/11 Retention Agreement email from Eric Belfi to George Hopkins).[84] [EX. 138]. It further provided that "[t]he division of attorneys' fees with other counsel may be determined upon a percentage basis or upon time spent in assisting with the prosecution of the Litigation." *Id*. The Retention Agreement did not name any individual attorney nor specify which, if any, of these "services" it would seek as part of the litigation. *See id.* It contains only a vague reference to "referral fees," and it does not name Chargois or Chargois & Herron, and makes no reference to the obligation to Chargois the ATRS lawsuit would trigger or how the payment would be made. Chargois acknowledged he played no role whatsoever in ATRS's *State Street* lawsuit, and only met George Hopkins once, when he happened to be in San Francisco visiting his sister and attended an unrelated court hearing. Chargois 10/2/17 Dep., pp. 54:18-23, 74:21-75:3. [EX. 125].

[84] Specifically, the Retention Agreement provides, in relevant part:

> Arkansas Teacher agrees that Labaton Sucharow *may allocate fees to other attorneys who serve as local or liaison counsel, as referral fees, or for other services performed in connection with the Litigation.* The division of attorneys' fees with other counsel may be determined upon a percentage basis or upon time spent assisting with the prosecution of the Litigation. Any division of fees among counsel will be Labaton Sucharow's sole responsibility and will not increase the fees payable by Arkansas Teacher or the class upon a successful resolution of the Litigation.

LBS011060 – 11062 (emphasis added). [EX. 138].

Labaton's purported reason for not informing Hopkins of the Chargois Arrangement is because Hopkins "did not want to know." *See* Hopkins 3/15/18 Declaration [EX. 130]; Belfi 9/5/17 Dep., pp. 23:17 – 24:5. [EX. 122]. This was a unilateral decision by Belfi, however, who concluded after meeting Hopkins that he would appreciate a more direct relationship. Belfi 9/5/17 Dep., pp. 27-28; 56-57. [EX. 122]. According to Belfi, the subject of Chargois "did not come up," and, admittedly, Belfi did not want to bring another attorney not from Labaton into the case, Belfi 9/5/17 Dep., pp. 110, 122. [EX. 122].

a. Agreement Among Labaton, Lieff, and Thornton to Share in the Payment of Labaton's Obligation to Chargois

Labaton's obligation to pay Chargois 20% of any fee it might be awarded in *State Street* was disclosed to Lieff and Thornton in or about April 2013. The subject was first raised at a meeting during a Global Justice Network conference in Dublin, Ireland, an event organized by Bob Lieff and attended by Michael Thornton, Garrett Bradley, and Lynn Sarko.[85] Lieff 9/11/17 Dep., p. 63:10-22. [EX. 139]. In an April 26, 2013, email from Garrett Bradley to Robert Lieff, Michael Thornton, Eric Belfi, Christopher Keller, and Dan Chiplock, and copied to Chargois (referred to by the parties as the "Dublin email"), Chargois was referred to as "the local counsel who assists Labaton in matters involving Arkansas Teachers Retirement System." LBS025771. [EX. 140]. In that

[85] Bob Lieff testified that he does not have a specific recollection of a conversation with Bradley and Michael Thornton regarding Chargois. Lieff 9/11/17 Dep., p. 66:2-5. [EX. 139]. Although Lynn Sarko attended the Global Justice Network meeting, there is no evidence that he was a party to any discussion with Bob Lieff, Michael Thornton or Garrett Bradley concerning Chargois, and Sarko testified that he did not learn about the Chargois agreement until it was disclosed in the Special Master's investigation in August 2017.

email, Garrett Bradley memorialized an agreement reached earlier among the three Customer Class law firms to share in the payment of Labaton's 20% obligation to Chargois.[86] In relevant part, Bradley's email stated as follows:

> Bob, as you, Mike and I discussed in Dublin last week, I am sending this e-mail regarding the obligation to the local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System. Labaton has an obligation to this counsel, Damon Chargois, copied on this e-mail, of 20 percent of the net fee to Labaton in the State Street FX cases before Judge Wolf. Currently this amount will be 4 percent because of the agreement between Labaton, Thornton and Lieff of a division of 20 percent guaranteed, each with the balance to be decided on at a later date. Obviously, this may go up should Labaton receive an amount higher than 20 percent. We have agreed that the amount due to the local, whatever it turns out to be, 4 or 5, will be paid off the top with the balance fee split between Lieff, Labaton, Thornton pursuant to our agreement. The local asks that I copy him on this e-mail so he will have confirmation of this agreement. When we spoke to him, he was agreeable to this as well. Garrett.

LBS025771 (4/25/13 G. Bradley email to R. Lieff, M. Thornton, E. Belfi, C. Keller and D. Chiplock, copied to Chargois). [EX. 140].

Discussions concerning the specific percentage to be paid Chargois were ongoing while the parties continued with their hybrid mediation in 2013 and 2014. Later, in late 2015, after the settlement had initially been agreed to by the parties, Customer Class Counsel all agreed to allocate 5.5% of their collective fee award to Chargois. Chiplock 9/8/17 Dep., pp. 106:18-107:1. [EX. 41]. Labaton, Lieff, and Thornton contributed

[86] During the *State Street* litigation, Garrett Bradley had substantial contact with Belfi and Keller of Labaton, and Chargois. Bradley attended annual marketing conferences hosted by Labaton and attended by Keller, Belfi, and Chargois. Then, effective January 1, 2015 through late 2016, Garrett Bradley held a dual role as partner at Thornton and "of counsel" to Labaton. *See* LBS007086 – 7090 (Bradley's Of Counsel Agreement). [EX. 141]. In this role, Bradley agreed to "assist Labaton partners in identifying and seeking retention by clients for securities." *Id*.

equally to satisfy this obligation. Labaton Sucharow's 8/11/16 Responses to Special Master's Supplemental Interrogatories, Response No. 1(b). [EX. 123].

5. Lieff's and Thornton's[87] Limited Knowledge of the Chargois Arrangement

Lieff and Thornton were not privy to the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which ATRS was a co-lead counsel. Lieff 9/11/17 Dep., p. 92:2-12 [EX. 139]; Thornton 9/1/17 Dep., pp. 19-21, 35:12-24. [EX. 127]. An original cost-sharing agreement circulated among Customer Class Counsel in 2011 was drafted, but never executed, shortly after the *ATRS* Complaint was filed. This draft referenced only that the firms acknowledged that "[t]here is an 'off the top' obligation to 'referring counsel' of 6% of the fees awarded," without any specifics. *See* TLF-SST-033911 – 33913 (5/4/11 letter agreement).[88] [EX. 82]. This draft agreement, with its reference to "referring counsel," was shared between Labaton and Garrett Bradley. However, a copy apparently was never circulated to Lieff. *See* Lieff 9/11/17 Dep., p. 98 [EX. 139]; Keller 10/25/17 Dep., p. 415 [EX. 83]; Oral Argument Trans, pp. 94-95 (Ms. Lukey), pp. 221-222 (Mr. Heimann) [EX. 162].This is significant both as to Garrett Bradley's knowledge of the true nature of the Chargois Arrangement, as well as Lieff's knowledge, as it reflects that Bradley and Labaton referred to Chargois

[87] As discussed *infra*, Garrett Bradley stood in a unique position vis-à-vis Labaton (*see* note 86, *supra*), and specifically, the Chargois Arrangement. Thus, Bradley's knowledge must be considered separately from that of the other Thornton attorneys.

[88] Christopher Keller, who drafted the letter agreement, testified that the "off the top" percentage to referring counsel -- 6% -- reflected 20% of Labaton's 1/3 share of the fees: "20 percent of a third is 6 point something so we probably just went with 6 percent." Keller 10/25/17 Dep., p. 419:8-9. [EX. 83].

as "referring counsel" but that all emails and other communications to Lieff refer to Chargois as "local counsel" or "the local."

This arrangement was next addressed among the three Customer Class firms in the April 24, 2013, "Dublin" email in which Garrett Bradley described a financial obligation owed to Chargois. In that email, Bradley characterized Chargois as "local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System." LBS 025771. [EX. 140]. The Labaton attorneys addressed on the email, Chris Keller and Eric Belfi, did not offer any additional explanation. Nor did either attorney inform their co-counsel that Chargois was not performing any work in the matter. Understanding that Chargois was operating as "local counsel," Bob Lieff responded to the email on April 23, 2013, stating "I am in full agreement [with splitting payment to Chargois]." LBS030997 – 30998, (4/24/13 Lieff Email to G. Bradley, et al.). [EX. 142]. Eric Belfi responded to the email on May 6, 2013, stating "[w]e are in full agreement." *Id*.

While members of the Lieff and Thornton firms were generally aware of Labaton's obligation -- to be shared by Customer Class Counsel -- to pay Chargois a percentage of Labaton's total fee in the *State Street* case, the exact percentage or details of that arrangement were not discussed until settlement discussions were well underway years into the litigation. Thornton 9/1/17 Dep., pp. 36:16-17, 22-24; 37:1-7. [EX. 127].

a. Thornton's Knowledge of the Chargois Arrangement

Garrett Bradley of Thornton received an initial draft of the proposed cost-sharing agreement on May 23, 2011. *See* TLF-SST-033910 – 33913 (email from Christopher

Keller to Garrett Bradley with draft cost-sharing agreement attached). [EX. 143]. Bradley knew at least three months before that Labaton had an ongoing relationship with Chargois, and that Chargois was entitled to 20% of fees awarded in this case. TLF-SST-075440-5441 (2/4/11 Keller email to Bradley). [EX. 204] Although the "referring counsel" was not identified in the proposed cost-sharing agreement, Bradley testified that he had never heard anyone other than Damon Chargois referred to as "referring counsel" by Labaton in connection with the *State Street* litigation, G. Bradley 9/14/17 Dep., p. 43:1-20 [EX. 85], and his deposition testimony indicates that he was aware that Labaton had an obligation to pay Chargois a percentage of the fees at least as early as "around the time the complaint was filed or shortly" before. *Id.*, p. 44:7-12.[89] Bradley testified, however, that he did not know that Chargois would not have to do any work for a share of the fees, nor did he know the details of the arrangement. ("I thought his role was similar to ours; that he did substantive work, corresponded with the client, dealt with the client, got authority. That's what I thought his role was." *Id.*, p. 45:10-13; *see also* p. 47:7-8).[90]

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[89] Bradley testified:

> I believe as early as -- just prior to or right around the time of filing in 2011, I raised with Chris [Keller] how are we going to deal with your obligation to Damon 'cause I was very concerned that he would try to apply for 20 percent of this entire case.
>
> And I asked them to deal with it.

G. Bradley 9/14/17 Dep. p. 44:7-13. [EX. 85].

[90] It is difficult to credit Bradley's testimony on this point because Bradley, Chargois, Belfi, and Keller spent a considerable amount of time together during Labaton's "marketing" conferences during this period and, in addition, Bradley held a dual role from January 1, 2015 through late 2016 as Thornton's managing partner and as "Of Counsel" to Labaton with the sole responsibility of client development. Further, Labaton's General Counsel, Mike Stocker, asked Bradley -- and not Labaton's own "relationship" lawyers, Belfi and Keller -- to intervene with Chargois in handling negotiations with Chargois when negotiations over Chargois' fee in the case became more pointed. *See* 6/21/16 email, TLF-SST-012527 – 012528. [EX. 144]. Beyond this, Thornton had arrangements with

Michael Thornton was included as an addressee of the May 4, 2011 draft letter, but testified that he never received or reviewed that letter at the time. Thornton 9/1/17 Dep., p. 148:6. [EX. 127]. Thornton testified that he was unaware of Chargois until Garrett Bradley told him of an obligation to pay "local/referring counsel" in or about 2013, and even then, did not know Chargois by name. *Id*., p. 148:7-13; p. 20: 14-17; p. 35: 14-24. While it is clear that Thornton understood that Chargois was entitled to receive a portion of the fees awarded in the *State Street* case due to his role in securing Labaton a position on the monitoring panel, *id*. at pp. 44: 8-22; 36: 16-19, Thornton did not know that Chargois was entitled to receive a 20% payment in every case in which ATRS served as lead or co-lead counsel. *Id*., p. 44: 16-24. And while Chargois did not serve as forum local counsel in the case, Thornton understood that Chargois was a referring attorney, *i.e.*, an attorney who referred the matter because he was either not competent or it was not his role to bring action on behalf of ATRS against State Street. *Id*. at p. 38: 4-11; p. 42:2-16.

b. Lieff's Knowledge of the Chargois Arrangement

Bob Lieff and Dan Chiplock, both recipients of the "Dublin" email, testified that they understood Damon Chargois to be performing some substantive role as local counsel for Labaton in the *State Street* litigation, serving the class by assisting the ATRS client

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Labaton similar to its arrangement with Chargois. And importantly, as noted, the draft of the original letter agreement as to sharing the Chargois fee – which refers to Chargois as "referring counsel," as opposed to "local counsel," was not shared with Lieff, indicating that Bradley was knowledgeable about the true nature of the Chargois Arrangement, and that Chargois was not acting as "local counsel," which is how he was referred in other correspondence in which Lieff is a party. Finally, as a more general matter, the Special Master finds Garrett Bradley to be a less than credible witness on a range of issues.

locally in Arkansas, *see* Lieff 9/11/17 Dep., pp. 58-80 [EX. 139]; Chiplock 9/8/17 Dep., pp. 101-116. [EX. 41].

In arriving at their understanding of the Chargois role, both Chiplock and Lieff relied both upon their understanding of Labaton's role as Lead Counsel and the representations made by Garrett Bradley in relation to Chargois. *See* 4/5/18 Declaration of Daniel Chiplock, ¶¶5-6 [EX. 145]; LBS 025771 [EX. 140], LCHB-0053483 (4/24/13 "Dublin email," in which Garrett Bradley referred to Chargois as "the local counsel who assists Labaton in matters involving Arkansas Teachers Retirement System" and to which Bob Lieff replied that he was in full agreement as to the proposed allocation). [EX. 146].

Bob Lieff testified that he thought Chargois was local counsel for Labaton dealing with the client in Arkansas. *See* Lieff 9/11/17 Dep., p. 67:9-13 ("I thought he was local counsel for Labaton in this particular case I assumed dealing with the Arkansas fund because that's what local counsel will do. That was my understanding.") [EX. 139]. He further testified that had he known that Chargois had done no work on the case, he would not have agreed to the allocation of part of his firm's fee award to Chargois. Lieff 9/11/17 Dep., p. 97:13-16.[91] [EX. 139]. Lieff also testified that had he known the full story of the Chargois-Labaton relationship, he would have encouraged the Labaton lawyers to make the Court aware of it. *See id*.

[91] While Bob Lieff's testimony on this point may reflect that he was incurious in not inquiring further as to Chargois' actual role in the case, the Special Master credits his testimony as it is supported by numerous contemporaneous documents and emails which refer to Chargois as "local counsel" or "the local" and the 2011 draft letter which referenced Chargois as "referring counsel" that was shared between Labaton and Garrett Bradley, but not Lieff.

Informing both Lieff and Chiplock's belief that Chargois played a local role was their recent experience in *BONY Mellon*, in which Lieff's local counsel interfaced with their Ohio pension fund client but otherwise had little contact with co-lead counsel and non-lead counsel participating in the New York litigation. *See* Lieff 9/11/17 Dep., pp. 58-80 [EX. 139]; Chiplock 9/8/17 Dep., pp. 101-116 [EX. 41]; 4/5/18 Declaration of Daniel Chiplock, ¶6. [EX. 145]. Subsequent email communications between Labaton, Thornton and Lieff in 2015 describing a financial obligation to a local Arkansas attorney reinforced Lieff's belief that Chargois fulfilled some local role in the case. *See*, *e.g.*, TLF-SST-040617 – 40618 [EX. 147], LCHB-0053491 – 53492 (8/6/2015 Bradley email to Lieff and Thornton regarding "Fee discussions" related to *BONY Mellon* and *State Street*, with reference to "Arkansas local") [EX. 148]; LCHB-0053493 [EX. 149], TLF-SST-038574 – 38579 (8/28/15 Lieff email to Bradley and Thornton regarding *State Street* and referring to Arkansas local counsel; Bradley response to same) [EX. 150]; TLF-SST-053117 – 53126 (8/28/15 Chiplock email to Sucharow, Bradley and Thornton regarding memorialization of the fee allocation agreement among the firms, and referencing payments to ERISA counsel and "local Arkansas counsel" in relation to the distribution of Customer Class Counsel fees) [EX. 151]; LCHB-0053513 - 53521 (continuation of correspondence among counsel regarding same) [EX. 152]; LCHB-0053507 – 53512 (8/28/15 separate correspondence between Chiplock and Lieff regarding same) [EX. 153]; TLF-SST-053117 – 53126 [EX. 151], LCHB-0053531 – 53532 (8/30/15 further response from Bradley to Chiplock, Lieff, and Sucharow referring to the "Arkansas firm" and the prior April 2013 correspondence, noting that there was already a "written

agreement between all the parties that the Arkansas component would come off the top") [EX. 154]. Neither Labaton or Bradley corrected these characterizations of the Chargois role as local counsel. Related communications from Chiplock to Lieff in mid-2016 demonstrate that Chiplock still believed that Chargois occupied this role during the finalization of the Fee Petition. LCHB-0053538 – 53540 (forwarding 2013 and 2015 email correspondence) [EX. 155]; LCHB-0053541 (forwarding 2013 correspondence and referencing calculation of "local counsel's" fee) [EX. 156].

Attorneys from the firms exchanged emails related to the Arrangement again in 2015. On August 28, 2015, Dan Chiplock corresponded with Larry Sucharow, Garrett Bradley, and Michael Thornton regarding memorialization of the fee allocation agreement among the firms; Chiplock referred to payments to ERISA Counsel and "local Arkansas counsel" in relation to the distribution of Customer Class Counsel fees. TLF-SST-053117 – 53126 (8/28/15 Chiplock Email to Sucharow, G. Bradley, Thornton, and Lieff). [EX. 151]. Garrett Bradley, referencing the prior emails in 2013, replied that there was already "a written agreement between all the parties that the Arkansas component would come off the top" and stated that the "ERISA piece" should be handled the same way. *Id*. As Chris Keller and Eric Belfi were not included on this email exchange, and Larry Sucharow was at that point unaware that Chargois was not performing any work as the local Arkansas counsel, the 2013 characterization of the Chargois role remained uncorrected.

The Chargois Arrangement was again raised in email correspondence between the three firms on July 8, 2016. Garrett Bradley wrote to Mike Thornton, Larry Sucharow, Dan Chiplock, Chris Keller, Eric Belfi, and Damon Chargois:

> Gentlemen,
>
> As we discuss how to distribute the fee between ourselves and, of course the ERISA attorneys, I have had discussion with Damon Chargois, the local attorney in this matter who has played an important role. Damon and his firm are willing to accept 5.5% of the total fee awarded by the Court in the State Street class case now pending before Judge Wolf. As you know, we had a prior deal with him that his fee would be "off the top". He understands that ERISA counsel is now in the same pool of money. He has agreed to come down to this number with a guarantee that it will be off the court awarded fee number. Please reply all if you agree. Given that it is off the total number their [sic] is no need to add the ERISA counsel to this email chain.

LBS039936 – 39937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois). [EX. 157].

At no time in this multi-year correspondence was the nature of Chargois' role -- *i.e.*, as a "referring attorney" -- made clear. None of the Labaton attorneys followed up on the July 2016 email in writing. Nor does the record contain any evidence that any of the Labaton attorneys informed their co-counsel, either before or after this email, that Chargois had played no role in the *State Street* case, nor did the Labaton attorneys attempt to explain what "important role" Chargois played. Bob Lieff and Mike Thornton replied to Bradley's July 8 email expressing their firms' respective agreement to these terms. *Id.*; LBS031152 – 31153 (7/8/16 Thornton Email to G. Bradley & 7/8/16 Lieff Email to G. Bradley, et al.). [EX. 158]. Separately, Chris Keller wrote to Garrett Bradley, "great work getting this done." LBS039936. [EX. 157].

c. Inconsistency of Information Regarding the Chargois Arrangement

As noted above, even among Labaton attorneys, full knowledge of the Chargois Arrangement appears to have been limited to Belfi and Keller and, later, Sucharow. *See* Sucharow 9/1/17 Dep., p. 17:10-13 ("I'm not sure I ever knew in the sense that I didn't hear 'til later on that there was an obligation to [Chargois]."). [EX. 38]. For example, Larry Sucharow, who described himself as the "lead negotiator and lead strategist" for plaintiffs in the *State Street* case, testified that, although he knew who Chargois was, he only learned of Labaton's financial obligation to Chargois in 2015. *Id.*, pp. 18:20-23; 87:1.[92] Similarly, David Goldsmith, the lead Labaton litigator who appeared and argued on behalf of the purported Settlement Class in the Preliminary and Final Settlement Approval Hearings before Judge Wolf, did not know anything about the Chargois Arrangement until November 21, 2016, several weeks after the Final Approval Hearing. Goldsmith 9/20/17 Dep., pp. 108:20-109:2.[93] [EX. 42]. Even those who were aware of the Arrangement were unfamiliar with Chargois' full name. Sucharow 9/1/17 Dep., pp. 7-9; 35:17-24. [EX. 38].

[92] Though he testified that he learned of his firm's obligation to Chargois in 2015, Sucharow signed the Omnibus Declaration, which was filed with the Court in September 2016; the Declaration did not disclose the Chargois Agreement or reference the intended payment to Chargois.

[93] David Goldsmith testified that he first learned of Chargois and his fee arrangement with Labaton on November 21, 2016. Goldsmith 9/20/17 Dep., pp.111:13 -112:9. [EX. 42]. He further testified that he had no idea that a payment was going to be made to Chargois out of the class funds or that the Chargois payment was going to be 5.5 percent of the total $75 million fee award. *Id.*, pp. 112:10 – 113:9. Goldsmith admitted that this was important information and that he would have liked to have known about it before he went before Judge Wolf at the Final Approval Hearing. *Id.* Goldsmith further admitted he knew of no work done by Chargois on the *State Street* case, nor had any other Labaton lawyer told him that Chargois did any work on the matter. *Id.* at pp. 114:11 – 115:13.

Outside of Labaton attorneys, the terms "forwarding fee" and "referral fee" have no significance in a class action context. 9/11/17 Lieff Dep., p. 79:20-22. [EX. 139]. Robert Lieff testified that the term "local counsel" is also not descriptive of Chargois' role, as it is a term of art used to describe an attorney who works for a client on a case-by-case basis and submits a fee petition for services performed in a particular case, an understanding shared by Chargois himself. Lieff 9/11/17 Dep., p. 80:9-17. [EX. 139]. Although they now seek to cast Chargois in the role of "referring" counsel, Labaton attorneys never used the phrase "referring counsel" in discussions with Chargois, other than in the 2011 draft letter agreement which was not circulated to Lieff and ultimately was not executed. Chargois 10/2/17 Dep., p. 64:15-19. [EX. 125]. When asked, Chargois did not view his role as a "referring counsel," "liaison counsel," or "local counsel" in the *State Street* case or any case involving ATRS. Chargois 10/2/17 Dep., pp. 55: 8-13, 20-24; 63:11 – 64:6 [EX. 125]**;** this was just "an agreement." *Id.*, p. 63:5-21.

6. ERISA Counsel's Lack of Knowledge of the Chargois Arrangement

Neither Labaton nor any other Customer Class Counsel ever informed ERISA Counsel of Labaton's obligation to Chargois, or Chargois' role in connection with this case. Sarko 9/8/17 Dep., pp. 56:18 – 57:9, 71:14-23 [EX. 37]; Kravitz 9/11/17 Dep. p. 70:8-10 [EX. 117]; McTigue, 9/8/17 Dep., p. 17:14-21 [EX. 159]. Like Hopkins, ERISA Counsel learned of the Chargois Arrangement only during the course of the Special Master's investigation in or about August 2017. Sarko 9/8/17 Dep., 71:14-23 [EX. 37]; Kravitz 9/11/17 Dep. 70:8-10 [EX. 117]; McTigue 9/8/17 Dep., p. 17:14-21 [EX. 159].

One effect of the Customer Class Counsel's failure to disclose the Chargois Arrangement to ERISA Counsel was the non-disclosure to the ERISA class representatives and members themselves.

As with Hopkins, Labaton was at pains to keep ERISA Counsel from learning about Chargois or the Chargois Arrangement. *See e.g.*, Sucharow response to G. Bradley email regarding proposed Claw Back letter (discussed *infra*) addressed only to Customer Class Counsel advising "no reason for ERISA to see Damon's split." TLF-SST-012272 – 12274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller, and Belfi) [EX. 160]; LBS039936 – 39937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois) ("Given that it is off the total number their [sic] is no need to add the ERISA counsel to this email chain.") [EX. 157]; TLF-SST-053117-53126 [EX. 151].

ERISA Counsel testified that had they known of the Chargois Arrangement during the *State Street* case, they would have proceeded differently in several material respects. Lynn Sarko of Keller Rohrback testified that had he known of the Chargois Arrangement, he "absolutely" would have felt an obligation to disclose the Arrangement to the ERISA class representatives and obtain their informed consent. Sarko 9/8/17 Dep., p. 91:4-15. [EX. 37]. Moreover, had he become aware that an attorney who did no work on the case would receive in excess of $4 million prior to signing the ERISA Fee Allocation in 2013, Sarko would not have agreed to the ERISA lawyers receiving only 10% of the total fee award, *id.* pp.75:2-22, 78:19-79:4. The other ERISA counsel, Brian McTigue of McTigue Law and Carl Kravitz of Zuckerman Spaeder, testified that they would not have

agreed to it, either. *See* McTigue 9/8/17 Dep. p. 21:15-24 [EX. 159]; Kravitz 9/11/17 Dep., pp. 83:3-84:22 [EX. 117]. (It bears noting here that Chargois received more than any of the ERISA firms received. *See* Table in Section G, *supra*; *see also* Labaton's 8/11/17 Response to Special Master's Supp. Interrog. No. 2.) [EX. 123].

Sarko further testified that had he known about the payment to Chargois, he would not have agreed to the filing of a joint fee petition with Customer Class Counsel because "in order to do that, I would have had to get approval from the named [ERISA] plaintiffs who would not have agreed…. They're straight shooters. They would say this doesn't sound right." Sarko 9/8/17 Dep., p. 75:18-22. [EX. 37]. Nor would he have signed the Claw Back Agreement (*see* Section L-3, *infra*) agreeing to reimburse Labaton for any reduction in the fee award imposed by the Court as a result of the November 10, 2016 letter to the Court admitting the overstatement of the *State Street* lodestar (discussed *infra*). Sarko 9/8/17 Dep., pp. 75:2-22, 78:19 – 79:4. [EX. 37].

In addition, the failure to tell ERISA counsel about the Chargois Arrangement and payment had yet another serious consequence: The Department of Labor, which had oversight and regulatory responsibility for the ERISA funds and was participating in the settlement negotiations, was also kept entirely in the dark about the Chargois payment. Lynn Sarko was the lawyer principally responsible for liaising with the DOL and keeping its lawyers advised of the progress of settlement negotiations, including attorney fees, and discovery documents and depositions clearly reflect that the DOL was acutely interested in the payment of attorneys' fees. *See* Sarko 7/6/17 Dep., pp. 51:2-3, 79:16-22, 8-:3-12 [EX. 28]; Sarko 9/8/17 Dep., p. 88:2-89:5 [EX. 37]. It was at the DOL's insistence that a

cap on the ERISA class's attorneys' fees was included in the Agreement of Settlement. *See* Stipulation and Agreement of Settlement, Dkt. #89, ¶ 24 and footnote 1 [EX. 114];[94] Sarko 9/8/17 Dep., p 35:1-8 ("That was a negotiated point with the Department of Labor… they [we]re very focused on the ERISA portion.") [EX. 37]. Because it was not informed by ERISA Counsel, and particularly Sarko, the DOL was kept ignorant of the Chargois payment.[95] This is significant because State Street was insisting upon a global settlement that included *all* interested parties -- especially the DOL. Sarko 9/8/17 Dep., pp. 23:19 – 24:4. [EX. 37]. In Sarko's opinion, "if you would have dropped this piece of information [about the Chargois payment] into the mix, it would have blown that up." *Id.*, p. 84:3.[96]

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[94] Paragraph 24 of the Stipulation and Agreement of Settlement provided:

> 24. Except with respect to the amount of Plaintiffs' counsel's attorneys' fees chargeable to the ERISA Plans, as provided for below, the amount of the Class Settlement Fund allocated to the ERISA Plans and Registered Investment Companies and other Settlement Class Members shall be increased or decreased, as the case may be, by their proportional share (using the allocations set forth in the Plan of Allocation compared to the Class Settlement Amount) of any interest, costs (including Notice and Administration Expenses), Litigation Expenses, Service Awards, Taxes and Tax Expenses, and attorneys' fees of Plaintiffs' counsel, obtained or paid pursuant to permission of the Court. However: (i) the cost of any ERISA Independent Fiduciary shall be borne solely by SSBT and shall not be paid out of the Class Settlement Amount; and (ii) ***no more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in attorneys' fees shall be paid out of the ERISA Settlement Allocation***.

Dkt. # 89, ¶ 24 (footnote omitted; emphasis added). [EX. 114].

A footnote appended to Paragraph 24 further made clear that "[i]f the Settlement Class seeks and/or the Court awards attorneys' fees at a rate which would, if applied to the $60,000,000 ERISA Settlement Allocation, result in a fee of less than $10,900,000, then such lower rate and resulting fee at that rate shall apply to the ERISA Settlement Allocation." *Id.*, note 1.

[95] The SEC and DOJ were similarly kept in the dark about the Chargois payment.

[96] The Special Master finds the testimony of Sarko, Kravitz, and McTigue to be credible on each of the points above.

7. Failure to Disclose the Chargois Arrangement to the Special Master

As noted *supra*, the Special Master first learned of Chargois' role the *State Street* case after Thornton disclosed a handful of documents referencing payment to Chargois during discovery.[97] Chargois' name, however, did not appear in the thousands of documents produced by Labaton or Lieff in response to substantially similar requests. At the Special Master's request, Thornton, Lieff, and Labaton collectively provided thousands of additional documents concerning what is now known as the Chargois Arrangement.[98]

Labaton now argues that neither it nor Lieff had an obligation to produce information related to that financial obligation in response to the Special Master's initial discovery requests.[99] *See* 4/12/18 Rebuttal Response by Labaton Sucharow LLP, at p. 11 [EX. 161]; 8/11/17 Labaton Sucharow LLP's Response to Supplemental Interrogatory

[97] *See* note 66, *supra*.

[98] While the lack of disclosure is somewhat disconcerting in light of the fact that Chargois received the fourth largest payout from the class fund, the Special Master does not conclude that the nondisclosure constitutes discovery misconduct. However, given the scope of the Special Master's mandate, certainly a more prudent practice would have been to inform the Special Master about the Chargois Arrangement, and produce all relevant documents, at the beginning of the investigation.

[99] *See* 4/12/18 Rebuttal Response by Labaton Sucharow LLP, at p. 11 ("The implication of discovery wrongdoing is clear, but incorrect. [EX. 161]. In fact, Request for Production No. 22 … which sought documents 'regarding the allocation of a certain percentage of the Fee Award among counsel,' and which is the only discovery request that arguably elicited information about the Chargois Agreement -- was withdrawn after a conference with the Special Master's counsel…. It is unclear why TLF produced the materials, but Labaton Sucharow and Lieff Cabraser were justified in not doing so."); *see also* 8/11/17 Labaton Sucharow LLP's Response to Supplemental Interrogatory 1(g) (stating that the firm did not read the Special Master's prior interrogatories or requests for production as requesting information related to the private referral arrangement or other information regarding the fee allocation). [EX. 123].

It is significant to note that Labaton did not disclose Chargois to its own counsel. Oral Argument Trans., 29: 11-14; 29:17 – 30:1. [EX. 162]. This is significant because, while Labaton had knowledge of the Chargois Arrangement, counsel whom it directed to negotiate with Special Master's counsel to limit the scope of the initial discovery requests did not. *Id*. at 29:17 – 30:1 ([Lukey:] "I didn't have a clue about Mr. Chargois at that point.")

1(g) [EX. 123]. Labaton's argument is based in large part, if not entirely, on the fact that Request for Production No. 22 -- seeking information about the allocation *among* counsel -- was withdrawn by agreement of counsel.[100] Several other discovery requests propounded by the Special Master, however, did reasonably call for disclosure of information and communications relating to Chargois and the Chargois Arrangement. And, apart from any discovery obligation, disclosure of the Chargois Arrangement is a critical piece of the Special Master's evaluation of the "accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses." March 8, 2017 Memorandum and Order, Dkt. # 173 at p. 2.[101] [EX. 163].

On March 23, 2017, Labaton, Lieff, and Thornton received identically worded Requests for Production[102] calling for "[a]ll documents referring to, relating to,

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[100] On March 22, 2017, counsel for Labaton (Lukey and Wolosz) met with Special Master's Counsel (Sinnott and McEvoy) to discuss how best to streamline and prioritize the information sought in the Special Master's First Set of Interrogatories and Requests served on Customer Class Counsel on May 18, 2017. Labaton's counsel also relayed concern shared by counsel for Lieff, who was unable to participate but had conferred with counsel for Labaton previously. Of great concern to all counsel was the looming deadline for responding to the detailed discovery requests then set just fourteen days from the service date to accommodate an expedited deposition schedule in June and July 2017. Counsel for the firms contended that several of the requests would be overly burdensome and/or otherwise unfeasible and potentially duplicative. After discussing the individual objections, the Special Master's Counsel agreed to narrow the scope of many of the requests prompting this concern and amended the upcoming deadline to a three-tiered deadline of June 1, June 9, and July 10, 2017, respectively. Because Lieff's counsel was neither present nor able to participate telephonically, the Special Master's Counsel sent Lieff a revised version of the May 18, 2017 discovery requests by email. *See* Revised Requests for Production to Lieff dated May 23, 2017 [EX. 165].; *See also* 5/23/2017 email from Special Master's Counsel to Richard Heimann. [EX. 258].

Thornton's counsel (Mr. Kelly) communicated Thornton's objections in an email dated March 22 to the Special Master's Counsel. The Special Master's Counsel responded to those objections by email the next day and served revised versions of both requests. *See* 5/23/17 Sinnott to Kelly [EX. 259].

[101] The March 8, 2017 order appointing the Special Master states that the Special Master "shall investigate and prepare a Report and Recommendation concerning *all issues* relating to the attorneys' fees, expenses, and service awards previously made in this case." (emphasis added) (March 8, 2017 Order, Dkt. # 173). [EX. 163].

[102] After meeting with Labaton's counsel, and after receiving written objections from Thornton's counsel, Special Master's Counsel propounded revised discovery requests amending the original requests. *See* note 100, *supra*.

evidencing or constituting discussions between the Law Firm and the Plaintiffs' Law Firms relating to sharing costs and/or expenses of the SST Document Review/SST Litigation, including but not limited to sharing the cost of Staff Attorneys, hosting costs for Catalyst database, and other expenses associated with conducting voluminous document review." *See* Revised Requests for Production to Labaton (No. 18),[103] Lieff (No. 16), and Thornton (No. 18) dated May 23, 2017.[104] [EX. 164; EX. 165; EX. 166]. In response to Request No. 18, Thornton produced June 2016 email communications between Bradley and Labaton's Belfi, Keller, and Stocker, which related to the Chargois obligation. *See* TLF-SST-012526. [EX. 144]. Thornton also produced TLF-SST-012759, a June 2016 exchange between Bradley and Chargois related to the fee negotiation.[105] [EX. 167]. Also included in Thornton's production was TLF-SST-012671 - 12672, the "Dublin email" exchange between Thornton, Lieff, Labaton, and Chargois in 2013. [EX. 168]. While these email communications were sent to or from Labaton attorneys, and in some cases Lieff attorneys, neither firm produced them.

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[103] As explained *infra*, Labaton's counsel met in person with the Special Master's Counsel on May 22, 2017, to narrow the scope of the initial requests propounded by the Special Master. During that meeting, counsel reached an understanding that several of the requests would be stricken and others significantly narrowed. Labaton thereafter memorialized their understanding of the new parameters in its written response to the Requests for Production. Because counsel for the Lieff and Thornton firms were not present at the May 22, 2017 meeting, the Special Master propounded "revised" requests on both firms shortly after that meeting.

[104] Labaton objected to the request on the basis of the volume of preliminary results, and Lieff joined in the objection. The firms were instructed by the Special Master to follow up, if necessary, to confer in relation to potentially narrowing relevant search terms; neither firm did.

[105] Bradley later referenced this exchange in email discussions with Belfi on the same date (*see* LBS037410) [EX. 169], which, after further negotiation, developed into confirmation by Bradley to Labaton and Lieff two weeks later that Chargois had agreed to a 5.5% fee (*see* LBS039936). [EX. 170].

Thornton also viewed the Dublin email as responsive to its Request No. 35, calling for "[a]ll documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records." Labaton and Lieff did not produce Chargois-related documents in response to identically worded Requests (Revised Requests Nos. 40 and 38, respectively) to their firms.[106]

The counterparts to those requests, the Revised Interrogatories, propounded by the Special Master that same date, also reasonably called for production of the Chargois Arrangement. Yet none of the three firms provided information about Chargois. For example, Revised Interrogatory No. 60 to Labaton ("Identify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor"), and identically worded Revised Interrogatory No. 62 to Lieff and No. 63 to Thornton, asked about financial expenditures not included in the Fee Petition. All three firms understood that Chargois' payment would be 5.5% of the Fee Award taken "off the top." *See* Labaton's June 9 Response to Special Master's First Set of Interrogatories [EX. 174]; Lieff's June 9

[106] Thornton's initial productions also included documents relating to Chargois that were responsive to Revised Request No. 40 ("All documents and/or communications relating to the discovery of billing errors disclosed in the November 10, 2016 Letter filed with the Court, including but not limited to communications between and among you, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms.") and Revised Request No. 43 ("All documents relating to, referring to, evidencing, or constituting the November 10, 2016 Letter, including all drafts, outlines, notes, and communications relating to the filing of that correspondence."). *See* TLF-SST-012272 [EX. 160], TLF-SST-012275 [EX. 171], TLF-SST-012279 [EX. 172], TLF-SST-012283 [EX. 173]. The reason for doing so appears to be that both requests seek communications among attorneys involved in the case about the attorneys' fees in this case, as implicated by the double-counting errors discovered in November 2016 (the subject of the November 10th letter to the Court) and the related claw back communications (discussed *infra*). Labaton and Lieff received corresponding requests (Revised Request No. 47 and Revised Request No. 50) of identical wording.

Response to Special Master's First Set of Interrogatories [EX. 175]; Thornton's June 9 Response to Special Master's First Set of Interrogatories [EX. 176]. Moreover, Labaton's obligation arose directly out of its portion of the total fee award. Neither Chargois nor the Chargois Arrangement was referenced in response to this inquiry.

Perhaps the request most directly calling for disclosure of Chargois is Interrogatory No. 72 to Labaton: "Identify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge."[107] Chargois was not listed in any of the interrogatory responses. The firms chose not to identify him in response to this catch-all question. Of course, all three firms were aware that Chargois received a fee based on the total fees awarded out of the settlement, and to that extent, had knowledge of the fees in the *State Street* case. While Labaton (and Thornton's Garrett Bradley) exclusively communicated with Chargois during the life of the case, and thus were uniquely situated to know his actual contributions to -- and by extension Chargois' own knowledge of -- the litigation, all three firms were aware of Chargois and his involvement in the fee allocation.[108]

8. Payments to Chargois Pursuant to the Chargois Arrangement

[107] This language appears verbatim in Revised Interrogatories No. 74 to Lieff and No. 76 to Thornton.

[108] In responding, Labaton construed this Interrogatory as calling for identification of "the principal Labaton Sucharow attorneys or staff who worked on, or have unique knowledge regarding, the topic being reviewed by the Special Master." *See* Labaton's June 9 Response to the Special Master's Revised Interrogatories [EX. 174].

Since the Chargois Arrangement began in 2008, Labaton has represented ATRS in at least nine cases for which it has paid Chargois a percentage of Labaton's total fee award:

- *In re A10 Networks, Inc. Shareholder Litigation*, No. 2015-1-CV-276207 (Cal. Super. Ct. Jan 29, 2015)
- *Brado v. Vocera Communications, Inc.* No. 13-CV-3567 (N.D. Cal. Aug.1, 2013)
- *Perry v. Spectrum Pharmaceuticals, Inc.*, No. 13-CV- 0433 (D. Nev. Mar.14, 2013)
- *Hoppaugh v. K12 Inc.*, No. 12-CV-0103 (E.D. Va. Jan. 30, 2012)
- *In re Hewlett-Packard Company Securities Litigation*, No. 11-CV-1404 (C.D. Cal. Sept. 13, 2011)
- *Arkansas Teacher Retirement System v. State Street Corporation*, No. 11-CV-10230 (D. Mass. Feb 10, 2011)
- *In re Beckman Coulter, Inc. Securities Litigation*, No. 10-CV-1327 (C.D. Cal. Sept. 3, 2010)
- *In re Colonial BancGroup, Inc. Securities Litigation*, No. 09-CV-0104 (M.D. Ala. Feb. 9, 2009)
- *In re Capacitors Antitrust Litigation*, No. 14-CV-3264-JD (N.D. Cal.) [109]

Labaton's 8/11/17 Response to Special Master's Supplemental Interrogatory, 1(a) [EX. 123]; Chargois 10/2/17 Dep., pp. 54:2-3; 65:1-71:13[110] [EX. 125].

[109] Chargois testified that *In re Capacitors* was not an ATRS case and hence not covered by the agreement. *See* Chargois 10/2/17 Dep., p.65:4-7. [EX. 125].

[110] While not identified in response to discovery, media reports also identify Labaton filing on behalf of ATRS and being named co-lead counsel in a multi-trillion-dollar action alleging that many of the country's leading banks harmed both the United States government and private investors by rigging the management of $13 trillion in securities sold by the U.S. Department of Treasury in *In Re: Treasury Securities Auction Antitrust Litigation*, (S.D.N.Y. 2017). Potentially, the Chargois Agreement would cover this case as well. *See*, *e.g*, Dunstan Prial, Law360, "Big Banks Face Wider Treasure Auction-Fixing Suit" (Nov. 16, 2017).

In each of these cases, Labaton paid Chargois a percentage -- more often amounting to 10-15% rather than the originally agreed-upon 20% -- of Labaton's total fee award. Chargois 10/2/17 Dep., p. 60:17-20.[111] [EX. 125]. Neither Chargois nor any Chargois & Herron attorneys entered an appearance or did any work in any of these actions.

L. MEDIA SCRUTINY OF THE STATE STREET SETTLEMENT AND THE SPECIAL MASTER'S APPOINTMENT

1. The *Boston Globe* Inquiry and Discovery of Double-Counting Errors

By all accounts, the $300 million settlement reflected an excellent result for the class members and was the product of the highly professional and skilled work of the class's law firms. Sarko 7/6/17 Dep., p. 109:22-23 [EX. 28]; Kravitz 7/6/17 Dep., pp. 105:23 – 106:7 [EX. 21]; Hopkins 6/14/17 Dep., p. 100:1-10. [EX. 4]. However, on

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[111] Chargois was not happy with the frequent reductions in the amounts Labaton paid him. He expressed his frustration in an October 18, 2014 email to Labaton:

> "… I am very concerned that you guys are attempting to significantly, substantially and materially alter our agreement. Our deal with Labaton is straightforward. We got you ATRS as a client after considerable favors, political activity, money spent and time dedicated in Arkansas, and Labaton would use ATRS to seek lead counsel appointments in institutional investor fraud and misrepresentation cases. Where Labaton is successful in getting appointed lead counsel and obtains a settlement or judgment award, we split Labaton's attorney fee award 80/20 period. As I said in my text to you regarding HP and your allocation, I understand the circumstances in this case and am okay with the fee split in this instance. We are not changing our fee split agreement for all the other pension fund cases. You promised me that you would give me advanced notice of when you guys would seek a modification or accommodation on a given settlement, and I want you to keep that going forward."

LBS017593 - 17594 (10/18/14 Chargois email to Belfi) [EX. 177]; *see also* Chargois 10/2/17 Dep., pp. 253:2-255:4. [EX. 125].

The Special Master did not investigate further into the background facts alleged by Chargois in this email as to how the Chargois/Labaton/ATRS relationship was originated and developed. This subject is beyond the scope of the Special Master's assignment from the Court. It is sufficient for the purposes of the Report and Recommendations for the Special Master to find, as he does, that Chargois was significantly involved at the inception of the Labaton/ATRS relationship by making the original contact with ATRS on Labaton's behalf and facilitating an introduction to the then-Executive Director of ATRS, Paul Doane, of Labaton attorneys Eric Belfi and Chris Keller.

November 8, 2016 -- less than a week after the Court had approved the Settlement and entered Judgment -- Garrett Bradley, managing partner at the Thornton Law Firm, received a phone call from the firm's counsel, Nixon, Peabody LLP, informing him that the firm had been contacted by a *Boston Globe* reporter. Garrett Bradley 6/19/17 Dep., pp. 85:23 – 86:11. [EX. 43]. According to Bradley, the reporter informed Thornton's attorneys that the *Globe* had reviewed the fee petitions submitted in the *State Street* matter and noted that certain staff attorneys' names appeared on both the Thornton lodestar report and the Labaton lodestar report with exactly the same number of hours down to a decimal point. *Id.*; *see also*, Michael Thornton 6/19/17 Dep., pp. 92:10-23 [EX. 2]; David Goldsmith 7/17/17 Dep., p. 132:16-24.[112] [EX. 58].

Bradley testified that after hearing this, he immediately went to see Evan Hoffman, the attorney at Thornton who had been in charge of in-taking the hours of the Labaton and Lieff staff attorneys assigned to Thornton on the *State Street* matter, and asked Hoffman to print out all of the fee declarations filed by the law firms in the case. G. Bradley 6/19/17 Dep., p. 86:15-17. [EX. 43]. Bradley stated that he then compared Thornton's fee declaration to Lieff's and Labaton's, "and immediately noticed same names, different rates, and [] knew something was wrong right away." *Id.*, 86:19-21. Bradley promptly called Labaton. *Id.* at p. 87:9. According to Bradley, "[T]hey pulled up what they had, we pulled up what we had and we could tell that there was a problem."

[112] David Goldsmith of Labaton testified that Garrett Bradley had also told him that the *Globe* reporter had made a comment about Thornton's billing rates, and "gave him [Garrett] grief about his brother," Michael Bradley, who was listed on the fee petition as one of the Thornton attorneys who worked on the *State Street* case. Goldsmith 7/17/17 Dep., p. 133:11-20. [EX. 58].

Id., p. 87:9-11. Bradley also had Mike Lesser, one of his partners at Thornton, reach out to Dan Chiplock of Lieff Cabraser and have Chiplock check Lieff's fee declaration, as well. *Id.*, 87:11-12.

David Goldsmith testified that at Labaton, the attorneys tried to figure out what was going on. Goldsmith 7/17/17 Dep., p. 136:5-6. [EX. 58]. Goldsmith said that he had numerous discussions with people in the firm:

> I spoke with Mike Stocker [Labaton's General Counsel]. . . . Nicole Zeiss and I were talking a lot. I spoke with Howard Goldberg. I spoke with Danette McKenzie, I spoke with Todd Kussin. And I basically led an effort to determine internally what the double counting was and how we could correct it and disclose the problem to the court.

Id., p. 137:11-19.

The attorneys at Lieff Cabraser also reviewed their records to locate any double-counting. *See* Chiplock 6/16/17 Dep., pp. 163:1 – 164:17. [EX. 10].

After conducting their internal reviews, Labaton, Lieff, and Thornton unanimously agreed that the *State Street* Fee Petition overstated hours worked by Customer Class Counsel by 9,322.9 hours due to the double-counting of certain lawyers' hours, resulting in a lodestar overstatement of $4,058,654.50.[113] The Fee Petition attributed hours of staff (and contract) attorneys allocated by Lieff and Labaton to Thornton for purposes of cost-sharing not only to the lodestar petitions of Lieff and Labaton -- the staff attorneys' host firms -- but also to Thornton's lodestar.

[113] The ERISA Counsel's lodestar reports were unaffected by the double-counting.

Specifically, the internal reviews revealed that 17 staff attorneys had been listed on both the Thornton and Labaton lodestar reports, and for all 17, the billing rates for the staff attorneys on the Thornton report were consistently higher. Goldsmith 7/17/17 Dep., p. 142:12-19. [EX. 58]. Lieff also confirmed that six staff attorneys on Thornton's lodestar report also appeared on Lieff's report. Chiplock 6/16/17 Dep., p. 164:9-17 [EX. 10]; *see also* Goldsmith 11/10/16 Letter to the Court, Dkt. # 116. [EX. 178]. This dramatically inflated the lodestar of Thornton. *See* 11/10/16 Letter from David J. Goldsmith to Hon. Mark L. Wolf, Dkt. # 116. [EX. 178].

2. The November 10, 2016 Letter to the Court

After Labaton, Thornton, and Lieff confirmed that the double-counting alleged by the *Globe* reporter had, in fact, occurred, David Goldsmith of Labaton took the lead in writing a letter to the Court to explain what had happened. G. Bradley 6/19/17 Dep., p. 87:15-17 [EX. 43]; Goldsmith 7/17/17 Dep., pp. 143:25 – 144:5. [EX. 58]. Goldsmith circulated his proposed letter to a number of people within his firm, and to the Thornton and Lieff firms. *Id.*, p. 144:5-9. He also circulated the letter to the ERISA firms. Various iterations of the letter were circulated within a compressed period of time. *Id.*

Goldsmith testified that he received a fair number of comments and proposed edits, but he recalled only two subjects on which there was some significant disagreement. One was that "when I wrote the letter, I said that we received an inquiry from the *Boston Globe*, and Garrett [Bradley] did not want to disclose that the media organization was the *Boston Globe*. He just wanted to say media organization. We ended up just saying media organization." *Id.*, p. 144:17-23. There was also some

disagreement about what exactly would be said with regard to the ERISA Counsel's part in this. *Id.*, p. 145:3-6. *See also* Sarko 7/6/17 Dep., p. 107:10-12 ("I remember the one thing I wanted to be in there was that it had nothing to do with the ERISA counsel." *Id.*) [EX. 28]; McTigue 7/7/17 Dep., p. 91:1-8 ("I suggested an edit ... which said the ERISA firms have not been involved in this staff attorney issue. In the actions that gave rise to the staff attorney issue." *Id.*) [EX. 11]. Goldsmith testified that ERISA Counsel's requested edits required some "massaging," and he ended up including a footnote in his draft that he thought pretty candidly said that the lodestar reports of the ERISA Counsel appeared unaffected. Goldsmith 7/17/17 Dep., p. 145:6-13. [EX. 58]. After all counsel finally agreed upon the language, Goldsmith finalized the letter and, on November 10, 2016, the letter was delivered to Judge Wolf.

The Goldsmith letter explained that due to "inadvertent errors," Plaintiffs' Counsel's reported combined time and lodestar were incorrect. Of the reported 86,113.7 hours, 9,322.9 hours were overstated. Of the reported lodestar of $41,323,895.75, $4,058,654.50 was overstated. 11/10/16 Goldsmith Letter, Dkt. # 116, p. 2. [EX. 178]. The letter stated that the mistakes had been brought to light as the result of a media inquiry and that the errors had been corrected by removing the duplicative time. *See id.* The letter also made clear that the lodestar reports in the individual firm declarations submitted by ERISA Counsel were unaffected by the double-counting errors found in Customer Class Counsel's lodestar reports. *See id.*, footnote 3.

Notwithstanding that their original lodestar reports had been overstated, Goldsmith suggested to Judge Wolf that the $4,058,654.00 overstatement -- more than 9,300 double-

counted hours -- of the Customer Class Counsel's lodestar should not change the Court's original determination of the reasonableness of his award of 24.85% of the gross settlement as attorney fees. *See* 11/10/16 Letter, p. 2. [EX. 178].

In relevant part, the November 10, 2016 letter stated as follows:

Dear Judge Wolf:

We are writing respectfully to advise the Court of inadvertent errors just discovered in certain written submissions from Labaton Sucharow LLP, Thornton Law Firm LLP, and Lieff Cabraser Heimann & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees, which the Court granted following the fairness hearing held on November 2, 2016. See Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Order," ECF No. 111).

These mistakes came to our attention during internal reviews that were conducted in response to an inquiry from the media received after the hearing. The purpose of this letter is to disclose the error and provide a corrected lodestar and multiplier. We respectfully submit that the error should have no impact on the Court's ruling on attorneys' fees.

As the Court is aware, the submissions supporting Lead Counsel's fee application included individual declarations submitted on behalf of Labaton Sucharow, Thornton, and Lieff Cabraser, reporting each firm's lodestar and number of hours billed. See ECF Nos. 104-15, at 7-9; 104-16, at 7-8; 104-17, at 8-9; see also ECF No. 104-24 (Master Chart).

The professionals and paraprofessionals listed in these firms' respective lodestar reports include persons denoted as Staff Attorneys, or "SAs." SAs are bar-admitted, experienced attorneys hired on a temporary, though generally long-term, basis, and are paid by the hour. The SAs in this action were tasked principally with reviewing and analyzing the millions of pages of documents produced by State Street.

Seventeen (17) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Labaton Sucharow lodestar report. Six (6) of the SAs listed on the Thornton lodestar report are also listed as SAs on the Lieff Cabraser lodestar report. Both sets of overlap reflect the fact that as the litigation proceeded, efforts were made to share costs among counsel,

such that financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices was borne by Thornton.

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Because of these inadvertent errors, Plaintiffs' Counsel's reported combined lodestar of $41,323,895.75, and reported combined time of 86,113.7 hours, were overstated. See ECF No. 104-24 (Master Chart).

We have corrected these errors by removing the duplicative time. When a given SA had different hourly billing rates, we removed the time billed at the higher rate. Deducting the duplicative time from the $41.32 million reported combined lodestar results in a reduced combined lodestar of $37,265,241.25, and a reduced combined time of 76,790.8 hours.

Cross-checking the $37.27 million reduced combined lodestar against the $74,541,250 percentage-based fee awarded by the Court yields a lodestar multiplier of 2.00. This is higher than the 1.8 multiplier we proffered in our submissions and during the hearing.

Plaintiffs' counsel respectfully submits that a 2.00 multiplier remains reasonable and well-within the range of multipliers found reasonable for cross-check purposes in common fund cases within the First Circuit, and that such an enhancement of the reduced lodestar represented by the 24.85% fee awarded by the Court remains well-supported by the $300 million Settlement obtained and fees awarded in comparable cases. See Fee Brief, ECF No. 103-1, at 24-25.

Accordingly, Plaintiffs' counsel respectfully submits that the Court should adhere to its ruling on attorneys' fees. See Fee Order ¶¶ 4, 6 (ECF No. 111); Nov. 2, 2016 Hrg. Tr. at 36:1-2 (finding 1.8 multiplier "reasonable").

We sincerely apologize to the Court for the inadvertent errors in our written submissions and presentation during the hearing. We are available to respond to any questions or concerns the Court may have.

Respectfully submitted,
/s/
David J. Goldsmith

11/10/16 Letter from David J. Goldsmith, Dkt. #116 (footnotes omitted). [EX. 178].

The Goldsmith letter made no attempt to explain how or why the double-counting occurred. Nor did Labaton take this opportunity to disclose the Chargois Arrangement. (Of course, Goldsmith, himself, did not know about Chargois at the time he wrote the letter to the Court.)[114]

3. The November 21, 2016 Claw Back Letter Agreement

After the November 10, 2016 letter was delivered, Plaintiffs' Counsel awaited a response from the Court. Recognizing that the Court might respond adversely and ultimately decide to reduce the fee award, on November 21, 2016, at the direction of Labaton's Chairman, Lawrence Sucharow, David Goldsmith drafted a letter that Sucharow then sent to all counsel -- including ERISA Counsel -- for their signature, asking all counsel to agree to refund to Labaton, for re-deposit into the *State Street* escrow account, their respective pro-rata share of any court-ordered reduction of fees, expenses, and/or service awards (the "Claw Back Letter"). *See* Goldsmith 7/17/17 Dep., pp. 152:17 – 155:13 [EX. 58]; *see also* TLF-SST-012264 – 12266 (11/21/16 Sucharow Draft Letter to Counsel). [EX. 179].

The issue of whether to send a similar letter to Chargois was raised in an email addressed only to Customer Class Counsel by Garrett Bradley, to which Sucharow responded:

> Need two letters with breakdown, ERISA just gets sent to ERISA counsel with 10 percent off the top and then a third each. Class co-counsel get one with ERISA 10 percent off the top, Damon's percentage also off the top, and each of class co-counsel split with the percentages agreed to. *In short, no reason for ERISA to see*

[114] This is another instance of problems created at Labaton as a result of its compartmentalization of its practice. *See* discussion, *supra.*

> *Damon's split. They only need to see their 10 percent and then split three ways.* By the way, I want to asterisk the 10 percent to ERISA with a footnote saying although our fee agreement with ERISA counsel only provides for a 9 percent allocation, co-class counsel have determined to increase that to 10 percent in light of the excellent work and contribution of ERISA counsel.

TLF-SST-012272 – 12274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller, and Belfi) (emphasis added).[115] [EX. 160].

Larry Sucharow then also directed Goldsmith to send a separate claw back letter to Damon Chargois for his signature, as well. Goldsmith 9/20/17 Dep., p. 171:14-23. [EX. 42]. Accordingly, Goldsmith drafted a letter for Eric Belfi, the "ATRS relationship partner" with Labaton, to send to Chargois. *Id*, p. 172:10-15. *See also* Belfi 9/5/17 Dep. p. 93:13-16. [EX. 122].

Goldsmith testified that all counsel ultimately complied with the request and signed the letter agreement. Goldsmith 7/17/17 Dep., p. 160:2-7. [EX. 58]. Although Goldsmith acknowledged that the ERISA firms had nothing to do with the errors in the Thornton/Labaton/Lieff fee petitions, he testified, "We thought the best way to deal with this would be to gather signatures from everybody, even if perhaps they apparently weren't involved in the double counting, that if there was a reduction that applied to them, that they would return the money." *Id.,* pp. 158:25 - 159:9. Goldsmith, however, admitted that "if there was a determination that expressly applied only to some firms, then I guess this letter would bring up some questions about how that would be handled." *Id.*, p. 159:10-15.

[115] This was another attempt to ensure that ERISA lawyers did not learn about the Chargois Agreement or payment.

4. The *Boston Globe* Article

Before the Court had an opportunity to respond to Goldsmith's November 10 letter, on December 17, 2016, the *Boston Globe* published its article. *See* Andrea Estes, *Critics hit law firms' bills after class-action lawsuits*, BOSTON GLOBE, December 17, 2016. In addition to reporting the double-counting and Goldsmith's explanation, the *Globe* article also criticized the rates at which the staff attorneys were billed in the *State Street* action. *See id*. The article further specifically targeted the fees billed by Michael Bradley, who, according to the article, "is a lawyer, but normally works alone, often making $53 an hour as a court-appointed defender in Quincy District Court," but was billed at "nearly 10 times that rate in the State Street case." *Id.* Citing Garrett Bradley's Fee Declaration, the *Globe* reported that Michael Bradley was billed in the *State Street* case as a "$500-an-hour 'staff attorney'" who "worked 406.4 hours on the lawsuit . . . at a cost of $203,200." *Id.*

The *Boston Globe* also criticized the billing rates of the other staff attorneys:

> Michael Bradley wasn't the only lawyer for whose work Thornton claimed stratospheric – and questionable – legal costs in the filing to US District Judge Mark L. Wolf. Garrett Bradley listed 23 other staff attorneys, each with hourly rates of $425, who collectively accounted for $4 million in costs. But one of the lawyers told the *Globe* he was actually paid just $30 an hour for his services – and not by Thornton. Like all the other staff attorneys on Garrett Bradley's list, except his brother, he worked for another firm in the case, which also counted his hours on its list of costs.
>
> . . . . .
>
> More than 60 percent of the costs that Thornton and two other law firms submitted to Judge Wolf came from the work of staff attorneys – all of them assigned hourly rates at least 10 times higher than the $25 to $40 an hour typical for these low-level positions – which involve document review.

Id.

5. The Court's Response to Goldsmith's Letter and the *Boston Globe* Article

a. Appointment of the Special Master

With questions having been raised as to the accuracy and reliability of the lodestar reports that had been submitted by Plaintiffs' counsel and relied upon by the Court in awarding fees, the Court proposed the appointment of a Special Master to investigate these issues and prepare a Report and Recommendation concerning them. *See* 2/6/17 Memorandum and Order, Dkt. # 117. [EX. 180]. The Court thereafter held a hearing on March 7, 2017 to discuss, among other issues, the appointment of Hon. Gerald E. Rosen as the Special Master. *Id.* At that hearing, all counsel consented to the appointment of Judge Rosen as Special Master. *See* 3/7/17 Hrg. Tr., Dkt. # 176, pp. 43, 55.[116] [EX. 96]. Counsel further consented to the payment of $2 million by Labaton, Lieff, and Thornton, collectively, for deposit with the Clerk of the Court to fund the Special Master's investigation. *Id.*, pp. 51-52.

The following day, March 8, 2017, the Court entered a Memorandum and Order appointing Hon. Gerald E. Rosen, ret., as Special Master to investigate and prepare a

[116] McTigue initially filed a written objection to the appointment of Judge Rosen, *see* McTigue Law's Response to 2/6/17 Order, Dkt. # 138 [EX. 181], but on the record at the hearing, Brian McTigue withdrew that objection. *See* 3/7/17 Hrg. Tr., Dkt. # 176, p. 55:3-4. [EX. 96].

Report and Recommendation. *See* 3/8/17 Memorandum and Order, Dkt. # 173. [EX. 163]. The Order, in pertinent part, provides as follows:

> [I]t is hereby ORDERED that pursuant to Federal Rule of Civil Procedure 53:
>
> 1. Judge Rosen is appointed as Master (the "Master"). The Master may retain any firm, organization, or individual he deems necessary to assist him in the performance of his duties.
>
> 2. The Master shall investigate and prepare a Report and Recommendation concerning all issues relating to the attorneys' fees, expenses and service awards previously made in this case. The Report and Recommendation shall address at least: (a) the accuracy and reliability of the representations made by class counsel in their request for awards of attorneys' fees and expenses, including but not limited to whether counsel employed the correct legal standards and had a proper factual basis for what was represented to be the lodestar for each firm; (b) the accuracy and reliability of the representations made in the November 10, 2016 letter from David Goldsmith, Esq. of Labaton Sucharow, LLP (Docket No. 116); (c) the accuracy and reliability of the representations made by class counsel and each of the named plaintiffs in requesting service awards; (d) the reasonableness of the amounts of attorneys' fees, expenses and service awards previously ordered, and whether any or all of them should be reduced; (e) whether any misconduct occurred in connection with such awards; and if so, whether it should be sanctioned, *see e.g.,* Fed. R. Civ. P. 11(b)(3) & (c); Massachusetts Supreme Judicial Court Rule of Professional Conduct 3.3(a)(1) & (3).
>
> ***
>
> 4. The Master shall have the authority described in Federal Rule of Civil Procedure 53(c)(1) and (2). Therefore, among other things, the Master shall have the authority to compel, take and record evidence. This includes the authority to require the production of documents and other records from the parties and third-parties; require responses to interrogatories, and other requests for information and admissions; conduct depositions; and conduct hearings.
>
> ***
>
> 11. The Master shall make and preserve a complete record of the evidence concerning his recommended findings of fact and any conclusions of law. Such record shall be filed with the Master's Report and Recommendation.

3/8/17 Memorandum and Order, Dkt. # 173 (footnotes omitted). [EX. 163].

b. The Special Master's Investigative Team

The Appointing Order in this case specifically authorized the Special Master to "retain any firm, organization, or individual he deems necessary to assist him in the performance of his duties." *See* 3/8/17 Memorandum and Order, Dkt. # 173, ¶ 1. [EX. 163]. Pursuant to that authority, the Special Master assembled a team led by William Sinnott, a partner in the Boston law firm of Donoghue, Barrett & Singal P.C. (now "Barrett & Singal, P.C.") ("Counsel to the Special Master") to assist him in the investigation. Other attorneys comprising the Special Master's investigative team were: Elizabeth McEvoy and Brian Mulcahy, also attorneys with Barrett & Singal; Linda Hylenski, former career law clerk for Judge Rosen in the United States District Court for the Eastern District of Michigan, currently a research attorney with JAMS; and the Hon. Mary Beth Kelly, a former Justice of the Michigan Supreme Court, currently a JAMS mediator and arbitrator. The Special Master also retained John Toothman, Esq., an authority on legal fees and legal fee management, to serve as the team's Technical Expert,[117] and Professor Stephen Gillers as an expert on the ethical and professional conduct issues raised in this case.

c. The Investigation

[117] Several of Plaintiffs' Counsel objected to the appointment of Mr. Toothman. The Special Master overruled the objection. *See* Special Master's 3/31/17 Order Regarding the Law Firms' Objection to Retention of John Toothman, Dkt. # 193. [EX. 182]. This decision was appealed to the District Court which affirmed the Special Master. *See* Dkt. # 199 [EX. 183], 204 [EX. 184].

Over the course of a fourteen-month investigation, the Special Master and his investigative team conducted written discovery, reviewed over 200,000 pages of documents, interviewed 34 witnesses, and conducted 63 depositions in Boston, New York, Washington, D.C., and Detroit. As directed in the Appointing Order, the principal areas of inquiry at the core of the investigation were:

a. The accuracy and reliability of the fee petitions;

b. The accuracy and reliability of the representations made in Goldsmith's November 10, 2016 letter to the Court;

c. The accuracy and reliability of representations made by the parties requesting service awards;

d. The reasonableness of the amounts of attorneys' fees, expenses, and service awards previously ordered and whether any or all should be reduced; and

e. Whether any misconduct occurred in connection with the awards, and if so, whether it should be sanctioned.

The Findings of Fact set forth above inform the Special Master's Conclusions of Law that follow. To the extent that any Findings of Fact constitute Conclusions of Law, they are so adopted.

III. CONCLUSIONS OF LAW

A. APPLICABLE STANDARDS

1. The Special Master's Authority to Decide Issues Regarding the Fee Award

In a certified class action, the court may refer issues related to the amount of an award of attorneys' fees and nontaxable costs to a special master pursuant to Fed. R. Civ. P. 54(d)(2)(D). *See* Fed. R. Civ. P. 23(h). Rule 54(d)(2)(D) provides, "[T]he court may refer issues concerning the value of services to a special master under Rule 53 without

regard to the limitations of Rule 53(a)(1)." As the 1993 Advisory Committee Note to Rule 54 explains, "the rule [] explicitly permits . . . the court to refer issues regarding the amount of a fee award in a particular case to a master under Rule 53. . . . This authorization eliminates any controversy as to whether such references are permitted . . ." Fed. R. Civ. P. 54 Advisory Committee's Note to 1993 Amendment. Pursuant to Rule 53, the appointing order delineates the special master's duties and authority. Fed. R. Civ. P. 53(b)(2)(A). *See* 3/8/17 Memorandum and Order, Dkt. # 173. [EX. 163].

2. Duties of the Court and Counsel in Class Action Fee Petition Proceedings

Fed. R. Civ. P. 23(e) squarely places the court in the role of protector of the rights of the class when a settlement is reached and attorneys' fees are awarded. *See In re Agent Orange Product Liability Litigation*, 818 F. 2d 216, 222 (2d Cir. 1987).[118] "In fulfilling this role, courts should look to the various codes of ethics as guidelines for judging the conduct of counsel." *Id.* (citations omitted).

Attorneys seeking fees from a common fund have a duty to present all relevant facts to the court reviewing the petition. *Id.* at 224-226. This duty arises under Rule 23(e) as the court must, pursuant to that provision, ensure that a settlement, and the distribution of that settlement, in a class action are fair and reasonable. *See Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 82 (1st Cir. 2015); Fed. R. Civ. P. 23(e)(2) ("[T]he court may approve [a proposed settlement] only after a hearing and on finding that it is fair, reasonable, and adequate.") As noted in the Advisory Committee Notes to Rule 23,

[118] *Agent Orange* is the leading case in the area of judicial scrutiny of fee-sharing agreements among class action plaintiffs' attorneys.

"Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. . . . In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility." Fed. R. Civ. P. 23(h), Advisory Committee Notes, 2003 Amendment.

This gatekeeper duty on the part of the court clearly reflects the court's equitable authority to safeguard settlement funds as a fiduciary of the class. *Bezdek v. Vibram, USA, Inc.*, 809 F. 3d at 80; *In re Fidelity/Micron Sec. Litig*., 167 F.3d 735, 736 (1st Cir.1999) ("[T]he district court, called upon to make awards of fees and/or expenses… functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class."); *see also In re Eastman Kodak ERISA Litig*., 213 F. Supp. 3d 503, 508 (W.D.N.Y. 2016) (quoting *Frankenstein v. McCrory Corp*., 425 F. Supp. 762, 765 (S.D.N.Y.1977) ("[S]ince the fee award in some respects operates to reduce the amount of benefit which might otherwise have accrued to class members, the courts bear a special responsibility to safeguard the interests of these absent plaintiffs").

The fee petition process clearly places an enhanced duty of full disclosure and transparency upon counsel filing their petition for attorney fees so that the court can perform its gatekeeping function fully and completely advised of all factors and agreements that impact the allocation of attorneys' fees vis-à-vis the actual recovery of the class. The First Circuit has held that where courts must determine an award of attorneys' fees -- such as in approving an award requested in a common fund class action

case -- a court has a responsibility to "render a principled decision" by closely scrutinizing fees, even fees agreed upon by counsel and the client. *See Codex Corp. v. Milgo Electronic Corp.,* 717 F.2d 622, 632 (1st Cir. 1983), *cert. denied*, 466 U.S. 931 (1984). Absent full disclosure, the court cannot, with full knowledge, discharge its gatekeeping function and ensure fairness to the class. *Weinberger v. Great Northern Nekoosa Corp.,* 925 F. 2d 518, 528 (1st Cir. 1991).

The Special Master is guided by the foregoing general standards in deciding the issues presented in this case.

B. ACCURACY, RELIABILITY, AND REASONABLENESS OF THE LODESTARS

The Court has called upon the Special Master to determine the accuracy and reliability of representations made to the Court in connection with the fee petition and the reasonableness of the fees previously ordered.

1. The Firms' Lodestar Petitions

To exercise its fiduciary duty to protect the class when responding to class counsel's fee request, a court needs accurate and complete information about the contributions of the firms seeking counsel fees. Here, the *State Street* fee petition requesting attorneys' fees in the amount of $74,541,250.00, plus $1,257,699.94 in expenses and accrued interest, was supported by the Omnibus Declaration of Lawrence A. Sucharow and nine individual declarations submitted by each law firm that had filed an appearance in the case.

The individual declarations incorporated a narrative provided to them in a "template" prepared by Labaton in setting forth the respective firms' attorneys' work on the case. Specifically, in these individual declarations, each of the law firms represented to the Court:

- The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request. (Dkt. Nos. 104-15, ¶ 6 [EX. 88]; 104-16, ¶ 3 [EX. 66]; 104-17, ¶ 4 [EX. 89]; 104-18, ¶ 3 [EX. 90], ¶ 3 [EX. 93]; 104-23, ¶ 3 [EX. 95]).

- The hourly rates for the attorneys and professional support staff in my firm [] are the same as my firm's regular rates charged for their service, which have been accepted in other complex class actions." (Dkt. Nos. 104-15, ¶ 7 [EX. 88]; 104-16, ¶ 4 [EX. 66]; 104-17, ¶ 5 [EX. 89]; 104-18, ¶ 4 [EX. 90]; 104-21, ¶ 4 [EX. 93]; 104-23, ¶ 4 [EX. 95].)[119]

[119] With respect to hourly rates, three of the ERISA firms -- McTigue Law, Zuckerman Spaeder, and Beins Axelrod -- used different language: McTigue Law's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." Dkt. No. 104-18, ¶ 20. [EX. 91].

Zuckerman Spaeder's individual fee declaration states that "[t]he hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions and are charged to clients paying us currently by the hour." Dkt. No. 104-20, ¶ 4. [EX. 92].

Beins Axelrod's individual fee declaration states that "[t]he hourly rates charged by the Timekeepers are the Firm's regular rates for contingent cases and those generally charged to clients for their services in non-contingent/hourly matters. Based on my knowledge and experience, these rates are also within the range of rates normally and customarily charged in Washington, D.C. by attorneys of similar qualifications and experience in cases similar to this litigation, and have been approved in connection with other class action settlements. The Firm has charged, and received, an hourly rate of $525.00 in litigation involving fiduciary breach by a former trustee and service providers. The Firm does charge a lower rate to longstanding Fund clients in non-contingency matters and to its Union clients. To serve the public interest, the Firm has also charged reduced rates to individual employees with employment discrimination claims. Dkt. No. 104-22, ¶ 8. [EX. 94].

A chart ("Exhibit A") summarizing each firm's respective lodestar through August 30, 2016 was attached to each individual firm's declaration, which listed the hours of work done by partners, associates, staff attorneys, contract attorneys, "of counsel" attorneys, local counsel, research analysts, paralegals, and investigators, and the rates at which their work was billed.

2. Governing Law

In examining the Fee Petition in this case, the Special Master starts with the basic principle that an award of attorneys' fees from a common fund must be reasonable. *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."). Because the Court derives its authority to order reimbursement from a common fund from its historical equitable powers, each fee request must be assessed on its own terms; "individualization is the name of the game." *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) (authority to order reimbursement from a common fund has its origins in equity); *see also United States v. 8.0 Acres of Land*, 197 F.3d 24, 33 (1st. Cir. 1999) (recognizing, in a land dispute case involving a common fund award, that the common fund is an equitable award and the district court has broad discretion in determining the appropriateness of such an award).

Courts analyze fee awards using two different methods: the percentage-of-fund ("POF") method and the lodestar calculation. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir.1995) (describing two methods); *see Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) (identifying

percentage-of-fund and lodestar as the two options for determining fee awards); *see also Duhaime v. John Hancock Mut. Life Ins. Co*., 989 F. Supp. 375, 377 (D. Mass. 1997).

Under the lodestar approach, the court calculates the number of hours reasonably expended by counsel multiplied by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"). Alternatively, courts can award fees based on what the court determines is a reasonable percentage of the fund recovered. *See In re Relafen Antitrust Litigation*, 231 F.R.D. 52, 77-79 (D. Mass. 2005) (discussing the applicability, use, and common percentage size when using the POF method); *Roberts v. TJX Companies, Inc*., No. 13-13142, 2016 WL 8677312, at *10 (D. Mass. 2016) (identifying factors the 1st Circuit has identified as relevant to the determination of the reasonableness of a POF award).

The First Circuit has taken a flexible approach and has determined that in a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a POF basis or by fashioning a lodestar. *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig*., 56 F.3d at 308. ("Given the peculiarities of common fund cases and the fact that each method, in its own way, offers particular advantages, we believe the approach of choice is to accord the district court discretion to use whichever method, POF or lodestar, best fits the individual case. We so hold, recognizing that the discretion we have described may, at times, involve using a combination of both methods when appropriate."

Although the First Circuit has declared that the district court has a choice as to whether to use the POF or lodestar approach, a majority of courts in this circuit rely heavily on the POF calculation in determining the reasonableness of fee awards. *See In re Lupron Mktg. & Sales Practices Litig.*, 2005 WL 2006833, at *3-5 (D. Mass. Aug. 17, 2005); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (POF method more aligns with interests of the class); *In re Relafen*, 231 F.R.D. at 79 (identifying POF as appropriate under the circumstances of the case). However, where the court begins with a POF analysis, it will nevertheless calculate the lodestar as a cross-check to confirm the reasonableness of the POF award. *See In re Thirteen Appeals*, 56 F.3d at 307; *Walsh v. Popular, Inc.*, 839 F. Supp. 2d 476, 485 (D.P.R. 2012) (using lodestar to confirm the reasonableness of the POF award for attorneys' fees in an ERISA class-action settlement); *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, No. 05–11148, 2009 WL 3418628, at *1 (D. Mass. 2009) (determining that lodestar is enough of a cross-check on the POF method; a full audit of all attorneys' fees and costs was too cumbersome and time-consuming). The lodestar cross-check is the approach used by the Court in this case. *See* 11/2/16 Hearing. Tr., pp. 30:18-22, 35:13. [EX. 78].

The transcript of the November 2, 2016 Hearing bears out that the Court accepted Class Counsel's calculation of fees and expenses, including service awards to the Plaintiff representatives, as 25.27% of the gross settlement fund. *See* 11/2/16 Hearing Tr., pp. 23:6-19; 35:3 – 37:3. The Court also applied the lodestar cross-check to the fees and found the fees reasonable. "The amount awarded is about 1.8 times the lodestar.

The lodestar is about $41 million. This is reasonable." *Id*., pp. 36:1-2. The Court left no doubt as to the importance of the lodestar in approval of the award: "I have used the percentage of common fund method. I've used the reasonable lodestar to check on that." *Id*., p. 35: 12-13.

In concluding that the amount of fees requested was reasonable, the Court reviewed in detail the relevant factors to determine reasonableness outlined in *Johnson v. Georgia Hwy. Express*, 488 F.2d 714 (5th Cir. 1974) and *Blum v. Stenson*, 465 U.S. 886, 898-99 (1984), highlighting the submission of the number of hours spent, the result achieved for the class, the novel theory pursued, the potential difficulty of achieving class certification, the global settlement reached with the ERISA class, the arduous discovery and mediation process that proceeded in tandem, and the involvement and agreement of the regulatory bodies involved, namely the DOL, the SEC, and the DOJ.

But beyond these factors -- and inherent in the application of the POF and lodestar cross-check -- any determination of the reasonableness of attorneys' fees depends entirely in the first instance on the accuracy and reliability of rates and hours submitted to the Court in the lodestar petitions of the parties.

3. Rates and Hours

a. Reasonableness of Hourly Rates

A reasonable hourly rate takes into account such factors as the type of work performed, who performed it, the expertise that it required, and when it was undertaken. *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950-51 (1st Cir. 1984) (internal citations omitted). There is, of course, no universal rate for legal services. *Hutchinson ex rel.*

Julien v. Patrick, 636 F.3d 1, 16 (1st Cir. 2011). Hourly rates vary based on "the nature of the work, the locality in which it is performed, the qualification of the lawyers, among other criteria." *United States v. One Star Class Sloop Sailboat*, 546 F.3d 26, 38 (1st Cir.2008) (when determining hourly rates for a lodestar calculation, a court may apply standard local rates for a specific type or work, even if the out-of-state attorney traditionally charges a higher rate for the same type of work), *citing Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 295 (1st Cir. 2001) (analyzing the factors to be considered when determining the reasonable hourly rate for a lodestar calculation under a fee-shifting statute). Given the great variance in hourly rates charged across different jurisdictions, and among attorneys of varying background and experience, the court must first determine the appropriate point of reference -- or venue -- against which the reported fees will be compared.

b. Prevailing Rates in the Community

i. First Circuit Rule -- Local Forum

In the First Circuit, courts apply the prevailing rates in the community taking into account the qualifications, experience, and specialized competence of the attorneys involved. *Gay Officers Action League v. Puerto Rico*, 247 F.3d at 295. The presumption for cases pending in federal court in Boston is that Boston rates apply. *See Stokes v. Saga Int'l Holidays, Ltd.*, 376 F.Supp.2d 86, 92 (D. Mass. 2005). This forum venue presumption clearly should apply in cases involving the interpretation of local statutes or a straightforward application of state common law claims. *See Maceira v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983) ("Where it is unreasonable to select a higher priced outside

attorney -- as, for example, in an ordinary case requiring no specialized abilities not amply reflected among local lawyers -- the local rate is the appropriate yardstick"). This is because local counsel are often better equipped than out-of-town counsel to litigate the nuances presented by local statutes and navigate local rules and procedures. *Id.* For these reasons, the First Circuit has determined that the "community" is the venue where the case is pending. *Id.* (discussing that a reasonable and well-informed client would be more willing to pay a local attorney at local rates if he or she could appropriately handle the legal issue); *see also Fryer v. A.S.A.P. Fire and Safety Corp., Inc.*, 750 F.Supp.2d 331, 339 (D. Mass. 2010) (finding the community rate to be the rate in the community where the court sits); *Stokes*, 376 F.Supp.2d at 92.

As with any rule, however, there are circumstances in which a rate other than the local rate is more appropriate. In *Maceira*, the First Circuit held that out-of-town specialists may be able to command a higher rate for their services if the case requires specialized abilities not amply reflected among local lawyers, or "when a specialist was required for the handling of the case and a smaller community does not have one available." *Guckenberger v. Boston University*, 8 F. Supp.2d 91, 103-104 (D. Mass. 1998) (small communities may not have a specialist required to handle a case, and therefore an out-of-town specialist may be required).[120]

Courts have also found that where a case is national in scope and requires the expertise of counsel from outside the forum, "national rates" rather than local rates may

[120] Absent evidence that out-of-town rates should apply, courts adhere to the presumption that the local rates of the forum community will apply. *See e.g., Vieques Conservation and Historical Trust Inc. v. Martinez*, 313 F. Supp. 2d 40, 46 (D. P.R. 2004).

be appropriate. *See In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1296, 1308-09 (E.D.N.Y. 1985) (finding that using a "nationally prevailing rate" was an appropriate solution for determining attorneys' fees in complex, wide-scope cases); *see also Feinberg v. Hibernia Corp*., 966 F. Supp. 422, 447 (E.D. La. 1997) (declining to apply the local New Orleans rates; considering multiple factors, including the relevant New York rates and expenses of the firms involved, court found New York rates should apply).

ii. The "Community"

The First Circuit rule and these exceptions underscore the importance of identifying the underlying community in determining the appropriate billing venue for legal services. The threshold question then becomes: What is the relevant "community" for purposes of national class action litigations? As counsel suggested throughout discovery, "community" refers not just to a geographic legal community, but more broadly to a community of practitioners. *See e.g.,* Heimann 7/17/17 Dep., pp. 70:5 – 71:4. [EX. 19]. Indeed, several courts have applied a similar analysis. *See, e.g., Boxell v. Plan for Group Ins. of Verizon Comm., Inc.*, No. 1:13–CV–089 JD, 2015 WL 4464147 at *9 (N.D. Ind. July 21, 2015) ("when the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that area is a national market, the relevant community is not the local market area, but the community of practitioners in that subject matter") (some internal punctuation omitted); *Lucas v. Kmart Corp.*, No. 99–cv–01923–JLK–CBS, 2006 WL 2729260 *4 (D. Colo. July 27, 2006) (relevant community for purposes of determining a reasonable billing rate

for class counsel consists of attorneys who litigate nationwide, complex class actions); *see also Donnell v. United States*, 682 F2d 240, 252 (D.C. Cir. 1982); *Flash II, supra*, 546 F.3d at 40-41. The Special Master agrees with counsel that what constitutes a community for purposes of determining a prevailing billing rate in this case is a far more nuanced inquiry than simply determining the situs of the Court.

iii. The State Street Case

Counsel contend that the venue of the litigation is not determinative of the community for purposes of selecting a billing venue in this case. Heimann 7/17/17 Dep., pp. 69:13 – 71:9 [EX. 19]; Fineman 6/6/17 Dep., pp. 74:24 – 75:9 [EX. 18]; Zeiss 6/14/17 Dep., pp. 65:5 – 23 [EX. 79]. Instead, counsel have argued the relevant community should be the community of practitioners equipped to handle the subject matter. Zeiss 6/14/17 Dep., pp. 65:24 – 66:13 [EX. 79]; *see also* Labaton Sucharow Responses to Interrogatories Nos, 44, 51 [EX. 174]. Counsel thus take the position that the relevant community in the *State Street* litigation is the community of practitioners with similar experience and skills to assert a national class action on behalf of a national class of plaintiffs. *Id.* Accordingly, counsel suggest "national" rates, rather than local rates, should apply.

It is certainly true that the forum venue of the *State Street* litigation is Boston, but it is equally relevant that counsel were members of the plaintiffs' class action bar and had extensive experience litigating complex class action matters across the country. *See* Lieff Cabraser Response to Special Master's First Set of Interrogatories, No. 1 [EX. 175]; Goldsmith 7/17/17 Dep., p. 11:4-9 [EX. 58]; Sucharow 6/17/17 Dep., 9:19-25; 13:11-13

[EX. 16]. Therefore, for purposes of determining billing venue, the community is one of seasoned class action litigators with experience bringing large securities, consumer, and ERISA claims.

Beyond this, the Plaintiff class members were situated throughout the United States.

For these reasons, it is appropriate that, as suggested by counsel, national rates should apply to the work performed in the *State Street* case. A thorough investigation has identified several factors that require expertise not readily available in the Boston market. In this analysis, consideration of the totality of the circumstances surrounding the case is required, including at least (1) the subject matter of the claims alleged; (2) availability of capable local counsel; (3) whether litigation called for out-of-town expertise not otherwise available in Boston; and (4) the national character of the litigation. A close examination of each factor strongly militates in favor of applying a national rate to the work performed in the *State Street* litigation.

1. *Complexity of FX Trading Claims and the Need for Experienced Counsel*

It is well accepted that a case requiring specialized abilities may, and often does, warrant higher attorney rates. *See Maceira, supra*; *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir. 1983). Cases involving complicated or novel legal concepts require clients to obtain counsel with specialized knowledge of the subject area. *See e.g., Interfaith Community Organization v. Honeywell Intern., Inc.* 426 F.3d 694, 707 (3d Cir. 2005). Specialized knowledge, however, may reside in out-of-town counsel. National class actions like the one brought against State Street are an area of specialty. *LV v. New York*

City Dept. of Education, 700 F. Supp. 2d 510, 515-16 (S.D.N.Y. 2010). Counsel with experience litigating complex class action cases do not reside in every legal market. That is because prosecution of a complex national class action requires unique legal skills and abilities as well as substantial resources. *Id; see also McClain v. Lufkin Indus., Inc.,* 649 F.3d 374, 382-83 (5th Cir. 2011); *Edmonds v. United States,* 658 F. Supp. 1126, 1146 (D. S.C. 1987). This is especially true in securities class action cases, which often require class members to meet heightened pleading requirements. *In re Omnivision Technologies, Inc.*, 559 F.Supp.2d 1036, 1047 (N.D. Cal. 2008).[121]

Encompassed in all this is the requirement that in order to stand on equal footing with well-resourced defendants in complex, sophisticated cases – defendants who will invariably have highly skilled, highly experienced, and well-resourced counsel – the class must have counsel of equal training, skill, experience, and resources. Such counsel on the plaintiffs' side of the case may well not exist in the forum of the case. The Special Master finds that this is an important factor in ensuring that class members are well represented in complex, sophisticated class actions.

This was particularly true in this case. Given the complexity of the wrongs alleged against State Street, finding counsel with highly specialized experience in handling complex national class actions was essential. In this case, experience was required in two different areas: First, there was a need for counsel who could

[121] While the *State Street* litigation does not fall squarely under the umbrella of a securities class action, the substantive and procedural legal challenges involved in the *State Street* litigation were as complicated, if not more, than a securities class action case brought under the PSLRA. Therefore, the analysis of the applicable billing venue in securities cases is instructive.

successfully navigate Fed. R. Civ. P. 23 and the other procedural hurdles in certifying a national class in a novel subject area. Second, the success of the litigation depended on finding counsel who were versed in the intricacies of the global FX market and could factually support a monetary claim for relief from State Street. The same was true for the ERISA claims.

Turning to the mechanics of class litigation, counsel faced several unique legal challenges that required a sophisticated legal strategy just to keep the case afloat. The legal claims asserted against State Street were novel. Goldsmith 7/17/17 Dep., pp. 25:8-10; 27:11-22 [EX. 58]; Chiplock 6/16/17 Dep., pp. 58:10 – 60:24 [EX. 10]. Prior to the *State Street* litigation, no court had the opportunity to opine on all the precise legal theories raised by counsel, most notably the ability to certify a national class under Mass. Gen. Laws. ch. 93A. Heimann 7/17/17 Dep., pp. 36:5 – 37:2; 40:14 – 41:7 [EX. 19]; Chiplock 6/16/17 Dep., 57:20-25 [EX. 10]. Counsel, in turn, did not have the benefit of relying on past judicial jurisprudence informing the likely outcomes of class certification under consumer protection law, fiduciary status, and other issues affecting certification of a national class. Goldsmith 7/17/17 Dep., pp. 28:7 – 29:5 [EX. 58]; Heimann 7/17/17 Dep., pp. 36:5 – 37:2; 41:23-25 [EX. 19]. Quite the opposite. The few courts that had weighed in on these threshold legal issues had reached outcomes that weighed against at least two of Plaintiffs' legal theories -- breach of fiduciary duty and violation of Massachusetts consumer protection laws. Heimann 7/17/17 Dep., p. 37:3-17 [EX. 19]; Chiplock 6/16/17 Dep., pp. 58:18 – 60:20 [EX. 10]. Counsel further faced the likely possibility that State Street, like BONY Mellon, would file meritorious counterclaims

against the individual customer funds to recover lost funds. Chiplock 6/16/17 Dep., pp. 63:3 – 64:9. [EX. 10]. *See also Southeast Pennsylvania Trans. Auth. v. The Bank of New York Mellon Corp.*, SDNY No. 12-cv-3066, Dkt. # 111; *Int'l Union of Operating Engineers, Stationery Engineers Local 39 Pension Fund v. The Bank of New York Mellon Corp.*, SDNY No. 12-cv-3067, Dkt. # 155; *Ohio Police and Fire Pension Fund v. The Bank of New York Mellon Corp.*, SDNY No. 12-cv-3470, Dkt. # 46. Filing counterclaims would markedly shift the parties' respective bargaining positions.

The non-legal hurdles required an equal, if not greater, level of sophistication. Counsel in this case faced a formidable opponent in State Street and WilmerHale, a top Boston-based national defense firm. WilmerHale advocated doggedly on behalf of State Street throughout the litigation and mediation. Chiplock 6/16/17 Dep., p. 68:12 ("[D]efense counsel made us work hard…") [EX. 10]; Michael Thornton 6/19/17 Dep., p. 15:7-14. [EX. 2]. As experienced counsel, the WilmerHale attorneys skillfully exploited the weaknesses and risks of plaintiffs' case at every stage. Combating sophisticated defense tactics required equally sophisticated and experienced plaintiffs' counsel. Plaintiffs' counsel skillfully matched defense counsel's arguments advanced throughout a hard-fought mediation. Chiplock 6/16/17 Dep., p. 69:10-12. [EX. 10].

For the sake of brevity, it is unnecessary to summarize each attorney's substantive contributions to the favorable settlement; rather only a few notable examples will be highlighted. Lawrence Sucharow, who led the mediation efforts, first raised the issue of a hybrid mediation and sold the idea to his counterparts at WilmerHale, with whom he had a long professional relationship. Sucharow 6/14/17 Dep., p. 17:3-25. [EX. 16].

Several other attorneys also brought significant experience and meaningful working relationships to the table. Lynn Sarko, who had a longstanding relationship and extensive experience litigating national cases alongside the DOL, served as the liaison to the DOL and was ultimately responsible for securing the DOL's approval of the settlement-in-principle, a necessary precondition for the global settlement insisted upon by Defendant. Sarko 7/6/17 Dep., p. 51:2-5 [EX. 28]; Chiplock 6/16/17 Dep., p. 85:7-19 [EX. 10]. Bob Lieff, who had participated in several multi-firm class action litigations, brought a different kind of expertise -- that of handling internal dynamics. Thornton 6/19/17 Dep., p. 57:3-4. [EX. 2]. Finally, Michael Lesser of the Thornton Law Firm, who had developed a comprehensive understanding of FX pricing during litigation of the California action, assumed a lead role in calculating the potential damages owed to the class and crafting a theory of damages to use as leverage in the mediation with State Street. Kravitz 7/6/17 Dep., p. 78:4-23 [EX. 21]; Lesser 6/19/17 Dep., pp. 22:22 – 23:1. [EX. 20].

But litigating and understanding complex legal issues was only half the battle. Simply understanding the intricacies of the FX market required a great deal of sophistication and familiarity with FX trading practices not commonly known by legal professionals -- even those with experience in securities and financial fraud matters. Goldsmith 7/17/17 Dep., pp. 24:15 – 25:12. [EX. 58]. There was a steep learning curve involved in understanding the mechanics of FX trading. Attorneys at Lieff and Thornton had already mastered the basics of the FX trading through their participation in the California *qui tam* action and the *BONY Mellon* MDL, making them akin to subject-

matter experts. *See* §§ II(A)(1) and (B)(1), *supra*. An advanced understanding of the mechanics of the FX market were not just helpful, but essential to proving the case. Just to assert a damage figure during the pleading and mediation stages, counsel had to analyze the differences in markups applied by State Street to its indirect customer trades as opposed to the market differentials for those same days and times. Hoffman 6/5/17 Dep., pp. 22:20 – 23:25 [EX. 63]; Lesser 6/19/17 Dep., pp. 21:14 – 22:13 [EX. 20]. This was no easy task and required a high level of comprehension.

2. Unavailability of Local Counsel

As described above, the sophistication of the subject matter necessitated counsel with significant experience. After a thorough review, it is apparent that, in the local plaintiffs' bar, there was no firm that possessed all of the requisite skills, experience, or resources necessary to carry the litigation forward on its own. While Thornton is based in Boston, Thornton's main contribution to the case was in its experience litigating national class actions. Moreover, Thornton lacked the human and financial resources to bring this action on its own. Hoffman 6/5/17Dep., pp. 31:25 – 32:23. [EX. 63].

3. National Scope of Class Action Litigation

The *State Street* case was national in scope in several other respects. The Settlement Class, comprised of all custody and trust customers of State Street (including ERISA Plans, Group Trusts, and State Street's direct trustees), included class members from all over the country suing State Street, a large custodial bank with offices around the country and in thirty countries around the world. Moreover, the class representatives who participated in the litigation resided in six different states: Arkansas, Pennsylvania,

Washington, New Mexico, Illinois, and Maryland. Counsel themselves hailed from six different cities in six different states.[122] That most of the counsel involved in the case were not "local" to Boston, combined with the presence of a diverse class of plaintiffs from across the country, further supports the adoption of a national rate approach.

4. ERISA Claims

The case for national rates is even stronger when considering the work of ERISA counsel in bringing the *Henriquez* and *Andover* complaints. Courts reviewing fee petitions in ERISA cases have routinely considered the comparable rates of ERISA attorneys in other jurisdictions and determined that ERISA cases involve a "national standard." *See, e.g., Mogck v. UNUM Life Ins. Co. of America,* 289 F. Supp. 2d 1181, 1191 (S.D. Cal. 2007). In *Mogck,* the court noted that counsel handling ERISA matters often take on complex, undesirable cases. *Id.* ERISA counsel, moreover, tend to practice in various districts. And, as is the case in the *State Street* litigation, ERISA counsel frequently have extensive experience litigating under the ERISA statute. *Id.*

Further, despite counsel's having obtained a very favorable result for the class, representing ERISA plans in the *State Street* case was not without significant challenges. As ERISA and non-ERISA counsel readily acknowledged throughout the investigation, the definition of "ERISA funds" was a constantly evolving concept. Chiplock 6/16/17

[122] Customer Class Counsel included Labaton Sucharow, based in New York City with offices in Delaware, Washington D.C., and Illinois; Lieff Cabraser, based in San Francisco with offices in Nashville, New York City, and Seattle; and Thornton Law Firm, based in Boston. ERISA Counsel included Keller Rohrback, based in Seattle with offices in Oakland, New York, Phoenix, Santa Barbara, California and Ronan, Montana; Zuckerman Spaeder, based in Washington, D.C. with offices in New York City, Tampa, and Baltimore; and, McTigue Law, based in Washington, D.C. Two other firms also participated on behalf of the ERISA participants: Beins Axelrod and Richardson Patrick. Beins Axelrod is based in Washington, DC; Richardson Patrick is based in Mount Pleasant, South Carolina (but maintains a national litigation practice).

Dep., p. 86:3-25. [EX. 10]. The total trading volume attributable to the ERISA plans (providing a basis for calculating damages) was subject to change throughout the period of negotiating the final term sheet. *Id.* And, similar to the *ATRS* complaint, the *Henriquez* and *Andover* complaints were subject to several legal arguments that could be raised in an inevitable motion to dismiss, most notably whether a group plan had standing to bring a breach of fiduciary claim against State Street. Sarko 7/6/17 Dep., p. 28:12-18 [EX. 28]; Kravitz 7/6/17 Dep., pp. 35:22 – 36:15 [EX. 21].

ERISA counsel representing the *Henriquez* and *Andover* plaintiffs in the *State Street* litigation overcame these challenges by drawing on several decades of experience litigating complex ERISA cases across the country. Keller Rohrback and McTigue Law, in particular, had recently been involved in the *BONY Mellon* case representing ERISA participants bringing substantially similar claims to those alleged in *State Street*. Sarko 7/6/17 Dep., p. 13:1-2 [EX. 28]; McTigue 7/7/17 Dep., p. 10:1-24 [EX. 11]. McTigue, in fact, has represented ERISA participants in many investment cases throughout his entire career. *Id.*, p. 9:1-7.

iv. Determination of National Rate

Given our decision that national, rather than regional, rates apply to this case, the next question is how to determine the appropriate national rate in the *State Street* case. The national rate applying to the *State Street* case, like any rate, must be tethered to the rates typically charged by counsel practicing in the subject matter -- here complex securities/financial fraud litigation -- in those geographic markets where securities and financial fraud litigation are typically brought. Like regional rates, national rates should

be commensurate with the legal rates for attorneys of comparable skill, experience, and reputation litigating substantially similar matters. Applying these principles, we rely on rates charged in comparable cases as well as those reported by firms in our target regions for partners, associates, and staff attorneys. Because of an apparent lack of data reported on "staff attorney" rates, as to the reasonableness of those rates we are further informed by courts that have weighed in on this issue.

c. Market Rates in 2016

We return to the basic premise that there is "no universal rate." Due to the wide range of experience and reputation among firms, and significant differences in legal markets, different law firms (and different law practices within those firms) command different rates. Even focusing solely on the national market, no single hourly rate can accurately convey the value of an entire legal field. Given the inherent challenges involved in calculating a uniform rate, the Special Master examines each of the firms' rates from the perspective of a reasonable range of national rates.

i. Legal Framework

In assessing the reasonableness of the hourly rates listed on the Fee Petition, it is important to identify the appropriate framework. Not all rates bear the same weight; some rates by virtue of the collector, subject-matter, or field, are more informative in our analysis than others. We look, then, to the source of the hourly rates rather than the dollar amounts themselves.

In deconstructing the Fee Petition rates, the Special Master has identified two threshold issues that inform and direct this analysis: first, what substantive practice

area(s) best reflect the legal work performed in the *State Street* case; and second, which geographic regions best inform a national rate for that practice area. Beyond this, even where consideration of the practice area and geographic regions yields a reasonable range, the Special Master must independently decide what, if any, adjustments must be applied to correct for the biases in the reporting data.

a) Relevant Practice Area

We start, rather than end, our analysis by noting that *State Street*, while venued in Boston, was a class action case of national scope with class members located all across the country. Even among national class actions, the *State Street* case was atypical in several respects. The alleged malfeasance in the FX trading market represented a "hybrid" between consumer, securities, and ERISA-based claims. Labaton's June 1 Response to Special Master's First Set of Interrogatories, No. 8 [EX. 249]. In 2009, when the theory for the *State Street* case was originated,[123] FX trading was not a heavily litigated area of the financial services industry. Thornton 6/19/17 Dep., p. 41: 11-17 [EX. 2]. Indeed, the *State Street* case drew the attention of three separate governmental agencies regulating three separate areas of law: the SEC, which monitors securities; the DOL, which oversees the labor market and work-related benefits such as ERISA plans; and the DOJ, which enforces the criminal code.

Given the novelty of the subject matter and the formidable size and resources of State Street, we find the *State Street* case most comparable to a large securities or

[123] *See People of the State of California, ex rel. Edmund G. Brown, Jr. v. State Street Corporation, et al.*, Cal. Super. Ct. No. 34-2008-00008457-CU-MC-GDS

financial fraud case, which typically involves complex financial data and implicates large national classes, rather than a more routine consumer class action case. We distinguish between securities class actions, on the one hand, and more ordinary class actions, on the other, in light of the higher demand for specialized and sophisticated market expertise required in litigating securities-based cases.[124]

b) Relevant Geographic Markets

It is axiomatic that the national rate is not merely an "average" of the rates charged across all legal markets in the United States. While that average figure has some bearing, we do not adopt a one-size-fits-all approach here. Rather, for our purposes, a national rate represents the appropriate hourly rate for counsel litigating national and highly complex securities or financial fraud cases -- whether in a multi-district or class action litigation -- based on what firms litigating in that space reasonably earn in their home market. Because the *State Street* case is most accurately viewed as a complex securities and/or financial fraud class action, we turn now to the question of *which* legal markets provide high-quality securities litigation such that they tend to influence the national rate for these services.

[124] While the size of a law firm is one factor to consider in determining whether the rates charged by that firm are reasonable, it is not determinative in our analysis of the reasonableness of rates charged by firms involved in this case. As was the case in *State Street*, firms specializing in plaintiffs' class action cases often operate with a smaller attorney team than that of a traditional large law firm. This subset of plaintiff-side firms, however, are often just as sophisticated and capable as their large-firm adversaries, and thus are entitled to the same compensation and should not be limited by the number of attorneys they employ. For this reason, we consider, but are not constrained by, the results of the NALFA survey, for which the majority of responses received were from firms with fifty or fewer attorneys. *See* NALFA Survey Results. [EX. 185].

Beyond this, as noted, the Special Master believes that because of the important societal role plaintiffs' firms play in protecting consumers and the public in these complex areas, plaintiffs' firms are entitled to the same levels of compensation as their large defense-firm counterparts.

The Plaintiffs' firms in this case were experienced in large-scale litigation and, specifically, FX litigation, and worked out of four major legal markets: New York City, Boston, San Francisco, and Washington, D.C.[125] For purposes of calculating a national rate, we rely heavily -- but not exclusively -- on the reported average hourly rates charged in these four legal markets.[126]

c) Survey Design Flaws and Challenges

As with any data analysis, we must take into consideration the statistical challenges and flaws in the methodology through which the data is collected.

First, an immediate challenge we faced in conducting our review was the limited data upon which to ground our analyses. Due to the proprietary nature of hourly rates, hourly rate data, designated by one's location and position within a firm, are not readily available to the public in great quantity. As a result, practitioners and courts alike rely heavily on information reported on lodestar petitions and their equivalents, and rates accepted by courts in comparable actions.

Second, we recognize the great potential for biases among those firms who self-report data in hourly fee surveys. Practitioners who take contingent cases and therefore routinely rely on courts to approve their hourly rates have a strong interest in reinforcing substantial rates, and given the scarcity of reliable hourly rate information, there may be

[125] While the main Keller Rohrback attorney, Lynn Sarko, works out of the firm's Seattle office, Keller Rohrback maintains offices in major cities in five states, including an office in New York City.

[126] The National Law Journal survey, discussed *infra*, provides data based upon the state in which the firm has its largest U.S. Office.

an incentive for law firms presenting fee petitions to a court to submit artificially inflated rates to reinforce the reasonableness of their own rates.

Additionally, and as addressed elsewhere in the Report, we proceed with caution when considering rates previously approved in other class action cases. Those rates, while tethered to the market in which those attorneys practice -- which naturally varies from case to case -- are often artificially selected by firms at the fee petition stage but are otherwise insulated from the scrutiny of the legal market. That is, they have been approved by judges reviewing the lodestar, but not by a client that has the option of looking elsewhere for legal representation. Thus, such rates may be higher than those charged to a client paying on an hourly basis who has an incentive to negotiate a lower price.

Finally, even rates billed to a client that pays a firm on an hourly basis are often not collected in full and do not represent the rate actually realized in a given case. Thus, even hourly rates that are vetted through a scrutinizing client, supply and demand, and the realities of a free market for legal services may be inflated compared to somewhat lower actualization rates. These inflated rates can be a misleading guidepost for judges assigning a reasonable rate for the purposes of a lodestar cross-check in a class action fee petition.

2. Analysis

a) Partners and Associates

The lodestar reports of Plaintiffs' Counsel charge partners at hourly rates ranging from $535 to $1,000, and associates at hourly rates of $325 to $725.[127] As discussed below, we conclude that these rates are commensurate with partner and associate rates charged and approved in similarly complex class actions, and therefore are reasonable.

Comparison to other securities/financial fraud cases

Given the niche area of securities/financial fraud class actions, we find particularly instructive those rates awarded in comparable class actions cases throughout the country.[128]

[127] Labaton had nine partners working on the case with billing rates of $800 - $925 an hour, and six associates with billing rates of $340 - $725 an hour. See Declaration of Lawrence Sucharow on Behalf of Labaton Sucharow LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. No. 104-15, Ex. A. [EX. 88]. Lieff had 10 partners with billing rates of $575 - $1,000 on the case, and two associates with billing rates of $425 and $435 an hour. *See* Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. No. 104-17, Ex. A. [EX. 89]. Thornton's lodestar report listed four partners at $535 - $850 an hour, and one associate at $450 an hour. *See* Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm LLP in Support of Motion for an Award of Attorneys' Fees and Payment of Expenses, Dkt. No. 104-16, Ex. A. [EX. 66].

On the ERISA side, Keller Rohrback had 14 partners with hourly billing rates of $550 - $925 and five associates billing at rates of $400 - $525 an hour. *See* Declaration of Lynn Sarko, Dkt. No. 104-18, Ex. A. [EX. 90]. Zuckerman Spaeder had five partners (and no associates) working on the case with billing rates of $650 - $990 an hour. See Declaration of Carl Kravitz, Dkt. No. 104-20, Ex. A. [EX. 92]. McTigue Law's lodestar report does not differentiate between partners and associates; the seven attorneys listed on McTigue's report had hourly billing rates of $325 - $725. *See* Declaration of Brian J. McTigue, Dkt. No. 104-19, Ex. A. [EX. 91]. Beins Axelrod's report lists only one partner, Jonathan G. Axelrod, who billed at $525 an hour, and one "of counsel" attorney who billed at $455 an hour. *See* Declaration of Jonathan G. Axelrod, Dkt. No. 104-22, Ex. A. [EX. 94]. Richardson Patrick lists three partners who worked on the case with billing rates of $500 - $800 an hour; no associates were listed. *See* Declaration of Kimberly Keevers Palmer, Dkt. No. 104-23, Ex. A. [EX. 95].

[128] The Special Master did not conduct an independent survey of all financial fraud class action cases. Such an effort would fall far outside his mandate to determine what rates are reasonable in the context of the *State Street* case. The Special Master, therefore, provides the following cases as representative of the range of rates accepted by Courts in other actions, but they are not intended to be an exhaustive collection of all such rates.

The *BONY Mellon* case, which overlapped with *State Street* in time and subject matter, which involved substantially similar legal claims in the FX arena, and which was litigated by five[129] of the nine firms listed on in *State Street* Fee Petition, is particularly instructive. In *BONY Mellon*, the rates billed by Lieff, Thornton, Keller Rohrback, the McTigue Firm, and Beins Axelrod were generally consistent, if not identical, to those listed in the *State Street* case. In some instances, these rates reflected a modest increase from the rates submitted by the same timekeepers.[130] Such increases over time are not unexpected and need not detain us here. *See* Exhibit B to Chiplock *BONY Mellon* Declaration, SDNY No. 2335, Dkt. No 622-1 [EX. 186]; Exhibit B to Lesser Decl. Dkt. No. 622-8 [EX. 187]; Exhibit B to Sarko Decl. Dkt. No. 622-3 [EX. 188]; Exhibit B to McTigue Decl. Dkt. No. 622-5 [EX. 189]; Exhibit B to Axelrod, Dkt. No. 622-4 [EX. 190]. In *BONY Mellon*, the hourly rates for partners ranged from $525 to $985, and for associates the range was $325 to $525. *See* fee petitions at Dkt. No. 922.

The range of rates approved in antitrust, bankruptcy, and securities/financial fraud class actions settled at or around the time of submission of the Fee Petition are also instructive. And we pay particularly close attention to those cases the firms themselves highlighted by attaching to their individual declarations submitted to the Court in 2016.[131]

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[129] Lieff Cabraser served as co-lead counsel in *BONY Mellon*. The Thornton Law Firm, Keller Rohrback, the McTigue Law Firm, and Beins Axelrod also participated in that case. All five firms submitted a fee petition that included a lodestar calculation.

[130] After review and consideration of the reasonableness of these rates, Judge Kaplan approved them. As compared to *BONY Mellon*, where the *State Street* rates increased, they did so by a modest amount of $25 or $50.

[131] *See, e.g., In re HealthSouth Corp. Securities Litigation,* No. CV-03-BE-1501-S, (N.D. Ala. 2010); *In re Countrywide Financial Corp. Securities Litigation*, No. CV 07-05295 MRP (MANx), (C.D. Cal 2010); *In re*

The fees approved by Courts in almost all such matters, involving a class action case on par with the complexity and magnitude of *State Street*, are commensurate with the fees listed in the *State Street* Fee Petition. A modest increase in hourly rate over a five or six-year span is expected in this economy, given the ever-growing legal industry and its demands, not to mention ordinary inflation. Legal professionals are entitled to set their own rates, and the Court and clients can push back as they deem necessary. In that regard, a more-than-modest, or in some cases substantial, elevation in rates may not be patently unreasonable.[132]

National Data: Market-to-Market Comparisons

While recognizing the potential biases and statistical limitations inherent in any fee survey, we also consider the national data collected on rates. As one such source, we highlight our review of the *National Law Journal*'s 2016 Billing Survey.

The partner and associate rates submitted on the *State Street* Fee Petition are consistent with the range of average hourly rates reported for Boston, New York City,

American Int'l Group, No. 04 Civ. 8141 (DAB) (AJP), (S.D.N.Y. 2012); *In re Composite Company*, No. 1:13-cv-10491-FDS (D. Mass. 2016); *In re Schering-Plough/ENHANCE Securities Litigation*, 2:08-cv-00397-ES-JAD, (D.N.J. 2013); *In re Facebook, Inc. IPO Securities And Derivative Litigation,* MDL No. 12-2389 (RWS), (S.D.N.Y. 2018) *In re Volkswagen Products Liability Litigation*, MDL No. 02672-CRB (JSC), (N.D. Cal. 2017). In reviewing the fees sought and approved in these and other cases relied on by the Customer Class and ERISA firms, we find equally as instructive the rates charged by contemporaries in the plaintiffs' class action bar who also participated in the matters

[132] Keller Rohrback's rates are but one example of a more noticeable upward trajectory. Of the several cases Keller Rohrback included in Exhibit C to Sarko's Declaration, the range of associate and partner rates, including Sarko's own hourly rate, have shifted over time. Dkt. # 104-18. [EX. 90]. For example, in 2011, associate and partner hourly rates in a previous securities class action and products liability action ranged from $275 to $740 and $295 to $450, respectively, as compared to *State Street*, where associates and partners charged hourly rates of between $400 and $925.*Compare In re Washington Mutual*, No. 2:08-md-1919 MJP, (W.D. Wash. 2011) and *In re Mattel, Inc., Toy Lead Paint Products Liability Litigation*, No. 2:07-ml-01897-DSF-AJW, (C.D. Cal. 2010) to Dkt. # 104-18. [EX. 90]. The listed rate for Sarko, who, as a senior member of the firm, billed at the top of that range, increased from $740 to $925 for *State Street*.

San Francisco, and Washington, D.C. The $535 to $1,000 range for partner hourly rates is generally consistent with the partner ranges of the four target regions, which collectively range from $475 to $1,350. It is also consistent with the REDACTED range charged by opposing counsel, WilmerHale. *See* 5/4/18 Paine Letter [EX. 250]. The $325 to $725 range for associate rate is also well within the range of hourly rates for associates reported in these representative geographic regions, which collectively reported $225 to $1,000, and is also consistent with associate (including senior associate) rates reported by WilmerHale for 2016, REDACTED. *See Id.*

The partner rates reported in the *NLJ* Survey for Boston (reporting only one firm) ranged from $607 - $792, with an average hourly rate of approximately $702; New York ranged from $225 - $1,350, with an average hourly rate of approximately $683; San Francisco ranged from $475 - $800, with an average rate of approximately $646 per hour; Washington DC ranged from $540 - $1,325, with an average rate of approximately $794 per hour.

The associate rates reported for Boston (four firms reporting) ranged from $225 - $508, with an average hourly rate of approximately $405; New York ranged from $250 - $1,000, with an average rate of $544 per hour (and counsel billing rates reported between $425 - $955, with an overall average rate of approximately $687 per hour); San Francisco ranged from $350 - $620, with an average rate of approximately $468 per hour (and counsel billing rates reported at an average of $630); Washington, D.C. ranged from $295 - $690, with an average rate of approximately $512 per hour (and counsel billing rates reported at an average hourly rate of $749).

While important for determining a baseline range, we do not go on to analyze each firm's rates against the reported trends in their geographic region. Local rates play a limited role in the calculation of a national rate for securities/financial fraud class actions. While law firms must maintain a physical office somewhere in the country, the going rate for services in that city has little bearing on the complexity, risks, undesirability, contingent nature, and/or sophistication of the work -- each of which is considered in the reasonable rate analysis -- taken on by a firm routinely engaged in plaintiffs' class action litigation. This is not to say that regional rates are insignificant; they are the benchmarks that drive our analysis. Lest we leave any doubt, regional rates provide the underpinnings of a national rate for this precise type of work.

While the *State Street* rates fall squarely within the bounds of the rates charged in 2016 in each home region, and thus are not patently *un*reasonable, whether the rates reported by the firms are, in fact, reasonable when compared to the most frequently charged rates for similar services requires further analysis. We look, then, to the average rates for each group. Overall, hourly billing rates for partners trended in the range of approximately $650 to $800 per hour in our sample markets, and for associates, $400 to $550. These rates are generally consistent with 2016 rates for the "NLJ 500" -- a list of the 500 largest U.S.-centric firms, which reported an average partner hourly rate of approximately $650 and average associate hourly rate of approximately $415 among the nationwide group. While the Plaintiffs' firms[133] are not included in the NLJ 500 based

[133] We recognize that, among the ERISA firms, Keller Rohrback and Zuckerman Spaeder have comparatively larger practices with 80-100 attorneys each, and offices in multiple locations. That said, we in no way diminish the

exclusively on their relatively small size, given the complexity of their specialized practices, the firms nonetheless demand rates comparable to those of large nationwide firms.

b) Staff Attorneys

We turn now to the reasonableness of the rates charged for the staff attorneys in the *State Street* case. The Customer Class firms reported staff attorneys at hourly billing rates of $335 to $515.[134] With the exception of two Lieff staff attorneys, those rates landed mainly between $335 and $440. Given that the staff attorneys performed associate-level work (albeit that of a junior-level associate) and on a more desirable weekly work schedule, these rates properly reflect a small discount from the reported $325 to $725 associate range.

For reasons that are not entirely clear to the Special Master, firms do not report staff attorney data with the same frequency as associate, counsel, and partner data. To help fill the void, the Special Master commissioned a survey through the National Association of Legal Fee Analysis ("NALFA") specifically soliciting information about staff attorney rates among sophisticated plaintiff-side firms.[135] While NALFA's

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important efforts of Brian McTigue and the McTigue Law Firm, which have initiated significant FX litigation that spurred national class actions, such as the *State Street* case, despite the firm's relatively small size.

[134] Labaton staff attorneys' rates ranged from $335 - $440 per hour, Lieff Cabraser staff attorneys were billed at $415, except for two staff attorneys (Joshua Bloomfield and Marissa Oh) who were charged at $515. Thornton billed $425 per hour for the staff attorneys.

[135] NALFA circulated the Staff Attorney Survey by email a total of 1,592 times. The emails targeted managing partners and office managers in the field of financial fraud/securities and other class actions. The "open rate" of the emails was a mere 15%; only 237 of the total emails sent were opened, as opposed to merely viewed, by recipients. And of the 237 opened emails, only 35 users clicked on the link to access the survey website, yielding a "click rate" of 15% of that subset. Overall, the results show that only 2% of recipients receiving the NALFA survey accessed

partner/associate counterpart survey received modest attention among recipients, none responded to the staff-attorney-specific questions.

Because the staff attorney survey did not generate any responses, NALFA could not reach any statistically significant conclusions or findings on the hourly rates of staff attorneys in the targeted legal community. *See* NALFA Report, p. 2. [EX. 191]. But the lack of response itself is significant to the Special Master's analysis. The difference between the click rate and the open rate may suggest either that law firms are less inclined to share data about the staff attorney position or that the firms do not employ attorneys in this capacity. This rate drops significantly -- to 2% -- when one looks at those users who successfully accessed the survey. The downward trend of responsiveness corroborates other record evidence that the use and designation of staff attorneys is not common practice and the classification itself is not, moreover, well understood among lawyers, including many of the firms involved the *State Street* case. Axelrod 7/7/17 Dep., pp. 29: 9-15 (testifying that firm did not use staff or contact attorneys), 35: 11-14, 37: 1-9 (familiar with the concept of non-tenured track attorneys and contract attorneys but not the term "staff attorney") [EX. 39]; Sarko 7/6/17 Dep., pp. 73: 9-26 (all attorneys working on *State Street* case appeared on firm website), p. 74: 6-17 (different firms use different titles for attorneys in non-associate roles) [EX. 28]; Kravitz 7/6/17 Dep., p. 84:8- 85: 22 [EX. 21].

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the survey questions. Notably and regrettably, none of the recipients who visited the survey website submitted information.

As with partner and associate attorneys, we give considerable credence to the staff attorney rates approved in comparable cases. Indeed, several District Courts have evaluated the reasonableness of staff attorney rates and, in doing so, have weighed similar factors including the experience and skill of the individual attorneys, their contributions to the litigation, the prevailing market for their services, and the propriety of the rates in the context of the overall fee award.[136]

Applying these factors, courts have approved hourly rates between $300 and $395 for staff attorneys who participated in complex litigation in recent years. *See*, *e.g.*, *In re Optical Disk Drive Prod. Antitrust Litig.*, 2016 WL 7364803, at *6-13 (N.D. Cal. Dec. 19, 2016) (accepting staff and contract attorney rates between $300 - $350 where litigation was complex, presented novel issues, and required review of documents produced in foreign languages, and where the firm provided sufficient evidence of the expertise, language skills, and contributions of the attorneys to the litigation); *Gilbert v. Abercrombie & Fitch, Co.*, 2016 WL 4159682, at *1 (S.D. Ohio Aug. 5, 2016), *report and recommendation adopted*, 2016 WL 4449709 (S.D. Ohio Aug. 24, 2016) (approving requested hourly rate of $350 for staff attorney involved in shareholder litigation);

[136] Courts have evaluated the rates charged for staff attorneys employed by legal services and non-profit organizations in much the same way, focusing on the attorneys' relative experience, skill, and contribution to the litigation. *See*, *e.g.*, *King v. New York City Employees' Ret. Sys. (NYCERS)*, 2017 WL 1317851, at *5 (E.D.N.Y. Jan. 12, 2017), *report and recommendation adopted sub nom. King v. New York City Employees Ret. Sys. (NYCERS)*, 2017 WL 1317223 (E.D.N.Y. Apr. 5, 2017) (hourly rate of $350 for three senior staff attorneys at Brooklyn Legal Services with between 26 and 35 years of practice experience); *Song v. 47 Old Country, Inc.*,2015 WL 10641286, at *4 (E.D.N.Y. Oct. 1, 2015), *report and recommendation adopted*, 2016 WL 1425811 (E.D.N.Y. Mar. 31, 2016) (hourly rate of $300 for experienced staff attorney employed in Legal Aid's Employment Unit since 2006; $250 rate for staff employed with Unit since 2009; $225 rate for staff employed with Unit since 2011); *Garcia v. Los Angeles Cty. Sheriff's Dep't*, 2015 WL 13646906, at *18 (C.D. Cal. Sept. 14, 2015) (hourly rates of between $300 -$400 for experienced staff attorneys at the Disability Law Rights Center were reasonable, based on the organization's extensive experience litigating civil rights class actions).

Phillips v. Triad Guar. Inc., 2016 WL 2636289, at *7 (M.D.N.C. May 9, 2016) (accepting rate of $350 for staff attorney participating in complex securities litigation, for which the total fee represented a negative lodestar multiplier); *In re Am. Apparel, Inc. S'holder Litig.*, 2014 WL 10212865, at *26 (C.D. Cal. July 28, 2014) (approving as reasonable hourly rate of $395 for two staff attorneys in case in which total requested fee was approximately half of total lodestar).[137] Courts have been reluctant to award those same rates, however, where the requesting firm fails to provide sufficient evidence corroborating the experience, qualifications, and contributions of staff attorneys.[138]

While many of the staff attorneys, including all the staff attorneys working for Lieff and Thornton, were billed at a rate above the $300 - $395 range, we find that the higher rates billed were justified in this instance. As discussed *infra*, Lieff and Labaton have presented sufficient evidence that the staff attorneys involved in this complex litigation performed substantive and valuable work beyond simple document review. In addition, the Special Master had the opportunity to interview and depose a number of staff attorneys during discovery and was highly impressed with their sophistication and knowledge of the FX market, especially given the two-year gap since intense fact review

[137] While it is not always clear from the available record in this case whether the attorneys involved are best described as staff attorneys, as opposed to agency attorneys, as we have defined them in this Report, to the extent we rely on these cases in determining the reasonableness of rates for *staff attorneys* (*see* discussion of the category of "contract" attorneys *infra*), we do so only to the extent they address licensed attorneys employed by the firms tasked with performing associate-level work.

[138] *See* pp. 231-231, *infra*.

in the *State Street* case ended.[139] Most, if not all, of the staff attorneys had specialized experience and/or skills that made them particularly equipped to perform comprehensive document review and spot important issues in the case. *See infra*. Beyond this, the staff attorneys here performed tasks that were more important than simple document review, such as preparing sophisticated legal memoranda and factual memoranda to prepare their respective litigation teams for depositions should the case reach that stage. This work was more in the nature of lower-level to mid-level associate work.[140]

d. Rates Used in Lodestar

i. Partners and Associates

Turing then to the lodestar reports in this case, those of Plaintiffs' Counsel list partners billing at hourly rates ranging from $535 to $1,000, and associates billing at hourly rates of $325 to $725. *See* discussion *supra.* As explained above, Labaton, Lieff, and the principal ERISA firms involved in this case all had structured annual fee-setting mechanisms in place. *Id. See also* Politano 6/14/17 Dep, pp. 35:22-37:7 [EX. 98]; Fineman 6/6/17 Dep., pp. 58:5 – 60:12 [EX. 18]; Heimann 7/17/17 Dep., pp. 60:13 – 66:13 [EX. 19]; Sarko 7/6/17 Dep., 94:16 – 95:20 [EX. 28]; Kravitz 7/6/17 Dep., pp. 115:16 – 116:25 [EX. 21]; Brickman 7/17/17 Dep., pp. 42:14 – 43:3 [EX. 40]. These

[139] The Special Master was particularly impressed with one staff attorney, David Alper. Alper, who had a lengthy background in FX trading, possessed greater substantive and industry knowledge than the other staff attorneys, and likely the other attorneys litigating the *State Street* case.

[140] This review for the most part went beyond the "first-level" document review, to determine relevance and privilege, performed by contract attorneys hired by WilmerHale in this case. *See* 5/4/18 Paine Letter to Sinnott (detailing document-review services by outside and firm document reviewers in 2016 at $36.40 and $75 per hour, respectively) [EX. 250].

formalized methods show an effort on the part of Labaton, Lieff, and the ERISA firms to set their fees based on prevailing market rates in the community, as those firms viewed the market.[141] Therefore, as discussed above, we find that the rates yielded by this process were reasonable. Given the ever-growing complexity of class action cases, the large financial risks associated with taking on multi-year contingent litigation, and the fierce competition among firms vying for those cases, we find nothing improper with the firms maintaining rates commensurate with other class action firms, as well as their defense-side adversaries. The rates charged by their adversaries in this case are instructive: REDACTED for partners; REDACTED for counsel; REDACTED for associates. *See* 5/4/18 Paine Letter [EX. 250]. This is simply a reality of legal practice.[142] Accordingly, the rates at which these firms billed on their lodestar reports are presumptively reasonable.

Although Thornton does not appear to have had any established mechanism for determining its attorneys' billing rates and instead appears to take a somewhat arbitrary approach for setting fees, *see* Thornton Law Firm, LLP's June 9, 2017 Responses to

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[141] As described above, the firms provided, and the Special Master has reviewed, the internal procedures maintained by the firms for determining annual billing rates within their respective firms. *See, e.g.,* Politano 6/14/17 Dep., pp. 35-45 [EX. 98]. With the exception of Thornton, which does not conduct an annual review, the firms each maintain executive committees to review the rates charged by the firm as compared to the rates charged by their direct competitors, accepted in other fee petitions, and as reported nationally in data collected through fee surveys.

[142] As a general proposition, the hourly rates submitted in some class action fee petitions may warrant heightened scrutiny. Unlike hourly rates charged to clients paying for legal services by the hour, the rates submitted to the Court on a fee petition rates are insulated from the pressures and client scrutiny of the legal marketplace. Absent a "paying client," firms may be tempted to artificially inflate their hourly rates on a lodestar petition. While this may well be the reality of bringing class action cases in generally, we do not find that this to be the case with the rates presented on the Fee Petition in the *State Street* case. This is borne out by the largely comparable rates charged by WilmerHale in this case. *See* 5/4/18 Paine Letter. [EX. 250].

Special Master's First Set of Interrogatories, Response No. 49 [EX. 176]; *see also* Garrett Bradley 6/19/17 Dep., p. 64:12-15 (explaining that the $500 per hour rate reported for his brother, Michael Bradley, was tethered only to "the fact of how many years he was an attorney, what he had recently billed to an hourly client, and the fact that he took it on contingent") [EX. 43], given that the rates at which Thornton partners and associates were billed were comparable to (and indeed generally less than) Labaton's and Lieff's billing rates, and given the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness. The Special Master is particularly persuaded that Thornton's billing rates here -- which range from an associate rate of $450 to partner rates of $535 - $850 an hour -- are reasonable because rates in this range were previously approved for Thornton by the Court in the *BONY Mellon* case.[143]

The *State Street* firms' billing rates are also consistent with the ranges of rates in the relevant markets. Examining the number of hours expended by partners at their respective billing rates, Labaton billed approximately $861 per partner hour, Lieff billed approximately $691 per partner hour, and Thornton billed approximately $694 per partner hour. Keller Rohrback billed approximately $755 per partner hour; Zuckerman Spaeder billed approximately $856 per partner hour; the McTigue Firm billed approximately $691 per partner hour; Richardson Patrick billed approximately $616 per partner hour; and Beins Axelrod billed $525 per partner hour. *See* discussion, *supra*.

[143] In *BONY Mellon*, the Court approved Thornton's $1,600,683 lodestar which listed associates with billing rates of $420 - $485 and partners with rates of $650 - $850. *See* SDNY No. 12-2335, Dkt. Nos. 622-8 [EX. 187]; 637 [EX. 9].

Considering the total number of associate hours included in the lodestar, Labaton billed at a rate of approximately $562 per associate hour expended, Lieff at a rate of approximately $432 per associate hour, and Thornton at a rate of $450 per associate hour. Keller Rohrback billed approximately $490 per associate hour. The other ERISA Class Counsel did not bill associate hours. *Id*. The range of rates included in the fee petition is generally consistent with the expected ranges for partners and associates practicing specialized class action litigation in the relevant markets, and the average hourly rates per partner-hour and associate-hour expended are similarly appropriate.

For all these reasons, the Special Master concludes that the hourly rates billed on the *State Street* Fee Petition for partners and associates were reasonable.

ii. Staff Attorneys' Rates

The lodestar reports list staff attorneys' billing rates ranging from $335 to $515 per hour. Labaton listed 25 staff attorneys: Three were billed at $410 per hour; four were billed at $390 per hour; one was billed at $375 per hour; seven were billed at $360 per hour; and ten were billed at $335 per hour. Lieff's report listed twenty staff attorneys, five of whom were billed at $515 per hour and fifteen of whom were billed at $415 per hour. Thornton listed twenty-four staff attorneys, twenty-three of whom were billed at $425 per hour while one -- Michael Bradley -- was billed at $500.[144]

Contrary to the picture painted in the *Boston Globe* article, with the exception of Michael Bradley, whose work is discussed separately, *infra*, these staff attorneys did

[144] The ERISA firms had no staff attorneys or "contract" attorneys.

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

The *Boston Globe* article also took issue with the staff attorney billing rates as compared to what the staff attorneys were actually *paid*. The article reported that these attorneys were paid only $25 to $40 an hour. In fact, the vast majority of the staff attorneys were paid in the range of $40 - $60 an hour, plus benefits. More importantly, there is nothing impermissible about marking up an attorney's billing rate above "cost" so long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed. *See City of Pontiac Gen. Employees Retirement Sys. V. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013); *see also Matter of Trinity Indus., Inc.*, 876 F.2d 1485, 1495 (11th Cir. 1989) ("private practitioners whose overhead expenses must be, and ultimately are, passed onto clients via a mark-up in hourly rates charged typically can recoup such expenses as part of a fee award"); *Guckenberger*, 8 F. Supp. 2d at 105 (D. Mass. 1998); *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 586 F. Supp. 2d 732, 782-83 (S.D. Tex. 2008).

As indicated, district courts determine the reasonableness of a petitioning firm's staff attorney rates in the same manner in which they examine the reasonableness of partner and associate rates -- by assessing the experience and skill of the individual attorneys, their contributions to the litigation, the prevailing market for their services, and the propriety of the rates in the context of the overall fee award.[145] *See*, *e.g.*, *In re Optical Disk Drive Prod. Antitrust Litig.*, *supra,* 2016 WL 7364803, at *6-13 (accepting staff and contract attorney rates between $300 - $350 where the firm provided sufficient evidence of the expertise, language skills, and contributions of the attorneys to the litigation); *Gilbert v. Abercrombie & Fitch, Co.*, *supra,* 2016 WL 4159682, at *1, *report and recommendation adopted*, 2016 WL 4449709 (approving requested hourly rate of $350 for staff attorney involved in shareholder litigation); *Phillips v. Triad Guar. Inc.*, *supra,* 2016 WL 2636289, at *7 (accepting rate of $350 for staff attorney participating in complex securities litigation, for which the total fee represented a negative lodestar multiplier); *In re Am. Apparel, Inc. S'holder Litig.*, *supra* 2014 WL 10212865, at *26 (approving as reasonable hourly rate of $395 for two staff attorneys in case in which total requested fee was approximately half of total lodestar); *see also In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 375-78 (S.D.N.Y. 2013) (commenting that a blended rate of $300 appeared more appropriate than $385 requested rate for staff attorneys whose work constituted more than 70% of attorney time expended and total lodestar value, but

[145] *See* note 133, *supra*.

declining to decide an "exact rate at which a hypothetical paying client would compensate a firm for the services of staff attorneys").

As noted, where firms fail to provide sufficient evidence of the experience, qualifications, and contributions of staff attorneys, courts may decline to award requested staff attorney rates or decline fees for staff attorney time altogether. *See*, *e.g.*, *Makaeff v. Trump Univ., LLC*, 2015 WL 1579000, at *5 (S.D. Cal. Apr. 9, 2015) (rejecting claimed staff attorney rate of $350, and excluding staff attorney fees of $121,047.50, where plaintiff did not produce satisfactory evidence of the prevailing market rate for staff attorneys in the district or the background, skill, and litigation experience of the attorneys); *City of Plantation Police Officers' Employees' Ret. Sys. v. Jeffries*, 2014 WL 7404000, at *14 (S.D. Ohio Dec. 30, 2014) (rejecting rates of $340 - $375 and applying rate of $185 for three staff attorneys where plaintiff provided no indication as to their qualifications and experience and no evidence of work performed beyond "assisting with investigating initial claims and reviewing document productions"); *see also Spangler v. Nat'l Coll. of Tech. Instruction*, 2018 WL 846930, at *2 (S.D. Cal. Jan. 5, 2018) (finding no issue with $315 staff attorney rate, but excluding staff attorney's 371.9 document review hours (Dkt. 199-6) as unreasonable or unnecessary); *St. Louis Police Ret. Sys. v. Severson*, 2014 WL 3945655, at *5 (N.D. Cal. Aug. 11, 2014) (reducing staff attorney rate from $395 to $350 and ultimately awarding no fee for seven hours expended by staff attorney, which were duplicative).

Here, as noted, the Customer Class firms have presented sufficient evidence that the staff attorneys involved in this complex litigation possessed specialized experience

and performed substantive and valuable work well beyond simple document review. The majority of the staff attorneys had specialized experience and skills in securities litigation, and a number of staff attorneys carried specialized knowledge from their prior participation in the *BONY Mellon* matter.

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

The rates at which the staff attorneys were billed, however, varied among the firms. Except for Michael Bradley's $500 per hour rate, Thornton billed all of the staff attorneys on its lodestar report at $425.[146] Except in two instances,[147] Thornton billed all

[146] Evan Hoffman of Thornton testified that the $425 hourly rate was selected for all the staff attorneys on Thornton's lodestar because Dan Chiplock of Lieff Cabraser, who had been lead counsel in *BONY Mellon*, stated that this was the rate that had been approved by the Court for the staff attorneys in that case. *See* Hoffman 6/5/17 Dep., p. 59:5-12. [EX. 63]. In an email at the end of August 2015, after the agreement-in-principle to settle the *State Street* case, when counsel were gathering their time and expense information in anticipation of the finalization of the settlement, Chiplock asked his fellow Customer Class Counsel whether "we want to cap document reviewer rates at a certain level" and suggested that they "probably need to pick a consistent rate." *See* LCHB-0052627 – 52628 [EX. 192]; *see also* Chiplock 6/16/17 Dep., pp. 182;5 – 183:5 [EX. 10]. "In *Bank of New York Mellon*, the top document reviewer rate was $425 an hour." *Id.* According to Chiplock, however, the discussion about setting rates for document reviewers was never picked up again. It was more than a year later that the Fee Petition was prepared. Yet, based on Chiplock's August 2015 email, Thornton decided to use $425 as the hourly rate for all the staff attorneys in its lodestar. Chiplock 6/16/17 Dep., p. 184:20-25 [EX. 10]; Hoffman 6/5/17 Dep., p. 59:5-12 [EX. 63].

[147] Lieff billed two staff attorneys -- Ann Ten Eyck and Rachel Wintterle -- at $515 per hour. *See* Lieff lodestar report, Dkt. No. 104-17(A). [EX. 89].

the staff attorneys on its lodestar report at rates that were generally considerably *higher* than the rates at which those same attorneys were billed by Labaton and Lieff.[148] The attorneys were billed by Labaton and Lieff at hourly rates ranging from $335 - $415, most in the range of $335 - $360 an hour. *See* Labaton lodestar report, Dkt. No. 104-15(A) [EX. 88]; Lieff lodestar report, Dkt. No. 104-17(A) [EX. 89].[149]

Although the Special Master finds nothing unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms, an adjustment of the amounts billed in Thornton's lodestar for staff attorneys will be required.[150]

iii. "Contract" Attorneys

Included within the staff attorneys listed on Lieff's and Thornton's lodestar reports were four "contract" attorneys who were hired by Lieff through one or more outside staffing agencies. Chiplock 6/16/17 Dep., pp. 112:23 – 113:5. [EX. 10]. It is a different question altogether whether the markup of billing rates for staff attorneys may be applied to "contract attorney" hours.

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[148] The double-counting of the staff attorneys is addressed separately, *infra*.

[149] Labaton billed two staff attorneys -- David Alper and D. Hong -- at $425, the same rate used by Thornton. *See* Labaton lodestar report, Dkt. No. 104-15(A). [EX. 88]. These two attorneys were the highest billed Labaton staff attorneys. *See id.* The rate billed for David Alper, who had unique experience for this case because of his extensive work as a trader in the FX industry, was especially reasonable in view of the valuable contributions this experience allowed him to make in this case.

[150] Fees for these staff attorneys will be calculated at the same rate as they were billed on the Labaton and Lieff petitions.

Contract attorneys are distinguishable from non-partnership-track attorneys working on an hourly basis, as these are "attorneys who are not permanent employees of the law firm, are hired largely from outside staffing agencies, are not listed on counsel's law firm website or resume, are paid by the hour, and are hired on a temporary basis to complete specific projects related to a particular action." *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394 (S.D.N.Y. 2013). Counsel nonetheless contend that because contract attorneys and non-partnership track staff attorneys performed functionally the same work, they should be treated equally for purposes of a lodestar calculation. Fineman 6/6/17 Dep, p. 47:5-12 [EX. 18]; Heimann 7/17/17 Dep., pp. 51:18 – 52:15 [EX. 19].

Viewed in isolation, as a basic proposition, it is not the least bit objectionable that law firms may charge clients legal fees that include a surcharge for overhead as well as profits. *Guckenberger*, *supra,* 8 F. Supp. 2d at 105; *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, *supra*, 586 F. Supp. 2d at 782-83. *See also* ABA Formal Opinion, 88-356. As several courts have held, there is nothing disingenuous about billing clients at market rates for work performed by attorneys, whether traditional or non-partnership-track. *See In re Tyco Intern, Ltd. Multidistrict Litigation*, 535 F. Supp. 2d at 272; *Charlebois*, 993 F. Supp. 2d at 1124 (hours of off-track attorneys and other attorneys not counsel of record properly included in lodestar). That one attorney is on a partnership track while another is not is, in this context, a distinction without a difference. Quite simply, similar work justifies similar rates.

But this logic rings hollow with respect to contract attorneys essentially "rented" by a firm on a temporary basis. Unlike the non-partnership-track staff attorneys, the contract attorneys utilized in this case did not enjoy an uninterrupted affiliation with the firm. Nor did the firm offer health insurance or provide other employment benefits made available to employees, including off-track staff attorneys. Further, the contract attorneys did not receive W-2s from the firm. Fineman 6/6/17 Dep, p.46:14-23. [EX. 18]. Beyond this, the contract attorneys, as non-employees, did not bring with them the full panoply of federal and state employment law obligations that relate to employees of a business.

For these reasons, the Special Master declines to treat the contract attorneys as the functional equivalent of associates or non-partnership-track staff attorneys employed by the firms. While courts that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates, *see In re Citigroup*, 395-396; *In re Beacon Assocs. Litig*., No. 09 Civ. 777(CM), 2013 WL 2450960, at *18 (S.D.N.Y. May 9, 2013), further differentiation among the so-called "temporary attorneys," *i.e.,* contract attorneys and non-partnership-track staff attorneys, is necessary.

Lieff's hiring of contract attorneys in this case resembled a cost more akin to an outsourced expense, such as a consultant. In making this observation, there is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary. The recommendation made herein reflects the economic realities for law firms that retain low-cost contract attorneys to perform work readily assigned to a first- or second-year associate in a traditional law firm

model. Given the considerable economic benefits realized by those firms that hire contract attorneys in a large class action case, such as *State Street*, law firms that realize such a benefit should distinguish the costs of contract attorneys from those of staff attorneys who perform the same or similar work on a matter when seeking reimbursement of fees and expenses.

To be sure, federal courts "have not spoken with one voice concerning the proper treatment of contract attorney costs in the calculation of a lodestar." *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *8-9 (N.D. Cal. Aug. 3, 2016), *dismissed sub nom. In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 16-16368, 2017 WL 3468376 (9th Cir. Mar. 2, 2017) (declining to decide whether contract attorneys' rates should be reduced on plaintiffs' lodestar). Several courts, including two within this Circuit, have applied market rates without regard to the actual wages paid to a contract attorney. *See, e.g., In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F.Supp.2d 249, 272 (D.N.H. 2007); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 410 (D. Conn. 2009); *see also Charlebois v. Angels Baseball LP*, 993 F. Supp. 2d 1109, 1124 (C.D. Cal. 2012).

In *Tyco* and *Carlson*, the District Courts of New Hampshire and Connecticut, respectively, applied market rates across the board without differentiating between contract and non-partnership-track attorneys paid on an hourly basis. For the reasons stated above, those decisions that find contract attorneys indistinguishable from off-track associates are not acceptable for purposes of this Report. It is from this faulty premise that both courts affirmed fee awards charging contract attorneys at the equivalent of associate rates. *See Tyco*, 535 F. Supp. 2d at 272 (reasoning that calculation of market

rates is not intended to reflect actual costs incurred by firm in applying associate market rates to contract attorney hours); *Carlson*, 596 F. Supp. 2d at 410 ("not objectionable per se [] to apply a multiplier to a lodestar that includes work performed by contract attorneys"). While an inherent markup on attorneys' fees may apply to non-partnership track attorneys who are employees of a firm, such a markup grossly distorts the financial burdens of hiring true "temporary" or contract attorneys. We find these courts have painted with too broad a brush.

On the other end of the spectrum, other courts have refused to reimburse non-partnership-track attorneys at associate market rates. *See, e.g., City of Pontiac Gen. Employees' Retirement Sys.*, 954 F. Supp. 2d at 280; *In re Citigroup*, 965 F. Supp. 2d at395–96. Where the law firm paid significantly less per hour for these attorneys -- between $40 and $50 per hour -- the presumption is that a reduction is required to reflect the economic discrepancy. *See City of Pontiac,* 954 F. Supp. 2d at 280 (court calculated a blended rate); *In re Citigroup,* 965 F. Supp. 2d at 398 (exercising its discretion to set a blended hourly rate between contract and staff attorneys). The Special Master joins the *City of Pontiac* and *In re Citigroup* courts in applying a healthy dose of skepticism to lodestar calculations charging equal rates for contract attorneys and non-partnership track staff attorneys.

Even more fundamental than the rate claimed on a fee petition is how contract attorney costs are passed to the clients -- here, the class members. That is, whether contract attorneys should be billed as expenses or legal service fees.

The Special Master diverges from those decisions applying a blended rate insofar as those courts accepted, without discussion, the billing of contract attorney expenditures as legal fees rather than as a cost or expense. Whether an expenditure constitutes a legal services fee or a reimbursable expense is not black-and-white. The ABA rules and judicial decisions leave attorneys a wide degree of latitude to decide: "[s]ervices of a contract lawyer may be billed to the client either as fees for legal services or as costs or expenses incurred by the retaining lawyer." ABA Formal Opinion 00-420. Moreover, the decision to bill a contract attorney as an expense or as a legal service fee is not a matter of ethics. *Id*. It is, rather, a measure of professional judgment. Attorneys must exercise that judgment considering the circumstances of each representation. At the very least, a decision must be informed by the role of the contract attorney vis-à-vis the other attorneys in the case.

Here, Lieff did not face the same long-term financial obligations in securing contract attorneys as it did with its non-partnership-track staff attorneys. The staff attorneys employed by Lieff full-time received health insurance and other employment benefits, such as participation in the firm's 401(k) plan. *See* Oh 6/6/17 Dep., p. 41:2-7 [EX. 61]; Ashur 6/6/17 Dep., p. 14:5-9 [EX. 106]; Fineman 6/6/17 Dep., p. 34:2 – 35:13 [EX. 18]. The firm paid others an annual salary (as opposed to an hourly wage), plus benefits. Zaul 6/6/17 Dep., p. 38:17-22. [EX. 59]. By contrast, Lieff does not offer contract attorneys paid through an agency any additional monetary benefits. In fact, the firm is largely not even privy to the compensation paid to contract attorneys because the agency is responsible for paying those wages. Fineman 6/6/17 Dep., p. 37:2-3. [EX. 18].

Charging contract attorneys as a fixed cost more accurately reflects the financial constraints, or lack thereof, in the contract attorney position. This is not to ignore the important role fulfilled by contract attorneys in large litigation matters. Contract attorneys have become increasingly common in complex cases requiring review of extensive electronic discovery. Johnson 7/17/17 Dep., pp. 17:10 - 18:6. [EX. 198]. In some instances, contract attorneys hired through a staffing agency can fulfill needs, particularly for document review, better than hiring new attorneys. Heimann 7/17/17 Dep., pp. 101:19 -102:19. [EX. 19].

This is no doubt true. But the fact remains that a law firm does not face the same long-term financial commitments and risks inherent in an employment relationship. Even in the most complex cases, a firm still pays only a modest hourly fee for contract attorneys, sometimes less than $50 per hour. *See* Fineman 6/6/17 Dep., pp. 36:21 – 37:11. [EX. 18]. In this respect, this cost is most akin to a disbursement of funds passed along to the client at face value. See ABA Formal Opinion, 93-379. [EX. 193]. Indeed, attorneys have an ethical obligation to pass along the benefit of a discount absent an agreement to the contrary. *Id*.

While legal and ethical rulings have not provided definitive guidance on this interesting issue, the better, more common-sensical view is that the costs of contract attorneys should be passed along as a reimbursable expense rather than as a marked-up profit center. *See Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015) (expenses for contract attorney document review among expenses); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 437 (S.D.N.Y. 2016) ("While courts in this Circuit have

permitted attorneys to garnish their lodestars with marked-up contract attorney fees, this Court appreciates Counsel's decision to treat these contractor fees as an expense. It saves the Court from having to determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary. This Court encourages the Plaintiffs' class action bar to consider adopting this practice in future actions") (citation and internal punctuation omitted).

As a final caution against allowing a market-rate markup of contract attorneys, it bears noting that when contract attorneys are permitted to be marked up and billed at market rates on lodestar petitions in class actions, the effective rate usually does not stop there. In the vast majority of cases, a multiplier is applied to these market rates, often (as in this case) at a level of two times or even more. Thus, the actual realized rate on these contract attorneys can be twenty times as much as the firm actually paid the agency, or more. For example, if a firm pays an agency $40/hour for a contract attorney but claims $400/hour for that contract attorney on its lodestar, and then obtains a 2.0 multiplier, the actual recovery rate for this contract attorney is $800/hour -- or twenty times what the firm paid for the attorney.

In class actions, this is charged against class funds. Quite simply, this is far too steep a price for class members to pay for what amounts to rented workers.

The lodestar multiplier given to class attorneys is, as a general matter, justifiable in part by such factors as preclusion of taking other cases or work, the nature and length of the relationship with the client, time limitations, the amount invested and the results obtained, novelty and complexity, and the undesirability of taking the case. *Johnson v.*

Georgia Highway Exp., Inc. 488 F.2d 714, 717-719 (5th Cir. 1974); *see also Blum v. Stenson*, 465 U.S. 886, 898-901 (1984). These factors have little if any applicability to the hiring of contract attorneys.

To permit marked-up rates and then add a multiplier on contract attorneys is an unfair burden on class funds.

iv. Michael Bradley

Counsel further sought reimbursement of fees for yet another outside "staff attorney" document reviewer in Michael Bradley, a Massachusetts-licensed attorney who is the brother of Garrett Bradley, the managing partner of Thornton. As part of the Fee Petition, Thornton submitted a lodestar assigning to Michael Bradley a rate of $500 per hour for 406.4 hours, for a total of $203,200.00 in fees. *See* Exhibit A to Garrett Bradley's Declaration, Docket #104-16. [EX. 66]. Despite the legal limbo of this case, Thornton has already paid Michael Bradley the entirety of this amount. M. Bradley 6/19/17 Dep., p. 70: 18-19. [EX. 67].

Put plainly, Michael Bradley's work did not justify a rate of $500 per hour.

Michael Bradley is a solo practitioner who practices in Quincy, Massachusetts. Bradley performed approximately ten hours per week of document review in the *State Street* case, working unsupervised from his own office, not at Thornton's offices. M. Bradley 6/19/17 Dep., p. 52:5-13. [EX. 67]. Michael Bradley does not currently work, nor has he previously worked, as an associate, staff attorney, or contract attorney for Lieff, Labaton, or Thornton. Indeed, Michael Bradley's only connection with any of those firms -- outside the *State Street* case -- is his brother. *Id.* at pp. 26:16 – 27:5; 29:11-

14. It comes as no surprise that, apart from the Thornton attorneys who assigned document review work to Bradley during this period, none of the other attorneys or class representatives involved in the *State Street* litigation even knew of Michael Bradley prior to the publication of the *Globe* article. *See* Heimann 7/17/17 Dep., p. 107:18-24 [EX. 19]; Chiplock 6/16/17 Dep., p. 209:20 – 21:3 [EX. 10]; Sarko 7/6/17 Dep., p. 103:18-21 [EX. 28]; *see also* Goldsmith 7/17/17 Dep., pp. 87:9 – 88:14 [EX. 58]; Zeiss 6/14/17 Dep., pp. 68:15 – 70:2. [EX. 79].

This is not to say that plaintiffs' firms should avoid retaining sophisticated outside attorneys where there is a need for a qualified reviewer or expert. Outside expertise can be a useful asset to plaintiffs' firms tackling complex financial issues such as those presented in *State Street*. But a firm must still charge rates in line with those of an attorney of "reasonably comparable skill, experience, and reputation." *Grendel's Den, Inc.*, 749 F.2d at 955.

1. Relevant Legal Background and Experience

During his involvement in the *State Street* case from 2013 to 2015, Michael Bradley owned and operated his own law firm based in Quincy, Massachusetts. Prior to that time, Bradley worked for two years, from 2005 to 2007, as an Assistant District Attorney in the Norfolk County District Attorney's Office, then spent a few years prior to 2011 as the executive director of the Underground Economy Task Force -- a task force charged with scrutinizing Massachusetts employment practices to identify routine

violators of state and federal employment and wage laws, where he oversaw interagency efforts but did not personally conduct any investigations. M. Bradley 6/19/17 Dep., pp. 11:9-11; 12:6-7; 22:8-20; 23:6-8, 11-24. [EX. 67]. After leaving the Underground Economy Task Force in 2011, Michael Bradley returned to private practice as a solo practitioner. *Id.*, p. 12:7-9.

In his practice, Bradley has represented clients in personal injury, probate, and employment/labor matters, but the vast majority of his practice is public and private criminal defense, principally representing, on the private side, clients in OUI cases, domestic violence cases, and other matters in district court, and as a court-appointed public defender, clients in a range of cases from minor driving infractions to serious felonies, such as assault and battery with a dangerous weapon. *Id.*, p. 21:6-11.

While Michael Bradley's experience is no doubt an asset to a potential client in need of criminal representation, it has no relevance to the allegations in the *State Street* case. Nor did Bradley's work as a prosecutor or as executive director of the Underground Economy Task Force uniquely qualify him to scrutinize the internal FX trading records produced by State Street. *But see* G. Bradley 6/19/17 Dep., 53:14-21. [EX. 43]. Michael Bradley did not have any relevant background in securities cases or with the FX market. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 3. [EX. 109]. Nor did he possess any technical expertise with the Catalyst document review system used in this case by Labaton and Thornton to facilitate review. M. Bradley 6/19/17 Dep., 25: 6-9. [EX. 67]. He was no more qualified to review documents than any other attorney with six years of general practice experience.

2. Contributions to the State Street Case

Beyond this, Michael Bradley's contributions to this case were distinctly limited when compared to the staff attorneys of the other two firms. The superficial nature of Michael Bradley's occasional document review in this case provides yet more support for the conclusion that $500 per hour is disproportionate to the work performed. For over two years, Michael Bradley's contribution to the *State Street* case consisted exclusively of reviewing and coding documents in the Catalyst system. *See* Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6 [EX. 109]; M. Bradley 6/19/17 Dep., pp. 47:8-10; 50:6-8 [EX. 67]. While there is no clear evidence of this, Bradley testified that he recorded comments on a "handful" of documents. *See* M. 6/19/17 Bradley Dep., pp. 39:7-13; 47:20-24; 50:19-24, 51:1-5. [EX. 67]. This is consistent with his recollection that, in over two years, he found only a "handful" of highly relevant documents. M. Bradley 6/19/17 Dep., p. 48:21-24. [EX. 67].

Perhaps most telling is Michael Bradley's failure to produce any substantive memoranda or other work product. M. Bradley 6/19/17 Dep., 46: 21-24 [EX. 67]; Answers of Michael Bradley Esq. to Special Master's First Set of Interrogatories, Interrog. Ans. No. 6 [EX. 109]. The lack of work product distinguishes Bradley not only from the non-partnership-track staff attorneys employed by Lieff and Labaton who were conducting document review -- on a full-time basis -- but also from the contract attorneys retained by Lieff who were also called upon to draft substantive and topical memoranda

based on the documents they reviewed. *See* Chiplock 6/16/17 Dep., pp. 115:11 – 116:10. [EX. 10].

By and large, Michael Bradley was unsupervised. As agreed to upfront, he operated independently of the other attorneys. M. Bradley 6/19/17 Dep., p. 49: 6-9. [EX. 67]. After receiving a basic onboarding from Thornton, Bradley's contact with the firm was limited to submitting weekly or bi-weekly emails tallying his hours and raising technical concerns about the software. M. Bradley 6/19/17 Dep., p. 10-24 [EX. 67]; Hoffman 6/5/17 Dep., pp.107:9-23; 107:24-25, 108:1-7 [EX. 63]. His review, moreover, was outside the scope of Todd Kussin and Kirti Dugar, the on-site supervisors at Labaton and Lieff, respectively. Kussin 6/5/17 Dep., pp. 63:20-23; 79:22-25, 80:1-2 [EX. 56]; Dugar 6/16/17 Dep., pp. 103:8-16; 104:9-14 [EX. 55].

Beyond this, all of his work was performed in his free time and did not infringe upon other paying work or reduce his earning opportunities. Although he performed his work on a contingency basis, with some contingent risk, in fact, aside from a modest expenditure of time, he had little risk.

3. Appropriate Hourly Rate

Looking at the benchmarks of comparable skill, experience, and reputation, the Special Master concludes that the rate of $500 per hour is disproportionate to Michael Bradley's contribution to the *State Street* case, particularly when compared to the other staff attorneys on the case. That rate grossly overstates the very basic skills and experience Bradley brought to the *State Street* case.

But it must be noted that the $500 rate was not set at Michael Bradley's initiative or request. Rather, Thornton -- specifically Garrett Bradley -- selected this rate in an apparent effort to increase Thornton's individual lodestar value. In this context, the Special Master does not credit Garrett Bradley's explanation that, in 2013, before his brother commenced employment with Thornton, he and Michael discussed his rate and agreed at that time that Thornton would pay Michael $500 per hour for his work on a contingent basis. *See* G. Bradley 6/19/17 Dep., pp. 53:24-54:10; 56:10-15. [EX. 43]. In making this finding, the Special Master is informed by email correspondence between Garrett Bradley and the other Thornton attorneys years later that was still discussing what an appropriate rate for Michael Bradley should be. *See* TLF-SST-012768 (G. Bradley 1/8/15 email correspondence with M. Lesser: "What rate are we using for my brother's time in SST? . . . Whatever it is, I'm sure we can bill him out higher") [EX. 196]; TLF-SST-01276 [EX. 197]]. *See also* discussion, *infra*.

The Special Master is equally unpersuaded that the hourly rates received by Michael Bradley immediately prior to the *State Street* case should determine his reasonable hourly rate in the *State Street* case. For private criminal defense work, clients principally paid Bradley a flat fee without regard to actual hours expended on the representation. *See* SSSM_MB_000119-123 [EX. 194]; SSSM_MB_000124-130 [EX. 195]; M. 6/19/17 Bradley Dep., 14: 18-19; 15: 22-24, 16: 1-11 [EX. 67]. Similarly, and as is typical for personal injury work, for such cases Michael Bradley received a contingent fee equal to one-third of the total recovery. M. Bradley 6/19/17 Dep. 13:7-10, 20-23. [EX. 67].

Michael Bradley has represented some clients on an hourly basis, but the hourly rates charged fall at opposite ends of the fee spectrum and are of little value to the analysis here. For example, Michael Bradley earned $450 per hour in one case for his representation of an estate administrator who became party to the underlying will contest. M. Bradley 6/19/17 Dep., 71: 11-16. [EX. 67]. And in one other case, Bradley charged $500 per hour for approximately three hours' work on a motion to seal records of a criminal matter. M. Bradley 6/19/17 Dep., pp. 16:17-24, 17:1-7 [EX. 67]; SSSM_MB_000257-261 [EX. 108]. On the other end of the spectrum, and far more frequently, Bradley has routinely received a mere $53 per hour for work as a court-appointed attorney through the Norfolk County Bar Advocate Program. M. 6/19/17 Bradley Dep., pp.12:22-24; 13:16; 20:15-23. [EX. 67]. That rate, of course, is set by the Legislature and not subject to fluctuations of the market. M. Bradley 6/19/17 Dep., p. 20:15-23. [EX. 67].

To determine the accuracy and reasonableness of the fees paid in the *State Street* case, one must look beyond the contemporaneous rates charged by Michael Bradley. The rates charged by Michael Bradley to his private clients do, and should, reflect the market for comparable legal services. Attorneys setting rates for a private client must consider several factors, such as overhead, risk, and profit. (The Special Master expresses no opinion whether the rates charged by Michael Bradley are in line with the market rates for similar services in the Greater Boston market.) Nevertheless, these rates are untethered to the substantive work Bradley performed in the *State Street* case.

What rates Michael Bradley charged his own clients has little bearing, if any, on a reasonable rate for Bradley's document review efforts performed in this case. Unlike his solo work, Bradley did not assume great risk in the *State Street* case. He worked exclusively on a database hosted by another firm. M. Bradley 6/19/17 Dep., p. 30:11-12 [EX. 67]; G. Bradley 6/19/17 Dep., p. 53:10-11 [EX. 43]. He was not responsible for creating the document review; he merely followed an existing protocol. M. Bradley 6/19/17 Dep., p. 34:14-21. [EX. 67]. Furthermore, as noted, Bradley worked on his own schedule, giving priority to his own cases and performing document review at odd hours or when time allowed. M. Bradley 6/19/17 Dep., pp. 51:16-20; 52:5-8, 14-18. [EX. 67].

Michael Bradley's hourly work in this case most closely resembles that of a junior level associate. Thornton paid no overhead costs for Bradley's services. G. Bradley 6/19/17 Dep., p. 64:12-19. [EX. 43]. Thornton's claim that, based on the firm's alleged agreement to pay Michael Bradley $500 per hour for his time only in the event of a successful recovery, it faced a far greater risk in procuring Michael Bradley as opposed to a contract attorney hired through an agency, is without justification. In reality, the firm's financial risk was minimal. Thornton's internal email traffic indicates that the firm had not assigned Michael Bradley a rate, at least for lodestar purposes, as late as 2015. *See* TLF-SST-012768 (G. Bradley 1/8/15 email correspondence with M. Lesser: "What rate are we using for my brother's time in SST? . . .Whatever it is, I'm sure we can bill him out higher") [EX. 196]; TLF-SST-01276 [EX. 197]]. *See also* TLF-SST-007843-7844 (7/28/15 email from Bradley, Lesser, and Hoffman directing that Michael Bradley be

billed at $500 per hour instead of the $400 hourly rate Thornton had previously decided to use for him). [EX. 107].

Given the unique circumstances governing Michael Bradley's work on the *State Street* case -- the minimal time commitment, the lack of supervision, and the fairly low level of work performed -- the Special Master finds that $500 is an unreasonable rate for purposes of a lodestar calculation. This conclusion, of course, does not impact any private financial arrangement between Thornton and Michael Bradley. Thornton is free to agree to any terms it sees fit, including to pay Michael Bradley $500 per hour or more. Indeed, Thornton has already paid Michael Bradley in full for his work on the case and the findings here are not intended to invalidate any obligation Thornton has to Michael Bradley. The Special Master leaves it to Thornton to take whatever action it sees fit to claw back those funds should it believe doing so is appropriate.

A final point must be made as to Michael Bradley's $500 per hour rate, both as to Bradley himself and as to Thornton. Unlike the other staff attorneys on this case who were paid only $40 - $60 an hour despite being billed at much higher rates, Michael Bradley was paid the full $500 an hour; he received all of that himself. This totaled over $200,000. Beyond this, because of the 1.8 multiplier effect, Thornton received almost an additional $500 per hour on Michael Bradley's time, resulting in an additional almost $200,000 to the Thornton firm. This is clearly unreasonable, and Thornton's award must be reduced by the amount earned by applying this inflated hourly rate at an almost two-times multiplier.

In sum, for purposes of the lodestar report presented by Thornton to the Court as support for the request for attorneys' fees, a substantial downward adjustment of the fees sought for Michael Bradley's work is necessary.

e. Hours of All the Firms

A reasonable hourly rate, of course, is only half of the lodestar equation -- other factors must be weighed in the equation. In general, the lodestar is the product of the number of hours appropriately worked times a reasonable hourly rate or rates. *Hensley*, 461 U.S. at 433; *Hutchinson ex. rel. Julien*, 636 F.3d at 13; *Gay Officers Action League*, 247 F.3d at 295. The party seeking an award of attorney fees has the burden of producing evidence supporting both the hours worked and the rate claimed. *Hensley*, 461 U.S. at 433.

i. Records of Time for the Firms

1. Contemporaneity of the Firms' Records

Courts in the First Circuit require that attorneys intending to seek fee awards maintain reasonably detailed contemporaneous time records to support a future fee application. *Gay Officers Action League*, 247 F.3d at 297.[151] The contemporaneous record requirement is designed to "ensure that the information presented is reliable and sufficiently detailed so that the reasonableness of the fee claimed may be challenged by the adversary and evaluated by the court. . . ." *Pontarelli v. Stone*, 781 F. Supp. 114, 120 (D.R.I. 1992). The First Circuit has warned that "in cases involving fee applications for

[151] Black's Law Dictionary defines "contemporaneous" as "living, occurring, or existing at the same time." Black's Law Dictionary (10th ed. 2014). Merriam Webster defines the term as "existing, occurring, or originating during the same time." *See* https://www.merriam-webster.com/dictionary/contemporaneously (last visited April 1, 2018).

services rendered. . . the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance." *Grendel's Den*, 749 F.2d at 952.

This requirement was first announced in relation to applications for fees and costs pursuant to 42 U.S.C. § 1988. *Id*. at 950-52. Courts in this Circuit have since adopted and applied the requirement in other contexts, including the review of fee applications related to class action settlements. *See*, *e.g.*, *Hutchinson ex rel. Julien, supra*, 636 F.3d at 13 (noting that fee-seeking party in negotiated class action settlement had burden of producing contemporaneous time and billing records); *Weinberger*, 925 F.2d at 523-527 (remanding where "woefully deficient" class action fee application failed to include contemporaneous time records or other documents). Where district courts employ the percentage of fund method in assessing the reasonableness of a requested fee, utilizing a lodestar cross-check, time records may "inform the court's inquiry into the reasonableness of a particular percentage" award. *See In re Thirteen Appeals*, 56 F.3d at 307, n. 11 (noting that "because the district court in any given case may eschew the [percentage of fund] method in favor of the lodestar method, [the First Circuit urges] attorneys to keep detailed, contemporaneous time records in common fund cases").

"The party seeking [an] award has the burden of producing materials that support the request… [t]hese materials should include counsel's contemporaneous time and billing records, suitably detailed, and information anent the law firm's standard billing rates." *Hutchinson*, 636 F.3d at 13 (citations omitted). Contemporaneous records serve as the best evidence that hours claimed were actually expended and provides a basis for a

court's review of the accuracy of the records and the reasonableness of time spent. *See Castaneda-Castillo v. Holder*, 723 F.3d 48, 79 (1st Cir. 2013) ("Records that include the different tasks each attorney performed, the total number of hours billed, the billing rate for those hours, the date on which each task[ ] was performed, and the amount of time spent on each task generally fulfill this requirement."); *see also Deary v. City of Gloucester*, 789 F. Supp. 61, 64 (D. Mass. 1992), *aff'd*, 9 F.3d 191 (1st Cir. 1993) (attorney affidavits detailing specific work completed on specific dates, coupled with attorney time slips, were essentially contemporaneous and sufficiently reliable in support of most hours claimed).

As a practical matter, it is time-consuming and laborious for a district court to review every underlying contemporaneous time entry, particularly in litigation spanning several years and involving numerous counsel. Thus, when assessing class action fee applications, district courts often rely upon summaries reflecting the contemporaneous time entries of attorneys involved. *See, e.g.*, *Authors Guild, Inc. v. Bass*, 614 F. App'x 564, 566 (2d Cir. 2015) ("The district court did not abuse its discretion in relying on the summaries rather than the records on which they were based"). *Gay Officers Action League*, 247 F.3d at 297 (where attorneys attested to having maintained contemporaneous time records, compilations of records submitted with fee application were acceptable in lieu of original records).

However, while a court may reasonably rely on summary evidence, such evidence must be based upon entries that are contemporaneously maintained in the first instance. *See*, *e.g.*, *Morin v. Sec'y of Health & Human Servs.*, 835 F. Supp. 1431, 1439 (D.N.H.

1993) (absent suggestion of a reconstructed record where no contemporaneous records had been maintained, district court concluded that submission was properly contemporaneous). Because a court has discretion in determining an appropriate fee award, it may properly reduce an award where counsel has not maintained reliable contemporaneous records. *See Hensley*, 461 U.S. at 438, n. 13 (1983). ("[T]he District Court properly considered the reasonableness of the hours expended, and reduced the hours of one attorney by thirty percent to account for his inexperience and failure to keep contemporaneous time records.").

"Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees." *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). Some courts in this Circuit have found reconstructed estimates of attorney hours insufficient to satisfy the contemporaneous record requirement, resulting in substantial percentage reductions to claimed awards or, in extreme cases, denial of fees altogether.[152] However, because courts maintain discretion in determining an appropriate fee award, some have noted that the requirement

[152] *See*, *e.g.*, *Gardner v. Simpson Fin. Ltd. P'ship*, 963 F. Supp. 2d 89, 92-95 (D. Mass. 2013) (citing cases involving a "deep discount" of 20-25% of hours on basis of reconstructed records, and substantially discounting requested award where counsel submitted no contemporaneous records and request was grossly inflated); *Mary G-N v. City of Northampton*, 2015 WL 9462080, at *3–4 (D. Mass. Dec. 28, 2015) (unpublished) (awarding 30% of claim by attorney that reconstructed time records on basis of dates on which computer files were saved and research was downloaded); *Wilson v. McClure*, 135 F. Supp. 2d 66, 73–74 (D. Mass. 2001) (district court reduced attorney's claimed hours "in order to reflect the strict minimum amount of time it would take one to perform the work actually performed"); *Libertad v. Sanchez*, 134 F. Supp. 2d 218, 231-34 (D.P.R. 2001) (50% reduction to claim based on reconstruction from attorney's memory, notes, assistant's records, and calendar of filings and court appearances; 75% reduction to claim based on attorney's memory and consultation with co-counsel 5-6 years after completing work, raising accuracy concerns); *Pontarelli*, 781 F. Supp. at 122 (denying fee application in entirety where failure to maintain contemporaneous records contributed to inaccuracies and discrepancies in records that cast "serious doubt" on their reliability).

should not be applied "blindly" and have that exercised discretion in awarding fees on the basis of other sufficiently reliable evidence demonstrating the reasonableness of a requested fee.[153]

In this case, the Special Master has found no evidence of a lack of contemporaneity with respect to the records of Labaton, Lieff, and the ERISA law firms. All of these firms kept track of attorney time electronically, and deposition testimony confirms that attorney time was entered on their respective timekeeping systems on a routine and regular basis. For example, at Labaton, attorneys used the "Rainmaker" software to keep track of their time. *See* Goldberg 7/17/17 Dep. pp. 11:7 – 12:25; 30:25 – 31:7. [EX. 199]. Howard Goldberg, who was part of Settlement Counsel Nicole Zeiss's team, testified that he used the Rainmaker program to prepare the firm's fee petition in *State Street. Id.*, p. 11:21-24. The software enabled him to isolate records for each individual who worked on the case, create a report, and sort the time of each timekeeper for use by Zeiss in preparing Labaton's lodestar fee petition. *Id.*, p. 12:21-25. Labaton staff attorneys testified that, daily, they electronically submitted time. *See, e.g.*, Orji

[153] *See*, *e.g.*, *Awuah v. Coverall N. Am., Inc.*, 791 F. Supp. 2d 284, 289 (D. Mass. 2011) (substantial reduction not required where district court had a "unique vantage point" as to the work completed by attorney, and the benefit of contemporaneous records submitted by other counsel); *Nkihtaqmikon v. Bureau of Indian Affairs*, 723 F. Supp. 2d 272, 291 (D. Me. 2010) (district court considered fact that a small portion of requested were not contemporaneously documented, but were supported by a combination of contemporaneous and reconstructive billing); *see also Orantes-Hernandez v. Holder*, 713 F. Supp. 2d 929, 966 (C.D. Cal. 2010) (25% reduction where attorney reconstructed misplaced contemporaneous records on basis of memory and references to records of other counsel and documents filed with the court or distributed to government); *Scott v. City of New York*, 643 F.3d 56, 59 (2d Cir. 2011) (entries in official court records could serve as reliable documentation of attorney time, if a district court chooses to rely upon them in a limited fashion, as they are comparable to contemporaneous attorney time records); *Scott v. City of New York*, 626 F.3d 130, 134 (2d Cir. 2010) (noting existence of "rare circumstances" in which, in the district court's discretion, attorney fees may be warranted in complete absence of contemporaneous); *Monaghan v. SZS 33 Assocs., L.P.,* 154 F.R.D. 78, 84 (S.D.N.Y. 1994) (collecting cases and noting that courts in the Second Circuit assessing reconstructed time records have applied roughly 30% reductions in absence of contemporaneous time records).

6/5/17 Dep., p. 22: 3-10 [EX. 102]; Bolano 6/5/17 Dep., p. 28:18- 29:8 [EX. 103]. Labaton staff attorneys also manually recorded their time "in" and "out" of the office through by recording those times in a hard-copy binder designated for staff attorney hours. *See* Alpert 6/5/17 Dep., p. 62: 18-22 [EX. 60]; Greene 6/5/17 Dep., p. 28: 4-14 [EX. 105]. In March 2014, Labaton provided a summary of its then-current lodestar and expenses to the other Customer Class firms, evidence of its regular maintenance of time records. *See* LCHB-0052426-2436 (5/27/14 email from Rogers to Lieff and TLF recipients attaching billing memo). [EX. 205].

Lieff used a comparable electronic timekeeping system to maintain accurate and contemporaneous time records for its attorneys. *See* Chiplock 6/16/17 Dep., pp. 151:20-21, 153:6-9. [EX. 10]. By way of example, Dan Chiplock and Kirti Dugar testified that staff attorneys employed by Lieff Cabraser are trained to "religiously send [their] time to our internal time keeping department [and] keep careful record of [their] time." *Id.*; Dugar 6/16/17 Dep., p. 115:8-15 ("Chris Jordan and Jon Zol [sic; Zaul] were entering time in our system. . . , and then they [TLF] were getting invoiced. So the time entry would maintain there because that's the source of the generation of an invoice.")[154] [EX. 55]. *See also* Heimann 7/17/17 Dep., p. 18:11-16 ("[I]n all of the cases that we are involved in, we maintain the time devoted to the case on a contemporaneous basis. We record our time [] whether or not we are going to be compensated on an hourly basis.") [EX. 19]. *See also* Fineman 6/16/17 Dep., pp. 39: 15 -40: 16 [EX. 18]. Lieff also

[154] A training error with respect to two agency attorneys paid for by Lieff, who reported time both to Lieff's internal time keeping department and to their staffing agency, reportedly contributed to the double counting issue. See Chiplock 6/17/17 Dep., pp. 151: 15- 153:20 [EX. 10].

periodically shared its time and expense records with fellow Customer Class Counsel. *See, e.g.*, LCHB-0052576-2578 (5/21/15 lodestar summary provided from Lieff to TLF) [EX. 206].

Lynn Sarko testified that Keller Rohrback uses a similar electronic time-keeping system: "[W]e have a computerized system. Rates are put in for each department for each timekeeper. . . . Whenever you record your time, it goes into the system. . . ." Sarko 7/6/17 Dep., p. 89:1-6. [EX. 28]. Zuckerman Spaeder attorney time is kept by the firm's accounting department. Kravitz 7/6/17 Dep., pp. 111:23-24, 112:3-5. [EX. 21]. Carl Kravitz testified that, with this centralized system in place, he, as the firm's lead attorney on *State Street,* could review attorney hours on the case at any time, and did so periodically: "[W]e try to keep track of what our investment [is] I would keep an eye on how much time we were putting into the case." *Id.*, p. 112:11-18.

(a) Thornton's Records

Though Thornton also owned billing software, it was used only sporadically and by only some of the firm's attorneys. In fact, the testimony of Thornton attorneys who worked on *State Street* testified that they did not use the software to track time spent on this case. *See* Thornton 9/1/17 Dep., p. 121:13-21 [EX. 127]; G. Bradley 9/14/17 Dep., p. 151:3-9 [EX. 85]. According to Garrett Bradley of TLF,

> We don't keep our time like other firms keep their time as we're a majority plaintiffs' firm. Contingent firm. We do keep our time on matters that we obviously need to keep our time on. I understand there to be a software that's not functional. I don't believe it was used by anybody [from Thornton] in this case. It wasn't used by me.

G. Bradley 9/14/17 Dep., p. 151:3-9. [EX. 85].

Mike Thornton did not view time-keeping as particularly important in contingent fee cases, such as the *State Street* case:

> You get contingency you get very sloppy about it normally 'cause you don't have to -- it doesn't make any difference, although some contingency law firms keep track of their hours because they want to see if they're justified -- that in the cases they're justified of the time they're putting in.

Thornton 9/1/17 Dep., p. 122:18-24. [EX. 127].

With those considerations in mind, the Special Master evaluates the reliability and sufficiency of the records maintained and produced by Thornton attorneys in this investigation. Notwithstanding that Thornton attorneys did not use an electronic time-keeping system, the Special Master finds the evidence of contemporaneity sufficient as to the time records submitted for Michael Lesser and Evan Hoffman. *See* Hoffman 6/5/17 Dep., p. 125:2-13 [EX. 63]:

> Q. When you gathered up your own particular time and submitted it to Labaton, had you kept your time contemporaneously or did you just make it up at the end of the process?
> A. No, I kept my time contemporaneously.
> Q. And the time that you kept was put down into various notes that we have delivered to the special master and his counsel?
> A. That's my understanding.

See also Thornton 9/1/17 Dep., p. 123:22-23 (Lesser and Hoffman were "very methodical about [keeping] their time.") [EX. 127]. Thornton produced copies of Hoffman's contemporaneous handwritten recordings. *See* TLF-SST-000420-0443 [EX. 207]. These records include a brief description of work completed, the date of performance, and the number of hours expended. Crediting Hoffman's testimony that the records were maintained during the course of the litigation, the Special Master deems the

records sufficiently reliable to support his time included in the Thornton lodestar. Thornton also produced similar handwritten time records purportedly maintained by Lesser. *See* TLF-SST-000492-0502 [EX. 208]. They similarly contain a description of the work performed, and the number of hours expended, on a given date, and are sufficiently detailed and reliable to support the Lesser time included in the Thornton lodestar.[155]

Mike Thornton and Garrett Bradley also presented evidence showing an attempt to keep contemporaneous time records. To some degree, however, the Thornton and Bradley time included in the Thornton lodestar appears to have been based on an after-the-fact reconstruction through other available records, rather than contemporaneously maintained time records.[156]

In including his time on TLF's lodestar, Mike Thornton testified that he simply used his calendars:

> Q. How did you put your work and hours on the time that was used for the load star [sic; lodestar] here? What sources did you use?

[155] Further evidence of Lesser and Hoffman's efforts to maintain contemporaneous time records is seen in 2014 email correspondence. In April 2014, in reference to the fee petition prepared in the concurrent *BONY Mellon* case, Chiplock reminded Lesser of the need to maintain sufficient time records for any potential fee petition. *See* TLF-SST-031020-1023 ("I've been meaning to check in with you guys and make sure you are keeping adequate time records for all of the good work you are doing – class action fee requests require time reports, and you don't want to be creating those after the fact. We can chat about it and I can send you samples if you like, just let me know.") [EX. 209]. In response, Lesser noted to Chiplock that he had "rough manual records" and requested that Chiplock provide the samples. *Id*. Chiplock provided Lieff's recent lodestar detail summary, which Lesser forwarded to Hoffman the next month with instruction to "enter the hours you have into forms like this[.]" TLF-SST-033600-3702 (5/20/14 Lesser to Hoffman) [EX. 210].

[156] While the District Court retains discretion to reduce those hours based solely on reconstructed records, *see Mary G-N*, 2015 WL 9462080, at *3–4, we do not recommend such a reduction here, based largely on the fact that the Court reviewed the hours as part of a lodestar cross-check, rather than reimbursing Thornton attorneys on a one-to-one basis. It is a close call. But given our finding that Garrett Bradley's Declaration, which included Thornton's individual lodestar calculation, was false, for which we recommend proposed remedies, we do not find it necessary to also reduce the hours.

> A. My calendars. My secretary would help. I tried to say on certain things where the hours were going to be necessary I said stop me at the end of the day and make me say how long I spent on times.
> I also -- my calendar helped in that I knew if I was doing a conference call, um, with other -- or co-counsel on this case, and there are many, many, many of those -- because I would have that on my calendar, and I may have a notation about the time; I might not, but then I could look at either Lieff Cabraser or Labaton's because they tend to be much more methodical than me.

M. Thornton 9/1/17 Dep., at p. 123:7-21 [EX. 127]. Thornton testified that while he and his assistant kept calendars, Michael Lesser and Evan Hoffman largely kept track of the hours he expended in the State Street matter. *Id*., p. 121:22-122:3; 123:7-19.

Garrett Bradley testified that he sometimes wrote notes on the bottom of whatever document he was reading and put it in the file for later compilation by Evan Hoffman or an assistant; and other times he, like Thornton, simply used his calendar:

> The way I kept time on this matter would be I'd write on -- if I was reading a document, I'd write on the document and stick it in the file. I'd also jot down time long hand on pieces of paper.
> There's -- obviously, many people in the firm were on this case, and Evan [Hoffman] as the junior lawyer would track some time if we were all doing something; and, if need be, if there was something specific like a mediation, it may be tracked by calendar or e-mail.

G. Bradley 9/14/17 Dep., p. 151:10-19.[157] [EX. 85].

There is evidence of Evan Hoffman's efforts to reconstruct time Thornton attorney time through other records. TLF-SST-011246-1249 (5/21/14 Hoffman email to Lesser) ("All of the hours are taken from LCHB's chart where there were mentions of discussions

[157] While Mike Thornton's calendar entries and Bradley's handwritten notes purport to be kept contemporaneously, we found no evidence to corroborate this contention other than Bradley's recent declaration. *See* 3/23/18 Declaration of Garrett Bradley [EX. 219]. More importantly, the numeric notations and dates themselves lack sufficient detail to allow the Court to evaluate the reasonableness of these expenditures based on a description of the tasks performed.

with either 'co-counsel' 'team' or, of course, Mike Lesser and/or MPT, GJB.") [EX. 200]. However, it appears that Hoffman did not always have access to Bradley's time records. TLF-SST-006839-6840 (6/29/15 Lesser email to Thornton and Hoffman, noting that "[w]e need hours for Garrett on this case" and Bradley's response, "I will get my time in…") [EX. 211].

Even accepting the records produced for Thornton and Bradley as contemporaneous -- that is, if we accept Thornton's representations as to their nature -- are limited and lack in sufficient detail to, alone, constitute reliable records in support of the Thornton (585.9 hours) and Bradley (734.9 hours) time included in the Thornton lodestar. For example, Thornton produced documents the firm has represented to contain calendar entries for Bradley (TLF-SST-036001-6037 [EX. 212]) and Thornton (TLF-SST-042987-30021 [EX. 213]), which do not account for all of the substantial number of hours expended by those attorneys. Thornton also produced records reflecting Bradley's time expenditure, which include versions of the lodestar compilation created by Hoffman and documents Hoffman used in creating that compilation. *See*, e.g., TLF-SST-000612-0620 (Bradley time entries) [EX. 214]; TLF-SST-000620-0637 (Bradley time entries) [EX. 215]. Bradley has also attested to having reviewed a set of documents during the litigation. *See* TLF-SST-090343-0346 (1/20/11 Internal Memo) [EX. 216]; TLF-SST-090347-0348 (12/8/10 Belfi Email to Lesser) [EX. 217]; TLF-SST-090657-0664 (12/22/10 Internal Memo) [EX. 218]; *see also* 3/23/18 Declaration of Garrett Bradley [EX. 219]. While a small percentage of these documents contain brief handwritten notations by Bradley, few contain any indication of the date of review and the number of

hours actually expended on a given date.[158] These documents, alone, do not support the lodestar hours submitted for Bradley. Thus, the Thornton and Bradley hours ultimately included in the Thornton lodestar were based, at least in part, on a reconstruction from other records.

ii. Reliability and Specificity

To support an award of fees, the First Circuit requires a "full and specific accounting" for time. *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977); *Weinberger*, 925 F.2d at 527. "[B]ills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused." *King*, *supra.* As described below, based on our review of the individual as well as firm-wide time entries recorded in this case, the time records produced by the firms participating in the *State Street* case sufficiently and reliably detail the firms' substantive, legal contributions to that case.[159]

To reach this conclusion, we rely, in large part, on comprehensive time records produced at the beginning of this investigation by each of the nine firms that received a

[158] Thornton was also asked to produce any other documentation supporting its fee petition. *See* Special Master's First Set of RFP, No. 53. [EX. 166] Many documents produced are copies of documents produced by State Street in relation to the California litigation. A small portion contain brief handwritten notes or markings, ostensibly made by a Thornton attorney or a staff attorney during document review. *See, e.g.*, TLF-SST-017998 ("Look for [m]ore") [EX. 220]; TLF-SST-018165 ("Get Dox") [EX. 221]; TLF-SST-019134 (notations related to volume and revenue figures) [EX. 222]; TLF-SST-023952-3954 (notation regarding "knowledge") [EX. 223]. A few contained more detailed notes. *See, e.g.*, TLF-SST-025463-5464 (more extensive handwritten notes regarding Automatic Repatriation) [EX. 224]. These written notations, however, do not reflect the date of review, the identity of the reviewing attorney, or the amount of time expended (or included on the lodestar summary) by the attorney, and are therefore of limited value in considering the reliability of the hours included in the Thornton lodestar.

[159] This is a different question than whether the records themselves were maintained contemporaneously by the respective firms. We distinguish Thornton along these lines. While Garrett Bradley and Michael Thornton's time records evidenced reasonable expenditures of time, given the complexity of the litigation, and described the work performed in sufficient detail, as we conclude above, they lacked sufficient indicia of contemporaneity. In fact, the record shows that Michael Thornton and Garrett Bradley's time was not kept on a daily basis.

portion of the Fee Award (except Chargois about whom the Special Master did not know) produced at the request of the Special Master as well as testimony and emails produced in discovery. In the aggregate, the attorneys in the *State Street* case expended approximately 77,000 hours. This total amount of time, while substantial, was appropriate given the voluminous document productions and complex nature of the legal claims, potential defenses, and damages implicated by the FX-based claims alleged in this case.

Aside from the reasonableness of the aggregate tally, we conclude that the hours presented on the Fee Petition are reasonable for three additional reasons. First, the firms appropriately staffed the case, assigning lawyers to specific tasks commensurate with their experience and capabilities with a sensitivity to the costs ultimately passed on to the client, the class, through the common fund. Thus, the hours expended by each individual attorney accurately reflect the nature of the work assigned to him or her. Second, the narratives in the time records themselves capture the precise nature of these substantive contributions in detailed -- and in some instances highly detailed -- descriptions of the legal work performed within the individual records.[160] Finally, while some of the firms in the case also worked on other FX cases before and during the *State Street* case, as described *infra*, we found no evidence that those firms "double billed" time from the other litigations to the *State Street* case, and deem it appropriate to include time spent reviewing related FX-case, especially those concurrent with *State Street*, to the extent the

[160] Because Chargois did not perform any substantive work on the *State Street* case Chargois and Herron did not submit a lodestar calculation or any time entries to Judge Wolf or the Special Master appointed to investigate the Fee Award in the underlying case.

review informed strategy, settlement, and the course of the *State Street* litigation. We address each firm in more detail below.

(a) Lieff

Over the life of the *State Street* case, Lieff billed the second largest number of hours in the case. We begin by acknowledging that the total amount billed by Lieff as well as its status vis-à-vis the other Customer Class firms as the second-highest billing firm in the case is consistent with the fact that Lieff housed a team of more than ten document reviewers throughout the multi-year hybrid mediation and played a significant role in the legal strategy and mediation. For the litigation team, Bob Lieff (665.9 hours) participated in the mediation sessions and consulted on settlement strategy, while Dan Chiplock (1357.9 hours) had a hands-on role with the case from inception of Lieff's involvement, from the researching and filing of the complaint, coordinating document review and discovery, to contributing to the drafting of the final approval briefs. *See* Lieff Cabraser Time Records (Chiplock). [EX. 247]. While Lieff listed other attorneys at the firm, and most importantly two senior partners -- Steve Fineman and Richard Heimann -- those attorneys' participation was far more limited than Chiplock, and in the case of Fineman and Heimann, was minimal[161] and related mainly to contacting potential clients. The billing entries of Lieff attorneys, moreover, sufficiently conveyed the nature of the work -- whether emails, meetings, drafting or reviewing -- along with the salient details, such as with whom and the basic substance of each task.

[161] Steve Fineman billed less than 100 hours on the case, while Richard Heimann billed less than 25 hours. *See* Lieff Time Records (Fineman and Heimann). [EX. 247].

While we recognize the danger that Lieff, as Co-Lead Counsel in the *BONY Mellon* case, could include hours in the *State Street* lodestar expended in litigating the *BONY Mellon* case or other FX matters, we conclude that Lieff did not do so here. All the hours submitted by Lieff in its *State Street* hours bear, directly or indirectly, on the legal issues presented in the *State Street* case.[162] *See* Chiplock 6/16/17 Dep., p.41: 2-7; Lieff Time Records (Chiplock entry, 4/9/2015 ["Telephone conference Dan Halston re ERISA recovery in BNYM settlement."]). [EX. 247]. These hours, however, represent a small percentage of the total hours and should not detract from the larger review of work performed in the *State Street* case.[163]

We comment separately on the time records submitted for Lieff's Staff Attorneys. While most of time entries submitted by Lieff staff attorneys include a generic narrative, such as "document review," or "review and code documents," we conclude that these descriptions, while generic, adequately describe their narrow yet important tasks. Although there is certainly room to improve these narratives,[164] such as to include

[162] Each of the three Customer Class firms included on their individual lodestars a certain amount of time spent meeting with pension funds other than ATRS. These efforts were unsuccessful, as evidenced by the fact that Arkansas was the only institutional class representative on the customer side, However, there is no class action unless a class representative is willing to come forward and bring a case. Thus, it is essential that plaintiffs-side law firms contemplating a meritorious class action secure at least one client to represent the class, which here was the non-ERISA class, and ideally, more than one. Finding an institutional client willing to sue their custodian bank is not an easy task, and it was reasonable for the firms to contact multiple institutional clients about participating in the *State Street* litigation, even after ATRS came on board. *See* discussion, *infra*.

[163] Lieff attorneys recorded less than fifteen hours for non-*State Street* FX litigations, and in each instance, those efforts had a direct benefit to the *State Street* case. *See* Lieff Time Records (Lieff, Chiplock). It is well within a Court's jurisdiction to allocate fees from a common fund for such hours performed outside the context of the litigation. *See Hawes v. Colorado Div. of Ins*., 65 P.3d 1008, 1023–24 (Colo. 2003) (distinguishing facts of present cases from common fund situation and noting that "courts, under inherent powers may grant attorneys' fees for work completed before the court's jurisdiction was invoked") (citing *Winton v. Amos*, 255 U.S. 373, 394–95 (1921); *Wininger v. SI Management L.P.*, 301 F.3d 1115, 1120-21 (9th Cir. 2002)).

[164] *See* Alper's time records. [EX. 264].

specific Bates ranges and topics, or to identify important documents or information uncovered during a day's review, both of which would yield a more complete record upon which to evaluate the hours spent, we nevertheless fully credit all the time entries submitted by Lieff's staff attorneys.

(b) Labaton

Labaton recorded the most hours in the *State Street* case. [EX. 264]. This expenditure of time is commensurate with its role as Lead Counsel as well as with the complexity and extremely hard-fought nature of the five-year long litigation. It is also reflective of the fact that Labaton housed numerous reviewers -- as many as twenty at one time -- working full-time throughout the duration of the mediation/discovery, which contributed significantly to the total tally.

As compared to Lieff and Thornton, Labaton assembled a much larger team to work on the *State Street* case.[165] We find that creating an expansive team was required to carry out Labaton's duties as Interim Lead Counsel and lead settlement counsel in the case. Specifically, the key players at Labaton included Larry Sucharow -- "lead negotiator and lead strategist" (801.4 hours); David Goldsmith, who argued substantive motions before the Court at the Motion to Dismiss, Preliminary Approval, and Final Approval hearings (1310.7 hours); and Michael Rogers, then an associate at the firm,

[165] The Labaton time records include several internal meetings and telephone conferences in which only Labaton attorneys participated. While this practice has drawn scrutiny in other contexts by insurance companies overseeing outside litigation, such collaboration and collective thinking is a necessary, if not critical, tool in devising strategy and meaningfully litigating a case, especially a case as complex and multifaceted as *State Street*. Accordingly, we find such meetings appropriate in these circumstances.

who performed the bulk of the legal research, initial drafting of the complaint and opposition, and oversaw document review on the Labaton side (1578.4 hours); Eric Belfi, who had an ongoing relationship with George Hopkins and ATRS and assumed primary responsibility for communicating with ATRS throughout the litigation (669.5 hours);[166] and Nicole Zeiss, the settlement partner who was the chief drafter of the Plan of Allocation, drafted the Omnibus and individual declaration templates, and coordinated settlement efforts and submission of the final approval pleadings (361.2 hours).[167] [EX. 264]. Given the attorneys' respective experience, skill sets, and positions within the firm, these totals are reasonable.

Although Labaton did not participate in the *BONY Mellon* case, as evidenced in the individual time entries of its lawyers, it was nevertheless informed by the legal theories proffered and tested in that case. The *BONY Mellon* case and settlement, which alleged substantially similar misconduct of FX trading, paralleled the *State Street* case in several respects, perhaps most importantly in that *BONY Mellon* also yielded a very positive result for its class. In fact, the *BONY Mellon* case was considered by those prosecuting the *State Street* case as a "template" to a successful settlement. Chiplock 6/16/17 Dep., p. 110: 20-25. [EX. 10]. The fact that the Labaton lawyers, mainly David Goldsmith, but to some extent also Michael Rogers and Larry Sucharow, reviewed *BONY*

[166] According to Belfi's time records, Belfi communicated with the "client," mostly George Hopkins himself, on approximately 87 separate occasions between November 2009 and July 2016. *See* Labaton Time Records (Belfi). As discussed *infra*, at no point during any of these conversations updating Hopkins on the case did Belfi inform him of the Chargois Arrangement or about Labaton's financial obligation to pay Chargois.

[167] Christopher Keller (182.5 hours), a partner at Labaton, was also involved in the case, though mainly with "client retention" and "case strategy." Given his limited role, we conclude that his total of 182 hours was reasonable.

Mellon pleadings and transcripts -- and in one instance actually attended the settlement approval hearing in the *BONY Mellon* case -- is evidence of strategic lawyering.[168] It reflects the reality that the *State Street* case was not litigated in isolation.

Like Lieff, most, if not all, of the time records for Labaton staff attorneys sufficiently detailed their document review and related discovery tasks. While the level of detail varies among time keepers, all but a few referenced the precise document set or bates ranges, or topics, reviewed.[169]

(c) Thornton

Thornton billed the third-largest amount in the *State Street* case, second only to Labaton and Lieff. The inclusion of Lieff and Labaton staff attorneys made up approximately 70% of these hours.[170] [EX. 245]. Putting aside how and when the time

[168] Labaton attorneys recorded fewer than twenty-five time entries, and no more than sixty hours, for consulting *BONY Mellon*-related pleadings and events.

[169] *See* Labaton Time Records (Alper, 2/18/15). We highlight one entry created by Labaton staff attorney, David Alper, which contains extensive details of the tasks performed and exemplifies the degree of detail that renders an entry more reliable than others to the Court:

> "Reviewed, analyzed and tagged emails spreadsheets and documents for responsiveness pertaining to the Arkansas Teacher Retirement System v. State Street case. Uncovered a Hot e email document which I promptly recorded in the Team's collective Excel spreadsheet for future reference and analysis. These numerous investment, pricing and revenue F/X documents are non-consecutive or the Bates range were missing from said documents." [EX. 264].

For one, this entry details the precise efforts made by Alper on this date – reviewing, analyzing and tagging – and, secondly, describe the fruits of that labor, namely, "[u]ncover[ing] a hot e-mail document" that was simultaneously flagged for the litigation team. While the time pressures and practice challenges of performing document review, not to mention contemporaneously documenting one's time, make it difficult to record each day's efforts with this level of precision, we nonetheless highlight this entry as a "gold standard" for entries pertaining to document review and related efforts.

[170] Thornton's inclusion of Labaton and Lieff staff attorneys on its firm lodestar contributed to, but was not the sole cause of, the double-counting issues that first raised concerns about the Fee Petition in this case.

entries themselves were created or maintained, the total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable.

Thornton's team included four key individuals: Mike Thornton (585.9 hours), who, along with lawyers at Lieff, came up with the concept of bringing the *State Street* case and oversaw the case strategy and mediations; Garrett Bradley (734.9 hours), who participated in the mediation sessions, vetted potential clients, and communicated with co-counsel during the case, including the finalization of the settlement; Michael Lesser (1433.8 hours), who was hands-on through all stages in the litigation, and most notably assigned discrete legal topics to lead the staff attorneys through complex issues presented in discovery, and additionally developed the theory on damages; and Evan Hoffman (1110.2 hours), who also participated in all stages of the litigation, contributed valuable substantive research, and had the difficult task of tracking Thornton's hours for its own attorneys as well as staff attorneys housed by Lieff and Labaton.

Thornton also made efforts, predating the filing of the *ATRS* Complaint in this case, to secure institutional clients to bring a lawsuit against State Street. Given the inherent challenges of finding any class member willing to publicly sue its custodian and serve as class representative, it was reasonable for the firms to reach out to firms other than ATRS at the initial stages of the case. Furthermore, Thornton attorneys, like its Customer Class colleagues, billed relatively few hours for consulting and/or reviewing pleadings and rulings in related FX cases, most notably in connection with the *BONY Mellon* case in which it was also involved. Such minimal expenditures of time are

reasonable given the significance of the *BONY Mellon* decision as well as the substantive and procedural overlap between the two cases. [EX. 245].

(d) Michael Bradley

While Michael Bradley's involvement raises several questions, for example, about the value he added to the case and the reasonableness of the rates charged on his behalf, we conclude that the total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable.[171] As described earlier, Michael Bradley performed his review largely during off-hours from his own private practice, typically billing between one to two or two-and-a-half hours per day, over a fifteen month period. *See* SSM_MB_000003-0052 (M. Bradley 3/29/13-7/1/15 Billing Records). [EX. 263]. Unlike the Lieff and Labaton staff attorneys, his time entries provide simply that he performed "Document Review" on each of these days. *See id*. However, because Michael Bradley only reviewed documents in the Catalyst system, "Document Review" adequately describes the tasks performed on each of those days.

(e) ERISA Firms

The six ERISA firms collectively billed just over 11,600 hours, less than any single Customer Class firm. While Richardson Patrick Westbrook & Brickman, Feinberg Campbell & Zack, and to some extent, Beins Axelrod, had a more limited role, the value contributed by the other three ERISA firms far exceeded their straight hour tally. Each of

[171] In reviewing the handwritten and email time records submitted by Michael Bradley in support of his time, the Special Master was not able to independently verify the exact total of 406.4 hours reported on the Fee Petition. However, in reviewing the daily and weekly totals Michael Bradley emailed to Evan Hoffman at Thornton on a periodic basis, the Special Master confirmed that those hours totaled at least 400 hours. We find any difference *de minimis*.

the firms played a significant role. McTigue Law (4,914.05), led by Brian McTigue, filed the *Henriquez* Complaint, initiating the ERISA suit, and represented four of the named plaintiffs; Keller Rohrback (4,690.65), led by Lynn Sarko, filed the *Andover* Complaint, represented two of the ERISA named plaintiffs, and engaged in extensive dialogue with the DOL; Zuckerman Spaeder (1,400.5), led by Carl Kravitz, also interfaced with DOL and contributed to the ERISA-specific strategy. [EX. 246]; [EX. 265]; [EX. 266]. Apart from spending a reasonable number of hours, McTigue Law, Keller Rohrback, and Zuckerman Spaeder appropriately delegated work among its senior and junior-level attorneys and made best use of their respective skill sets.[172]

Like the Customer Class firms, the ERISA firms also recorded time for periodically reviewing pleadings, docket entries, and decisions in related FX litigations. Again, such an expenditure of time and effort was warranted in light of the novelty of the FX-based legal claims and challenges, and the concurrent nature of those cases with the *State Street* case. In this instance, a thorough review of current and pending FX cases was good lawyering and we do not take issue with those entries.

[172] For McTigue Law Firm, Brian McTigue and James Moore (and Regina Markey after April, 2015) handled case strategy, conferences with co-counsel, and substantive work on the merits of the underlying case as well as approval of the settlement. *See* McTigue Law Time Records. [EX. 265]. Other attorneys at the firm participated in research and drafting efforts, and David Bond, a valuable nonlawyer at the firm, conducted important review of dockets and pleadings in other FX litigations. For Keller Rohrback, Laura Gerber, David Copley, and Lynn Sarko had the greatest involvement in filing the *Andover Complaint* and joining the other firms in litigating the *State Street* case, with Copley having greatest involvement during the negotiation of the term sheet and finalization of the settlement and Gerber expending the majority of her hours communicating with the firm's two named representatives, Mr. Stangeland and The Andover Companies, in the early stages of the litigation (2012-2013). [EX. 246]. Finally, for Zuckerman Spaeder, Adam Fotiades and Afton Hodge were heavily involved in reviewing discovery and coordinating document review among ERISA Counsel. Dwight Bostwick, the firm's Chairman, participated with Carl Kravitz in handling discussions with co-counsel and opposing counsel and determining strategy for the case. *See* Zuckerman Spaeder Time Records. [EX. 266].

f. Double-Counting of Staff Attorney Hours

The hot-button issue which triggered the Special Master's investigation was the double-counting of staff attorney (SA) hours uncovered by the *Boston Globe* in November 2016. Internal reviews of the individual fee petitions conducted by Labaton, Lieff and Thornton following the *Globe* inquiry revealed that 17 staff attorneys had been listed on both the Thornton and Labaton lodestar reports and six staff attorneys appeared on both Thornton's and Lieff's reports. The result of the double-counting was a significant overstatement of the combined attorney time reported in the Lodestar Fee Petition: Of the reported 86,113.7 hours, 9,322.9 hours (or approximately 11%) were overstated; of the reported lodestar of $41,323,895.75, $4,058,654.50 was overstated. *See* 11/10/16 Letter to the Court, Dkt. # 116, pg. 2. [EX. 178].[173] The double-counting was disclosed to the Court in David Goldsmith's November 10, 2016 letter. *Id*

i. Causes of the Double-Counting Are Not Explained in Goldsmith's Letter

As to the cause of the double-counting, the only explanation offered by Goldsmith in his letter was that the double-counting occurred due to "inadvertent errors." *See* 11/10/16 Letter to the Court, Dkt. No. 116. [EX. 178]. Though the letter explained that "efforts were made to share costs among counsel," such that Thornton bore "financial responsibility for certain SAs located at Labaton Sucharow's and Lieff Cabraser's offices," *id.,* no mention is made in the letter of the unusual agreement to "allocate" particular staff attorneys to Thornton or of the fact that Thornton decided that this cost-

[173] As part of its mandate, the Special Master reviewed voluminous documentation produced by the firms in support of their respective lodestar figures. The Special Master confirmed that the total hours and lodestar calculations were, in fact, accurate.

sharing arrangement entitled it to claim the time billed by the allocated staff attorneys in its own lodestar.

It is clear, however, that some attorneys at Labaton, Lieff and Thornton independently assumed that Thornton would claim the SA time on its lodestar. *See e.g.*, G. Bradley 6/19/17 Dep., p. 48:1-5 ("We just assumed -- I just assumed where the local counsel were on the papers, we're litigating the case, we're putting the fee up, why wouldn't we put the people up that we were paying for?") [EX. 43]; Rogers 6/16/17 Dep., pp. 91:18 – 92:16 ("I certainly assumed [Thornton] would [claim the SA time on their fee petition] .... They were paying for it up-front, I assume they wanted to get paid on the back end.") [EX. 54]; *see also* Hoffman 6/5/17 Dep., p. 58:12-16 [EX. 63]; Chiplock 6/16/17 Dep., p. 136:10-19 [EX. 10]; TLF-SST-011206 (6/29/15 email from Lesser to Chiplock) [EX. 68]. Nevertheless, the Special Master has found no evidence of any explicit agreement by Labaton or Lieff to allow Thornton to claim on its lodestar the time worked by Labaton or Lieff staff attorneys, and this arrangement was so unusual and outside the norm that, had there been an agreement, it certainly should have been captured or reflected in a formal contract or at least an informal writing. Neither was the case here, and it was this lack of an explicit or formalized agreement to allow the Labaton and Lieff staff attorneys to be included on Thornton's fee petition that contributed greatly to the double-counting of the staff attorney time.

Despite this, there is sufficient evidence in the record to find that at least some attorneys at both Labaton and Lieff believed that the staff attorneys paid for and allocated

to Thornton would be included on Thornton's lodestar petition,[174] and that the inclusion of these same staff attorneys by Labaton and Lieff on their own fee petitions was simply a mistake that grew out of a combination of different circumstances. However, because the occurrence was so unusual and none of this was explained in the Goldsmith letter to the Court, this subject bears extensive examination and discussion.

ii. The Allocation of Staff Attorneys to Thornton

The stated purpose of the staff attorney allocation arrangement was to share the cost and risk burdens of the litigation equally among the three Customer Class law firms. *See* Chiplock 6/16/17 Dep., pp 127:23 – 128:5; 131:23 – 133:15 [EX. 10]; Belfi 6/14/17 Dep., pp. 51:8 – 53:12. [EX. 17]. Sometimes referred to as the "10/10/10 agreement," as Labaton and Lieff each assigned five staff attorneys to Thornton so that each firm ended up bearing the cost of approximately ten staff attorneys, not only did this arrangement provide a means of equalizing the costs and burdens, but also as Garrett Bradley, managing partner of Thornton candidly admitted, it was "the best way to jack up the load star [sic]. . . the best way for us [Thornton] to increase our load star [sic] and make it comparable to the other two firms. . . . I was absolutely concerned about Thornton's load star [sic] vis-à-vis the other two firms." G. Bradley 6/19/17 Dep., p. 67:4-13 [EX. 43];

[174] After learning of the double-counting, Chiplock emailed Goldsmith explaining how the double-counting occurred. His email confirms that two Lieff staff attorneys, Rachel Wintterle and Ann Ten Eyck "*should not have been included in [Lieff]'s lodestar at all*," and then described how their time, as well as time for Chris Jordan and Jonathan Zaul, was "inadvertently" included with the time of other Lieff reviewers because Lieff "neglected to exclude time entries" for a specific time period. TLF-SST-032267 (11/9/16 Chiplock to Goldsmith). [EX. 261]. This sentiment is reflected in the November 10 Letter, drafted principally by Goldsmith, which states that certain hours of both Labaton and Lieff staff attorneys "mistakenly were [] reported" in those firms' respective lodestars. 11/10/16 Letter. [EX. 178]. During the investigation, both Mike Rogers and Kirti Dugar, the person on the ground at Lieff, testified that they assumed Thornton would claim the staff attorneys allocated to it on the Thornton lodestar. Rogers 6/16/17 Dep., pp. 91: 18-23; 92: 12-16 [EX. 54]; Dugar 6/16/17 Dep., pp. 114: 22 – 115:5 [EX. 55].

TLF-SST-011124 - 1126 (2/6/15 email from Garrett Bradley to Michael Thornton). [EX. 64].

The allocation of staff attorneys was effectuated through normal billing/invoicing procedures, which was largely handled by those who knew nothing of the details of the arrangement. *See* Politano 6/14/17 Dep., pp. 26:15 – 28:9 [EX. 98]; Chiplock 6/16/17 Dep., p. 156:16-21 ("I delegated that process [at Lieff Cabraser] to Nick [Diamond], and to Kirti [Dugar], to work out with our accounting department creating an invoice and sending it off to Thornton so that those hours are properly accounted for and paid for.") [EX. 10]. According to Labaton's chief operating officer, Ray Politano,[175] Labaton billed Thornton monthly for the hours worked by the allocated staff attorneys, without identifying the staff attorneys whose hours were being invoiced. Politano 6/14/17 Dep., pp. 26:15 – 28:9. [EX. 98]. Politano further testified that Labaton had shared costs of staff attorneys in a similar manner in approximately ten other cases but that the staff attorneys would be listed on Labaton's fee petition, *not* on the other firms' fee petitions, "ninety percent of the time." *Id.*, pp. 22:22 – 23:14. (In the other ten percent of the cases, the shared staff attorneys would enter their time directly into the other firm's database and never report it to Labaton; hence, Labaton did not list them on in its fee petition. *Id.* at pp., 23:20 – 24:7.) Michael Rogers testified that it was more common to simply invoice the other firm for the shared-cost staff attorneys, get reimbursed for the cost, and then at the end, if there was a successful resolution to the case, allocate a share of the fees

[175] Politano is not a lawyer; his background is in finance. Politano 6/14/17 Dep., p. 9:3-5. [EX. 98]. He testified that his responsibilities at Labaton "are to maintain the review of the administrative area. I'm in charge of accounting, records, marketing, word processing, all the administrative functions within the firm." *Id.*, p. 10:14-18.

to the other firm, which reflected what that firm might have gotten if it had billed themselves. Rogers 6/16/17 Dep., pp. 94:7-19; 96:13-17. [EX. 54]. Suffice it to say that had this more straight-forward method been followed here, rather than through the artifice of "allocating" the individual lawyers to Thornton, and Thornton putting those lawyers on its lodestar report as if the staff attorneys were Thornton's own lawyers, the double-counting would not have occurred.

iii. Failure to Detect the Double-Counting Error

As noted, Goldsmith's November 10 letter makes no attempt to explain why the double-counting error occurred nor why it was not caught before the Fee Petition was filed. Labaton, Lieff and Thornton had agreed in May of 2011 "to exchange on a quarterly basis our then current lodestar reports showing quarterly and aggregate billings in this matter." TLF-SST-033911-3913 (5/4/11 Keller Letter). [EX. 82]. There is no evidence, however, that the three firms ever followed that agreement. Had they done so, the "inadvertent mistake" of double-counting would almost certainly have been detected.

The Special Master finds that one major reason that the double-counting error was not detected is Labaton's compartmentalization of its litigation practice, which resulted in the preparation of the fee petition by a Labaton partner, Nicole Zeiss, who was not involved in the litigation, and knew nothing of the SA cost-sharing arrangement but was responsible for preparing the settlement and fee petition documents. Zeiss testified she was not informed of any agreement for loaning Lieff or Labaton staff attorneys to Thornton, and, therefore, did nothing to verify the accuracy of any hours submitted by the various firms. Zeiss 6/14/17 Dep., pp. 24:8-20; 25:17 – 26:18; 84:16 – 86:12. [EX. 79].

Nor did Zeiss circulate among the class firms the individual declarations or lodestar reports. Zeiss 6/14/17 Dep., pp. 21:4-7, 22:24-25 ("I sent out the template to all the firms, and asked them to complete the templates and send me drafts. . . . It's not the practice to exchange time records [among the firms.]") [EX. 79]. As a consequence, neither Lieff nor any of the ERISA firms ever saw Labaton's or Thornton's fee petitions prior to their being filed with the Court and, therefore, were not in a position to catch the double-billing. (The ERISA firms did not utilize staff attorneys in this case, and as Goldsmith noted in his November 10 letter, the ERISA firms' lodestars were unaffected by the double-counting.)

If the November 10 letter had been fully explanatory, it would have, and should have, provided the Court with the details of the cost-sharing/staff attorney allocation agreement, including the reason(s) why the double-counting mistake was not caught before the Fee Petition was filed.

iv. Thornton's Higher Billing Rates for Staff Attorneys Not Explained

The Goldsmith letter similarly does not explain how or why the hourly rates at which Thornton billed the shared-cost staff attorneys were rates *higher* than the rates at which the same staff attorneys were billed by Labaton and Lieff. As indicated above, Thornton billed all of the staff attorneys on its lodestar report at $425 per hour. *See* Thornton Lodestar Report at Dkt. No. 104-16. [EX. 66]. Labaton billed all but three of the shared-cost attorneys at rates ranging from $335 to $410 per hour, most in the $335 to

$360 range;[176] four of the six Lieff staff attorneys were billed at $415 per hour (the other two were billed at a higher rate, $515/hour.) *See* Lieff Lodestar Report at Dkt. No. 104-17. [EX. 89]. Thornton's explanation was that they simply used the same hourly rate ($425) that had been used as the rate for the staff attorneys in the *BONY Mellon* case in the Southern District of New York. Though Thornton contends that Dan Chiplock of Lieff and Mike Rogers of Labaton suggested that they use $425 as the hourly rate, *see* Hoffman 6/05/17 Dep., p. 59:5-12 [EX. 63], the evidence presented to the Special Master indicates only that Chiplock and Rogers suggested that they try to be "consistent" in the SA rates they used and that they use $425 as a "cap" on SA rates, *not* that they use $425 as the hourly rate for all staff attorneys. *See* LCHB-52627 – 52628. [EX. 192].

Rather than make any attempt to explain the discrepancy in billing rates in the November 10 letter, Goldsmith stated they merely removed the duplicative time and "[w]hen a given SA had different hourly billing rate, we removed the time billed at the higher rate." 11/10/16 letter, Dkt. No. 116. [EX. 178]. While this approach was prudent, it does not explain why the Thornton rates were higher than the Labaton and Lieff rates for the same staff attorneys.

4. Misrepresentations in Thornton Fee Petition

a. Labaton Template Issues

As indicated, the individual fee petitions of the Customer Class and ERISA law firms incorporated a narrative provided to them in a "template" prepared by Labaton's

[176] Only three of the shared-cost staff attorneys -- D. Alper, D. Fouchong and D. Hong -- were billed by Labaton at the same rate used by TLF, $425/hour. *See* Labaton Lodestar Report at Dkt. No. 104-15. [EX. 88].

settlement counsel, Nicole Zeiss. Several law firms modified that template to provide the Court with accurate information concerning their particular firms. *See e.g.*, McTigue Declaration, Dkt. No. 104-18, ¶ 20 [EX. 90]; Kravitz Declaration, Dkt. No 104-20, ¶ 4 [EX. 92]; Axelrod Declaration, Dkt. No. 104-22, ¶ 8 [EX. 94]. Garrett Bradley, however, did not do so; instead, in petitioning for fees for Thornton, Bradley adopted, without any changes, the template prepared by Labaton. Unfortunately, the narrative in Bradley's sworn Declaration was affirmatively false and misleading in a number of important respects and these misleading statements were a contributing cause of the double-counting errors.

In his Declaration in support of Thornton's individual fee petition, Garrett Bradley declared, under penalty of perjury,

> 3. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request.
>
> 4. The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their service, which have been accepted in other complex class actions.

Dkt. No. 104-16, ¶¶ 3, 4. [EX. 66].

Paragraphs 5 and 6 implicitly incorporate some of these statements.[177]

[177] These paragraphs state:

Exhibit A to Bradley's Declaration identifies 24 staff attorneys (SAs). The total compensation requested on the Thornton petition for these staff attorneys is $4,508,837 -- *i.e.*, more than 60% of Thornton's total lodestar -- at an hourly rate of $425 for each staff attorney (referred to as "SAs"), except Michael Bradley, who is also designated as an "SA" but is billed at $500. Additional compensation requested for four Thornton partners and one associate totals $2,831,187.

Garrett Bradley's Declaration contains numerous untrue statements:

- *Exhibit A is a summary of time spent by attorneys and professional support staff members "of my firm."* None of the SAs were employed by Thornton. 3/7/17 Hearing Tr., p. 87:8-10 [EX. 96]; G. Bradley 6/19/17 Dep., pp. 82:12-21; 83:4-7 [EX. 43].

- *The billing rates for the SAs are "based on my firm's current billing rates."* Thornton did not maintain "current billing rates" for SAs or other attorneys listed on its lodestar calculation in Exhibit A. 3/7/17 Hearing Tr., p. 87:14-19 [EX. 96]; G. Bradley 6/19/17 Dep., pp. 48:24 – 49:4, 64:12-15 [EX. 43]; Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master's First Set of Interrogatories, Response No. 49 [EX. 99]; *see also* Exhibit A to Dkt. No. 104-16 [EX. 66].

- *For personnel "who are no longer employed," the lodestar is based on their rates for the "final year of employment."* Again, none of the SAs were employed by Thornton. 3/7/17 Hearing Tr., p. 87:8-10. [EX. 96].

- *The schedule was prepared from "contemporaneous daily time records regularly prepared and maintained by my firm.*" Thornton did not prepare or maintain daily time records of the hours worked by the SAs listed on its

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5. The total number of hours expended on this litigation by my firm during the Time Period is 15,302.5. The total lodestar for my firm for those hours is $7,460,139.

6. My firms lodestar figures are based upon the firm's billing rates, which rates do not include charges for expense items. Expense items are billed separately and such charges are not duplicated in my firm's billing rates.

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lodestar. Hoffman 6/5/17 Dep., pp. 63:2-7; 69:19-25; 70:12-16; 79:19-23 [EX. 63]; Kussin 6/5/17 Dep., p. 69:4-17 [EX. 56]. Nor did Thornton maintain sufficiently reliable contemporaneous time records for all of the lawyers working on the *State Street* case. TLF-SST-011246 – 11249 (5/21/14 email from Hoffman to Lesser) ("All of the hours are taken from LCHB's chart where there were mentions of discussions with either 'co-counsel' 'team' or, of course, Mike Lesser and/or MPT, GJB."[178] [EX. 200].

- *The hourly rates "are the same as my firm's regular rates charged for their services."* Thornton did not maintain "regular rates" for the SAs listed on its lodestar report. 3/7/17 Hearing Tr., p. 88:2-5. [EX. 96].

- *These rates "have been accepted in other complex class actions."* With the exception of 4 staff attorneys, the $425 rate charged for the remaining staff attorneys listed on the lodestar, including Michael Bradley, had not been accepted in other complex class actions. G. Bradley 6/19/17 Dep., p. 54:1-7. [EX. 43].

Garrett Bradley admitted -- both in deposition and during the March 7, 2017 hearing before Judge Wolf that these statements were "not accurate." *See* G. Bradley 6/19/17 Dep., pp. 82:17-20, 83:4-7 [EX. 43]; *see also* 3/7/17 Hrg. Tr. p. 87:8-10; 88:6-8; 88:15-16; 88:18-19 [EX. 96].

Bradley testified in his deposition that he did not give his sworn declaration a very "close read" before signing it; that using Labaton's model fee declaration template, Mike Lesser of his firm, with the assistance of Evan Hoffman, drafted his Declaration and they brought him the final version which he signed, without closely reading it. *See* G. Bradley 6/19/17 Dep., pp. 83:17 – 84:24. [EX. 43].

[178] As noted *supra*, while the Special Master finds that Thornton did provide sufficient evidence of contemporaneity with respect to the time records of Mike Lesser and Evan Hoffman, it is questionable whether the handwritten notes and calendars of Garrett Bradley and Michael Thornton are sufficiently reliable to constitute contemporaneous records of their time.

Though Bradley testified in his deposition that he only looked at his declaration before it was filed, *id.*, p. 86:16, the record evidence shows that Bradley had ample opportunity to give the declaration the "close read" that was required. Emails during this time period show that Nicole Zeiss sent the template to Garrett Bradley on August 31, 2016 and asked they be returned on September 8, 2016. *See* TLF-SST-029796 – 29801 (8/31/16 Zeiss email to G. Bradley attaching model fee declaration). [EX. 201]. Emails among Garrett Bradley, Mike Lesser and Evan Hoffman show that drafts of the declaration were circulated among these Thornton attorneys for review. This is confirmed by the testimony of Evan Hoffman: "[w]e put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and ***then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed***" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15. [EX. 63].

At the March 7, 2017 hearing, Garrett Bradley acknowledged the inaccuracy of the information in his Declaration, characterizing the information as "unclear" and admitting that it "should have been clarified by me at the time" it was prepared, but "it was not." 3/7/17 Hearing Tr., p. 88:14-19 [EX. 96]; *see* also p. 91:4-6. At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway. *See e.g.*, 3/7/17 Hearing Tr., p. 87:13-14; 88:2-9; 14-18; 91:5-7; 92:3-8. [EX. 96].

i. Garrett Bradley's Declaration Violated Fed. R. Civ. P. 11

Fed. R. Civ. P. 11 provides, in relevant part:

> **(b) Representations to the Court**. By presenting to the court a pleading, written motion, or other paper -- whether by signing, filing, submitting, or later advocating it -- an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> ***
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.

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

Rule 11(c) provides for sanctions for violation of Rule 11(b):

> (1) If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

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

Sanctions for violations may be monetary or nonmonetary. Fed. R. Civ. P. 11(c)(4). "The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons." Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendment.

Rule 11(b)(3) required that before submitting his Declaration in support of Thornton's fee request, Garrett Bradley have conducted "an inquiry reasonable under the circumstances," and after such inquiry, submit a Declaration containing only "factual contentions hav[ing] evidentiary support." Garrett Bradley has admitted that the statements in his Declaration listed above are "not accurate," G. Bradley 6/19/17 Dep.,

pp. 82:17-20, 83:4-7 [EX. 43]; *see also* 3/7/17 Hrg. Tr. p. 87:8-10; 88:6-8; 88:15-16 [EX. 96]; 88:18-19. and, hence, lack evidentiary support. A simple reading by Bradley, much less a reasonable inquiry, would quickly have identified the above listed statements as false.

Bradley admits only that he did not take the time to "closely read" the Declaration before signing it. G. Bradley 6/19/17 Dep., p. 84:22-24. [EX. 43]. The Special Master believes Bradley did not read the narrative section at all or if he did, even in a cursory fashion, he turned a blind eye to the falsity of the statements, ignoring the ethical obligations imposed by Rule 11 and the potential impact of the false statements upon the attorney fees approval process. Had he given the Declaration even a cursory reading, he would immediately have known the above sworn statements were untrue and would have -- or certainly should have -- corrected them. Indeed, if he had read them, however fleeting, and left them uncorrected, as his statement at the March 7, 2017 hearing implies, this would increase the likelihood that the sworn statements were intentionally misleading or at least that he attributed no significance -- ethical or otherwise -- to the falsity of the sworn statements.

"Whether a litigant breaches his or her duty [under Rule 11] to conduct a reasonable inquiry into the facts and the law depends on the objective reasonableness of the litigant's conduct under the totality of the circumstances." *Aronson v. Advanced Cell Tech., Inc*., 972 F. Supp. 2d 123, 139 (D. Mass. 2013) (quoting *CQ Int'l Co., Inc. v. Rochem Int'l USA*, 659 F.3d 53, 62 (1st Cir. 2011)). The factors that may be examined by a court include "the complexity of the subject matter, the party's familiarity with it,

the time available for inquiry, and the ease (or difficulty) of access to the requisite information." *CQ Int'l Co*., 659 F.3d at 62–63 (quoting *Navarro–Ayala v. Nunez*, 968 F.2d 1421, 1425 (1st Cir.1992).)

Here the subject matter -- information pertaining to Thornton's own professional staff and billing rates – was hardly complicated, and a matter with which Garrett Bradley, as the firm's managing partner, was certainly intimately familiar -- Thornton was a relatively small firm (18 lawyers). He had ready access to all information necessary to have made a truthful and accurate representation, and the email evidence demonstrates that he was kept apprised of all billing rates and hours of Thornton's professional staff -- including the staff attorneys (SAs) employed by Lieff and Labaton -- throughout the course of the *State Street* litigation. Emails between Bradley and other Thornton attorneys, namely Mike Lesser and Evan Hoffman, and Nicole Zeiss show that Bradley had more than a week to review the Labaton "template" and the information used to complete it. But more than this, Bradley knew without having to even perform a "reasonable inquiry" that the SAs identified in Exhibit A of his sworn Declaration were not employed by his law firm, as well as the inaccuracies attendant to the other misrepresentations in the Declaration.

The Advisory Committee Notes to the 1993 Amendment to Rule 11 identify other considerations that may be appropriate in deciding whether to impose a sanction and what sanctions would be appropriate in the circumstances. These include considering "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only

one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; and what amount is needed to deter similar activity by other litigants." Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendment.

Several of these considerations require the imposition of significant and substantive sanctions. First, the Special Master finds that the statements were false, and the false statements were not due to simple mere negligence, but rather Bradley intentionally and willfully identified the SAs in his Declaration as members of his firm and that their hourly rates were the same as the firm's regular rates charged for their services. Bradley's motivation for making the false statements is clear and well supported by the record. The record evidence shows that Bradley intentionally sought to "jack up" Thornton's individual firm lodestar vis-à-vis the other Customer Class firms, and representing the SAs as members of Thornton with billing rates of $425 an hour ($500 an hour, in the case of Michael Bradley) was the way to do it. *See* G. Bradley 6/19/17 Dep., p. 67:4-13 [EX. 43]; TLF-SST-011124 - 11126 (2/6/15 email from Garrett Bradley to Michael Thornton) [EX. 64].[179]

[179] Here, beyond the emails in which Bradley specifically refers to "jacking up" the lodestar, the Special Master's view is informed by the email exchanges between Bradley and Chiplock in which Bradley conveys his belief that Thornton did not receive a fair share of the *BONY Mellon* fee, in part because its lodestar was too low. *See* TLF-SST-031166 - 31173 (G. Bradley, Bob Lieff, Dan Chiplock email chain of 8/28/15.) [EX. 87]. In its *State Street*

Further, Bradley's misrepresentations "infected the entire pleading" as Bradley's Declaration vouched the firm's lodestar, which lead to the approval of an inflated fee award.[180] Although there is no evidence that Garrett Bradley has engaged in similar conduct in other litigation, Bradley is an experienced lawyer who practices regularly in federal court and should be expected to know his obligations under Rule 11.

Bradley's misrepresentations were not, as Thornton's Rule 11 expert, Professor Georgene Vairo, characterized them merely a "technical violation" of Rule 11, and the Special Master declines Professor Vairo's invitation to simply overlook Garrett Bradley's sworn misrepresentations to the Court.[181] This was not simply a failure to "focus on certain aspects" of "boilerplate" language, Vairo 4/10/18 Dep. p. 105:24 – 106:11 [EX. 202]; rather the Special Master concludes that Bradley deliberately and intentionally

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petition, the Labaton and Lieff staff attorneys included in Bradley's Declaration Exhibit A comprised more than 60% of TLF's lodestar.

[180] *See* discussion, *infra*.

[181] Professor Vairo testified as follows:

> THE SPECIAL MASTER: My question is, are you saying to Judge Wolf and to me that courts and in my role here as a special master should simply overlook the clearly inaccurate and misleading statements made in Garrett Bradley's declaration?
> ***
> THE WITNESS [VAIRO]: You know, I'm not saying that you shouldn't think about it. And again, the Rule 11 jurisprudence I think is very clear. Even in many, many cases some of which I have cited in my declaration courts should be concerned about ensuring that attorneys practice law in as professional a manner as possible. But we all know or anybody who's been an attorney -- and you were an attorney for many, many years before you joined the bench -- mistakes get made. People get called out for them. Getting called out is very, very different from sanctioning somebody when a mistake has been made.
> Garrett Bradley made a mistake by not taking a closer look at the template before he submitted it to the Court. But that does not mean that he violated Rule 11. . . .

Vairo 4/10/18 Dep., pp. 60:18 – 61:10. [EX. 202].

Here, Professor Vairo's casual dismissal of the seriousness of sworn misrepresentations to the Court, and their potential impact upon the process, are as surprising as they are unhelpful to the decisional process in this investigation.

misrepresented the make-up of Thornton's professional staff and their hourly rates so that Thornton's lodestar petition would be grossly inflated.

The Special Master is further persuaded that Rule 11 sanctions are necessary because Bradley has admitted that he "should have clarified" the information in his Declaration "at the time" he prepared, reviewed and signed it. *See* 3/7/17 Hearing Tr., p. 88:14-19 [EX. 96]; *see* also p. 91:4-6. But, the violation was not simply at the time he signed the Declaration. Bradly had numerous opportunities after signing to correct the misrepresentations. Yet, despite having been presented with numerous opportunities to do so, he did not take advantage of any of those opportunities and continued to adhere to the falsehoods for more than four months after the Declaration was filed on September 15, 2016, until he was specifically called to the task by the Court on March 7, 2017. In those intervening four months, Bradley could have taken the opportunity to "clarify" his Declaration at the Final Approval hearing which he attended on November 2, 2016. He could have done so immediately after problems with the Fee Petition first surfaced with the *Boston Globe*'s initial inquiry; he could have done so on -- or soon after -- the November 10, 2016 letter to the Court, with which he was involved in drafting; he could have done so after the *Globe* article was published on December 17, 2017; or, at the very latest, immediately after receiving the Court's February 6, 2017 Order directing counsel to respond as to whether a Special Master need be appointed to investigate the accuracy of their lodestar petitions.

Bradley did not avail himself of any of these opportunities to "clarify" his Declaration and never did so until questioned by the Court on March 7, 2017. Even here,

Bradley's admissions were not at his own initiative; it was only after he was directly questioned by the Court that he grudgingly acknowledged the he "could have been clearer" in his Declaration statements.

Beyond these rather obvious factors, several additional factors inform the Special Master's finding that these Rule 11 violations require a significant sanction. The first is obvious. The misrepresentations made here were not made in a routine pleading, motion or other paper -- they were made under oath directly to the Court, by an officer of the Court, with the expectation and intent that the Court would rely upon them in awarding millions of dollars in fees to his law firm. Professor Vairo's opinion that this all should be chalked up to "sloppiness," Vairo 4/18/18 Dep., p. 109:17-18 [EX. 202], or that the sworn misrepresentations were somehow less serious because the focus of the Court's fee award was on a percentage of the total award to the class and that the lodestar was essentially an unimportant part of the award -- and therefore, Bradley's misrepresentations had no significant effect upon the award[182] -- both understates the importance of the lodestar cross-check, which the Court indicated it was using, and

[182] Professor Vairo testified,

> So the Court was not misled in any manner, shape or form. Those [staff attorneys] time were going to be accounted for in somebody's fee petition.
> ***
> But if the agreement was to try to equalize the position of each of the firms within the context of the litigation, then I just fail to see what that has to do with Rule 11.
> The Court was using the lodestar check as a means of determining whether the 25 percent fee was an appropriate one. And so the dollar amount, the 41 million, would have been there regardless of how the individual firms manifested them on their individual fee declarations.

Vairo 4/10/18 Dep. pp. 46:19 – 48:8. [EX. 202].

diminishes the obligation of attorneys to be fully truthful and accurate in their submissions to the Court.

The second additional factor is perhaps less obvious, but equally important in the context of the double-counting error. The Special Master finds that had Garrett Bradley fully and accurately described the reason why the Labaton and Lieff SAs were being included on the Thornton petition -- and that these SAs were not employees of Thornton and did not have current billing rates with Thornton -- the entire double-counting error may well have been avoided. This is because if Garrett Bradley had been complete and accurate in his description and sent such an edited version of the Declaration to Nicole Zeiss at Labaton, it is likely her attention would have been drawn to the change in the template language, and she would have been alerted to the fact that Labaton's and Lieff's staff attorneys were included on Thornton's lodestar. So alerted, Zeiss may well have examined all three petitions with greater scrutiny and thereby have caught the double-counting of the SAs.

More importantly, given the Court's fiduciary role to the class, and beyond the possibility that Nicole Zeiss may have been alerted to the double-counting had Bradley accurately described the relationship of the SAs to TLF, the Court would likely have been alerted that something was amiss because claiming another firm's attorneys on your own lodestar would be so unusual as to raise red flags, the Court would have raised questions on its own, either at or before the November 2, 2016 Final Approval Hearing, thereby causing the lawyers to more carefully review their petitions and to catch the double counting.

While it would be saying too much to assign primary responsibility to Garret Bradley for the double-counting error, it is not too much to say that his misrepresentations to the Court were a contributing factor to the double-counting error.

For all of these reasons, the Special Master concludes that Garrett Bradley's Declaration was submitted in violation of Fed. R. Civ. P. 11(b).[183] Accordingly, the Special Master recommends Rule 11 sanctions be imposed on Garrett Bradley and Thornton.[184] For the reasons set forth here, the Special Master concludes that both a significant monetary and a non-monetary sanction is required.

In fashioning a monetary sanction, the Special Master is cognizant of the the financial resources of Bradley and Thornton. Thornton received approximately $18.5 million of the fees awarded in this case. *See* Zeiss 9/14/17 Dep., p. 141: 1-2. [EX. 115]. The result of the double-counting of the staff attorneys in this case was a $4 million plus overstatement of the total lodestar for the case. Under these circumstances, the Special Master recommends as an appropriate and proportionate monetary sanction in a range of $400,000 to $1 million, an amount equal to 10% to 25% of the overstatement

[183] Rule 11(b) contemplates that an attorney will receive notice and an opportunity to respond and correct any misstatements and misrepresentations. Professor Vairo conceded in her deposition that safe harbor does not apply here because sanctions would be court-imposed, not on a motion by a party. Vairo Dep., p. 62:8 -12. [EX. 202]. Nonetheless, Professor Vairo believes that even when a court *sua sponte* imposes sanctions, the "spirit" of the 1993 amendments to Rule 11 contemplates a safe harbor. *Id,* at p. 64:16-18. This seems a stretch, but even if Rule 11 is interpreted as contemplating a safe harbor in this context -- which we do not believe it does -- here, as outlined above, Garrett Bradley had numerous opportunities to correct his misrepresentations but he failed to take advantage of any of them to do so.

[184] In making this finding, the Special Master concludes that there is no evidence to support a finding that Michael Thornton, or any other Thornton attorney was involved in these misrepresentations to the Court. Therefore, no other Thornton attorney was individually in violation of Rule 11. These misrepresentations are simply Garrett Bradley's sole responsibility. However, Rule 11 violations of individual attorneys of a law firm are imputed to the law firm, except in "exceptional circumstances." Fed. R. Civ. P. 11(c). Here, there are no exceptional circumstances.

of the lodestar and appropriately reflects the seriousness of an untrue sworn statement made to a court by an attorney in connection with an application for millions of dollars in attorneys' fees.[185]

ii. Garrett Bradley's Declaration in Support of TLF's Fee Request Violates Mass. R. Prof. C. 3.3(a) and 8.4(c)

Garrett Bradley's false statements in his Declaration and his failure to correct those statements despite having had numerous opportunities to do so also violates several Massachusetts Rules of Professional Conduct.

As the Massachusetts Supreme Judicial Court has recognized, "[a]n effective judicial system depends on the honesty and integrity of lawyers who appear before their tribunals." *Matter of Finnerty*, 418 Mass. 821, 829 (1994) (citing *Matter of Mahlowitz*, 1 Mass. Att'y Discipline Rep. 189, 192-194 (1979)). The Court further has emphatically stated, "[W]e cannot approve of any practice in which an attorney misleads a court." *Finnerty*, 418 Mass. at 829 (quoting *Matter of Palmer*, 413 Mass. 33, 39, 594 N.E.2d 861 (1992)). "Were we to condone such conduct by an attorney, whether as a litigant or as counsel, 'the integrity of the judicial process would be vitiated.'" *Id.*, pp. 829-30 (quoting *Matter of Neitlich*, 413 Mass. 416, 423 (1992)).

Rule 3.3 of the Massachusetts Rules of Professional Conduct "sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process." Mass. R. Prof. C. 3.3, Comment [2]. Rule

[185] This proposed sanction is discussed in some detail in the Recommendations section, *infra*.

3.3(a)(1) provides, "A lawyer shall not knowingly (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Mass. R. Prof. C. 3.3(a)(1). Rule 1.0(g) defines "knowingly":

> "Knowingly," "known," or "knows," denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Mass. R. Prof. C. 1.0(g).

In the context of Rule 3.3(a)(1), a fact is "material" if, viewed objectively, it directly or circumstantially "had a reasonable and natural tendency to influence a judge's determination." *In re Angwafo*, 453 Mass. 28, 35 (2009). However, it is not necessary to show that the statement of material fact did, in fact, influence a determination by the judge. *Id.*

The proscriptions of Rule 3.3(a)(1) are encompassed within Rule 8.4(c) which provides that it is professional misconduct to engage in any kind of conduct involving dishonesty or misrepresentation. *See* Mass. R. Prof. C. 8.4(c)

The conduct of Garrett Bradley described in the previous section of this Report is specifically the kind of conduct Rule 3.3(a)(1) and 8.4(c) are intended to deter.

As emphasized by the Court in *In re Diviacchi*, 475 Mass. 1013, 1020 (2016), "[A]n assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer *knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.*" *Id.* (quoting Mass. R. Prof. C. 3.3, Comment [3] (emphasis in original)).

As set forth above, Garrett Bradley made the statements in his sworn Declaration knowing that they were false. Further, he failed to make a "reasonably diligent inquiry" to ascertain the truthfulness of the statements.

In *Matter of Schiff*, 677 A.2d 422, 425 (R.I. 1996), the Rhode Island Supreme Court ordered that a lawyer be suspended from the practice of law for a period of eighteen months for violating Rule 3.3 of the Rhode Island Rules of Professional Conduct (which is identical to the Massachusetts Rule)[186] for submitting a false affidavit in support of a petition for attorney's fees -- the same kind of conduct as Garrett Bradley engaged in in the *State Street* case. The Rhode Island Court's handling of *Schiff* informs the Special Master with regard to Bradley's false Declaration in this matter.

In *Schiff*, the attorney filed an application in the United States District Court for Rhode Island for attorney's fees and costs as a prevailing party in a civil action pursuant to 42 U.S.C. § 1988, seeking an award of attorney's fees for herself and others in the amount of $511,951 and payment of costs in the amount of $203,268.28. In support of her application for fees and costs, Schiff submitted an affidavit that stated, in pertinent part:

> "The summary of time and charges for my services attached hereto present an accurate statement of services performed in connection with this litigation and was prepared from contemporaneous time records and with respect to sums for costs and expenses from accounting records."

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[186] Rule 3.3(a)(1) of the Rhode Island Rules of Professional Conduct provides:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

R. I., Sup. Ct. Rules, Art. V, Rules of Prof. Conduct, Rule 3.3(a)(1).

677 A.2d at 423.

The U.S. District Judge who heard the fee application ruled that this statement contained in the attorney's sworn affidavit was simply not true: The billing sheets she submitted sought reimbursement for work unrelated to the case, sought payment for time not worked, and indicated that portions of those records had not been made from contemporaneous time records. *Id.* Schiff conceded as much, admitting that these statements in support of her fee application was "*not entirely accurate*" and that some entries on her summary-of-time charges "were not, strictly speaking, derived from contemporaneous records." *Id*. at 423-24. She also acknowledged that she had also made estimates regarding costs she had incurred that were not derived from accounting records. *Id.* at 424.

On the basis of these admissions the Rhode Island Bar's disciplinary board readily concluded that there was clear and convincing evidence that Schiff had violated Rule 3.3(a)(1). *Id*. The Rhode Island Supreme concurred with this finding of the board. "The record discloses that respondent had indeed filed a false affidavit with the Federal Court in support of her application for fees and costs." *Id.*

At her disciplinary hearing, Schiff had pointed to several "mitigating factors" which she claimed demonstrated that her false affidavit statements were unintentional and, therefore, did not warrant disciplinary action. Among those mitigating factors considered by the board were that Schiff "had rushed to prepare her fee application to file

it within the time allowed by the court" and in her haste had borrowed "boilerplate language" from a form submitted by a colleague in an unrelated case. *Id.*

The Rhode Island Supreme Court refused to accept the attorney's claim that her submission of a false affidavit was inadvertent, holding, "*No attorney can sign such an affidavit without being fully responsible for its contents*." *Id.* (emphasis added). The Court also found it significant that Schiff "made no effort to advise the court or opposing counsel about the inaccuracies contained in that affidavit at any time during the period of almost two years during which the application was pending and that she continued to defend the accuracy of her application throughout that time." *Id.*

The disciplinary board had recommended that, for Schiff's violation of Rule 3.3(a)(1), she be publicly censured. *Id.* The However, the Rhode Island Supreme Court did not find a public censure a severe enough penalty for the misconduct:

> Although we accept the findings of fact made by the board, we do not believe that the imposition of a public censure is a sufficiently severe response to the egregious character of the respondent's conduct. She submitted and subsequently defended a false affidavit in support of her claims for fees and costs. *This affidavit is not mere boilerplate or surplusage; rather it is a sworn statement designed to convince the trial court that the respondent's fee application was fair, reasonable, and accurate. The respondent knew or should have known that this statement was not true. Indeed, her misrepresentations to the court bear a close resemblance to an attempt to obtain money under false pretenses.* Her testimony about mitigating circumstances does not reduce or ameliorate the seriousness of her misconduct.

Id. at 424 (emphasis added).

Therefore, instead of censure, the Court ordered that Schiff be suspended from the practice of law for a total period of eighteen months. *Id.*

The facts in *Matter of Schiff* are eerily similar to those here. Just like Schiff's affidavit, Garrett Bradley's Declaration here was a sworn statement designed to convince Judge Wolf that Thornton's fee petition was fair, reasonable and accurate. Further, just like Schiff, for the reasons stated above in this Report, Bradley knew or should have known that his statements were not true. And, just as with Schiff, Bradley's statements were made in conjunction with an attempt to persuade a court to award a large sum of money to his own firm.

Therefore, the Special Master concludes that Garrett Bradley violated Mass. R. Prof. C. 3.3(a)(1).

Even if it were to be determined that that Bradley "*un*knowingly" submitted a false Declaration, the Special Master would nonetheless find that Bradley violated the Massachusetts Rules of Professional Conduct.

Similar to Rule 3.3(a)(1)'s imposition of a duty to correct a false statement of material fact previously made to a tribunal, Rule 3.3(a)(3), requires that a lawyer who unknowingly offers false evidence to a tribunal and comes to know of its falsity must take reasonable remedial measures if the evidence is material. Mass. R. Prof. C. 3.3(a)(3). "This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence." Mass. R. Prof. C. 3.3, Comment [5]. If evidence is offered that is subsequently ascertained to be false, Rule 3.3(a)(3) requires that its false character be "immediately disclosed." Mass. R. Prof. C. 3.3, Comment [6].

Bradley's Declaration is "evidence" in the sense that it is information declared to be true and upon which the Court was invited to issue a ruling,

Even if Bradley did not know his Declaration statements were false -- which, as indicated, the Special Master does not find to be the case -- as set forth *supra*, he certainly was put on notice and should have ascertained the statements the statements were false after the *Boston Globe* inquired about the accuracy of the *State Street* Fee Petition at the beginning of November 2017. He could have -- and should have -- disclosed and corrected the falsehoods in the November 10, 2017 letter to the Court, or after the *Globe* article was published on December 17, 2017, at the latest, immediately after receiving the Court's February 6, 2017 Order. But, as set forth above, Bradley did not avail himself of any of those opportunities to disclose and correct the statements, which by then, he most assuredly should have determined were false.

For all of the foregoing reasons, the Special Master concludes that Garrett Bradley is guilty of professional misconduct for violating Rules 3.3(a)(1) and (3) and 8.4(c) of the Massachusetts Rules of Professional Conduct. Accordingly, for the reasons more fully discussed in the Recommendation section, *infra*, the Special Master recommends that Bradley be referred the Massachusetts Board of Bar Overseers for consideration of appropriate discipline.

5. <u>Lodestar Multiplier</u>

In performing a lodestar cross-check on a proposed percentage-of-fund fee award, a lodestar multiplier is used. A lodestar multiplier is determined by dividing the proposed percentage-of-fund award by the total lodestar. *See, e.g., In re Puerto Rico*

Cabotage Antitrust Litig., 815 F. Supp. 2d 448, 465 (D.P.R. 2011). In the instant matter, Plaintiffs' counsel's combined lodestar was $41,323,895.75. Dividing the proposed fee of 25% of the total fund, $300,000,000, by the lodestar yields a multiplier of 1.8.

A 1.8 multiplier is certainly within the reasonable range. *See In re Relafen Antitrust Litig.*, 231 F.R.D. at 82 ("A multiplier of 2.02 is appropriate."); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir. 2001) (holding that a lodestar multiplier of three would be reasonable and appropriate); *In re TJX Cos. Retail Sec. Breach Litig.*, 584 F.Supp.2d 395, 408 (D. Mass. 2008) (applying a lodestar multiplier of 1.97); *In re Tyco Intern., Ltd. Multidistrict Litig.*,, 535 F.Supp.2d at 271 (applying a lodestar multiplier of 2.697); *In re Visa Check Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503, 524 (E.D.N.Y. 2003) (applying a lodestar multiplier of 3.5); *see also In re Prudential Ins. Co. America Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

Judge Wolf found that a multiplier of 1.8 times the lodestar to be reasonable, *see* 11/2/16 Hearing Tr., Dkt. No. 114, p. 39:1-2 [EX. 78], and subject to the discussion of the rules and ethics issues in other parts of this Report, and the adjustments recommended therein, this is not an unreasonable starting point.

C. ACCURACY AND RELIABILITY – CHARGOIS ISSUES

The most significant issues raised during this investigation arise out of the nondisclosure of a payment of $4,102,549.43 to Damon Chargois, an attorney who neither appeared in the *State Street* docket nor worked on the case. Chargois, who was

never disclosed to ATRS, the other class representatives, or the class members, stands in stark contrast to the numerous other litigating attorneys who, after dedicating a half-decade to skillfully negotiating and engaging in teamwork and assuming substantial financial and legal risk in taking on the litigation, secured an excellent result for the class members. While all three Customer Class firms shared in the payment, the relationship with, and financial obligation to, Chargois was Labaton's alone. By its nondisclosures, however, Labaton shifted its own pre-existing obligation to Chargois to the class and its co-counsel without their informed consent. The responsibility for not disclosing Chargois, therefore, must fall squarely on Labaton.

The evidence produced during the investigation clearly reveals that Labaton engaged in consistent, conscious, and calculated efforts to conceal Chargois from all the participants in the *State Street* litigation: Labaton's client, the class; the other Customer Class Counsel;[187] ERISA Counsel; and most importantly, the Court, upon whom the law imposes a fiduciary duty to protect absent class members. The Special Master finds that Labaton had a duty, or at least a legal obligation, to inform each of these participants in the class action.[188] Labaton's failure to disclose the Chargois Arrangement to anyone

[187] The record evidence shows that Labaton did not fully inform Lieff of the true nature of the Chargois Arrangement, i.e., that Chargois played no substantive role in the litigation and added no value to the case. *See* § II(K)(5)(b), *supra*. Nor did Labaton disclose these critical details about Chargois and his role to Thornton law firm attorneys Mike Thornton, Mike Lesser, and Evan Hoffman. *See* § II((K)(5)(a), *supra*. We find however, that Garrett Bradley had full knowledge of the Chargois Arrangement. *See id*.

[188] After completing a second round of discovery, made necessary by the discovery of the Chargois Arrangement, the Special Master's Counsel retained Professor Stephen Gillers from New York University Law School to opine on potential ethical and legal issues implicated by the Arrangement. Professor Gillers authored an "Ethical Report for Special Master Gerald E. Rosen," sent to the law firms on February 23, 2018. [EX. 232]. In response to Professor Gillers' Report, Customer Class Counsel requested an opportunity to respond. At Counsel's request, the Special Master requested from the Court an eight-week extension for the filing of his Final Report & Recommendation, which the Court granted. Customer Class Counsel retained seven additional experts who opined on the same issues,

else in the case raises serious questions regarding class action attorneys' ethical and legal obligations to clients and co-counsel, as well as considerable concerns about how judges can fulfill their essential fiduciary obligations to the class. We address each of these specific obligations in turn, and why Labaton failed to fulfill them.

1. DUTIES TO THE CLIENT

We begin with Labaton's duties to its direct client, ATRS, and eventually the class.[189] Upon its engagement in the *State Street* case, Labaton owed ATRS the full panoply of fiduciary duties normally owed in an attorney-client relationship. Those duties did not, and do not, exist in a vacuum. They are defined by ATRS's important role as class representative with duties of its own. As Lead Counsel, Labaton also owed fiduciary duties to the class whom it represented as clients, as least as of August 8, 2016, the date on which the Court certified the class for settlement purposes. *See* 8/8/16 Hearing. Tr., Dkt. # 93, p. 11 [EX. 111]; *see also* Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, Dkt. # 97. [EX. 264].[190]

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all but one of whom considered themselves experts in legal ethics -- Professors Wendel [EX. 229] [EX. 243], Joy [EX. 227] [EX. 241], Green [EX. 230] [EX. 240], and Vairo, and Hal Lieberman, Esq. [EX. 228] [EX. 242], and Timothy Dacey, Esq. [EX. 237] [EX. 244] -- as well as Professor Rubenstein [EX. 234], who opined on the interplay of the Federal Rules of Civil Procedure and disclosure obligations in a class action setting. Prompted by the discourse that took place during this intensive discovery process, Professor Gillers supplemented his Report to clarify previous opinions and identify new ones. [EX. 233].

[189] We agree with Professor Gillers' view that, because the *State Street* case was filed and pending in the United States District Court for the District of Massachusetts (Boston), the Massachusetts Rules of Professional Conduct govern the ethical conduct of lawyers involved in the case. *See* Gillers Supp. Report, § IV(A)(i) [EX. 233].

[190] We discuss Labaton's duty to the class members, *infra*.

As it would with any client, Labaton had a fundamental duty to keep ATRS "reasonably informed" about the status of the *State Street* matter. Mass. R. Prof. C. 1.4(a)(1)(3).[191] In the context of a class action case, a class representative such as ATRS must be given the information reasonably necessary to perform its fiduciary duties to the class. Fed. R. Civ. P. 23(a)(4). Such information includes both the identity of any attorney positioned to receive a portion of the final settlement award funding the common fund as well as the basic role played by that attorney, whether it be a referral role or something more substantive. Thus, Labaton had a duty to inform ATRS as its client, but more so as a representative of the class, that Chargois would receive 20% of Labaton's share of the total fee award. Indeed, Rule 1.5(e) governing attorney conduct as to fees speaks directly to this issue. In its current form, Rule 1.5(e) imposes an unequivocal duty upon lawyers to obtain a client's consent before dividing fees with lawyers outside the

[191] Massachusetts Rule of Professional Conduct 1.4(a)(1) is also illustrative of the obligation a lawyer serving as class counsel has to his or her clients. It provides that a lawyer "shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent [] is required by these Rules." Mass. R. Prof. C. 1.4(a)(1). This same obligation was imposed in substantially the same language in 2011. *See* Mass. R. Prof. C. 1.4(a)(1) (eff. Jan. 1, 1998, providing "[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information") [EX. 251]. As discussed *infra*, neither the current version of Rule 1.5(e) nor the version in effect in 2011 required a lawyer obtain "informed consent" to share fees with a lawyer outside the firm. For example, the current version of Rule 1.5(e) does not use the exact phrase "informed consent," but rather requires that a lawyer *inform* the client that a division of fees will be made, and that the client *consents* in writing to the joint participation. *See* Rule 1.5(e) ("[a] division of a fees between lawyers who are not in the same firm may be made only if, after *informing* the client that a division of fees will be made, the client *consents* to the joint participation[.]") (emphasis added). We find this incongruence a distinction without a difference. We read Rule 1.5(e) both now and then to require a lawyer seeking division of fees to inform the client of the key parameters of the fee division, including the identity of the recipient lawyer. As written in Comment [7A] to the Rule, this does not, however, include the amount of the payment absent an inquiry from the client.

Rule 1.2 contemplates that material information about the representation be disclosed to the client at the beginning of the representation so that the client can duly authorize his or her attorney: "[a]t the outset of a representation and subject to Rule 1.4, the client may authorize the lawyer to take specific action on the client's behalf without further consultation." Mass. R. Prof. C. 1.2, cmt [3]. Should those circumstances change, a lawyer must again seek authority after disclosing the challenges: "[a]bsent a material change in circumstances, a lawyer may rely on such an advance authorization, The Client may, however, revoke such authority at any time." *Id*.

firm.[192] By failing to inform Hopkins -- or anyone at ATRS -- of the Chargois Arrangement, Labaton deprived its client of the opportunity to make a reasonably informed decision. In so doing, Labaton breached its duty under Rule 1.5(e).

In reaching this conclusion, we rely on the plain language of Rule 1.5(e) as interpreted by Massachusetts' highest court in 2005. While Labaton's experts have attempted throughout this investigation to characterize the firm's 2011 Retention Agreement as "imperfect" compliance,[193] we do not accept their invitation to blur the lines between compliance and noncompliance. While it is admittedly a close call, by not disclosing to ATRS that it had a pre-existing obligation to pay Chargois 20% of its fee for performing no work, we conclude that Labaton simply failed to comply with Rule 1.5(e) and its requirement of disclosure to its direct client, ATRS. Any other interpretation of this Rule would invite a lack of candor and half-measure disclosures to a client and deprive the client of the ability to make a meaningful decision in its own best interest.[194]

[192] For the reasons discussed *infra*, we conclude that the pertinent rule governing Labaton's conduct was the prior version of Rule 1.5(e), as in effect in 2011, which preceded the most recent amendments to Rule 1.5(e). *See* Mass. R. Prof. C. 1.5(e) (eff. Jan 2., 2001) [EX. 225].

[193] *See* Joy 4/3/18 Dep., pp. 19:23 – 20:2 [EX. 227]; Joy Report, § IV(A) [EX. 241]; Lieberman 4/4/18 Dep. pp. 33:6-9, 77:10-12, 87:6 – 88:20 [EX. 228]; Lieberman Report, § IV(A),(B) [EX. 242]; Wendel 4/3/19 Dep., pp. 151:10 – 152:2 [EX. 229].

[194] This interpretation attains even more force where, as here, the client is a possible class representative that in some instances will be making decisions on behalf of the class.

a. Labaton failed to comply with Rule 1.5(e), as effective February 8, 2011.

Since its adoption in 1997, the Massachusetts ethical rules on fee-sharing among lawyers have undergone several revisions.[195] In 2011, at the time ATRS retained Labaton to represent it in the *State Street* case, Rule 1.5(e) read:

> "A division of a fee between lawyers who are not in the same firm may be made only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separate or retirement agreement.

Mass. R. Prof. C. 1.5(e) [EX. 225].[196]

While the current version of Rule 1.5(e) imposes additional requirements,[197] those changes -- while adopted by the Supreme Judicial Court -- had not taken effect at the time

[195] Prior to the adoption of the Massachusetts Rules of Professional Conduct, DR2-107 of the Canon of Ethics and Disciplinary Rules Regulating the Practice of Law, SJC Rule 3:07, 382 Mass. 773 (1981), addressed fee-sharing between lawyers not in the same firm. Like its counterpart in the Rules of Professional Conduct, Rule 1.5(e), DR2-107(A) imposed strict limitations on the division of fees among lawyers not in the same firm. It provided, in pertinent part, that "A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless [1] [t]he client consents to employment of the other lawyer after a full disclosure that a division of fees will be made… [3] [t]he total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client." DR2-107(A) [EX. 226]. In 1997, effective January 1, 1998, Massachusetts transitioned to the Rules of Professional Conduct. As a result, Rule 1.5(e) replaced DR-207(A)(1) as the prevailing ethical rule governing fee divisions between unaffiliated lawyers. As quoted above, Rule 1.5(e) required that an attorney dividing fees inform the client that a division of fees *will* be made, although the rule (as written) did not explicitly state *when* consent would occur nor that it be in writing. On December 20, 2010, the Supreme Judicial Court adopted formal amendments to Rule 1.5(e) requiring that the client be informed "before or at the time" of retention and provide written consent.

[196] The Special Master recognizes that Massachusetts is in the distinct minority in that it permits attorneys to receive referral payments despite performing no substantive work or assuming joint responsibility in a case -- i.e. "bare referrals." By permitting bare referrals, Massachusetts encourages attorneys to refer matters to those lawyers best equipped to handle them. Whether the legitimate policy objectives advanced by permitting bare referral fees are achieved by this practice, however, is a different matter than the potential harm and inequities that result from not informing a client about a payment of referral fees or fee-sharing agreements.

[197] Rule 1.5(e), effective as of March 15, 2011, now requires that "the client is notified *before or at the time* the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation *in writing* and the total fee is reasonable" (emphasis added).

ATRS became a client in *State Street*. Thus, as an initial matter, we look to the pre-2011 version of Rule 1.5.[198] But, as Professor Gillers points out, the Rules of Professional Conduct, like any statute, cannot be read in isolation. *See* Gillers Supp. Report, pp. 66-67. Lawyers are held to know the law beyond what is written in codified rules. Thus, we look beyond the Rule itself and read Rule 1.5(e) in conjunction with the Supreme Judicial Court's decision in *Saggese v. Kelley*, 445 Mass. 434 (2005), in which the Court opined squarely on the issue of what constitutes a valid referral payment under Rule 1.5(e). In answering that query, the SJC held that a lawyer must disclose more than what was written in 1.5(e). Going forward,[199] the Court imposed two new obligations to take effect immediately: (i) all fee-sharing agreements must be disclosed to the client before a referral is made; and (ii) the client must consent in writing to the agreement. *Id*. at 443.[200]

The other experts proffered by Labaton differed as to what extent, if at all, *Saggese* should be read as imposing new requirements -- i.e. a writing -- not appearing in

[198] Our reliance on the previous version, however, does not render Rule 1.5(e), as currently written, inconsequential. While not controlling, we look to the text of the current Rule as reflective of the spirit of Massachusetts' ethical obligations to disclose fee-sharing agreements.

[199] The SJC specifically held that the rules announced therein "will be construed to require this in fee-sharing agreements that are formed after the issuance of the rescript in this decision." Id. at 443. Under Massachusetts Rule of Appellate Procedure 23, rescripts are effective twenty-eight days after issuance of the final decision.

[200] Whether written consent was required in 2011, after the *Saggese* decision but prior to the March 15, 2011 amendments taking effect, is a close question. But we are persuaded that a definitive statement by Massachusetts' highest court requiring that a client consent in writing must be followed as pronounced in a public decision of that Court. In doing so, we reject Mr. Lieberman's opinion that the writing requirement articulated in *Saggese* was "dicta." Lieberman 4/4/18 Dep., pp. 130:12 – 131:1 [EX. 228]. When the highest Court in the jurisdiction specifically says, "[t]he rule will be construed to require this in fee-sharing agreements that are formed after the issuance of the rescript in this decision," lawyers act at their own peril if they treat such a specific pronouncement of a new legal standard as dicta.

the text of the Rule at that time. Professor Joy, for example, agreed with Mr. Lieberman's analysis that *Saggese* did not impose a writing requirement, and took the position that a practitioner is only bound by the Rules as written. Joy 4/3/18 Dep., pp. 69: 20-70: 3 [EX. 227]; Lieberman 4/4/18 Dep., p. 114: 20- 115:3, 121: 19-23 [EX. 228]. While that may well be a consideration in imposing discipline and/or sanction for a violation of the Rule(s), it does not change the scope of Labaton's duties owed to ATRS under Rule 1.5(e) when ATRS engaged the firm in 2011.

Professor Wendel distinguishes *Saggese* on different grounds. He reads the Court's decision in *Saggese* as confined to those instances in which a lawyer attempts to modify the terms of an ongoing client engagement "midstream," rather than as imposing new obligations as to what information a lawyer must provide a client at the beginning of the representation about a division of fees. Professor Wendel, therefore, opines that *Saggese*, despite announcing a requirement that consent to fee-sharing be captured in writing going forward, did not impose upon Labaton a duty to inform ATRS or Hopkins because that obligation arose before and not during the representation. Wendel 4/3/18 Dep., pp. 27: 2-8; 29: 14-19; 30: 22-31:13. [EX. 229].

We disagree with Professors Joy and Wendel and Mr. Lieberman on this point. Even in its pre-2011 form, Rule 1.5(e), alongside the requirements in *Saggese*, required written consent to any fee-sharing arrangement.[201] It is with these obligations in mind that

[201] Because these changes were not codified in the Rules of Professional Conduct until March 15, 2011, after a three-month notice period, we recommend that no disciplinary sanctions be imposed for failure to abide by the requirements added by *Saggese v. Kelley*. *See* Recommendations, § IV, *infra*.

we agree with Professor Gillers (Gillers Supp. Report, pp. 69-70) and conclude that Labaton more than "imperfectly" complied with Rule 1.5(e); it violated the Rule, however technical that violation may now be construed in hindsight. While the violation was not egregious in nature, it is a violation nonetheless, and one that had potentially far-reaching implications given Labaton's obligations as Class Counsel and ATRS's obligations as class representative.

b. Labaton did not adequately inform ATRS about the Chargois Arrangement.

With the emergence of Rule 1.5(e) in this investigation, Labaton argues that, while Hopkins did not have personal knowledge of Chargois, ATRS -- as an institution -- was sufficiently on notice of Chargois' role in the *State Street* case. It reaches this result by conflating three unrelated exchanges between Labaton and ATRS (or its representatives) stretching back to 2008, years before the commencement of the *State Street* case: (1) the joint application of Labaton and Chargois & Herron for, and the acceptance of Labaton only, as monitoring counsel for ATRS in 2008; (2) Hopkins' instruction to Belfi not to inform him about fee allocations in *State Street* or any other case in which ATRS served as a class representative; and (3) the February 8, 2011 Retention Agreement, signed by Hopkins, engaging Labaton. This position is supported to varying degrees by all four Labaton experts, who, while acknowledging that no single event meets Rule 1.5(e)'s requirements,[202] focus on these events in the aggregate as evidence of sufficient notice of

[202] The expert testimony on this topic varied considerably. Professors Joy and Wendel conceded that Belfi's 2008 email exchange with Christa Clark was not alone sufficient. Joy 4/3/18 Dep., p. 172:7 – 173:19 [EX. 227]; Wendel 4/3/18 Dep, pp. 137:24 – 138:11 [EX. 229].

fee-sharing to ATRS. These factual conflations are, at most, constructive notice, and likely something less than that; regardless of the label used, we find that these communications did not satisfy the actual notice requirement of Rule 1.5(e).

Put simply, we are unconvinced by Labaton's strained post-hoc explanation of events and the legal theory that purports to flow from it. None of these communications, taken individually or together, disclosed the true nature of the Chargois Arrangement or Chargois' role in the case.[203]

We begin with the earliest event, Labaton and Chargois & Herron's Joint Response to the RFQ on July 30, 2008. *See* Joint RFQ Response [EX. 128]. There is no question that Damon Chargois' name and the Chargois & Herron firm appeared in the Joint RFQ Response. *See id*. But neither Labaton nor Chargois & Herron revealed, nor intimated, that after Chargois was rejected as co-monitoring counsel, he (or the Chargois & Herron law firm) would receive 20% of Labaton's fees earned from any and all future ATRS/Labaton litigation, regardless of whether Chargois worked on the cases.[204] More

[203] While Labaton had a duty to disclose to its clients, ATRS and the class (at least through its class representatives), that Chargois was entitled to a significant portion of the fees awarded in the case based on an existing agreement that required Chargois to perform no work, under Massachusetts law, Rule 1.5(e) did not go so far as to require that Labaton inform ATRS the exact percentage that was allocated to Chargois unless asked. *See* 1.5(e), cmt [7a] ("The Massachusetts rule differs from its ABA counterpart in that it does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.") Had Hopkins learned of Chargois' role in the case, he may well have asked Labaton about the financial division between firms, and Labaton would have been required to respond truthfully.

[204] Specifically, the RFP (§ 5.10) solicited the firms to "describe proposed billing arrangements, including contingency fees, for securities litigation…. state what discounts, if any, to these rates the firm proposes to provide to ATRS." Joint RFQ Response [EX. 128]. In the Joint RFQ Response, neither Labaton nor Chargois and Herron informed ATRS of a contemplated agreement to pay referral fees to Chargois and Herron. If Labaton now wishes to rely on the RFQ approval process to prove that it gave ATRS notice of Chargois, Labaton must also bear responsibility for the incomplete answer it gave to the RFQ questions as to the terms of the Chargois Arrangement.

There is some evidence that both Labaton and Chargois believed Chargois would serve as local counsel to Labaton in future litigation involving ATRS. Belfi 9/5/17 Dep., pp 27:11-15 [EX. 122]; Chargois 10/2/17 Dep., pp. 38:23- 39:1 [EX. 125]. That Chargois and Labaton intended for Chargois to perform substantive legal work on

importantly, ATRS, through its Chief Legal Counsel Christa Clark, explicitly rejected the joint relationship as proposed. She wrote that Chargois and Herron would *not* be added to the monitoring panel, and instead "add[ed] [Labaton] independently to the list of approved firms." [EX. 129]. While Labaton could, in its discretion, affiliate with Chargois and Herron as it "deem[ed] appropriate, on a case-by-case basis," if it was "a necessary and appropriate expense of the case," the Clark email left no doubt that only *Labaton* -- not Chargois and Herron -- would be appointed, and thereby serve the organization, as monitoring counsel. *See id*.

Moreover, neither the Joint RFQ Response itself, nor the Response when read in conjunction with Clark's email, met the requirements of Rule 1.5(e) read with *Saggese*. *See* Gillers Supp. Report, 69 [EX. 233]. Neither sufficiently informed ATRS of the Chargois Arrangement, as opposed to the identity of Chargois or his firm; that is, nothing in that response alerted ATRS that Chargois would receive 20% of Labaton's gross attorneys' fees earned in cases where ATRS served as lead or co-lead counsel.[205] Just the opposite. If anything, the Joint RFQ Response gave ATRS and Clark the false impression that Chargois would be performing substantive work alongside Labaton. While that may have been the intent early on, those discussions very soon thereafter gave

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future cases involving ATRS does not change our analysis. As all the parties acknowledge, under the ultimate agreement reached (which we now refer to as the "Chargois Arrangement") Chargois was to receive 20% of any fees awarded to Labaton in an ATRS-lead (or co-lead) case. It is this sharing of fees that triggers Labaton's duty to inform under Rule 1.5(e). We read the rule as matter-specific. Thus, even if we accept Labaton's argument that the initial monitoring disclosures constituted notice and consent under Rule 1.5(e), Labaton had a duty to inform ATRS about the change in the relationship at the time it began representing ATRS in the *State Street* case.

[205] Belfi testified that he had subsequent telephone conversations with Christa Clark.

way to what is now known as the Chargois Arrangement. Under that agreement, Chargois' entitlement to 20% of the firm's gross fees -- whatever the amount -- was not up for discussion; it effectively created a floating lien interest on every Labaton/ATRS case. *See* Chargois 10/2/17 Dep., pp. 50:18 - 51:12. [EX. 125].

We are equally unpersuaded that Hopkins' statement to Belfi that Hopkins did "not want to know" (or otherwise be involved with) the specifics of Labaton's fee agreements effectively relieved Labaton of its ethical obligation to inform ATRS about Chargois. *See* Hopkins 9/5/17 Dep., pp. 60: 13 – 61: 13 ("…[w]hen I do these cases, I have one focus, and that is to get a good outcome. I'm not trying to be a referee. I'm not trying to be a bank teller. I'm not trying to be somebody that directs fees to one law firm or another, and I – I didn't want that. And I don't want that.") [EX. 12];[206] Hopkins Declaration, ¶14 ("Because of my instructions to Mr. Belfi regarding my desire *not to know or otherwise be involved with* the specifics of Labaton's fee agreements, I do not feel misled…") (emphasis added). [EX. 130].[207] As Professor Gillers so effectively puts

[206] In his first deposition, before the Special Master learned of the Chargois Arrangement, Hopkins testified that in the *State Street* matter, he "wasn't trying to figure out -- I wasn't trying to control how the attorneys divided up their fee." Hopkins Dep., p. 79: 9-11. But it is clear from his testimony that his deference to Labaton was in relation to how the fees would be divided between ERISA and Customer Class Counsel, not among counsel, in general. *See id*. p. 78:20-22 (Q: were you aware of the amounts in attorneys' fees that were ultimately awarded to the ERISA attorneys?"), p. 79: 12-16 ("If they divided [their fee] up in a way that -- in an amount that the judge ordered that they could all live with, you know, happiness to them. I 've got plenty to do – enough to do without trying to divide up the attorney fees.").

After the Chargois Arrangement came to the Special Master's attention, Hopkins testified a second time, this time addressing specifically his knowledge of Chargois' involvement in the *State Street* case. In his testimony, Hopkins stated (for the first time in this record) that "[Belfi] wanted me to understand everything about what all [the lawyers] were doing," but that Hopkins informed Belfi that he "expected the attorneys to handle the attorney stuff because, you know, once you become the gatekeeper of what law firms are hired…the last thing I wanted was to have any knowledge or power about what law firms were hired." Hopkins 9/5/17 Dep., p. 60: 8-12, 17-22. Hopkins later purported to ratify the agreement. *See* Hopkins Declaration, ¶¶ 11-12, 14.

[207] Hopkins' statements in his recent Declaration that he told Belfi "if [he] ever wanted to know the details of Labaton's fee-sharing agreements, [he] would ask him," and that Hopkins was "not concerned with how that

it, Labaton deliberately *chose* not to tell Hopkins about Chargois based on its own perception that the Chargois Arrangement would not matter to Hopkins. *See* Gillers Supp. Report, p. 76 [EX. 233].

Contrary to Labaton's recent assertions, a client's request not to be informed does not constitute consent under Rule 1.5(e). Far from it. Even Labaton's distinguished panel of experts acknowledge that a client's desire, however explicit, not to know certain facts does not relieve lawyers of their ethical duty to inform that client of fee-sharing. *See* Lieberman 4/4/18 Dep., p. 30:3-5 [EX. 228]; Green 4/4/18 Dep., pp. 158: 6-159:10-15 [EX. 230]; Wendel 4/3/18 Dep. p. 151: 14- 152: 3. [EX. 229]. We cannot accept the notion raised by Professor Wendel that these inherent ethical duties are obviated simply because the client is sophisticated or familiar with the practices of the securities class action bar, or knows "the players" in class action cases. *See* Wendel 4/3/18 Dep., p. 100: 2-6 [EX. 229]. While such a position is belied by black-letter ethical law, it is also particularly troublesome because, by shifting the burden to the client, it eviscerates the deep-seated protections built into the ethical rules to protect clients. These protections are particularly critical where Labaton was anticipating an appointment as Lead Counsel,

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aggregate fee is distributed among lawyers or law firms" in any way, raise serious questions about Hopkins' adequacy to serve as a class representative moving forward. *See* Hopkins Decl., ¶¶ 10-11 [EX. 130]; Fed. R. Civ. P. 23(a)(4) ("One or more members of a class may sue or be sued as representative parties on behalf of all members *only if* … the representative parties will fairly and adequately *protect the interests of the class*.") (emphasis added). These concerns are not assuaged by Hopkins' blanket statement that "[i]n his view, this payment had no effect on the interests of the class." Hopkins Decl., ¶ 15 [EX. 130]. The class had a right to know that Lead Counsel intended to, and did, pay $4.1 million out of settlement funds to a person who performed no work in the case, as a result of Lead Counsel's own pre-existing obligation, whether or not the payment itself was permitted under Massachusetts ethical rules. We cannot see how, in light of a clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately protect the class's interests moving forward.

and of ATRS as a class representative, and was well aware of the obligations to the class that are inherent in that position.

While shifting the burden to a client is inappropriate in any case, it is especially so here where the client was serving in a fiduciary role and owed ethical duties of his own to the class he represented. In this context, a client such as Hopkins speaks not only for himself but for the absentee class members, a duty Hopkins clearly took seriously. Hopkins 6/14/17 Dep., p. 85:14-25 ("ultimately my duty is to ensure that the class got as good an outcome as they could under the circumstances presented to us.") [EX. 4]. Labaton, therefore, had a clear obligation to affirmatively inform Hopkins of the full parameters of the Chargois Arrangement -- that pursuant to a pre-existing obligation of Labaton's, Chargois would receive a substantial payment if Labaton successfully recovered fees but had no obligation to do any work on the case -- and obtain his written consent. *See* Chargois 10/2/17 Dep., pp. 50:18 - 51:12 [EX. 125]. Hopkins' instruction to Belfi did not waive that critical duty, much less rise to the level of informed consent contemplated by Rule 1.5(e).

Finally, in what is perhaps the most compelling of Labaton's three-part argument for compliance under Rule 1.5(e), Labaton argues that the February 8, 2011 Retention Agreement -- and specifically a single two-word phrase within it -- sufficiently notified ATRS of the Chargois Arrangement. [EX. 138]. The Retention Agreement reads: "[ATRS] agrees that Labaton Sucharow may allocate fees to other attorneys who serve as local or liaison counsel, *as referral fees*, or for other services performed in connection with the Litigation." (emphasis added). One can read this sentence in one of two ways.

The sentence can be read, according to Labaton's experts, as (1) permitting fee allocation (a) to local or liaison counsel; (b) paid out as referral fees; *or* (c) paid for other services performed in the litigation (*See* Wendel 4/3/18 Dep., pp. 25:15 – 26:2 [EX. 229]; Green 4/4/18 Dep., pp. 119: 11-17; 120:8-16 [EX. 230]; and Lieberman 4/4/18 Dep., pp. 30:6-20, 37:1-11 [EX. 228]), or (2) providing only two options, (a) referral fee payments to local/liaison counsel *or* (b) fees to other attorneys performing work on the case (in other words, with "as referral fees" modifying "local or liaison counsel"). While the latter interpretation is more plausible, this fact is of no moment. Even if we were to read the Retention Agreement as Labaton's experts suggest, that letter falls well short of compliance under Rule 1.5(e).

On this point, we agree with Professor Gillers and part ways with Labaton's various experts. While Labaton's experts disagree whether the letter alone satisfies Rule 1.5(e) (Joy says that it does), or whether the letter must be read in conjunction with the monitoring relationship and Hopkins' instruction to Belfi (as Green and Lieberman say), they agree that the Retention Agreement adequately conveyed what was required under Rule 1.5(e). We simply do not agree.

Rule 1.5(e) contemplates disclosure of more than just the words "referral fees." This is the only conclusion that reflects both the plain meaning of the Rule -- historical and current -- and the significance of client consent in a "bare referral" state. The history of Rule 1.5(e) reinforces our view that a mere mention of "a division of fees" or "referral

fee," absent some explanation, does not suffice for the nature of the consent required.[208] Reading the rule in this more meaningful fashion further enhances the significance of obtaining a client's consent in a bare referral jurisdiction. In bare referral states, such as Massachusetts, an attorney is rewarded, if not encouraged, to refer matters to substantially more capable counsel by making a referring attorney eligible to earn a fee simply for making such a referral. Because no work is required to receive this fee, the only safeguard in place to prevent an attorney from abusing his or her discretion to share fees with attorneys is Rule 1.5(e)'s consent requirement.[209] By apprising the client of any fee divisions up front, the client is empowered to ask questions, renegotiate, decline representation, or agree to the arrangement as explained. Such decisions are the client's prerogative and the client must have sufficient information to knowledgeably exercise that prerogative. We, therefore, view this obligation as an important one, not as a casual or pro-forma empty one.

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[208] On this point, we are informed by the original language of DR2-107(A)(1), the predecessor to Rule 1.5(e), which provided that "[a] lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his firm or law office, unless… [t]he client consents to employment of the other lawyer after a *full disclosure* that a division of fees will be made." (emphasis added). [EX. 226]. While that phrase no longer appears in the current version of the Rule or in the version effective in 2011, its inclusion in Massachusetts' ethical canon suggests that steps beyond those taken by Labaton are required to comply with Rule 1.5(e).

[209] Professor Gillers opines that Rule 1.5(a), prohibiting excessive fees, also applies to any division of fees paid to a lawyer under a fee-division agreement under Rule 1.5(e). *See* Gillers Supp. Report, pp. 126-127 [EX. 233]. As he points out, this is a logical reading of Rules 1.5(a) and 1.5(e) -- intended to protect the client from unduly burdensome fees -- because it prevents lawyers from "teaming up" with other lawyers and dividing their fees to circumnavigate the reasonableness check imposed by Rule 1.5(e). On the other hand, Labaton construes Rule 1.5(a) as limited to a singular fee with no bearing on fee divisions under 1.5(e). Labaton 4/12/18 Rebuttal, pp. 21-23. [EX. 161] And, as the firm notes, at least one of the factors enumerating the "time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly" is incompatible with a bare referral fee (that requires no substantive work to be performed). *Id.*, p. 22. Although a $4.1 million fee paid to someone who does no work on a case is excessive by any definition of that word, we make no finding with regard to Rule 1.5(a).

Labaton's reliance on a multi-year, multi-topic dialogue with ATRS fails for the additional reason that consent under Rule 1.5(e) must be matter-specific.[210] *See* 1.5(e) (fee division may occur only after informing the client that a division of fees "will be made.") That is, it requires consent to division in every matter, regardless of a past or existing relationship with the client, however robust. This is surely true of ATRS, whose relationship with Labaton predated the *State Street* case by three years, during which time ATRS's leadership turned over and the Executive Director (Paul Doane), with whom Chargois and Herron had the initial contact, was replaced by a new Executive Director, George Hopkins, who was told nothing about Chargois or the evolving nature of the Arrangement. *See* Hopkins 9/5/17 Dep., pp. 21:5-10, 64:4-67:11. [EX. 12]. On this point we firmly reject Labaton's attempts to bootstrap its own then-existing monitoring relationship and/or one-off conversations between Belfi and Hopkins to comprise meaningful consent to the fee-sharing agreement with Chargois. This is simply a bridge too far.

Finally, the Special Master's view on the issue of the nature of the consent required under Rule 1.5(e) is informed by the unique and troubling nature of the entire Chargois Arrangement, itself. It was not a relationship in which an attorney was

[210] Professor Wendel opines that the consent required for Rule 1.5(e) is not matter-specific absent a midstream modification of an existing attorney-client relationship. *See* Wendel 4/3/18 Dep., pp. 30:15 – 31:17, 40:5-14. [EX. 229.] It defies logic that Rule 1.5(e), which requires that the client be told that a division of fees "will be made" can be satisfied by disclosing a *potential* referral arrangement in response to a securities monitoring rather than litigation-based RFQ, three years before the referred matter is initiated. In short, a lawyer cannot advise his or her client that a referral *will* be made in the future, as required by the Rule, unless the matter triggering the referral obligation is underway. This is the only reasonable reading of the Rule.

receiving a simple referral fee. Rather, it was a fee that grew out of a pre-existing obligation of Labaton, alone. Because ATRS was likely going to be a class representative in a class action, the phrase "as referral fees" takes on a more far-reaching meaning, as it would mean that ATRS was giving permission for the payment of this pre-existing obligation to be satisfied from class funds, effectively permitting Labaton to shift its own obligation to Chargois to the class.[211]

c. Application of Rule 7.2(b)

A separate but related issue arising out of Labaton's noncompliance with Rule 1.5(e) is whether the firm's conduct also violated Rule 7.2(b)'s proscription on paying for a recommendation of a lawyer. Rule 7.2(b) prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services." Mass. R. Prof. C. 7.2(b).[212] This rule must be read in tandem with Rule 7.2(b)(5), which explicitly carves out fee-sharing agreements that comply with Rule 1.5(e). Mass. R. Prof. C. 7.2(b)(5).[213] Professor Gillers opines that a failure to comply with Rule 1.5(e) is a *per se* violation of Rule 7.2(b). *See* Gillers Supplemental Report, § IV(B)(i)-(ii). Labaton's experts respond

[211] This situation is exacerbated by the fact that Labaton similarly did not give notice of the pre-existing Chargois obligation to the class, *see infra*.

[212] This language previously appeared as Rule 7.2(c), with language substantially similar to Rule 7.2(b). *See* Mass. R. Prof. C. 7.2(c) (eff. 2011) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may: … [4] pay referral fees permitted by 1.5(e).) [EX. 231].

[213] In addition to Rule 7.2(b)(5), the broader language of Rule 7.2(b) also exempts from its general prohibition against payments for recommendations another category of fee division among lawyers: those made pursuant to reciprocal referral agreements under Rule 7.2(b)(4). Rule 7.2(b)(4) permits *lawyers* to receive payment from another lawyer or nonlawyer professional under a non-exclusive reciprocal referral agreement, of which the client is informed "of the existence and nature," and where payment of fees is not otherwise prohibited. While we recognize that the Chargois Arrangement did not involve a reciprocal referral arrangement, the carve-out in this section is further evidence (on top of the unambiguous language in Rule 7.2(b)(5)), that Rule 7.2(b) applies to lawyers and nonlawyers alike. To read these two textual exceptions otherwise is to render both of them meaningless.

that the two provisions are unrelated; in their view, Rule 7.2(b) governs payments to a nonlawyer or non-referral fees, and Rule 1.5(e) governs fee-sharing. *See* Wendel 4/3/18 Dep., p. 209:1-9 [EX. 229]; Joy 4/3/18 Dep., 31:21 – 32:9 (Rule 7.2(b) may apply to lawyers not acting in the capacity of a lawyer) [EX. 227]; Green 4/4/18 Dep., p. 63:4-14 (Rule 7.2(b) applies to payments for recommendations *not* in the context of fee-sharing) [EX. 230]; Lieberman 4/4/18 Dep., p. 79:8-10 (membership in the bar takes a monetary arrangement outside 7.2(b)) [EX. 228]. For the reason below, we find that Professor Gillers has the stronger argument.

We must begin with the meaning of the word "person" under Rule 7.2(b). To the uninformed, the answer to this question may appear obvious, based on common sense and the application of a common dictionary term. But on this point Professor Gillers and Labaton's experts sharply disagree.

On its face, Rule 7.2(b) proscribes giving anything to value to a *person*. As Professor Gillers indicates, the most plausible reading, if not the only reading, is that a person means just that, an individual, and applies equally to lawyers and nonlawyers. *See* Gillers Supp. Report, p. 67-68. [EX. 233]. This commonsense approach is consistent with, but not made explicit in, the Rules of Professional Conduct. The Rules define "person" as a corporation, an association, a trust, a partnership, and any other organization or legal entity, but are silent as to which *individuals* come within this category.[214] Mass. R. Prof. C. 1.0(i). Perhaps because it defies logic that a lawyer would

[214] As used throughout the Rules of Professional Conduct, "person" refers broadly to all individuals, whether a lawyer or nonlawyer; the terms person and lawyer are not mutually exclusive. *See* Rule 1.0, cmt. [6] ("any explanation reasonably necessary to inform the client *or other person* of the material advantages and disadvantages

not be considered a person under the law, the omission of the common dictionary meaning -- that a person is a human being -- does not give us reason to pause. *See Merriam-Webster Dictionary*; "Person" ("human, individual – sometimes used in combination especially by those who prefer to avoid man in compounds applicable to both sexes.")

But Labaton's experts, seizing on these semantic shortcomings, opine that "person" refers only to *non*lawyers. Therefore, they argue, Rule 7.2(b) has no application to Labaton's payment to a licensed attorney such as Chargois.[215] To justify this strained reading of the rule, Labaton's experts point to the title assigned to Rule 7.2(b) -- "advertising" -- as evidence that Rule 7.2(b) has nothing to do with "fees" (the subject of Rule 1.5(e)) or fee-sharing. Hence, "person" does not include lawyers.[216] Wendel Report, p. 16 [EX. 243]; Lieberman 4/4/18 Dep., pp. 81:20 – 82:4 [EX. 228]. Mr. Lieberman, pushed to defend this position in the extreme during depositions, testified that a law

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of the proposed course of conduct and a discussion of the client's or other person's options and alternatives") (emphasis added). "Nonlawyer," on the other hand, is used less frequently but with deliberation, mainly to indicate a difference between the responsibilities owed by lawyers and nonlawyers in particular circumstances. *See* Rule 3.8, cmt. [6] ("Special Responsibilities of a Prosecutor"); Rule 4.2, cmt. [4] ("Communication with Person Represented by Counsel"); Rule 5.3 ("Responsibilities Regarding Nonlawyer Assistants").

[215] Professors Wendel and Joy point out that the Rule has historically been applied to "runners" or "touts" or other individuals pursuing clients in a lawyer's stead. *See* Wendel Report, pp. 15-17 [EX. 243]; Joy Report, pp. 20-21 [EX. 241]. This is one fact to consider but does not persuade the Special Master that Rule 7.2(b), as written, is inapplicable to lawyers.

[216] Labaton argues that the title of Rule 7.2, "advertising," is indicative of the Rule's limited scope. This is particularly evident when read alongside Rule 1.5(e), a subsection of the rule on "fees," which has nothing to do with advertising conventions. We do not agree. Captions and titles of Rules are not substantive parts of a Rule. *See INS v. St. Cyr*, 533 U.S. 289, 309 (2001) (citing *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("The title of a statute … cannot limit the plain meaning of the text."); *see also Opinions of the Justices*, 309 Mass. 631, 639 (1941) ("[T]hough the title of an act of the General Court is part of such act in a legal sense, such title cannot be given the effect of extending or restricting the scope of the act manifested by unambiguous language in the body thereof.").

degree and membership in a legal bar fully insulates a lawyer from Rule 7.2(b). *Id.*, p. 79:8-10.

The Rules of Professional Conduct themselves suggest otherwise. "Nonlawyer" is a term of art. That phrase appears several times throughout the Rules of Professional Conduct -- at least thirty-six times by our count -- and describes a lawyer's duties vis-à-vis a nonmember of the bar. Despite the drafters' liberal use of the word throughout the Rules, "nonlawyer" does not appear anywhere within the text of Rule 7.2(b), or its predecessor, Rule 7.2(c). Had the drafters intended "person" to refer only to nonlawyers, they could have used the term "nonlawyer" as they did in so many other instances.[217] We do not accept Mr. Lieberman's testimony that omission of "nonlawyer" is simply "bad drafting." Lieberman 4/4/18 Dep., p. 99: 1-3. [EX. 228].

We do not accept Labaton's strained reading of the rules for several other reasons, not the least of which is that none of the distinguished experts testifying in this case could point to any legal authority that has found a person to mean a nonlawyer. Nor have we found any. Labaton's experts focus, instead, on a handful of non-Massachusetts decisions and ABA or non-jurisdiction-specific guidance categorizing the conduct of nonlawyers as violations of Rule 7.2(b) or its equivalent. *See* Joy Report, pp. 20-24 [EX. 241]; Wendel Report, pp. 15-16 [EX. 243]. The absence of decisions condemning

[217] A more reasonable interpretation of Rule 7.2(b)'s "person" requirement is that offered by Professors Joy and Green, who concede that a lawyer *can* be a person under Rule 7.2(b). Joy 4/3/18 Dep., p. 31:9-20 [EX. 227]; Green 4/4/18 Dep., pp. 62:7 – 63:14 [EX. 230]. This is true, for example, when a lawyer is not acting in a legal capacity. A quintessential example is a lawyer who drives a taxicab. The taxicab driving lawyer cannot avoid Rule 7.2(b) merely because he holds a license to practice law. *See* Joy 4/3/18 Dep., p. 31:1-7. [EX. 227].

lawyers for engaging in similar conduct is evidence, they argue, that a lawyer is not a person under Rule 7.2(b). But we do not make this logical leap. The fact that several bar authorities charged with enforcing Rule 7.2(b) (or its equivalent) have disciplined lawyers for paying nonlawyers for a recommendation in no way restricts the scope of Rule 7.2(b) to the nonlawyer population. To do so runs the risk of disciplining conduct involving nonlawyers while exculpating the identical conduct of a lawyer.[218] We cannot read the judicial silence as limiting the plain language in that way.[219]

Finally, we disagree with Labaton's view that "person" refers only to nonlawyers for two additional but equally important reasons: Rules 7.2(b)(4) and 1.5(e), the two exceptions written into Rule 7.2(b) that expressly permit referral payments between *lawyers*. Rule 7.2(b)(4) permits lawyers to enter into non-exclusive reciprocal referral arrangements with lawyers and nonlawyers with client consent. Rule 7.2(b)(5), likewise, carves out an exception for referral fees between lawyers that meet the division-of-fee requirements of Rule 1.5(e). It would make little sense to insert not one, but *two*, provisions that have no bearing on the conduct of those whom the Rule itself governs. Neither exception would be necessary if we were to read the rule in the manner urged by Labaton and its experts (that a lawyer is not a person). Labaton's experts provide only a facile explanation for these explicit carve-outs of permissible payments by lawyers.

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[218] Labaton's experts contend that monetary payments made by a lawyer are sufficiently governed by a combination of Rule 1.5(e) and Rule 7.3 (solicitation).

[219] While the lack of existing legal authority applying Rule 7.2(b) to lawyers specifically factors into our analysis as to whether sanctions are warranted, and is as a mitigating factor, it does not alter our analysis as to whether Chargois' early contact with Doane/ATRS violated Rule 7.2(b).

Professor Green says the exception in Rule 7.2(b)(5) for agreements complying with Rule 1.5(e) is merely "surplusage;" Mr. Lieberman says Rule 7.2(b)(5) is "redundant." Green 4/4/18 Dep., pp. 60:15-22, 63:19 – 64:5 [EX. 230]; Lieberman 4/4/18 Dep., p. 82:13-14 [EX. 228]. It is a basic rule of statutory construction that statutes and rules are to be read as they are written. We cannot accept the explanation that clear language in a Rule of Professional Conduct should be deemed surplusage or a redundancy. Such an argument ignores the tenets of statutory construction and offends notions of common sense.

In sum, we find the position of Labaton's experts belied by the construction of the rule -- cross-referencing fee-referral between *lawyers* in Rule 1.5(e) -- and largely conflating the lack of legal authority framing noncompliance with Rule 1.5(e) as a Rule 7.2(b) violation with Chargois' immunity from the rule as a lawyer. While informative, this argument ultimately does not persuade us to accept their view.

Beyond the plain language of Rule 7.2(b), its application to lawyers and nonlawyers who engage in proscribed conduct is evidenced from its historical application. In fact, the very cases upon which Labaton's experts rely to argue that Rule 7.2(b) categorically does not apply to lawyers involve recommendations factually similar, if not analogous, to what Chargois did in connecting Labaton and ATRS.[220] More to the point, Labaton's working arrangement with Chargois, and Chargois' conduct, raise the

[220] The Rules of Professional Conduct define recommendation as "[a] communication [that] endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities." Mass. R. Prof. C. 7.2(b), cmt. [5].

same concerns that have led commentators to condemn more avaricious payment-for-referral models intended to be disciplined by 7.2(b).[221]

In evaluating Chargois' conduct under Rule 7.2(b), we again distinguish the payment to Chargois from a traditional referral fee. Unlike cases where one lawyer pays another a fee for referring a client which the referring lawyer is not competent or able to represent, Chargois initiated the relationship between Labaton and ATRS at Labaton's request. ATRS did not come to Chargois for legal representation or seek out Chargois for a referral, or even his opinion, on counsel; rather, it was the other way around. While Chargois was licensed to practice in Arkansas, ATRS did not consult Chargois in his capacity as a licensed member of the bar. In other words, ATRS did not ask Chargois to find it additional monitoring counsel, nor is there any evidence in the record that ATRS had such a need; in fact, it already had three firms performing monitoring. Rather, it was Chargois who cold-called Doane, and soon after establishing contact, volunteered that he was working with a New York law firm that "specializes" in institutional investors.[222] Chargois 10/2/17 Dep., p. 34:20-23. [EX. 125]. From there, Chargois attended an initial meeting with Labaton, at which Labaton successfully persuaded ATRS to hire it as a fourth monitoring counsel. In all of this, Chargois was effectively acting as a "tout" of the same kind toward which Rule 7.2(b) was directed.

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[221] *See* Ellen J. Bennett, et al., *Annotated Model Rules of Professional Conduc*t (7th ed. 20Il); Charles W. Wolfram, *Modern Legal Ethics* § 14.2.5, at 786 (1986).

[222] In fact, Chargois testified that he did not even know what an "institutional investor" was at the time Belfi first inquired about an introduction to Arkansas pension funds. According to Chargois, whose testimony we credit, Chargois had to first explain to Doane who he was and why he was calling. Chargois 10/2/17 Dep., p. 32: 19-24; 34:6-9. [EX. 125].

Professor Gillers opines that these facts are evidence of a "recommendation" within Rule 7.2(b). *See* Gillers Supp. pp. 71-72, n. 80. [EX. 233]. We agree. Chargois' efforts went far beyond a neutral introduction; it was simply solicitation by another name. Chargois himself boldly described his extensive efforts later in the relationship, saying he spent "political favors" and considerable money to secure the introduction. *See* LBS017593-7594 (10/18/14 email from Chargois to Eric Belfi). [EX. 177]. Professor Green's attempt to parse between an implicit recommendation (not covered by Rule 7.2(b)), on the one hand, and the explicit statement by Chargois describing Labaton's securities practice as "specialize[d]" -- which Green opines does not rise to the level of a recommendation -- is awkward and unconvincing. *See* Green 4/4/18 Dep., pp. 43: 19-44:2; 45: 11- 46:4. [EX. 230]. The facts here are not that complicated. Chargois had no relationship with ATRS or Doane, was not sought out for legal advice or a referral, and effectively vouched for Labaton's specialized securities monitoring services, a recommendation that was given emphasis by Chargois attending a meeting between Doane, Belfi, and Keller.

This type of solicitation is analogous to *In re Disciplinary Action Against McCray*, 755 N.W.2d 835 (N.D. 2008), a case cited by Professor Joy in his Report (p. 23).[223] [EX. 241]. In *McCray*, the Court imposed Rule 7.2(b) discipline[224] on a lawyer who paid a

[223] The *McCray* disciplinary decision is not unique in its facts or its finding of a violation of Rule 7.2(b) on those facts. *See, e.g., Disciplinary Counsel v. Mason*, 925 N.E.2d 963 (Ohio Sup. Ct. 2010) (finding violation of Rule 7.2(b) where attorney paid a consultant to refer him cases).

[224] The discipline and appeal discussed in this case related to North Dakota Rule of Professional Conduct 5.4(a), which provided, "[a] lawyer or law firm shall not share legal fees with a nonlawyer." *See In re Discipline Action Against McCray*, 755 N.W. 2d 835, 845 (N.D. 2008).

nonlawyer marketing firm for recommending that attendees of bankruptcy seminars hosted by the marketing firm use the services of the lawyer, whose specialty was assisting individuals with improving their poor credit after bankruptcy.

Chargois' introduction to Doane parallels the *McCray* case in several ways. First, in both cases, the referring source (the nonlawyer) unilaterally recommended the lawyer. As noted above, Chargois had no preexisting relationship with ATRS, nor did ATRS consult Chargois seeking an attorney referral. Second, neither Chargois nor the nonlawyer in *McCray* worked on the referred securities or credit-related matter. While Massachusetts, as a bare referral state, does not require a lawyer to perform any work on a case to receive a fee, the failure to participate in any way in the *State Street* case -- or the other eight cases for which Labaton paid Chargois a fee -- is a fact of great significance. In fact, Chargois only learned of the progress in *State Street* through periodic updates from Belfi, who, as a practice, often forwarded Chargois correspondence originally sent to the client, thereby avoiding putting Chargois and Hopkins on the same email and keeping Chargois' identity from the client. *See* Chargois 10/2/17 Dep., p. 74: 9-15. [EX. 125] *see also supra*. Third, in both cases, the proscribed payments were not isolated incidents but rather part of a pattern of payments for the original recommendation. In *McCray*, the lawyer sponsored twenty-five seminars in one year. 755 N.W.2d at 839. The record in this case shows that, while Chargois' payment in the *State Street* case was the most lucrative, it was hardly his only compensation for the original recommendation. Under the Chargois Arrangement, Chargois received

payments in at least eight class action litigations involving ATRS. *See* Findings of Fact, § II(K)(8), *supra.*

Chargois' role vis-à-vis Labaton and ATRS, therefore, is functionally indistinguishable from the role played by the nonlawyers in the cases cited by Labaton's experts. We read these critical facts as taking Chargois' initiative to secure ATRS as a client for Labaton outside the fee-sharing context altogether and, thus, outside Rule 1.5(e). This was not a "referral fee" as that term is used and understood in the legal profession. As Professor Green recognized, a "referral" is rationally understood as recommendation to another, more competent attorney. *See* Green 4/4/18 Dep., pp. 77:16 – 78:5; 129: 19-14 [EX. 230]; s*ee also* Sarrouf 3/21/18 Dep., p. 34:12-20 [EX. 252]. Labaton's payments to Chargois were, instead, purely payments for a recommendation, payments that Green himself acknowledges fall outside the fee-sharing context, and are quite different from imperfect attempts to comply with fee-sharing rules. Green 4/4/18 Dep., pp. 69:19 – 70:3, 72:6 – 73:15. [EX. 230]. These payments were not made to Chargois for directing ATRS to a more competent securities firm, though that may well have turned out to be the case. The financial obligations turned solely on ATRS's involvement as class representative in a class action, not Labaton's competency to represent ATRS. Labaton also paid Chargois in numerous other ATRS cases, in various jurisdictions, and yet never told Hopkins. Indeed, evidence of an "attempt" to "notify" ATRS of the Chargois Arrangement is extremely thin and is comprised mainly of the fact that the word "referral" appears in the Retention Agreement signed by Hopkins. *See* 2/8/11 Retention Agreement. [EX. 138].

On balance, the scales tip toward a pure payment for recommendation. The entire Chargois/Labaton Arrangement seems more in the nature of providing Chargois with a finder's fee and a future floating lien over all Labaton/ATRS cases than a legitimate, professionally-based referral fee for professional services.

This finding takes us back to where we began this analysis, with Professor Gillers' view that Labaton's failure to sufficiently inform its client of a referral fee under Rule 1.5(e) implicates Rule 7.2(b). Despite a pattern of creative yet unconvincing arguments to the contrary by Labaton's experts, Professor Gillers makes a far stronger case to draw such a connection. This conclusion is warranted in large part by the construction of the Rule itself, which includes an explicit safe harbor provision in Rule 1.5(e). A lawyer who does not comply with Rule 1.5(e)'s safe harbor must then fall within the ambit of Rule 7.2(b).

Having found this, however, does not end the discussion. What does give us some pause before recommending redress for a violation of Rule 7.2(b) is the fact that, apparently, no bar disciplinary authority or Court has ever imposed discipline upon an attorney for a violation of this Rule by paying another attorney. Therefore, this factor must be weighed in the context of the larger questions raised by Labaton's involvement in the Chargois Arrangement and what redress is appropriate to remedy this pattern of conduct. These questions will be addressed in the Recommendations section below.

2. DUTIES TO THE CLASS

As Lead Counsel for the class, Labaton owed not only a duty to disclose the Chargois Arrangement to its direct client, ATRS, but equally, if not more importantly, a

fiduciary and ethical duty to disclose to the members of the class, including the ERISA class members, that an attorney who did no work on the case would receive $4.1 million from the Settlement Fund, and that this payment obligation arose from a pre-existing obligation of Labaton's own.

a. Rule 23 Requirements

From a procedural perspective, disclosure of the Chargois Arrangement falls within the scope of Fed. R. Civ. P. 23, specifically subsections (e) and (h) of the Rule.[225]

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[225] Rule 23(e) states:

> **(e) Settlement, Voluntary Dismissal, or Compromise.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:
>
> **(1)** The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
>
> **(2)** If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
>
> **(3)** The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
>
> **(4)** If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
>
> **(5)** Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

Subsection (h) provides:

> **(h) Attorney's Fees and Nontaxable Costs.** In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
>
> **(1)** A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
>
> **(2)** A class member, or a party from whom payment is sought, may object to the motion.

By its terms, with respect to informing class members, Rule 23(e) prescribes only that a notice of a settlement be provided to class members "in a reasonable manner." Fed. R. Civ. P. 23(e)(1). There is no direct prescription as to the content of the notice. Rather, the content of the settlement notice is dictated by two other aspects of Rule 23: the requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement. Fed. R. Civ. P. 23(e)(5). To safeguard class members' opportunity to object, "notice must be sufficiently clear and informative to make those opportunities meaningful." Rubenstein Report, p. 29 [EX. 234]; *see also* Rubenstein 4/9/18 Dep., p. 116:6-11. [EX. 235].

With respect to the attorneys' fees aspect of any class action settlement, Rule 23(h) requires that a claim for an award be made by motion under Rule 54(d)(2).[226]

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(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

Fed. R. Civ. P. 23.

[226] Rule 54(d)(2) provides:

(2) ***Attorney's Fees.***

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

The Advisory Committee's note to the 2003 amendment of Rule 23 contemplates that when a class settlement is proposed for Rule 23(e) approval, "notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself." Fed. R. Civ. P. 23(e), Advisory Committee Note to 2003 Amendment. The fee notice's content is primarily dictated by Rule 23(h)(2)'s guarantee that class members have a right to object to the fee motion.[227] As with the right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. *See* Rubenstein Report, p. 30. [EX. 234].

Here, the caption of the Notice identifies ATRS, Henriquez, and the Andover Companies as named plaintiffs. *See* Notice, Dkt. # 95-3, Ex. C. [EX. 81]. It refers to the "class action lawsuits (collectively, the 'Class Actions')." *Id.* It defines the "Settlement Class" as follows:

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

Id., 3.

> **(iii)** state the amount sought or provide a fair estimate of it; and
>
> **(iv)** disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.
>
> Fed. R. Civ. P. 54(d)(2).

[227] *See* Fed. R. Civ. P. 23(h)(2) and *supra*.

Labaton Sucharow and Lawrence Sucharow are identified as "Lead Counsel." *Id.*, pp. 2, 14. The Notice further states that "Labaton Sucharow LLP has been appointed Lead Counsel for the Settlement Class." *Id.*, p. 13. No other law firm or lawyer is identified. Recipients were told "Lead Counsel, on behalf of ERISA Counsel and Customer Counsel, will apply to the Court for an order awarding attorneys' fees in an amount not to exceed $74,541,250.00." *Id.*, pp.4, 13. Recipients were also told that attorneys' fees for ERISA counsel would not exceed $10.9 million, and they were told how fees for the other counsel would be computed "if the Court awards the total amount of fees that Lead Counsel intends to request." *Id.* at 9. They were told that additional fee information would be posted on the case website by September 15, 2016, and they were provided the website address. *Id.*, p. 13. Labaton's phone number, website, and email address were given as a source of "[a]dditional information." *Id.*, p. 2. Recipients were told their right to opt out and/or to object, and how to do so. *Id.*

However, the Notice did not identify Damon Chargois or his law firm, Chargois & Herron, nor did it disclose the Chargois Arrangement or make any mention of a $4.1 million payment to Chargois pursuant to his pre-existing arrangement with Lead Counsel Labaton. It defies common sense to believe that information that a lawyer who never appeared in the case and who did no work to produce the class recovery stood to receive more than $4 million from the class fund would not reasonably have influenced members of the class in deciding whether to exercise their right to object to the settlement and the fees contemplated to be awarded as summarized in the Notice. The fact that this payment grew out of a pre-existing obligation of Lead Counsel's alone only underscores this point.

Unfortunately, the Notice did not include any reference to that payment, and the class members never had an opportunity to consider this information and object to it.

Under Fed. R. Civ. P. 23(e)(3), "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money elsewhere that they may have received. *Manual for Complex Litigation, Fourth*, § 21.631. [EX. 248]. Precisely because the Chargois Arrangement allocated money that the class may have received elsewhere (i.e., to Chargois), Rule 23(e)(3) would appear to require that the class -- through a filing with the Court -- have been informed about it.[228] According to Professor Rubenstein, however, in general, fee allocation agreements do not need to be included in the notice to the class. Rubenstein 4/9/18 Dep., p. 116: 6-17. [EX. 235]. Professor Gillers acknowledged that the plain language does not require as much. *See* Gillers 3/20/18 Dep. pp. 150: 3-7 – 151: 17-22. [EX. 253].

Although he admits that Rule 23 is "peculiarly written," relying on the plain language of Rule 23(h)(2)(B)(iv),[229] Professor Rubenstein -- as he does with the duty to disclose to the Court itself -- contends that Labaton was under no duty to disclose the Chargois Arrangement to the class absent an order from the Court directing it to do so.

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[228] Rule 23(e)(3)'s requirement that a statement be filed disclosing "any agreement made in connection with the [settlement] proposal" is addressed more fully in the "Duty to the Court" section, *infra.*

[229] Rule 54(d)(2)(B)(iv) states that a motion for fees must "disclose, *if the court so orders*, the terms of any agreement about fees for the services for which the claim is made." Fed. R. Civ. P. 54(d)(2)(B)(iv) (emphasis added).

Rubenstein 4/9/18 Dep., pp. 119:7, 121:10-17. [EX. 235]. "I'm saying Rule 23 says that the burden's on the Court. That's how the framers wrote it. They -- the experts who wrote this picked up the language of Rule 54 and put that burden on the Court." *Id.*, p. 121:10-17.[230]

[230] Rubenstein conceded this is a lot to ask of the judge:

> THE SPECIAL MASTER: So I believe what you're saying here again is that the burden is on the Court at the notice stage to make sure that fee allocation agreements are in the class notice?
>
> THE WITNESS [PROF. RUBENSTEIN]: I'm saying Rule 23 puts that burden on the Court, that's correct. I'm not saying it's the burden. I'm saying Rule 23 says that's the burden's on the Court. That's how the framers wrote it. They -- the experts who wrote this picked up the language of Rule 54 and put that burden on the Court.
>
> THE SPECIAL MASTER: And the obligation under Rule 23(h)(2) that class members be given sufficient information to do so, meaning to object to a fee petition, is an obligation as to fee agreements and allocation agreements that is on the Court ? . . .
>
> THE WITNESS: Yes. . . .
>
> THE SPECIAL MASTER: And the obligation to provide sufficient information for the class means that as to fee allocation agreements the Court has to ask? Yes?
>
> THE WITNESS: Yes. That's what Rule 23 says. That's correct.
>
> ****
>
> THE SPECIAL MASTER: It's a lot to put on a judge. Separate and aside from what Rule 54 says and the incorporation of Rule 54 into Rule 23, you said earlier the class only knows what it knows and can only object to what it knows, right? Is that -- obviously that's a --
>
> THE WITNESS: Sounds like a truism.
>
> THE SPECIAL MASTER: -- truism. That was the word I was going to use. It's also true of a judge. And this burden of requiring the judge to ask in every case tell me everything about every fee agreement, you know, that is in this case, don't judges have the right to rely upon what the lawyers are giving them as to be all of the necessary and material important information? . . . Without having to ask is anybody getting a fee here that didn't work in the case, this didn't appear in the lodestar, that didn't appear in the case? . . .
>
> *****
>
> THE WITNESS: I -- the sense that you're -- it's a lot to ask of a judge. I think we ask an enormous amount of federal judges. They're incredibly busy in a wide range of things. And then at this moment in a class action lawsuit we say to the federal judge, hey, you're now a fiduciary for absent class members is an enormous burden to put on judges, but I think the courts that use

Although Professor Rubenstein is in agreement with the Special Master and advocates that, in the interest of transparency, fee allocation agreements should be made known to the class, *see* Rubenstein, *5 Newberg on Class Actions*, at § 15:12, as nothing in Rule 23 requires disclosure of fee agreements absent a court order, the Special Master cannot conclude with certainty that as a matter of law the nondisclosure of the Chargois Agreement in the Notice provided to the class members violated any Rule of Civil Procedure.[231] [EX. 236].

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that language do so specifically to remind the judge you're the backstop. It's up to you. And you have to do something here.

THE SPECIAL MASTER: . . .[D]oesn't the judge have the right to expect the lawyers to tell him or her everything that the judge should know so that the judge can fully perform his or her fiduciary duties to the class? []

THE WITNESS: I'd answer it this way, your Honor. I think that lawyers have the right to rely on the rules, and the rule is the Court can ask for the fee agreements if they want. I think beyond that, it's a tough question for a lawyer to answer because you're now asking them to interpret what would be pertinent to a judge, and it varies wildly.

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But if a judge doesn't ask for it, are they supposed to predict that the judge really means to ask for it and didn't? . . .

*****

And so I think that lawyers appearing in [class action] cases have the right to rely on the rule structure, and it's hard to put on them a burden to predict what else would be important for the judge to know.

Rubenstein 4/9/18 Dep., pp. 121:6 – 125:19; 126:13 – 127: 23. [EX. 235].

[231] In the absence of clear law to the contrary, and with Professor Gillers in agreement, the Special Master is constrained to reach this conclusion. But this surely is a strained and unsatisfactory result, given the clear, plain-English mandates of Rule 23(e)(3) that "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." Certainly, the agreement to pay Chargois $4.1 million is an "agreement made in connection with the proposal." While Rule 23(e)(3) appears to only require the *filing* of such a statement with *the Court*, absolving class counsel of any responsibility to give *the class* notice of a fee agreement such as the one with Chargois and placing that burden only upon the Court to do so seems to stand common sense and the realities of class action litigation upon its head.

Courts can only know what they are told by the class attorneys, and to reverse the burden and put it on the Court to ask the lawyers seems not only a direct contravention of the plain language of Rule 23(e)(3), but also a misapprehension of the responsibilities of the respective players in the class action process. It is the lawyers who

b. Ethical Obligations

However, the presumed procedural mandates of Rule 23 do not in any way diminish Labaton's ethical duties toward members of the class (and the Court). The Massachusetts Rules of Professional Conduct make it clear that an attorney must provide the client with "sufficient information" to participate intelligently in decisions concerning the objectives of the representation. *See generally* Mass. R. Prof. C. 1.2, 1.4 (and cmt. [5]). The class members' decisions whether to accept or object to the *State Street* settlement and/or the proposed award of attorneys' fees falls within the scope of those ethical rules governing any attorney-client relationship.

It cannot be disputed that at least as of August 8, 2016, when the Court certified the Settlement Class, Labaton's client was no longer only ATRS; as of that point the ERISA class members were also Labaton' clients. This is abundantly evident in the Notice that Labaton prepared and then sent to the class members, including the ERISA Plaintiffs.[232] *See* Notice, Dkt. # 95-3. [EX. 81].

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are requesting fees from class funds and know of all the agreements between counsel as to these fees. It is surely not asking too much of class counsel to require them to tell the class of such agreements so that class members -- their clients -- can make an informed decision, rather than requiring the Court to ask.

Even Professor Rubenstein acknowledges that "some agreements among counsel would impact settlement terms and hence should be disclosed to the class." 5 *Newberg on Class Actions*, § 15:12 (emphasis added). [EX. 236]. The Special Master recommends that courts and academics consider revisiting and reallocating this responsibility under the Federal Rules of Civil Procedure.

[232] Customer Class Counsel, in fact, recognized the ERISA plaintiffs as their clients even before the class was certified. *See* Chiplock 9/8/17 Dep. pp. 97:3- 10 ("I felt that customer class counsel had a responsibility to the entire customer class with no distinctions. We didn't discriminate in our class definition. We didn't see the need to when we filed our case."); Goldsmith 9/20/17 Dep., pp. 42:11-14 ("[W]e did not assert an ERISA claim in our complaint, but we did allege a class which was broad enough to encompass ERISA governed assets."); 61:11-14 (How much of the settlement would go to ERISA clients "was something that [DOL] were focused on. Of course, we were focused on it as well because they were our clients"). *See also* 11/15/12 Lobby Conference:

In *Fulco v. Continental Cable Vision, Inc.*, 789 F.Supp. at 47, the Court recognized that an attorney-client relationship is formed between class counsel and the class after the class is certified. "While this is apparently a case of first impression in the First Circuit, I agree with courts which have held that 'once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel.'" *Id*. Unquestionably, the attorney-client relationship is a fiduciary one. *See Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 974 (1st Cir. 1993) ("The relationship between lawyer and client in Massachusetts is fiduciary as a matter of law.") Courts have acknowledged that the attorney-client relationship imposes on class counsel a fiduciary responsibility with regard to the members of the class. *See Piambino v. Bailey*, 757 F.2d 1112, 1139 (11th Cir. 1985) ("The lawyers who bring these [Rule 23] cases have a heavy fiduciary responsibility to their clients -- especially those who are absent and those in the minority whose interests are at odds with the named plaintiffs and their group -- to the trial judge and to the people who provide the forums and governmental resources for these suits."); *Singer v. AT&T*

MICHAEL THORNTON: I just want to clarify one thing of Mr. Rudman's [State Street's attorney's] excellent summary that we might differ on. There are two clear ERISA cases, *Henriquez* and *Andover*, and in the third case, *Arkansas*, um, the ERISA claims are included in the class definition. So we also have a claim.

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ROBERT LIEFF: . . . There is an overlap, that's all we're trying to say. We represent the same people.

THE COURT: You do represent the same people?

MR. LIEFF: Yes.

11/15/12 Lobby Conference Tr., pp. 16-17, Dkt. # 64. [EX. 22].

Corp., 185 F.R.D. 681, 690 (S.D. Fla. 1998) ("The class attorney has a fiduciary duty to the court as well as to each member of the class.").

However, due to the practical challenges of communicating with every class member and the unique posture of class members in class action cases, the scope of the fiduciary duties owed in this circumstance is something less than that owed to an individual client.

In this attorney-client-type relationship, class members are considered "clients" for some purposes but not others. For example, individual class members are considered clients for purposes of bringing their communications within the protection of the attorney-client privilege, effectively barring defense counsel from communicating directly with current or potential class members. *See e.g., Dodona I, LLC v. Goldman, Sachs & Co.*, 300 F.R.D. 182, 187 (S.D.N.Y. 2010); *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1483 (S.D.N.Y. 1986); *In re School Asbestos Litig.*, 842 F.2d 671, 683 (3d Cir. 1988); *Bower v. Bunker Hill Co.*, 689 F. Supp. 1032, 1033 (E.D. Wash. 1985); *see also* Rubenstein Dep. p. 147. On the other hand, conflict rules are far more relaxed in the class action context than in the traditional sense. *See e.g., Radcliffe v. Hernandez*, 818 F.3d 537, 545-46 (9th Cir. 2016); *Lazy Oil Co. v. Witco Corp*, 166 F.3d 581, 590 (3d Cir. 1999); *In re Agent Orange Prod. Liab. Litig.,* 800 F.2d 14, 19 (2d. Cir. 1986); *see also* Rubenstein Dep. pp. 148-49. Moreover, individual class members cannot bring suits against class counsel for legal malpractice, *see id.*, nor can the reasonable communication expectations articulated in Mass. R. Prof. C. 1.2 and 1.4 be "transferred one to one with

class members." Dacey Dep., p. 44 (analogizing attorney-client communication to publishing notice in the newspaper).

Thus, the class is not a client for all purposes.

While courts have found that the fiduciary duty imposed on class counsel vis-à-vis the individual members of a large class (such as the approximate 1,900[233] members of the consolidated class in this case) is lessened, principally due to the burdens inherent in dealing with a large number of individual "clients," we find a heightened duty to class members in the *State Street* case because the Settlement Class here was atypical; it was a "hybrid" class that included not only Customer Class members -- of which ATRS, Labaton's direct client, was one -- but also separate ERISA plan and group trust members. Our view is informed by Professor Gillers' observation that those special circumstances -- "few and tailored" -- that require a less stringent application of the Rules of Professional Conduct are exceptions, not the rule, and do not support the purported notion that class actions operate entirely outside the traditional bounds of the attorney-client privilege. Gillers Supp. Report, pp. 101-102. [EX. 233]. To require disclosure of the Chargois Arrangement to unnamed class members here would not impose the same undue burdens on class counsel which led courts to originally place limitations on the attorney-client relationship in conflicts situations.

Here, it would be no great burden at all for Labaton to disclose the Chargois Arrangement to the handful of named ERISA class representatives, i.e., the named

[233] *See* Declaration of Eric J. Miller, A.B. Data. Dkt # 104-13. [EX. 256].

plaintiffs in the *Henriquez* and *Andover* actions -- Arnold Henriquez, Michael Cohn, William Taylor, Richard Sutherland, the Andover Companies (through Janet Wallace and/or Alan Kober), and James Pehoushek-Stangeland.[234] Since informing this significantly smaller number of "clients" is not a great imposition, we find that the attorney-client relationship imposed a duty on Labaton to ensure that the Chargois Arrangement was disclosed at least to these named plaintiffs/class representatives.[235] As Professor Rubenstein noted, these class representatives "play[] the function of being the client for the absent class members, stand[ing] in as the client to the lawyer for the absent class members." Rubenstein 4/9/18 Dep., p. 141:9-13. [EX. 235].

Indeed, to meet its ethical duty under the Rules of Professional Conduct to provide these ERISA clients with sufficient information to enable them to make intelligent decisions about accepting or objecting to the Settlement and the application for attorneys' fees here,[236] it would have been even less burdensome as the ERISA plaintiffs had their own attorneys, who were active participants in the mediation and settlement process.

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[234] Though no separate ERISA sub-class was ever designated by the Court, no one disputes that these named ERISA Plaintiffs were the designated representatives for the classes identified in the *Henriquez* and *Andover* complaints, which were consolidated with the ATRS action for settlement purposes.

[235] And as Professor Gillers points out, Labaton could easily have included a basic description of the Chargois Arrangement in the Notice sent to *all* class members, thereby discharging their fiduciary duties to inform the class and allowing the class to decide whether to object to the fee award as proffered. *See* Gillers Supp. Report, pp. 98-99. [EX. 233].

[236] This ethical duty is highlighted in several of the Massachusetts Rules of Professional Conduct. For example, Mass. R. Prof. C. 1.4(a)(1) provides that "[a] lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f) is required by these Rules." Rule 1.0(f) states that "'[i]nformed consent' denotes the agreement by a person to a proposed course of conduct *after the lawyer has communicated adequate information and explanation* about the material risks of and reasonably available alternatives to the proposed course of conduct" (emphasis added). Similarly, Mass. R. Prof. C. 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." *See also* Mass. R. Prof. C. 1.2(a) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.")

As Professor Gillers points out, to fulfill its ethical obligation to provide all of its clients all of the information necessary to make informed decisions concerning the settlement and fee award, Labaton needed only inform ERISA Counsel of the Chargois Arrangement, who, in turn, would be obligated to communicate the information to their individual clients. *See* Gillers Supp. Report, pp. 99-100 & n.91. [EX. 233]. As Lynn Sarko, counsel for the *Andover* Plaintiffs, testified, knowledge of the Chargois Arrangement would have affected the advice he gave to his clients, and he believed they would not have agreed to the Chargois payment. Sarko 9/8/17 Dep., p. 75:18-22. [EX. 37]. However, as indicated above, Labaton did not disclose the Chargois Arrangement to ERISA Counsel. *See* Findings of Fact, Section II(K)(6), *supra*.

Here, class members were told their "legal rights," which included their right to object to the anticipated fee application, but they were not given information that could reasonably have prompted an objection. *See* Gillers Supp. Report, p. 103. [EX. 233]. Such an omission undermines the purpose of the Notice, because, as Professor Gillers opines, the central purpose of the Notice is to present the class with information upon which it can decide whether to settle its legal rights. *Id*.

In the context of this case, we conclude that Labaton's failure to disclose the Chargois Arrangement to members of the consolidated Settlement Class was in derogation of its ethical duties under Mass. R. Prof. C. 1.2 and 1.4 to provide its clients with information necessary to make informed decisions with regard to the settlement.[237]

[237] Remedies for this derogation of Labaton's ethical duties are discussed, *infra*.

3. DUTIES TO CO-COUNSEL

The ultimate responsibility for not disclosing the Chargois Arrangement falls on Labaton alone. Labaton's disregard of its duties to its client, to class members, and to the Court is compounded by the firm's neglect of its important duties to its co-counsel in the *State Street* litigation. These duties were rooted both in Labaton's status as Lead Counsel appointed by the Court (and the attendant expectations that accompany that important designation in the class action context) and in the firm's contractual relationships with both Customer Class Counsel and ERISA Counsel. These duties of disclosure to co-counsel are particularly enhanced here as to the Chargois payment because the Chargois obligation had nothing to do with the *State Street* case -- and indeed, it preceded the case by several years -- and no value to the class or counsel was derived from it. Rather, the obligation was Labaton's and Labaton's alone. By paying Chargois from class funds, and having Lieff and Thornton share in the payment, Labaton shifted its own obligation onto the class and co-counsel.

Though the parties and their experts disagree on the exact disclosure requirements carried by Labaton in this case,[238] the weight of the testimony in the investigation makes

[238] Expert testimony that implicated the disclosure obligations among co-counsel (in relation the Chargois Arrangement or to fee allocations generally) varied, and rested on different sources of authority. *See*, *e.g.*, Wendel 4/3/18 Dep., pp. 170: 3 -172: 12 (Massachusetts Rules of Professional Conduct did not govern Labaton's duty to disclose the Chargois Arrangement to ERISA counsel or to fully inform Lieff and Thornton as to the nature of the Chargois Role) [EX. 229]; Green 4/4/18 Dep., at pp. 167: 23 –169: 13 (Massachusetts Rules of Professional Conduct do not govern fairness in the division of fees amongst attorneys, though principles of contract law may) [EX. 230]; Joy 4/3/18 Dep., pp. 112: 4- 114:5 (testimony from ERISA counsel regarding the effect of nondisclosure on ERISA counsel's conduct does not impact expert's opinion that notice of the Chargois Arrangement to class members, and specifically ERISA class members, was not required) [EX. 227].

Regarding whether there was an obligation for Labaton to provide material information about the Chargois Arrangement to co-counsel, Professor Rubenstein testified, 4/9/18 Dep., p. 47:13-15, "I'm breaking it down into a legal obligation. I don't know anything in class action law that addresses this directly." [EX. 235] He testified further:

apparent that the nondisclosure had a rippling effect throughout the case. Counsel from all firms have testified at length about the nondisclosure, or incomplete disclosure, to co-counsel firms during the litigation and settlement process. As set forth in the Findings of Fact, § II(K)(6) *supra*, ERISA counsel testified that, had they been told about the Chargois Arrangement, they would have proceeded differently in multiple material respects -- from disclosing the Arrangement to their clients to considering the arrangement in their own fee negotiations. Co-counsel Bob Lieff also testified that Lieff would not have agreed to share in the Chargois payment had he known the true nature of Chargois' role, rather than being led to believe by Labaton that Chargois was serving as local counsel. *See* § II(K)(5), *supra*. Bob Lieff also testified that he would have

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> THE WITNESS: I think what you're asking, if I understand it correctly, is you're using Mr. Lieff's testimony to say that this is a material fact.
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> THE SPECIAL MASTER: Correct.
>
> THE WITNESS: Yeah.
>
> THE SPECIAL MASTER: At least it was material to him.
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> THE WITNESS: Yeah. And given that it's a material fact, does that increase their duty to disclose it?
>
> THE SPECIAL MASTER: Obligation.
>
> THE WITNESS: Obligation. And, again, I -- I go back to the same answer I had before. If the Court is involved and the Court asks, absolutely. If you're talking about a private agreement among them, I don't know any law on the subject. It would be my testimony that if I were wanting to be lead counsel repeatedly, I'd be as forthright as possible in these circumstances.
>
> THE SPECIAL MASTER: So more in the nature of a best practice than an obligation?
>
> THE WITNESS: I think that sounds right. But again it's not... It's not something I prepared, I think, to testify on that point specifically and I've thought a lot about. As I'm right here, most judges leave this to the lawyers. I think a lot of the allocation stuff goes to the lawyers' reputational interests and trust that they build up with other lawyers in these cases."

Id., pp. 49:17:8-51:1. [EX. 235].

encouraged Labaton to disclose the Chargois Arrangement to the Court. Lieff 9/11/17 Dep., p. 97:13-16. [EX. 139].

Labaton has maintained that it had no obligation to disclose the Chargois Arrangement to ERISA Counsel because the agreement had no impact on ERISA Counsel's fee, and had no duty to disclose further details to Lieff and Thornton because those firms had a sufficiently detailed understanding of the agreement. *See e.g.*, 11/3/17 Response by Labaton to Special Master's 9/7/17 Request for Supp. Submission, pp. 29-30, 35-36 [EX. 238]; 4/12/18 Rebuttal Response by Labaton, pp. 34-35. [EX. 161]. Because Labaton's position ignores the important duties the firm owed to its co-counsel firms, the Special Master credits neither of these arguments.

Labaton's evasion of its disclosure obligations materially affected both its fellow Customer Class Counsel and ERISA Counsel -- each of whom relied significantly on Labaton in its role as Lead Counsel -- by preventing them from executing their *own* duties to the Court, to their clients, and to the class. Moreover, Labaton's failure in its duties as Lead Counsel, and its conscious effort to conceal the existence or true nature of the Chargois obligation, prevented the co-counsel firms from being fully informed as to the fee-allocation arrangements to which they consented based on misinformation or outright material omissions. Labaton's failures thus prevented its co-counsel from carrying out their own obligations in the litigation, and also call into serious question the validity of the multiple fee agreements reached between the firms.

a. Governing Principles of Fairness and Transparency

Though perhaps falling short of imposing a true *fiduciary* duty on Labaton in its relationship with its class action co-counsel, general principles of fairness and professional responsibility toward co-counsel, and toward the Court, strongly suggest that Labaton was required to disclose the Chargois agreement. *See In re San Juan Dupont Plaza Hotel Fire Litigation*, 111 F.3d 220, 234 (1st Cir. 1997) (noting that the *Manual for Complex Litigation* counsels courts to remind lead attorneys of "their responsibility to the court and their obligation to act fairly, efficiently, and economically in the interests of all parties and their counsel"); *see also Bartle v. Berry*, 80 Mass. App. Ct. 372, 378 (2011), quoting *Lamare v. Basbanes,* 418 Mass. 274, 276 (1994) ("In the absence of an attorney-client relationship, an attorney has a duty of reasonable care to a nonclient if the attorney knows or has reason to know the nonclient is relying on the attorney's services. 'However, the court will not impose a duty of reasonable care on an attorney if such an independent duty would potentially conflict with the duty the attorney owes to his or her client.'"). [239]

[239] We recognize that a number of state and federal courts have declined to find fiduciary duties *between* co-counsel, on public policy grounds, because such duties could create potential conflicts with respect to each counsel's undivided loyalty to its client. *See*, *e.g.*, *Skepnek v. Roper & Twardowsky, LLC*, No. 11–CV–4102–DDC–JPO, 2015 WL 4496301, at *23 (D. Kan. July 23, 2015) (discussing decisions in California, Louisiana, and Washington, and "predict[ing] that the Supreme Court of New Jersey would hold, as a matter of public policy, that no fiduciary duties exist between co-counsel for lost prospective fees."); *Appel v. Schoeman Updike Kaufman Stern & Ascher L.L.P.*, 2015 WL 13654007, at *23, n. 9 (S.D.N.Y. Mar. 26, 2015) (citing state cases and rejecting breach of fiduciary duty claim on an additional basis that "co-counsel generally do not owe each other a fiduciary duty"). Some courts, usually in the context of a fee dispute between counsel, have dismissed the concept of counsel's fiduciary duty to co-counsel with respect to ensuring and protecting co-counsel's expected fees. *See*, *e.g.*, *Bartle*, 80 Mass. App. Ct. at 379 (collecting cases from jurisdictions that have rejected a duty of care owed by one attorney to another to protect an interest in a fee); *Beck v. Wecht*, 28 Cal. 4th 289, 298 (2002) ("The better approach… is a bright-line rule refusing to recognize [ ] a fiduciary duty" to conduct joint representations in a way that doesn't diminish expected fees).

One Court in the District of Massachusetts, citing the *Manual for Complex Litigation*, has elaborated on the duties of courts and litigants in complex multi-district litigation:

> In complex multi-district litigation, courts are encouraged to:
>
> invite submissions and suggestions from all counsel and conduct an independent review (usually a hearing is advisable) to ensure that counsel appointed to leading roles are qualified and responsible, that they will fairly and adequately represent all of the parties on their side, and that their charges will be reasonable. Counsel designated by the court also assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel.
>
> *Manual for Complex Litigation*, § 10.22. [EX. 248].
>
> Complex litigation requires particularly professional conduct from attorneys, as judges are especially dependent on the assistance of counsel. *Id.* § 10.21, at 22–23. "Counsel need to fulfill their obligations as advocates in a manner that will foster and sustain good working relations among fellow counsel and with the court." *Id.* at 23. In a class action, lead counsel must meet a demanding standard of trustworthiness because the Court must rely on representations made by counsel. *See, e.g., In re Vitamins Antitrust Litig.,* 398 F.Supp.2d 209, 237 (D.D.C.2005); *In re Organogenesis Sec. Litig.,* 241 F.R.D. 397, 408 (D.Mass. 2007) ("to understand the facts and issues presented to it in any case, including a class action, the court must employ and to some extent rely on representations made to it by counsel.")

In re Pharm. Indus. Average Wholesale Price Litig. 2008 WL 53278, at *1–2 (D. Mass. Jan. 3, 2008).

Thus, while a firm's appointment as lead counsel does not create a true fiduciary obligation to co-counsel, the relationship created is one rooted in trust, and co-counsel may reasonably rely upon a level of candor and trustworthiness from appointed lead counsel.

Similar notions of fairness and responsibility underlie a court's execution of "well-established class action principles and basic judicial standards of transparency and fairness" that require a court's scrutiny of the accuracy, fairness, and equitable implications of a proposed fee allocation among counsel -- a fundamental function that disclosure of the Chargois Arrangement would have permitted the Court to carry out in the *State Street* litigation. *See In re: High Sulfur Content Gasoline Products Liability Litigation*, 517 F.3d 220, 227 (5th Cir. 2008) (noting the need for sufficient procedures and oversight so as to determine the accuracy and reasonableness of a proposed fee allocation in a class action settlement for which district court had appointed fee committee to propose allocation affecting all other counsel); *see also*, *e.g.*, Rubenstein Dep., at pp. 35-54 (citing *In Re: High Sulfur* and discussing notions of transparency in disclosures amongst co-counsel in relation to fee allocation); *In re Nortel Networks Corp.*, 2002 WL 1492116, at *2 (S.D.N.Y. Feb. 4, 2002) ("the Court is aware of the importance of controlling attorneys' fees and the need to adopt appropriate procedures to that end"). As noted *supra*, while Labaton's failure to disclose the Chargois obligation directly to the Court prevented the Court from executing its gatekeeper role as a fiduciary to the class and from properly examining the equity of the fee allocation, the firm's concealment from co-counsel, despite its obligation of candor toward all parties and parties' counsel, further ensured that the Court would be constrained from doing so.

b. Interference with Co-Counsel's Duties to Class Members

Perhaps the most significant ramification of Labaton's non-disclosure (to ERISA Counsel) and limited disclosure (to Lieff and Thornton) is the preclusion of these

attorneys from fulfilling their own fiduciary duties to their individual clients and to absent class members. Courts have long recognized the existence of fiduciary duties (if not yet a full attorney-client relationship) owed by class counsel to the class prior to the point of class certification.[240] Beyond this, it is widely accepted that "once the court enters an order certifying a class, an attorney-client relationship arises between all members of the class and class counsel." *See Fulco*, 789 F. Supp. at 47, quoting *Bower*, 689 F.Supp. at 1033.[241] Customer Class and ERISA Counsel owed fiduciary duties to class members by the time of preliminary settlement approval in August 2016 or, at the latest, class certification and ultimate settlement approval. "It is well-settled law, regardless of jurisdiction, that attorneys owe their clients a fiduciary duty" which "includes undivided loyalty, candor, and provision of material information." *Huber v. Taylor*, 469 F.3d 67, 81 (3d Cir. 2006) (suit by putative class against class action plaintiffs' attorneys for breach of fiduciary duty and related counts, on basis of undisclosed conflict of interest and improper disclosure of full terms of settlement offers).

As previously noted, co-counsel in large class action litigation *share* responsibilities to the clients and the class. Here, the co-counsel firms relied heavily on

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[240] *See, e.g.*, *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."); *Schick v. Berg*, 2004 WL 856298, at *5 (S.D.N.Y. Apr. 20, 2004), *aff'd*, 430 F.3d 112 (2d Cir. 2005) ("[A]t least some fiduciary duties attach prior to class certification, at the time the class action is filed.").

[241] The precise contours of the relationship in the class action context differ in some respects from a traditional attorney-client relationship. S*ee In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 313 (3d Cir. 2005); *see also* Joy Dep., at pp. 110-14 ("Labaton had certain duties to the class as a whole, but they weren't a client like an individual client is.").

Labaton to enable them to effectively carry out their own duties to each of these groups. Whatever the allocation of duties and responsibilities between attorneys or firms involved in a co-counsel representation, each counsel's duty of loyalty to the client is, inherently, a non-delegable duty. *Id.* at 82, and n.18. Whatever its scope, class counsel owe a fiduciary duty to the class, which requires class counsel to "refrain from misconduct and prosecute the case with loyalty to the class." *In Re: Sw. Airlines Voucher Litig.*, 2016 WL 3418565, at *2 (N.D. Ill. June 22, 2016), *appeal dismissed sub nom. In re Sw. Airlines Voucher Litig.*, 2017 WL 5485463 (7th Cir. Feb. 2, 2017). To the extent that Labaton's incomplete disclosures, or complete nondisclosures, affected the ability of other firms to carry out their duties to the class, Labaton failed in its responsibility as Lead Counsel to act fairly and in the interests of all parties and all counsel, exacerbating the firm's failure to fulfill its own obligations to the class.

The significant and malignant impact of Labaton's nondisclosure can be seen in its intentional decision to not tell the ERISA attorneys about the Chargois Arrangement, in general, and the proposed payment of $4.1 million to Chargois. First and foremost, failure to share this information prevented the ERISA attorneys from disclosing the payment to their class representative clients and advising them about it. Lynn Sarko testified that, had he known about the Arrangement, he "absolutely" would have felt an obligation to disclose it to the ERISA class representatives and advise them about it, and would have felt that the arrangement could not have been carried out without their consent. Sarko 9/8/17 Dep., p. 91:4-15. [EX. 37]. Sarko also testified that, had he known of the Arrangement, he would not have agreed to file a joint fee petition because

he "would have had to get approval from the named plaintiffs who would not have agreed." *Id*., pp. 75:2-22.

Just a half-step removed in importance from this impact is that the nondisclosure to the ERISA attorneys ensured that the DOL was kept in the dark. As noted elsewhere, State Street was insistent upon a fully global settlement, a critical piece of which was DOL's agreement to the settlement. As all agree, Lynn Sarko, who had DOL's confidence, was the primary attorney negotiating with the Department. Sarko testified that had he been told of the proposed Chargois payment, he would have been obligated to tell the DOL about Chargois and his Arrangement with Labaton; that the DOL likely would have had questions about the Arrangement; and that the entire settlement may have "blown [] up" if those questions affected the DOL's approval, which was necessary for the global settlement. *Id*., pp. 76:14-22; 84:3-5.

Thus, the full impact of not telling the ERISA lawyers about Chargois is not theoretical or attenuated. This non-disclosure had a direct and profound impact upon other important actors in the class action.

c. Contractual Implications of Nondisclosure

Apart from principles of fairness and transparency that should govern conduct between co-counsel, courts have recognized that contract principles may also impose duties within a co-counsel relationship (frequently in the context of fee disputes).[242] *See*,

[242] For example, to succeed on a breach of contract claim, one must prove (1) that the parties reached a valid and binding agreement; (2) that one party breached the terms of the agreement; and (3) that breach caused the other party to suffer damages. *Michelson v. Digital Fin. Servs*., 167 F.3d 715, 720 (1st Cir. 1999).

e.g., *Sobran v. Millstein*, 148 F. Supp. 3d 71, 72 (D. Mass. 2015) (in dispute over division of fees in a large class action settlement, dismissing counts of breach of contract, breach of fiduciary duty and quantum meruit, but allowing promissory estoppel claim to advance); *Vita v. Berman, Devalerio & Pease, LLP*, 81 Mass. App. Ct. 748, 748–49 (2012) (affirming jury award for breach of contract claim stemming from an unpaid referral fee); *Marks v. Swartz*, 174 Ohio App. 3d 450, 460 (2007) (local counsel's breach of contract action against co-counsel); *Parker & Waichman v. Napoli*, 815 N.Y.S.2d 71, 74 (2006) (breach of contract related to fee splitting agreement).

Here, contract principles are most relevant to the enforceability, or voidability, of the fee-sharing agreement among Customer Class Counsel and the agreement between the Customer Class Counsel and ERISA Counsel. "The load-bearing element of a contract is the mutual assent of the parties to the essential terms of the agreement, the so-called meeting of the minds." *Enos v. Union Stone, Inc.*, 732 F.3d 45, 48 (1st Cir. 2013) (quotation omitted). Cognizant of the limitations of contract principles in this particular context -- outside a typical dispute between bargaining parties -- contract principles nevertheless further inform the Special Master's assessment of the equitable implications of the nondisclosure to co-counsel, and consideration of a court's fiduciary duty to safeguard class settlement funds and its equitable authority to modify an unfair and unreasonable fee allocation among class counsel.[243]

[243] While the Special Master recognizes that a contract is rendered void *ab initio* in limited circumstances, a court may, on equitable grounds, set aside a contract invalidated by omission. *See*, *e.g.*, *Cathcart v. Robinson*, 30 U.S. 264, 266 (1831) ("The difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific

i. Misrepresentations and Material Omissions

"A contract is voidable (and thus unenforceable) if 'a party's manifestation of assent is induced by either a fraudulent or material misrepresentation by the other party upon which the recipient is justified in relying.'" *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 20 (1st Cir. 2009), quoting *Restatement (Second) of Contracts*, § 164 (1979).[244] "Massachusetts law regarding fraud in the inducement follows the widely-accepted model set forth in [the *Restatement]." Nash v. Trustees of Boston Univ.*, 946 F.2d 960, 967 (1st Cir. 1991). To establish fraud in the inducement, and thereby be relieved of the effect of a contract, a party must establish the elements of common law deceit, which include "misrepresentation of a material fact, made to induce action, and reasonable reliance on the false statement to the detriment of the person relying." *Commerce Bank & Tr. Co. v. Hayeck*, 46 Mass. App. Ct. 687, 692 (1999), quoting *Hogan v. Riemer,* 35 Mass. App. Ct. 360, 365 (1993).

In considering the validity of the fee-sharing agreement between Customer Class Counsel and ERISA Counsel, the Special Master considers evidence of

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performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement; or that it is unconscientious or unreasonable; or that there has been concealment, misrepresentation or any unfairness; are enumerated among the causes which will induce the court to refuse its aid.").

[244] *See also Wamester v. Karl*, No. 13–P–389, 85 Mass. App. Ct. 1106 (March 14, 2014) ("To be sure, a contract can be avoided by showing it was procured by fraud."); *NPS, LLC v. Ambac Assur. Corp.*, 706 F. Supp. 2d 162, 169 (D. Mass. 2010) ("Massachusetts law follows the Restatement's model for fraud in the inducement: 'If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.'") (quoting *Nash v. Trustees of Boston Univ.,* 946 F.2d 960, 967 (1st Cir.1991). "In obedience to the demands of a larger public policy the law long ago abandoned the position that a contract must be held sacred regardless of the fraud of one of the parties in procuring it." *Bates v. Southgate*, 308 Mass. 170, 182 (1941).

misrepresentations actually made to ERISA Counsel such that the fee agreement could be subject to rescission. "Mere nondisclosure, absent a duty to speak such as with a misleading partial disclosure, generally will not support any cause of action for misrepresentation." *Davis v. Dawson, Inc.*, 15 F. Supp. 2d 64, 137 (D. Mass. 1998) (alterations and internal quotations omitted). However, "[a]lthough mere silence or nondisclosure does not constitute fraud in the absence of a duty to speak… silence may be actionable where the relationship of the parties creates a particular legal or equitable obligation to communicate all facts." *DeMarco v. Granite Sav. Bank*, 1993 Mass. App. Div. 122, *2 (Dist. Ct. 1993) (citations omitted).[245]

The existence of the Chargois Arrangement was undoubtedly information material to class members, upon which class members could base decisions to object to or opt out of the proposed settlement. But it was also material to Labaton's co-counsel in the litigation, both because this information would have enabled those firms to discharge

[245] Here, while the relationship between co-counsel falls short of a fiduciary one, Lead Counsel is held to a "demanding standard of trustworthiness" required in its relationship with co-counsel and the court, and co-counsel can reasonably expect appropriate candor and trustworthiness from lead-counsel. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 2008 WL 53278, at *1–2. Further illuminating expectations of trustworthiness in this context -- to the extent that a sufficiently important relationship of trust can be recognized between co-counsel -- are principles recognized in the *Restatement of Contracts* and *Restatement of Torts* suggesting that a material omission can equate with of a false assertion between certain parties in limited circumstances. "A person's nondisclosure of a fact known to him is equivalent to an assertion that the fact does not exist… where the other person is entitled to know the fact because of a relation of trust and confidence between them." *Restatement (Second) of Contracts* § 161(d) (1981). "Even where a party is not, strictly speaking, a fiduciary, he may stand in such a relation of trust and confidence to the other as to give the other the right to expect disclosure." *Id*., comment (f). "One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question. *Restatement (Second) of Torts* § 551(1) (1977). "One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated… matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Id*., subsection (2)(a).

their fiduciary duties toward the class and because it would have affected the negotiation of the fee-allocation agreements among counsel.

Here, it bears re-emphasizing that the Chargois payment grew out of a pre-existing obligation that was Labaton's alone, and that by satisfying this obligation from class funds, Labaton was effectively having the class and its co-counsel shoulder a share of its own separate obligation. This fact alone creates an enhanced duty upon Labaton not only to disclose the Chargois Arrangement and payment to co-counsel but to ensure its disclosure to the class, the client and the Court. This goes to the heart of Labaton's obligations as Lead Counsel.

Labaton was Lead Counsel, and other counsel could be expected to rely upon its attorneys to fully disclose all material facts necessary for co-counsel to make an informed decision on issues relating to the fee-allocation agreements. Though lacking a fiduciary relationship, the expectation of trust and confidence between co-counsel rendered the fee-allocation negotiations distinct from traditional arm's-length bargaining between contracting parties. The existence of the $4.1 million payment, based upon a pre-existing obligation to a lawyer who never appeared in the case, did no work on the case, and was hidden from the Court and all participants in the case, was a material fact that would clearly have informed ERISA Counsel's decision about the fee-allocation agreement. Labaton knew that ERISA Counsel was uninformed about the Chargois Arrangement, and Labaton was aware that the information would be material to ERISA Counsel even long after the initial fee-allocation agreement, as evidenced by Larry Sucharow's November 2016 email correspondence in which he ordered that two separate claw-back

letters be sent to class co-counsel and to ERISA Counsel, noting, "[i]n short, no reason for ERISA to see Damon's split. They only need to see their 10 percent and then split three ways." TLF-SST-012272 – 2274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller, Belfi).[246] [EX. 160].

Rendering the materiality of the Chargois payment to ERISA Counsel even clearer is the brute fact that Chargois' $4.1 million payment is more than any ERISA firm received -- and significantly more. The Keller Rohrback firm received total fees and expenses of $2,829,160.22, the Zuckerman Spaeder firm received total fees and expenses of $2,525,063.88, and the McTigue law firm received total fees and expenses of $2,536,569.99; other smaller firms received far less. That Chargois was receiving a payment in an amount of $1.2 to $1.6 million *more* than any of the primary ERISA firms makes the Chargois Arrangement a material fact. Lynn Sarko, Carl Karvitz and Brian McTigue each testified that, had they known of the Arrangement prior to signing the fee-allocation agreement in 2013, each of them would not have agreed to the sign the agreement as negotiated at that time. Sarko 9/8/17 Dep., pp.75:2-22, 78:19-79:4 [EX. 37]; McTigue 9/8/17 Dep. p. 21:15-24 [EX. 159]; Kravitz 9/11/17 Dep., pp. 83:3-20. [EX. 117]. Moreover, as late as June 2016, Labaton's Of Counsel, Garrett Bradley, who spearheaded Labaton's negotiation with Chargois concerning his fee percentage in the *State Street* case, ostensibly understood that the agreement with ERISA Counsel was by

[246] *See also* LBS039936 – 9937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois) (discussing fee allocation among customer class attorneys, ERISA attorneys and Damon Chargois, and noting that "[g]iven that [the Chargois percentage] is off the total number their [sic] is no need to add the ERISA counsel to this email chain.") [EX. 157].

no means a done deal. That the ERISA fee negotiation remained ongoing until the end of settlement discussions in the case underscores the continuing materiality to ERISA Counsel. *See* TLF-SST-060973 (6/21/16 Bradley email to Chargois regarding proposed 5% fee to Chargois, noting that "The fee we will apply for is $70,9000,000, This will be for Lief [*sic*], Thornton, Labaton, you and now three Erisa [*sic*] firms. We are attempting to hold the Erisa [*sic*] firms to 10% because that is what they agreed to several years ago, but the Erisa [*sic*] part of the settlement is now 20%. I think we can hold them to 10%..."). [EX. 260].

Beyond this, the incomplete disclosure to Lieff and Thornton was also material and impactful. The non-disclosure to Lieff, in particular, is significant. Bob Lieff and Dan Chiplock testified that they were led to believe that Chargois was performing some of the work and services local counsel routinely do, assisting the ATRS client locally in Arkansas. *See* Lieff 9/11/17 Dep., pp. 58-80 [EX. 139]; Chiplock 9/8/17 Dep., pp. 101-116. [EX. 41]. Bob Lieff in particular testified that had he known that Chargois actually did no work, and provided no value to the case, he would not have agreed to his firm sharing in the Chargois $4.1 million payment obligation. Lieff 9/11/17 Dep., p. 97:13-16. [EX. 139]. Lieff also testified that he would have encouraged Labaton to disclose the Chargois payment to the Court. *Id.*, p. 97:13-16. [EX. 139].

Supporting Lieff's testimony that he was misled is the fact that in all the emails between Labaton, Lieff, and Thornton, Chargois was always referred to as "local counsel" or "the local" or a similar variant. *See*, *e.g.*, LBS025771 (4/24/13 "Dublin email," in which Garrett Bradley referred to Chargois as "the local counsel who assists

Labaton in matters involving Arkansas Teachers Retirement System") [EX. 140]; TLF-SST-040617-0618 (8/6/15 Bradley email to Lieff and Thornton regarding *BONY Mellon* and *State Street* fee discussions, with reference to "arkansas local") [EX. 147]; TLF-SST-038574-8579 (8/28/15 Lieff email to Bradley and Thornton referring to Arkansas local counsel) [EX. 150]; TLF-SST-053117-3126 (8/28/15 Chiplock email to Sucharow, Bradley and Thornton regarding fee allocation among the firms, and referencing payments to ERISA counsel and "local Arkansas counsel" in relation to the distribution of Customer Class Counsel fees) [EX. 151]; LBS039936 – 9937 (7/8/16 G. Bradley email to Lieff, Thornton, Sucharow, Chiplock, Keller, Belfi, and Chargois referencing fee to "Damon Chargois, the local attorney in this matter who has played an important role"). [EX. 157].

It is significant that Labaton never corrected these characterizations. The mischaracterization, made in the context of persuading co-counsel to share Labaton's separate and independent $4.1 million obligation, clearly constitutes a materially misleading misrepresentation of the true and complete story behind the Chargois payment.[247]

The redress and remedies for Labaton's conduct vis-à-vis its various co-counsel will be discussed in the Recommendations section, *infra*. The duties owed between co-

[247] The situation with Thornton is more complex and nuanced. As noted, there is no evidence that Michael Thornton knew the complete story behind the Chargois payment, and he testified that he did not know. *See* Findings of Fact, § II(K)(5) *supra*. "Thornton's Knowledge of the Chargois Arrangement"). However, as noted elsewhere, the Special Master believes that Thornton's managing partner (and Labaton's Of Counsel) Garrett Bradley surely did know all about Chargois. We will not repeat here all of the reasons why the Special Master finds that Garrett Bradley was fully apprised of the Chargois Arrangement. Suffice it to say that Garrett Bradley's testimony that he believed Chargois was performing local counsel work on the case, *see id*., is simply not credible.

counsel in class action litigation, and the related and instructive contract and equitable principles, inform the Special Master's analysis of recommendations to the Court.

4. DUTIES TO THE COURT

The most troubling issue in this case is Labaton's failure to disclose to the Court the $4.1 million payment to Chargois. At the settlement approval stage, the Court stands as the final gatekeeper to protect the class, and in that role, is the fiduciary of the class. Class counsel must assist the Court in performing that obligation to the class by providing it with all the information necessary to discharge its fiduciary responsibilities. As Lead Counsel here, Labaton had a legal and ethical duty to provide the Court with all information it needed to make an informed decision as to the award of attorneys' fees out of the *State Street* settlement fund. This included disclosure of the identity of all attorneys -- including Damon Chargois -- who would be sharing in the award and what the share of each attorney would be.

Case law, much of which is quoted in greater detail by Professor Gillers (pp. 79-83) -- including cases from within the District of Massachusetts -- recognizes the Court's responsibility to protect the class and the class's interests, and the Court's reliance on counsel to be forthcoming with the information needed in order to do so. *See, e.g., In re Relafen Antitrust Litig.*, 360 F. Supp. 2d 166, 193 (D. Mass. 2005) ("We and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.") (quoting *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 279-80 (7th Cir. 2002) (Posner, J.)); *In re Lupron Marketing and Sales*

Practices Litig,, 228 F.R.D. 75, 93 (D. Mass. 2005) ("[T]he court has a fiduciary duty to absent members of the class in light of the potential for conflicts of interest among class representatives and class counsel and the absent members," citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods*., 55 F.3d at 805 ("Rule 23(e) imposes on the trial judge the duty of protecting absentees. . . .")); *In re Volkswagen and Audi Warranty Extension Litig.,* 89 F. Supp. 3d 155, 183 (D. Mass. 2015) ("While fee sharing agreements among counsel may be respected . . . [m]ore important than the terms of a private agreement are the actual contributions each firm made to the prosecution of th[e] case and the interests of the class." (citations omitted)); *see also In re Agent Orange Prod. Liab. Litig.,* 818 F.2d at 223 (rejecting authority that "allows counsel to divide the award among themselves in any manner they deem satisfactory under a private fee sharing agreement. Such a division overlooks the district court's role as protector of class interests under Fed. R. Civ. P. 23(e)… In addition, this approach overlooks the class attorneys' duty. . . to be sure that the court, in passing on [the] fee application, has all the facts" as well as their "fiduciary duty to the . . . class not to overreach" (quoting *Lewis v. Teleprompter Corp.,* 88 F.R.D. 11, 18 (S.D.N.Y. 1980) (internal citations omitted))).[248]

As a significant element in analyzing this section, it must be borne in mind that the obligation to Chargois was Labaton's and Labaton's alone, and the payment to him without disclosing it to the Court significantly and adversely impacted the Court's ability to protect the class from an enormous payment for which the class received no value and

[248] We agree with Professor Gillers that, in total, federal case law makes clear that counsel must be transparent in providing the court all available information when seeking a fee award in class action cases. *See* Gillers Supp. Report, p. 82. [EX. 233].

of which the class representatives were never informed. In a very real sense this created a potential conflict between Labaton and the class, a conflict the Court could not protect the class against because it was hidden from the Court.

As a significant element in analyzing this section, it must be borne in mind that the obligation to Chargois was Labaton's and Labaton's alone, and the payment to him without disclosing it to the Court significantly and adversely impacted the Court's ability to protect the class from an enormous payment for which the class received no value and of which the class representatives were never informed. In a very real sense this created a potential conflict between Labaton and the class, a conflict the Court could not protect the class against because it was hidden from the Court.

a. Rule 23 Requirements

We begin with the fact that full and accurate disclosure to the court is the underpinning of Fed. R. Civ. P. 23(e)'s requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement and any attendant fee petition under Fed. R. Civ. P. 23(e)(5) and (h)(2). As with the right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. *See* Rubenstein Report, p. 30. Unfortunately, by not disclosing to the Court that $4.1 million of the settlement funds would be paid to an attorney who did no work on the *State Street* case, Labaton deprived the Court information it needed to discharge its fiduciary obligations to protect the class's interests.

As indicated above, Professor William Rubenstein places the entire blame for the nondisclosure of the Chargois payment in this case upon the Court. He has opined that Rule 23(h), by its incorporation of the procedures for making a claim for attorneys' fees under Fed. R. Civ. P. 54, places the burden on the Court to order disclosure of a fee agreement or payment such as the $4.1 million payment to Chargois out of the class funds in this case, and, absent such a court order -- or the court specifically asking -- disclosure is not required:

> THE SPECIAL MASTER: [W]hat you're saying here again is that the burden is on the Court at the notice stage to make sure that fee-allocation agreements are in the class notice?
>
> THE WITNESS [Rubenstein]: I'm saying Rule 23 puts that burden on the Court, that's correct. I'm not saying it's the burden. I'm saying Rule 23 says that the burden's on the Court. . . .
>
> THE SPECIAL MASTER: And the obligation under Rule 23(h)(2) that class members be given sufficient information to do so, meaning to object to a fee petition, is an obligation -- as to fee agreements and allocation agreements that is on the Court? . . .
>
> THE WITNESS: Yes. . . .
>
> THE SPECIAL MASTER: And the obligation to provide sufficient information for the class means that as to fee-allocation agreements the Court has to ask? Yes?
>
> THE WITNESS: Yes. That's what Rule 23 says. That's correct. . . .

Rubenstein Dep., pp. 121:6 – 122:22.[249]

However, separate and apart from Rule 23(h) and its incorporation of the Rule 54 procedures for making a claim for attorneys' fees, Fed. R. Civ. P. 23(e)(3) requires that

[249] Professor Rubenstein's deposition testimony regarding it being the Court's obligation to inquire about and order disclosure of any fee-allocation agreements is further detailed in discussion, *supra.*

"parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money that they may have received elsewhere. *Manual of Complex Litigation*, § 21.631. [EX. 248].

In his treatise, Professor Rubenstein himself recognized counsel's independent obligation of disclosure under Rule 23(e)(3). Section 15.12 of *Rubenstein and Newberg on Class Actions*, entitled "Fee procedures at a class action's conclusion -- Disclosure of fee-related agreements requirement," first speaks to the Rule 23(h) and Rule 54(d)(2)(B) requirement to disclose any agreements as to fees when so ordered by the court. The Section goes on to recognize, however:

> [I]n addition to Rule 54's disclosure requirements, Rule 23(e), governing class action settlement -- not fee -- approval, states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal." This generally references the settlement agreement itself, but, *given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself -- such as any agreements about fees -- may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests. There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class. . . . Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.* [250]

[250] Professor Rubenstein's deposition testimony and Report are curious in light of the position he has taken in his treatise, particularly as emphasized in this quote. Beyond this, at his deposition, Professor Rubenstein continually professed to be a "strong advocate" for transparency to the class and the Court. *See e.g.*, Rubenstein Dep., pp. 35:19 – 36 :4; 169:20 – 170:1; 179:8-9. [EX. 235]. These protestations, however, ring hollow given the positions he has taken in this case, particularly his position that the burden of ensuring disclosure to the class is the Court's and the Court's alone.

5 *Newberg on Class Actions*, § 15.12 (5th ed.) (footnotes omitted; emphasis added). [EX. 236].

As Professor Rubenstein observed, the broad language of Rule 23(e)(3) itself requires disclosure to the Court of "*any* agreement made in connection with the [settlement] proposal." Certainly, the agreement to pay Chargois $4.1 million was an "agreement made in connection with the proposal," and Rule 23(e)(3) required that the agreement be disclosed to the Court. While Rubenstein notes that "courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests,"[251] he acknowledges that there may be cases where agreements would impact the class's interests, in which case disclosure would be required. *Newberg*, § 15.12. [EX. 236]. Labaton's obligation -- which pre-existed the case and was Labaton's alone -- to pay Chargois $4.1 million out of the settlement fund for contributing no value to the class is one such agreement impacting the class's interests, as it "allocates money that the class members may have received elsewhere," *i.e.*, to Damon Chargois. *See Manual on Complex Litigation*, § 21.631. [EX. 248]. Indeed, the payment to Chargois not only

[251] By way of example, Rubenstein cites *Hartless v. Clorox Co.*, 273 F.R.D. 630 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012). In *Hartless*, the parties identified the agreement for attorneys' fees and the defendant, Clorox, agreed not to oppose a request for attorneys' fees and costs not to exceed $2.25 million. The court found that "the agreement as to the amount of attorneys' fees could affect the class members [but] [t]he allocation of those fees amongst class counsel does not affect the monetary benefit to class members." *Id.*, p. 946.

allocates money elsewhere, it allocates its own private obligation elsewhere -- to the class (and co-counsel).

Here we have an *un*disclosed agreement to pay $4.1 million out of the settlement funds -- funds that could otherwise be allocated to the class members -- to an attorney who did no work on the case whatsoever. In order to assist the Court in performing its fiduciary function to protect the interests of the class, Labaton was obligated to disclose to the Court its pre-existing agreement to pay Chargois this substantial amount of the settlement fund.[252] Labaton's failure to do so was in derogation of the duties imposed upon it by Fed. R. Civ. P. 23(e)(3).

b. Failure to Disclose the Chargois Agreement in the Fee Petition

i. Sucharow's and Labaton's Obligations Under Fed. R. Civ. P. 11

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[252] On April 26, 2018, the Supreme Court adopted amendments to Fed. R. Civ. P. 23(e), to take effect December 1, 2018. Among the amendments is a new subsection 2 which specifically requires the court, in determining whether a proposed settlement is fair, reasonable, and adequate to take into account "any agreement required to be identified under Rule 23(e)(3)." The amended Rule 23(e)(2) provides:

> (2) Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:
>
> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> *(iv) any agreement required to be identified under Rule 23(e)(3);* and
> (D) the proposal treats class members equitably relative to each other.

See 2018 US Order 0020.

That the Supreme Court saw fit to make it explicit that courts are to consider all agreements made in connection with a proposed settlement reaffirms that the Chargois Agreement should have been disclosed to the court in this case.

As part of its Lead Counsel obligation in this case, Labaton submitted to the Court the "Declaration of Lawrence A. Sucharow in Support of Plaintiff's Assented-To Motion for Final Approval of the Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for Award of Attorney Fees" (the "Omnibus Declaration"). *See* Dkt. No 104. [EX. 3]. In two separate places in the Omnibus Declaration, at footnotes 2 and 6, Sucharow purports to identify all "Plaintiffs' Counsel." *Id*. These footnotes identify all attorneys receiving fees from class funds – except one: Chargois.

In footnote 2, Sucharow identifies as "Plaintiffs' Counsel" his own firm, Labaton Sucharow, and "the Thornton Law Firm LLP ('TLF'), Lieff Cabraser Heimann & Bernstein LLP ('Lieff Cabraser'), Keller Rohrback L.L.P. ('Keller Rohrback'), McTigue Law LLP ('McTigue Law'), and Zuckerman Spaeder LLP ('Zuckerman Spaeder')," *Id.*, note 2, p. 1. In footnote 6, Sucharow identifies Labaton Sucharow, Thornton, Lieff Cabraser, Keller Rohrback, McTigue Law, Zuckerman Spaeder, and Beins, Axelrod, P.C. (which partnered with McTigue Law and Zuckerman Spaeder in representing the *Henriquez* plaintiffs); Richardson, Patrick, Westbrook & Brickman, LLC (former co-counsel for the *Henriquez* plaintiffs); and Feinberg, Campbell & Zack, P.C. (local counsel for McTigue Law in the *Henriquez* action) as Plaintiffs' Counsel who submitted individual fee petitions. *Id*., note 6, p. 41.[253] Within Labaton's lodestar report attached as

[253] In Lynn Sarko's Declaration in support of Keller Rohrback's individual fee petition, Sarko identified fees to be paid to Theodore Hess-Mahan of the Massachusetts firm of Hutchings Barsamian Mendelcorn LLP, which served as local counsel for Keller Rohrback in the *Andover* matter. *See* Dkt. No. 104-18. Because Hess-Mahan's lodestar and expenses were not significant, Labaton requested that Hess-Mahan not submit an individual fee declaration. *See* KR00001192-1198 ("8/31/16 Zeiss email to Keller Rohrback). [EX. 97]. Sarko complied with that request and

Exhibit A to Labaton's individual fee declaration at Dkt. No. 104-15, Sucharow further identifies fees paid to a non-Labaton "of counsel" attorney, P. Scarlato (Paul Scarlato of Goldman Scarlato, a Pennsylvania law firm).[254]

On the surface, these Declaration statements could reasonably lead the Court to believe that these were all the lawyers being paid from class funds. However, by a calculated omission, only Chargois, who was also paid from class funds, is not mentioned anywhere in Sucharow's Omnibus Declaration or in Labaton's individual fee declaration -- which was also signed by Lawrence Sucharow -- or on Labaton's lodestar reports annexed thereto.

This omission is striking. It is true, strictly speaking, that Chargois is not "Plaintiffs' Counsel." But this description seems an artifice that, while technically accurate, created a subterfuge to camouflage the fact that Chargois received $4.1 million from class funds and that this payment was not being disclosed.

Sucharow admitted that he knew of Chargois and Labaton's fee arrangement, and that Chargois would receive a portion of the fees in the *State Street* case *before* he filed the *State Street* fee declarations. The Omnibus Declaration, along with all the individual fee declarations appended thereto, was filed on September 15, 2016. Sucharow testified:

> Q: And when did you become aware that Damon Chargois had as a referring attorney -- a significant stake in this case?

included Hess-Mahan's fees within Keller Rohrback's lodestar. *See* Keller Rohrback's 10/6/17 Responses to Special Master's Second Supplemental Interrogatories, Response No. 4.

[254] *See* Zeiss 9/14/17 Dep., p. 43:3-4 [EX. 115]; Politano 6/14/17 Dep., pp. 69:25 – 70:12 [EX. 98]; Keller 10/25/17 Dep., p. 466:9-10. [EX. 83].

> A [by Sucharow]: At some point -- I'm trying to think what year; 2015 -- I happened to be speaking with Garrett, and he mentioned that there was an obligation that had to be dealt with, and Eric confirmed that to me. So I knew there was an obligation. It was not described to me in any further detail.
>
> Q: And by obligation you mean that he was owed a piece of any settlement or --
>
> A: No.
>
> Q: -- judgment?
>
> A: A piece of our attorneys' fees.

Sucharow 9/1/17 Dep., p. 18:17 – 19:6. [EX. 38].

Sucharow knew of the obligation to pay Chargois a portion of the *State Street* fee award more than a year before he filed the Fee Petition. Yet Chargois is conspicuously not even mentioned in the Sucharow's Omnibus Declaration, Labaton's individual fee declaration, or anywhere else in the Fee Petition.

Sucharow further admitted that he knew or assumed that Chargois did no work on the case that would support a payment of a portion of the attorneys' fees award to him:

> Q: It's fair to say though, Larry, that Chargois other than that original referral played absolutely no role in this case?
>
> A: That would be an assumption I would make. I only saw what I saw…. No application was submitted for time and work on the case. So you can draw a conclusion from that.
>
> And I never called upon him to do any work when I was -- I think I described myself as the lead negotiator and lead strategist. . . .
>
> Q: He never entered an appearance in this case, correct?
>
> A: Matter of record. I would doubt it.

Id., pp. 86:15 – 87:6.

Labaton contends that the Court had no interest in the $4.1 million Chargois payment because Customer Class Counsel was paying it out of their own fee award, so there was no need to disclose it. This argument is legally and factually wrong. Labaton's and the other Customer Class Counsel's fee did not, and would not, exist unless and until the Court awarded it. Labaton itself recognized as much in the Notice. The Notice states, "Lead Counsel *will apply* to the Court for an order awarding attorneys' fees…." Dkt. No. 95-3, p. 4. [EX. 81]. *See also* page 9 of the Notice ("*If* the Court awards fees" at a particular rate….) (emphasis added). *Id*.

In deciding the amount of fees to award class counsel -- and to whom to award it -- the Court, as a fiduciary for the class, including unnamed class members, needed *first* to know -- and Labaton had a duty to tell it -- who would be participating in any fee the Court in its discretion might award from the class recovery, and the basis for the claim. By not disclosing the intended payment of $4.1 million to Chargois, Labaton kept the Court in the dark and denied it the very information it needed in order to decide how much of the settlement funds should go to counsel, and which counsel, and how much should go to the class. As Professor Gillers observed, "Quite simply, until the Court made that decision, *there was no fee to divide*." Gillers Supp. Report, p. 97. [EX. 233]. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the recovery to Chargois, who never appeared, did no work, and made no contribution whatsoever to the success of the *State Street* litigation, and instead to direct that the money intended for Chargois should instead go to the class. The

Court, however, never had an opportunity to make that decision because of the material omission of Chargois from Sucharow's Declaration.

1. Omission of a Material Fact is Sanctionable under Fed. R. Civ. P. 11.

Rule 11 applies both to disclosures and omissions. *See In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988) (cautioning that the omission of facts is "highly relevant to an accurate characterization of the facts stated" and can be "just as misleading, sometimes more misleading, than an absolutely false representation."); *see also Gurman v. Metro Housing and Redevelopment Auth.,* 842 F. Supp. 2d 1151, 1154 (D. Minn. 2011) ("[A]s required by Rule 11(b)(3), plaintiffs' factual contentions must 'have evidentiary support' and must not be misleading by omission.") "'[O]nly those factual omissions that are material' ... may warrant Rule 11 sanctions." *Campmor, Inc. v. Brulant, LLC*, Civ. No. 2:09-cv-05465 (WHW) (CLW), 2014 WL 5392036, at *7 (D.N.J. Oct. 21, 2014) (quoting *In re Kouterick*, 167 B.R. 353, 364 (Bankr. D.N.J. 1994)). The intentional omission of material facts in a pleading constitutes a falsehood and may result in the imposition of sanctions under Rule 11. *Lamon v. Armheign,* No. 1:12–cv–00296–AWI–GSA–PC, 2014 WL 3940286, at *6, n.1 (E.D. Cal. August 12, 2014).

Rule 11(b)(3) required that before submitting his Declaration, Sucharow have conducted "an inquiry reasonable under the circumstances" to ascertain that all factual contentions contained therein had evidentiary support and were not misleading by omission. Here, Sucharow's Declaration could reasonably have led the Court to believe that all the attorneys who would be sharing in the *State Street* fee award were identified

therein. Damon Chargois and his firm, Chargois & Herron, are not identified in the Declaration.

As noted *supra*, whether a litigant breaches his or her duty under Rule 11 to conduct a "reasonable inquiry" into the facts or the law depends on the objective reasonableness of the litigant's conduct under the totality of the circumstances. *See Aronson*, 972 F. Supp. 2d at 139. Several considerations for courts to consider are delineated in the Advisory Committee Notes to the 1993 Amendment to Rule 11. The Special Master finds that several of these considerations weigh in favor of finding Sucharow's conduct sanctionable.

The factors delineated in the Advisory Committee Notes include: "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; and whether the responsible person is trained in the law." Fed. R. Civ. P. 11, Advisory Committee Notes, 1993 Amendment.

Courts have also examined factors to be considered, including "the complexity of the subject matter, the party's familiarity with it, the time available for inquiry, and the ease (or difficulty) of access to the requisite information." *CQ Int'l Co.*, 659 F.3d at 62–63 (quoting *Navarro–Ayala*, 968 F.2d at 1425).

Sucharow admitted that he knew about Chargois and his arrangement to share in the fees to be awarded in the *State Street* case a year before he submitted his Declaration.

A reading of his Declaration before signing it would have disclosed to Sucharow that there was no mention of Chargois anywhere in it. Granted, Sucharow's Declaration was lengthy and covered numerous issues. But the information as to which firms were sharing in the fee award was readily accessible to him, and the completeness of his listing of firms sharing in the *State Street* fee award was readily discernable.

While the evidence here shows that Sucharow did not draft the declaration -- Labaton's Settlement Counsel, Nicole Zeiss, and Chief Litigator, David Goldsmith, did, *see* Zeiss 6/14/17 Dep., pp. 15:25 – 16:6 [EX. 79] -- Sucharow admitted, "I was presented with drafts [of the declaration], I reviewed and made corrections where I thought corrections were appropriate, and then executed it." Sucharow 6/14/17 Dep., p. 45:2-5. [EX. 16]. Mr. Sucharow is trained in the law and well versed in federal practice and hence should be well aware of his Rule 11 obligations.

Also weighing in favor of finding Sucharow's conduct sanctionable is that the nondisclosure of Chargois in Sucharow's Declaration is a part of a pattern of activity to keep Chargois' identity and his fee arrangement with Labaton concealed from all participants in the *State Street* case, including the Court. Sucharow himself actively engaged in this pattern of concealment by intentionally hiding Chargois' identity and his sharing of the *State Street* fee award from ERISA counsel -- Sucharow, in fact, personally directed that a separate claw-back letter be sent to Chargois (rather than copying him along with all the other *State Street* counsel) because there was "no reason for ERISA to see Damon's split." TLF-SST-012272-12274 (Sucharow response to G. Bradley email

regarding proposed claw-back letter) [EX. 160]; *see also* LBS039936-39937 (Sucharow email to Goldsmith, G. Bradley, Keller, and Belfi). [EX. 157].

Beyond this, Labaton did not disclose payments to Chargois to courts in eight other cases. This is similarly indicative of a pattern of material omissions.[255]

For the foregoing reasons, the Special Master concludes that the nondisclosure of the payment to Chargois was a material and intentional omission from Sucharow's Declaration.

However, whether to impose sanctions for the apparent violation of Rule 11 gives the Special Master pause because there is no First Circuit case, either appellate or district, holding that a material omission warrants the imposition of Rule 11 sanctions. Furthermore, while the Special Master believes that Sucharow's firm, Labaton Sucharow, violated Fed. R. Civ. P. 23(e)(3) by failing to disclose the Chargois agreement to the Court during the settlement and fee-petition process, he is cognizant that courts generally do not read Rule 23(e)(3)'s disclosure requirement as requiring disclosure of fee agreements among counsel, and we have found no First Circuit cases squarely holding that disclosure is required under that Rule.[256]

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[255] In these eight other cases, Labaton was either lead or co-lead counsel and ATRS was lead or co-lead plaintiff. Chargois was not disclosed in any of these cases. Although Sucharow did not file declarations in any of these cases, this nonetheless shows a pattern of nondisclosure on the part of Labaton.

[256] On May 2, 2018, Labaton submitted to the Special Master a "Memorandum of Labaton Sucharow LLP Regarding Rule 11," in which Labaton argues that because it acted in accordance with the directives of Fed. R. Civ. P. 23(h) and 54(d)(2), which do not require disclosure of fee agreements absent an order of the Court, the Special Master cannot find that the nondisclosure to the Court of the Chargois Arrangement violated Rule 11. [EX. 262]. Labaton posits that if complying with Rules 23(h) and 54(d)(2) simultaneously constitutes a nondisclosure that violates Rule 11, "the Federal Rules of Civil Procedure are internally inconsistent and directly contradict each other." 5/2/18 Memorandum, p. 8. [EX. 262]. Labaton, however, does not mention, let alone discuss in its Memorandum, the separate and independent obligation imposed on Labaton by Rule 23(e)(3) to "file a statement identifying any agreement made in connection with the [settlement] proposal." It is in the context of this separate

For these reasons, the Special Master believes that, although the omission of the $4.1 million payment from the Declaration is both material and intentional, it presents a close case as to whether it merits Rule 11 sanctions. On balance, the imposition of Rule 11 sanctions, although certainly supportable, is unnecessary in view of the finding below of violations of the Rules of Professional Conduct which are sufficient to address the conduct here.

ii. Violation of Mass. R. Prof. C. 3.3

Separate and apart from any of the imperatives of the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct required disclosure of the Chargois Arrangement to the Court. Mass. R. Prof. C. 3.3 imposes upon attorneys practicing in Massachusetts a "duty of candor toward the tribunal." Rule 3.3(a) provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

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obligation the Special Master finds a material omission in the Sucharow Declaration. However, as noted, the Special Master acknowledges that the imposition of Rule 11 sanctions for this material omission presents a close question and one on which the First Circuit has not spoken. Accordingly, the Special Master is not recommending Rule 11 sanctions. Therefore, it need not further address the eleventh-hour arguments raised in Labaton's May 2, 2018 Memorandum.

Mass. R. Prof. C. 3.3(a).

Comment 3 to Rule 3.3 makes clear that an attorney's failure to make a disclosure in an affidavit or in open court can be the equivalent of a misrepresentation within the purview of Rule 3.3(a). *Cf*., Mass. R. Prof. C. 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving… misrepresentation").

As Professor Gillers points out, several decisions of the Massachusetts State Bar Disciplinary Board further make clear that a true statement can violate these rules through omission. *See e.g., In re O'Toole*, 2015 WL 9309021, at *5 (Mass. St. Disp. Bd. 2015) ("'[H]alf-truths may be actionable as whole lies.'. . . Statements that are 'technically accurate' or 'literally true,' but nevertheless are 'clearly intended to mislead' or 'beg[] [a] false inference' amount, in appropriate cases to false statements within the meaning of Rules 3.3(a)(1) and 4.1(a)"); *In the Matter of An Attorney*, 2007 WL 4284758, at *4 (Mass. St. Disp. Bd. 2007) ("It is not a defense to these charges that the individual statements made in the letter could be read as literally true. Literal truth may be a defense to a criminal charge of perjury, [b]ut Rule 8.4(c) prohibits more than outright perjury") (citations and some internal punctuation omitted); *see also Matter of Harlow*, 20 Mass. Att'y Disc. R. 212, 216-218 (2004) (misleading partial disclosure violated Rule 8.4(c)).

Compliance with Rules 3.3(a) and 8.4(c) required Sucharow to disclose Chargois and his fee arrangement with Labaton in his Omnibus Declaration and/or his "small fee" declaration in support of the *State Street* fee petition. As noted, that information was highly relevant to the Court's exercise of its fiduciary duty to protect the class because

the Court could find that the class had no interest in paying Chargois for his introduction of Labaton to ATRS years before the *State Street* litigation even commenced. In fact, as also noted, the Court may have found this an inherent conflict. Given these considerations, the court may well have decided that, given the size of Chargois' share of the fees, the $4.1 million should be in whole or in part redirected to the class.

That Sucharow had a duty to disclose the Chargois Arrangement to the Court is further made clear by Comment 14A to Rule 3.3, which provides:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit . . . the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Mass. R. Prof. C. 3.3, cmt. [14A].

Rule 3.3(d) provides:

> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Mass. R. Prof. C. 3.3(d).[257]

[257] Labaton and its expert, Professor Peter Joy, contend that Comment 14A and Rule 3.3(d) do not apply here because the fee petition was not presented jointly by true adversaries, i.e., the Plaintiff class and the Defendant, State Street; it was only presented by the various members of the Plaintiff class. *See* Joy 4/3/18 Dep., pp. 187:19 – 188:20 [EX. 227]; 4/13/18 Oral Argument Tr., pp. 187:19 – 188:20. [EX. 162]. Professor Gillers maintains that at the fee determination stage, the interests of class counsel and the class are adverse. The fee will come out of the class recovery. Consequently, although class counsel remains counsel for the certified class, with the fiduciary duties that lawyers owe clients, they are understood to be advocating their own interests, not the class's interests. Since the class interests are not represented when lawyers petition for a fee, the proceeding is properly understood to be *ex parte*. *See* Gillers Supp. Report, p. 91. [EX. 233]. This is particularly true here, given the aforementioned potential for conflict between the class and Labaton and the underlying factors.

In any event, there *is* evidence indicating that lawyers viewed this as a non-adversarial, *ex parte* proceeding. In an email exchange between Garrett Bradley, Lawrence Sucharow and David Goldsmith dated August 17, 2016, Customer Class Counsel discussed Bill Paine's (State Street's counsel's) support of the fee petition. The topic arose out of a discussion about the appropriate time to file a different lawsuit on behalf of a different plaintiff (Swift) against State Street. The concern in filing the Swift litigation was that it might prompt Bill Paine not to support the Customer Class's fee request at the final approval hearing. In that email exchange, counsel

As Professor Gillers observed, Comment 14[A] "recognizes that when there is no adverse party, the Court is denied the benefit of an adversary proceeding. There is no opponent who can bring to the Court's attention facts or legal authorities that challenge the contentions or citations of the lawyer appearing before the court." Gillers Supp. Report, p. 89. [EX. 233]. Hence, it is incumbent on the lawyer, given the duty of candor owed to the tribunal, to bring all facts, including adverse facts, to the Court's attention.

Sucharow violated these Rules of Professional Conduct by failing to disclose the Chargois Arrangement in his Omnibus Declaration and small fee declaration in support of the Fee Petition. By not disclosing the intended payment of $4.1 million to Chargois, the Court was denied information it needed in order to decide how much of the settlement funds should go to counsel, and which counsel, and how much should go to the class. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the recovery to Chargois, who never appeared, did no work, and made no contribution whatsoever to the success of the *State Street* litigation, and instead to direct that the money intended for Chargois should go to the class. But the Court was never afforded an opportunity to make any such decision because of Sucharow's failure to disclose the payment to Chargois.

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discussed the possibility of Paine filing an affidavit in support of the *State Street* Fee Petition. Goldsmith expressed concern that Paine filing an affidavit stating State Street's approval of the fee request "could draw a big objection and suggest collusion," and it could draw the attention of Judge Wolf who had specifically noted his concern about the adversary system breaking down in the fee context at the preliminary approval hearing. TLF-SST-032617-2618 (8/17/16 email exchange between Garrett Bradley, David Goldsmith, Michael Sucharow, and others at the Thornton and Labaton firms). [EX. 203].

Moreover, as Professor Gillers notes, this is not a situation where disclosure to the Court would have harmed a client or waived a privilege. If it were, a lawyer might sometimes be able credibly to resolve real doubts as to disclosure in favor of the client. Here, "disclosure could only *benefit* the client, the class, by giving the Court (and the class members) the opportunity to consider the Chargois Arrangement. Indeed, it is hard to understand what countervailing interests could have justified nondisclosure. To whom did Labaton owe a competing duty not to disclose?" Gillers Supp. Report, p. 88. [EX. 233].

For all of these reasons, the Special Master concludes that Sucharow deliberately concealed the Chargois Arrangement from the Court and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class. Sucharow's concealment of this very relevant information violated Massachusetts Rule of Professional Conduct 3.3.

iii. Violation of the General Duty of Candor to the Court

As Professor Gillers notes, in arguing that Rules 23 and 54 were the sole sources of its duty to the Court and that Comment 14A does not literally apply, Labaton subordinates any duty its lawyers may have had as officers of the Court. While "the phrase 'candor to the Court' is not an unbounded source of duty, entirely untethered to rules, custom, or case law. . . the word 'candor' should at least guide a lawyer's understanding of his or her duties as officers of the court." Gillers' Supp. Report, p. 88. [EX. 233]. This broad duty of candor was recognized by the First Circuit in *Pearson v. First NH Mtg. Corp.*, 200 F.3d 30, 38 (1st Cir. 1999). In addition to finding that the

attorney in that case violated New Hampshire's version of Rule 3.3(a)(1), the *Pearson* court found he also violated his general duty of candor to the court that exists in connection with an attorney's role as an officer of the court:

> Here, Attorney Gannon made an affirmative misrepresentation to the court, which did not comport with his duty of candor. *See*, *e.g.,* NHRPC 3.3(a)(1), comment ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."); *In re Tri–Cran,* 98 B.R. at 616 ("'Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.'") (citation omitted); *cf. Burns v. Windsor Ins. Co.,* 31 F.3d 1092, 1095 (11th Cir.1994) ("Every lawyer is an officer of the court ... [and] he always has a duty of candor to the tribunal"; *United States v. Shaffer Equip. Co.,* 11 F.3d 450, 457 (4th Cir.1993) ("[A] general duty of candor to the court exists in connection with an attorney's role as an officer of the court"); *cf. also Erickson v. Newmar Corp.,* 87 F.3d 298, 303 (9th Cir.1996) ("[I]t is th[e] court which is authorized to supervise the conduct of the members of its bar ... [and has] a responsibility to maintain public confidence in the legal profession").

200 F.3d at 38.

As indicated, *Pearson* cites, among other cases, the Fourth Circuit's decision in *Shaffer Equipment* to recognize a "general duty of candor to the court." In *Schaffer,* the government failed to disclose false testimony at the deposition of its expert witness in a civil environmental case, and then moved for summary judgment without relying on his opinion. The government claimed that it had not violated the terms of West Virginia's Rule 3.3. The District Court dismissed the government's case because of its nondisclosure, citing both Rule 3.3 and the general duty of candor to the Court. The government appealed. The Fourth Circuit wrote that the professional conduct rules are not the sole source of a lawyer's duty of candor:

> It appears that the district court, in finding that the government's attorneys violated a duty of candor to the court, applied the general duty of candor imposed

> on all attorneys as officers of the court, as well as the duty of candor defined by Rule 3.3. Although the court referred to Rule 3.3, it also described the duty of candor more broadly as that duty attendant to the attorney's role as an officer of the court with a "continuing duty to inform the Court of any development which may conceivably affect the outcome of litigation." It concluded, "Thus, attorneys are expected to bring directly before the Court all those conditions and circumstances which are relevant in a given case." In its brief, the government did not address the existence, nature, and scope of any general duty of candor and whether its attorneys violated that duty. Nevertheless, we are confident that a general duty of candor to the court exists in connection with an attorney's role as an officer of the court.
>
> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions -- all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent. (internal citations omitted.)[258]

United States v. Shaffer Equip. Co., 11 F.3d 450, 457 (4th Cir. 1993).

As Professor Gillers observed, these cases establish that lawyers have a duty of candor to the court that goes beyond the text of Rule 3.3. Gillers Supp. Report, p. 92. The Special Master agrees. Further, it is not only Mr. Sucharow that owed a duty of candor to the Court. Rather, all other Class Counsel who knew about Labaton's agreement to pay Damon Chargois $4.1 million out of class funds for doing no work on

[258] Further distinguishing duties under Rule 3.3 from the duty of candor, the *Shaffer* court wrote: "While Rule 3.3 articulates the duty of candor to the tribunal as a necessary protection of the decision-making process, and Rule 3.4 articulates an analogous duty to opposing lawyers, neither of these rules nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process." *Shaffer Equipment*, 11 F.3d at 458 (internal citation omitted).

the *State Street* case had a duty to disclose that arrangement to the Court to ensure that the Court met its fiduciary obligations to the class.

At the November 2, 2016 hearing on the Motion for Final Approval of Settlement and Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Service Awards, David Goldsmith of Labaton, accompanied by Nicole Zeiss, Labaton's Settlement Counsel, represented the "plaintiffs and the settlement class." 11/2/16 Hearing Tr., Dkt. # 114, pp. 3:7-9, 10-11. [EX. 78]. Goldsmith argued the motions before Judge Wolf. Dan Chiplock of Lieff Cabraser and Carl Kravitz of Zuckerman Spaeder also attended the hearing. *See id*., pp. 2-3. Garrett Bradley and Michael Thornton of Thornton also were in attendance. *See* G. Bradley 9/14/17 Dep., pp. 152:19 – 153:11.

The hearing presented another opportunity to inform the Court of the intended Chargois payment. Unfortunately, that opportunity was not taken. At the conclusion of the hearing, stating that he was "relying heavily on the submissions and what's been said today," Judge Wolf approved the $300 million gross settlement and approved a 25% award of attorneys' fees in the amount of $74,541,250.00 plus expenses in the amount of $1,257,699.94. *Id*. p. 35:7-8. But as indicated above, the written submissions and what was said by Goldsmith at the hearing did not inform the Court of all material facts needed to make a fully informed decision.

Goldsmith testified he personally did not learn of his firm's fee arrangement with Chargois until November 21, 2016 – more than two weeks after the Final Approval Hearing. *See* Goldsmith 9/20/17 Dep., pp. 108:24 – 109:3. [EX. 42]. No evidence was

presented that would discredit Goldsmith on this. Due to the compartmentalization of its practice, knowledge of the Chargois Arrangement within the Labaton firm was largely limited to Sucharow and the firm's "relationship partners," Eric Belfi and Christopher Keller; Goldsmith, who was not a "relationship partner" but rather a litigator, was not informed about Chargois or the Chargois Arrangement. Nor did Nicole Zeiss, the settlement attorney from Labaton who accompanied Goldsmith at the hearing, have information concerning the Chargois Arrangement. Zeiss 9/14/17 Dep., pp. 19:17-22; 25:24 – 26:6. [EX. 115].

Carl Kravitz, one of the ERISA Counsel, attended the hearing but, as discussed in the previous section, did not know about Chargois. Dan Chiplock of Lieff Cabraser knew of the Chargois Arrangement but was led to believe that Chargois served as "local counsel," not that he was being paid for doing no work on the case.[259]

For all the foregoing reasons, the Special Master concludes that Labaton, through Sucharow, intentionally concealed the $4.1 million Chargois Arrangement from the Court and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function.

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[259] The Special Master has found that Garrett Bradley of the Thornton firm, who attended the Final Settlement and Fee Approval Hearing, did know the full Chargois story. The Special Master does not credit Bradley's testimony to the contrary on this point, for all of the reasons set forth, *supra*. (See discussion of Garrett Bradley's knowledge in the Findings of Fact, § II(K)(5) and Conclusions of Law, § III(C), *supra*. He, like all the other counsel, was provided with copies of Sucharow's Omnibus Declaration and all the other small fee declarations and exhibits, and should have known upon reading it that the payment of $4.1 million to Chargois was not mentioned in any of the fee petition documents. While certainly the obligation to disclose the Chargois Arrangement fell primarily upon Labaton, the opportunity was presented for Bradley, who at this time was also Of Counsel to Labaton, to exercise his duty of candor as an officer of the Court to bring this omission to the Court's attention, but he did not do so. However, it seems somewhat of a stretch to hold Bradley responsible for violating a duty of candor to the Court for not speaking up about an omission in another lawyer's declaration.

The remedies for this conduct are addressed in the Recommendations section below.

IV. SPECIAL MASTER'S RECOMMENDATIONS

Introduction

Beyond the investigation and analysis of the myriad irregularities in the attorneys' fees petitions and the fee approval process outlined in the previous sections, the most challenging yet important aspect of this assignment has been to determine for recommendation to the Court appropriate and proportionate remedies and sanctions that fairly but adequately balance the interests of the class, the law firms, the legal profession, the public and the institutional needs of the Judiciary to enable judges to perform their critical fiduciary obligations in class actions. Arriving at appropriate redress is not a simple or straight-forward task, both because the law in a number of the relevant areas is not entirely clear and precise -- with, at times, arguably conflicting requirements of the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct and state and federal case law – and the fact that the questionable conduct of some, but not all, of the lawyers and law firms spans the spectrum from clear and unquestionable misconduct, on the one hand, to "grey area" activity that skates along the edges of misconduct and raises the specter of at least sharp practice, but is perhaps not clearly defined as outside the bounds of the rules and the law.

Complicating this piece of the assignment is the need to weigh in the balance of appropriate and proportionate redress, the truly laudable result achieved by the lawyers for their clients, the class members, through their dedicated and highly skilled hard work

and professional acumen in a case which posed real risks and the uncertainty of perhaps never achieving any award for the class or any fee at all for themselves. As noted in this Report's Introduction, perhaps the most lamentable aspect of this investigation is that the outstanding result achieved for the class has become tainted by the questionable conduct described in these pages.

In recommending appropriate remedies and redress for the various shades of conduct discovered in this investigation, the Special Master has attempted to strike a balance that recognizes and addresses both the serious and sustained ethical violations and quasi-violations raised by the conduct of some of the lawyers with the excellent result achieved that not only provided a substantial recovery to the class for the troublesome conduct of the defendant in the main case, but which in the process also shined a light upon a heretofore hidden corner of abuses in the trading world which will likely benefit the general trading public.

While others may disagree, the Special Master believes that the remedies and sanctions recommended here effect, to the extent possible, a fair, legal, and equitable balance of the sometimes-conflicting law and interests discussed in these pages.

After a brief overview, the recommendations for legal findings, remedies and sanctions in this section are set out as they relate to the various duties and obligations the lawyers in this case had to their clients, to the class, to other counsel in the case, and last, but by no means least, to the Court. This section ends with a brief discussion of lessons which can be learned from this investigation and "best practices" going forward for lawyers and courts in large, complex class actions.

Recommended Legal Findings

As described in some detail in the body of this Report, the questionable conduct breaks down roughly into two separate but broadly related areas, all under the larger rubric of what should have been included in the fee petitions and disclosed to the clients, the class, co-counsel and the Court – the Chargois Arrangement and payment – and what should not have been included in the fee petitions of Labaton, Lieff and Thornton – the double-counted hours of the staff attorneys and the contract attorneys. Because there has already been extensive discussion of the underlying factual record and applicable law in the previous sections of this Report along with the attendant findings and conclusions, these areas will be revisited only in summary fashion as necessary to provide context for the recommendations of legal findings, remedies and/or sanctions.

As a broad proposition, where violations are minor or close calls under the law or applicable rules of professional conduct, the Special Master recommends that these be addressed with remedies, as opposed to formal disciplinary sanctions or other action. The caveat to this is that because some of the conduct that may have presented close legal questions or resulted from true inadvertence or sloppiness nonetheless had a profound impact upon the class or other counsel, and the Court's ability to perform its fiduciary obligations to the class, the redress recommended, although intended to be remedial in nature, is nonetheless substantial. As to these categories of conduct, although professional discipline is not warranted, some of the remedies recommended will be strong medicine for the subject law firms.

Another class of conduct that is both intentional and a clear violation of the law and rules of professional conduct, as well as impactful, requires more rigorous redress, including a recommendation of professional discipline.

Finally, as to two law firms, Labaton and Thornton, because the conduct discovered in this investigation was endemic and the result of pervasive practices within the respective firms, a remedy more prophylactic and future-leaning in nature is appropriate.

Recommended Legal Findings for Breach of Duties to the Client (ATRS)

It is established without contest that after attorney Damon Chargois helped Labaton secure ATRS as a client (initially to help monitor ATRS' portfolio) sometime in 2007 or 2008, well before the inception of the State Street case, Labaton agreed to pay attorney Chargois twenty percent of every fee Labaton received for cases in which Labaton served as lead (or co-lead) class counsel and ATRS served as a class representative. Although this agreement was never successfully reduced to a signed writing, it is also undisputed that Labaton never informed anyone at ATRS about this obligation to Chargois in the State Street litigation, or at any other time, including in the eight other cases in which Chargois was paid. In fact, as discussed in the Findings of Facts and Conclusions of Law sections, lawyers at Labaton were at pains to ensure that George Hopkins, Executive Director of ATRS, did not find out about the Chargois Arrangement, and intentionally kept this information from him.

The most disturbing aspect of what was learned during the entire investigation is the pervasive secrecy and concealment that attended Labaton's relationship with

Chargois. As discussed in detail in the other sections of this report and below in this section, not only did Labaton not tell the client, in its role as Lead Counsel, it did not tell the class, the ERISA attorneys or the Court anything about the Chargois Arrangement. Beyond this, when they sought to have Lieff and Thornton share in the obligation to Chargois by splitting equally the $4.1 million payment to him, they told them only a portion of the story, leading them to believe that Chargois was local counsel and performing work of value in the case. (However, for the reasons set out in the previous sections, the Special Master believes that Garrett Bradley – who was wearing the two hats of managing partner at Thornton and Of Counsel at Labaton -- knew at least the most important parts of the whole story of the Chargois Arrangement, and that Bradley's testimony to the contrary is simply not credible.)

Despite all of this, however, the Massachusetts Rules of Professional Conduct regarding what must be disclosed to a client -- and how and when -- as they apply to these facts, are not as clear as one might hope. As set out in the Conclusions of Law above, the Special Master has found that the Labaton lawyers technically violated Rule 1.5(e) of the Massachusetts Rules of Professional Conduct, as it existed at the time of the retention letter in this case and informed by a Massachusetts Supreme Judicial Court decision, *Saggese v. Kelly*, 445 Mass. 434, 443 (2005) (requiring disclosure of a fee-sharing agreement to the client before the referral is made and obtaining the client's consent in writing). The SJC's decision was, of course, the law of the jurisdiction, and it is axiomatic that lawyers are held to know the law. However, the rule announced in *Saggese* was not enacted into the Rules of Professional Conduct until March 15, 2011,

just after the retention letter in this case was signed, and even the decision in *Saggese* and the amended Rule, do not make clear the degree of information that lawyers must provide to clients concerning a fee-sharing agreement so that the client may make an informed decision before giving consent.

The retention letter signed February 8, 2011 in this case permitted Labaton to allocate fees to other attorneys "who serve as local or liaison counsel, as referral fees, or for other services performed in connection with the litigation." This was the only notice to ATRS that there might be a referral fee in the State Street case, although Hopkins was told about the division of fees with Lieff and Thornton. Labaton's experts on this point (Professors Green, Joy and Wendel) both in their reports and in their depositions say that this was sufficient notice to the client – that the Rule requires only that ATRS have been told that a division of fee may be made, with no obligation whatsoever to disclose details or the identity of who was receiving the fee or how much it would be. In making this point, they observe that Massachusetts has a more lenient division-of-fee rule than most other states, including that it permits "bare referrals" to be paid to lawyers who perform no work on a case and never appear in the case. They also argue that neither *Sagesse*, nor the rule in effect at the time, nor the subsequent rule specify the nature or amount of information a client must be given about a fee division, nor is the nature of the consent required from the client spelled out. They also point out that Hopkins instructed Labaton's Eric Belfi that he did not want to know about any division of fees, and that if he wanted to know about a division of fees, he would ask. Labaton's experts also point out that even if there was a technical failure to comply with Rule 1.5(e), there was at least

an effort to comply through the retention letter and such "imperfect compliance" does not merit a finding of a violation of the Rule. As to any differences between the compliance required under *Sagesse* and the Rule in effect at the time of the retention letter, Labaton's experts point out that a lawyer in Massachusetts has never been disciplined for not following an SJC decision that has not been codified in the Rules of Professional Conduct.

The Special Master's expert, Professor Gillers, disagrees with Labaton's experts, pointing to a raft of other evidence indicating Labaton never intended to comply with the Rule, that the Chargois Arrangement was not a true division of fee agreement because it was never formalized and did not comply with the division of fee rules in every jurisdiction ATRS and Labaton did business and that, under the circumstances, the fact that the client was told nothing about the Chargois Arrangement meant that the client had insufficient information upon which to give consent in this case – the troubling position of the class representative's Executive Director, George Hopkins, that he instructed Labaton attorneys that he did not want to know about fee allocations among counsel to the contrary notwithstanding.

As described in the Conclusions of Law, the Special Master believes that the requirements of Rule 1.5(e) were not complied with and that given all of the circumstances here, particularly that ATRS would be acting as class representative -- with all of the obligations to the class that would entail -- Labaton should have at least informed Hopkins and ATRS of the agreement it had with Chargois and the fact that if there was a successful result, he would be receiving a substantial portion of the fee.

Beyond this, it is significant that the "fee" owed to Chargois was Labaton's own obligation that arose out of a pre-existing agreement with Chargois. It was unrelated to the *State Street* case. In this sense, the payment to Chargois can hardly be said to be a "referral fee."

Nevertheless, the Special Master acknowledges that, given Massachusetts' unique rules and history on fee division, and the fact that Hopkins told Belfi he did not want to know about fee divisions, this is a close case, made closer by the fact that apparently lawyers in Massachusetts are not disciplined for not complying with rules announced by courts but not codified into the Rules of Professional Conduct.

Although the Special Master believes that Labaton had a professional obligation to tell its client ATRS, a class representative, the salient details of the Chargois Arrangement so that the client could make an informed determination of whether to give consent, and how this might impact its obligations as class representative -- rather than intentionally keeping the information from the client -- the intersection of the law and the facts here do not rise to the level of requiring disciplinary action. The obligations to the client, and the timing of them, were simply too unclear at the time to merit the imposition of professional discipline or any kind of disciplinary sanction.

Closely related to the issues surrounding Rule 1.5(e) are questions of whether Labaton violated Rule 7.2(b), the rule forbidding a lawyer from giving "anything of value to a person for recommending the lawyer's services." The reason Rule 1.5(e) is implicated in this discussion is that subsection (5) of Rule 7.2(b) includes an exception to the prohibition of paid recommendations for valid division-of-fee agreements under Rule

1.5(e). Rule 7.2(b)(5). In other words, if there is a valid division-of-fee award under Rule 1.5(e), it is permissible to pay a lawyer for recommending another lawyer without implicating Rule 7.2(b)'s proscriptions.

As noted, Professor Gillers believes that there was not compliance with Rule 1.5(e) and, therefore, goes on to analyze whether the Chargois Arrangement, and the history of how the Arrangement began, constitute a violation of Rule 7.2 (b). He believes that there was a violation. Contrary to the opinions of two of Labaton's experts (Wendel and Lieberman) -- who believe that Rule 7.2(b) does not apply to lawyers at all because a lawyer is not a "person" for purposes of the Rule -- Professor Gillers opines that payments by a lawyer to another lawyer for recommendations that do not comply with Rule 1.5(e) are within the proscriptions of Rule 7.2(b). In other words, Professor Gillers believes that a lawyer is a "person" under the Rule. Professor Gillers, commonsensically, points out that if the word "person" was intended to exclude lawyers from its ambit, there would be no need for the exception in Rule 7.2(b)(5) for fee agreements that divide fees between *lawyers*. Beyond this, the Rule or its comment use the word "non-lawyer" five times, and if the drafters of the Rule wished to limit the category of covered persons to non-lawyers, they would have used the word non-lawyer, rather than person. Thus, the purpose of using the word "person" was to make clear the Rule covered both lawyers and non-lawyers.

Further, Labaton's experts say that the entire history of the Rule was directed toward advertising and solicitation for lawyers by touts, taxi drivers and other non-lawyers, and was not intended to cover recommendations by a lawyer to others for the

services of another lawyer. Therefore, as noted, they reason, a lawyer is not a "person" within the meaning of the Rule. Two experts (Joy and Green) opine further that because the Rule covers only the "recommending" of a lawyer's services, and what Chargois did was to introduce Labaton to ATRS and facilitate a relationship, the Chargois Arrangement is not the product of a "recommendation" and, therefore, covered under the Rule. Finally, and more persuasively, at least one of Labaton's experts (Professor Green) pointed out that a lawyer has never been disciplined in Massachusetts under Rule 7.2(b) and there are no cases in Massachusetts -- or in fact in any jurisdiction in the country -- that have ever been brought against a lawyer for a violation of Rule 7.2(b).

In the Conclusions of Law section, the Special Master finds that Professor Gillers has the stronger argument on this point as a strict matter of law and statutory construction. In reaching this decision, it resonates with the Special Master that the Rule creates a specific exception for valid fee divisions between lawyers and if lawyers were not intended to be covered by the Rule, this exception would be unnecessary. When one of Labaton's experts (Green) was questioned about this, he simply said the language was "surplusage"; another expert (Lieberman) said it was "redundant." The Special Master cannot accept these rather facile explanations -- one must presume that drafters of laws mean what they say and do not adorn statutes, regulations and rules with unnecessary language -- and finds that Rule 7.2(b) covers recommendations made by lawyers for the services of other lawyers, unless there is compliance with Rule 1.5(e). Further, after a careful review of the record, the Special Master is persuaded that the entire origin and nature of the Chargois Arrangement fit easily within the ambit of Rule 7.2(b) and,

therefore, the payments by Labaton to Chargois for his recommending of Labaton at the inception of the Labaton/ATRS relationship falls within Rule 7.2(b)'s proscriptions. Therefore, because, as discussed, the fee division agreement did not comply with Rule 1.5(e), the entire Chargois Arrangement violated Rule 7.2(b).

However, this does not end the discussion, as it begs the question of whether professional discipline is merited to address the conduct. The Special Master concludes that it does not, for several reasons. First, as noted, the question of compliance with Rule 1.5(e) is a close question upon which reasonable experts and lawyers may differ and if there was compliance with that Rule, there was no violation of Rule 7.2(b). Because the violation of Rule 1.5(e) found here does not merit professional discipline, it would be hard to say that the connected violation of Rule 7.2(b) merited discipline. Beyond this, the Special Master is struck by the fact that apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer for paying another lawyer under Rule 7.2(b).

Although Professor Gillers analysis and opinion makes absolute sense, this goes to the question of notice to the practicing bar. Perhaps going forward, if the Court adopts Professor Gillers' and the Special Master's views on this Rule, the practicing profession will be on notice that bare recommendations that are not made pursuant to a valid division-of-fee agreement under Rule 1.5(e) could subject lawyers to discipline under Rule 7.2(b). But, because this appears to be an issue of first impression and not one of which the profession might have been well- advised in advance, it would not be

appropriate to impose professional discipline in these circumstances. Accordingly, no professional discipline or sanctions is warranted here and none is recommended.

But even this does not end the matter. Whether the conduct here merits professional discipline or sanction under the Rules of Professional Conduct, it is nonetheless sharp practice and requires redress and remedial action. The intentional and pervasive withholding of the history and details of the Chargois Arrangement from George Hopkins and ATRS (and every other actor in the case), combined with the blatantly commercial nature of the relationship at the inception of the relationship, and the continuing payments to Chargois -- apparently in perpetuity -- without ever telling the client, seems more like the payment of a finder's fee with a resulting floating lien on all subsequent cases than a true professional relationship intended for the good of the client, or for that matter, the public. The secretiveness that surrounded the Chargois Arrangement only exacerbates its unseemliness.

Labaton's conduct in not disclosing the Chargois Arrangement to the client and obtaining effective consent merits some remedial action. This remedy will be imposed as part of the larger remedy for Labaton's nondisclosure to other important actors here from whom the Chargois Arrangement was intentionally hidden, including the ERISA lawyers, the class (who, as discussed, are also Labaton's clients), and the Court, and will be discussed separately.

Recommended Legal Findings as to Breaches of Duties to the Class

Before moving to a specific discussion of the implications of Labaton's failure to provide information and notice to the class about the Chargois Arrangement and $4.1

million payment, it bears noting that in all of Labaton's legalistic arguments against any notice requirement, it never even gives a nod to what would be in the best interests of the class members, nor does it in any way acknowledge that in keeping this information from the class, Labaton in its role as Lead Counsel may have deprived the class members of their fundamental right to control the outcome of their case by exercising rights that can only have real meaning if they are informed of the necessary information upon which to make a decision. This reliance on formalistic and legalistic defenses to their conduct, although it is certainly Labaton's right to do so, is a troubling response from one of the nation's leading plaintiffs class action law firms in whom countless class members have placed their trust and confidence.

In addition to not disclosing the Chargois Arrangement to ATRS, the class representative, Labaton did not disclose it to the class itself in the Notice of Pendency of Class Action after the class was certified in August of 2016, or on its class action website where the fee petition was posted in September, nor at any other time. This fact raises one of the most challenging and tangled mixed questions of law and fact in the investigation, as the issue of whether Labaton had a duty to disclose the Chargois Arrangement and resulting payment to the class, at least as of the time the class was certified, is the subject of much uncertainty among courts, lawyers and academics and both the governing Federal Rules of Civil Procedure and ethics rules again provide no clear answer on the facts here. Among other reasons for this complexity are the facts that the certified class not only has rights to notice of a motion for award of attorney fees, and an opportunity to object to the fees, under Rule 23(h)(1) and (2), and also agreements that

affect settlement under Rule 23(e)(3), but also that the certified class is a client (at least for some purposes) and class counsel have fiduciary obligations to the class as a client.

Beyond this, the nature of the certified class here presents further factual and legal nuances because the certified class included class members which overlapped between the classes alleged in the original "customer class" complaint and those in the two ERISA cases that were consolidated by the court for pretrial purposes, *see* 11/19/12 Stipulation and Motion to Stay, and Order, Dkt. # 62 [EX. 51], and each of the complaints proposed different sets of class representatives. While these three cases may have had overlapping membership, the legal claims brought in the customer class case were grounded in state law and were distinct from those in the two ERISA cases, which were grounded in that federal statute.

In at least one instance, the court was reassured by class counsel that all of the class members were their clients. 11/15/12 Lobby Conference Tr., Dkt. No. 64 [EX. 22]. In addition, during depositions, class counsel indicated that they viewed the ERISA class members as their clients. *See* Chiplock 9/8/17 Dep. pp. 93:24 – 94:2 ("We had a responsibility as class counsel to the class. And that included ERISA plans.") [EX. 41]; Goldsmith 9/20/17 Dep., p. 61:11-14 (How much of the settlement would go to ERISA clients "was something that [DOL] were focused on. Of course, we were focused on it as well because they were our clients.") [EX. 42].

The potential divergence of interests arising out of these facts, and others, are myriad. First, ATRS was formally the class representative for the entire certified settlement class, while the ERISA class representatives had no specific standing as to the

certified settlement class. As noted, ATRS Executive Director George Hopkins was not told of the Chargois Arrangement or payment, so it cannot be said that the class had notice of it through him, even if he had authority to speak for the class on this issue, which is doubtful. But, he both testified in his deposition that he told Eric Belfi that he did not want to know about specific allocation of fees to other counsel and filed a declaration toward the end of the investigation both reiterating that he had told Belfi this and purporting to ratify post-hoc the $4.1 million payment to Chargois. *See* Hopkins 3/15/18 Declaration. [EX. 130]. (As discussed in the Conclusions of Law section, this raises some serious questions as to Hopkins' adequacy to serve as a class representative.)

However, the ERISA lawyers were not told anything about the Chargois Arrangement or payment either, and the potential for conflict here arises because a number of the counsel for the ERISA class members raised serious questions about the Chargois Arrangement and payment once they learned of it during this investigation. Lynn Sarko, counsel for the *Andover* class, said had he known of the Chargois Arrangement, he would have had to advise his ERISA clients and he believed they would have objected to it. Sarko 9/8/17 Dep., p. 75:18-19 [EX. 37]; Kravitz 9/11/17 Dep., p. 85:1-17. [EX. 117].

So, the question fairly arises as to what obligations Labaton, which knew the entire Chargois story and was class counsel, had to disclose it to the certified settlement class. Not surprisingly, the experts differ dramatically in their testimony. One expert, Professor Rubenstein, testified that Fed. R. Civ. Pro. 23(h) -- the Rule governing notice to the class of proposed attorneys' fees -- does not require disclosure to the class of the

Chargois Arrangement or payment in the class notice, and that the only information that must be provided to the class is the total aggregate fee award to the lawyers. Rubenstein 4/9/18 Dep., p. 181:7-13. [EX. 235]. Professor Rubenstein testified that the obligation to inform the class falls exclusively upon the Court, and not the class attorneys, because Rule 23(h) incorporates Rule 54(d)(2), and that Rule puts the entire burden of finding out about fee allocations upon the court because the obligation to tell the Court about fee allocations only arises, in Rubenstein's view, if the Court orders disclosure or specifically asks about them. Here, Professor Rubenstein opines that because the Court did not specifically ask the lawyers about the allocation of fees, there was no obligation under Rules 23(h) of 54(d)(2) to tell the court, and because of this, no obligation to provide notice to the class of the Chargois payment. *Id.,* p. 70:13-19.

In this context, Professor Rubenstein believes that the Court's specific statement in approving the settlement and the attorneys' fees that it was "Relying heavily the submissions and what's been said today," 11/2/16 Hearing Tr., Dkt. # 114, p. 35, is not sufficient to trigger the obligation to tell the Court anything about the Chargois payment. [EX. 78]. In the Conclusions of Law section, the Special Master has expressed his concern and frustration that Rule 23(e)(3), which requires that parties seeking approval of a settlement "must file a statement identifying any agreement made in connection with the proposal," and Rule 23(h), either taken separately or together, are apparently not sufficient to trigger a duty to disclose the Chargois payment, at least in the circumstances here, to the class, and that putting the entire burden on the court by requiring it to ask about fee allocation agreements is unsatisfactory and ignores the realities of class action

litigation. (The question of whether the attorneys had an obligation to tell the Court about the Chargois Arrangement and payment is the subject of discussion in the Conclusions of Law section and in the section below on class counsel's duties of disclosure to the Court.)

Beyond any obligations imposed under the Federal Rules of Civil Procedure, Labaton's other experts testified that class counsel had limited ethical duties to the class as a client, and that class counsel did not have an ethical duty to inform the class of the Chargois Arrangement or payment. Wendel 4/3/18 Dep., pp. 131:18 – 132:5. [EX. 229]. Another Labaton expert, Professor Peter Joy, testified that the disclosure and consent requirements of Rule 1.5(e) did not apply to "every individual class member ... Labaton had a fiduciary duty but not one that encompasses the fee-sharing arrangement." Joy 4/3/18 Dep., pp. 136:7-8, 154:12-14. [EX. 227]. Joy testified that this lack of duty applied equally to the ERISA class members to whom they owed no duty beyond the generalized duty owed to all class members to receive fair and equitable fees. *Id.*, pp. 178:24 – 179:12. This, of course, raises the question of whether in this context the Chargois payment was a fair and equitable fee.

Professor Gillers again disagrees. Although he does not find a duty to provide notice of the Chargois Arrangement or payment under the Federal Rules of Civil Procedure, he opines that the class members are clients (at least as of the class' certification in August 2016), and that counsel have fiduciary duties. He notes that class members were provided in the Notice information only that counsel would apply for fees not to exceed $74,541,250, that of this, fees for ERISA counsel will not exceed $10.9

million, and how fees for other counsel would be computed if the court awards the requested amount. The class members were also told that additional fee information would be posted on the case website (with the website address) as well as Labaton's phone number, website and email address. Professor Gillers notes that the notice tells class members they have a right to opt out or to object, and how to do so -- in fact, he points out, at the August 8, 2016 hearing on preliminary approval, the Court specifically said "As I understand it, counsel will seek up to 25 percent, roughly $76 million dollars, of the common fund. The class members will have an opportunity to be heard on the propriety of that." Gillers Supp. Report, p. 100 (quoting 8/8/16 Hearing. Tr., pp. 24:23 – 25:1). [EX. 233].

Professor Gillers points out that counsel's relationship to the class carried with it heavy fiduciary duties to the class as clients under various Rules, and that these duties included the duty to give their clients information relevant to a decision as to whether to accept the settlement, or to object, or to opt out. Professor Gillers further observes that while class actions do not always fit within the framework of ethical rules, these situations are few and tailored, and also tend to be situations in which doing so favor the class or a segment of it. He opines that these situations are not a reason to relieve class action lawyers from ethical obligations that would benefit the class and supplement, not contradict, duties to clients under Rule 23.

In finding duties to the class members as clients, Professor Gillers notes that class counsel are fiduciaries for their clients as a matter of law, and as such, class counsel had a duty to give their clients information relevant to decisions that belong to the client – and

that one of these decisions is whether or not to settle the case. In particular, Professor Gillers finds instructive Rule1.4(a), which requires the lawyer to promptly inform the client of any circumstance with respect to which the client's informed consent (as defined in Rule 1.0(f)) is required. Rule 1.0(f) defines informed consent to be such information from the lawyer that "communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Professor Gillers opines that the extraordinary circumstances of the Chargois Arrangement and $4.1 million payment to Chargois triggered the legal rights of the class members to object to the anticipated fee application, and that the class could rely upon ATRS, as the class representative, and Labaton, as class counsel, to fulfill their fiduciary duties to the class and protect their interests.

But, ATRS did not know about Chargois because Labaton did not tell it, and Labaton did not independently put the Chargois payment information in the class notice or on its class website. Nor did Labaton disclose to the ERISA Counsel anything about Chargois so that they could inform their class representative clients, and Labaton did not fully disclose the Chargois Arrangement and resulting payment to the other customer class lawyers, Lieff and Thornton, so that they could have weighed in on the question of whether to provide notice to the class members.

Given the true and complete circumstances here, the Special Master finds that the Chargois payment would have been material information upon which at least some of the class members may have based a decision to either object or opt out. In not disclosing the information to the class members, or at least to all of the class counsel and class

representatives, the Special Master finds that Labaton as Lead Counsel for the class failed to meet its fiduciary duties to the class members as clients. In reaching this finding, the Special Master considers particularly significant not simply the size of the Chargois payment itself, or even the facts that Chargois did no work and contributed no value to the case, but also that the Chargois payment obligation preceded the *State Street* case and was Labaton's obligation alone and had no connection to the result achieved in the case.

However, given the lack of clarity and differences of opinion -- and the possible conflicts between class counsel's legal obligations under the Federal Rules of Civil Procedure and the applicable Massachusetts Rules of Professional Conduct -- the Special Master must again stop short of recommending to the Court that professional disciplinary sanctions or other formal action be imposed upon Labaton attorneys. Although the Special Master believes that Labaton breached its fiduciary duty to the class, the questions are simply too close to merit formal discipline, with all of the potentially harsh professional ramifications and consequences that may attend to such action. However, the fact remains that the class members were deprived of important and material information, and the Special Master finds that the failure to provide sufficient information to the class such that class members could make an informed decision about whether to agree to the payment to Chargois, or to object, or to opt out of the settlement, requires significant remedial measures to correct this serious flaw in the notice process.

The appropriate remedies for this conduct will be addressed separately.

Recommended Legal Findings for Breach of Duties to Co-Counsel

In its role as Lead Counsel, Labaton failed in its duties of fairness, trustworthiness and transparency to its co-counsel, and this failure had serious and wide-ranging adverse ramifications for its co-counsel and class members.

The breaches of duty to its co-counsel spring from two separate but related sources. First, in its role as Lead Counsel, Labaton had a duty to act fairly, efficiently, and economically in the interests of all parties and parties' counsel. *In re Pharm. Indus. Average Wholesale List Price Litig.*, 2008 WL 53278, at *1-2 (quoting *Manual for Complex Litigation*, § 10.22, at 24 (4th ed.)) Although courts generally do not find a fiduciary duty between lead counsel and co-counsel, "lead counsel must meet a demanding standard of trustworthiness because the Court must rely on representations made by counsel." *Id.* By this responsibility, lead counsel should be expected to deal forthrightly and honestly with its co-counsel so that all counsel can discharge their responsibilities to class members and be fully informed themselves as they make decisions about their own fee allocations. By failing to disclose the Chargois Arrangement and payment to ERISA counsel, Labaton failed to provide sufficient information upon which ERISA counsel could act in the best interests of their clients, the ERISA class representatives, and in their own interest in negotiating their fees with Labaton and the other customer class counsel.

A second but related failure arises under settled principles of contract law. Apart from the principles of fairness and trustworthiness that accompanied Labaton's role as Lead Counsel, courts have recognized that contract principles also impose duties within a co-counsel relationship. *See, e.g.*, *Sobran*, 148 F. Supp. 3d at 72; *Vita*, Mass. App. Ct. at

748-49; *Marks*, 174 Ohio App. 3d at 460; *Parker & Waichman*, 815 N.Y.S. 2d at 74. A basic element of contract law is the mutual assent of the parties to the essential terms of an agreement. *Enos*, 732 F.3d at 48-49. Although mere nondisclosure or silence by itself will generally not support a breach of contract action, where a party's assent to an agreement is induced by a material omission, a contract may be voidable where the parties' relationship creates legal or equitable obligations to communicate all relevant facts. *DeMarco*, 1993 Mass. App. Div. at *2. Here, as noted, Labaton was serving as Lead Counsel and the ERISA attorneys were not only co-counsel, but had their own clients to whom they owed obligations. In the context of this relationship, ERISA counsel were entitled to rely upon the forthrightness and fair-dealing of its Lead Counsel, Labaton. In not telling ERISA counsel about the Chargois payment, Labaton not only precluded ERISA counsel from fully informing their clients, it prevented them from making fully informed decisions about their own fee allocations in their negotiations with the customer class counsel. Here, context is important. The $4.1 million payment to Chargois -- who performed no work and never appeared in the case -- was considerably more than any ERISA law firm received.

That this omission by Labaton was material is borne out by Lynn Sarko's testimony that had he known of the Chargois payment, (1) he would have had to advise his client representatives, and he believes they would not have agreed to it, Sarko 9/8/17 Dep., p. 75:18-19; and (2) he would not have agreed to the fee allocation agreement limiting the ERISA attorneys to 9% (later 10%) of the total fee. [EX. 37]. Beyond this, Labaton knew that the payment to Chargois would be material to the ERISA attorneys.

Even long after the fee allocation agreement between the customer class and ERISA attorneys was made, Labaton was at pains to make sure the ERISA attorneys still did not know about the Chargois payment. In an email about the claw-back letter in November 2016, Larry Sucharow directed that separate letters be sent to customer class counsel and ERISA counsel, saying "Need two letters with breakdown, ERISA just gets sent to ERISA counsel with 10 percent off the top and then a third each. Class co-counsel get one with ERISA 10 percent off the top, Damon's percentage also off the top, and each of class co-counsel split with the percentages agreed to. *In short, no reason for ERISA to see Damon's split. They only need to see their 10 percent and then split three ways."* TLF-SST-012272 – 2274 (11/22/16 Sucharow email to Goldsmith, G. Bradley, Keller and Belfi). [EX. 160]. This reflects Labaton's own knowledge that the $4.1 million payment to Chargois would be significant to the ERISA attorneys as to their own fees.

Labaton's omission had another important ramification that speaks to its materiality. As noted, Sarko was the ERISA attorney principally liaising with DOL, the governmental agency that had oversight responsibility for ERISA plans. Carl Kravitz was also involved with negotiating with DOL. Defendant State Street was insisting on a fully global settlement with all interested parties, including DOL. By not telling the ERISA attorneys about the Chargois payment, Labaton prevented them from fully informing DOL. Both Sarko and Kravitz testified that had they known about the Chargois payment, they would have had to have told DOL. In Sarko's view, this could have "blown up" the entire settlement. Sarko 9/8/17 Dep., p. 84:5. [EX. 37].

Beyond this, as set out in the Findings of Fact, the Settlement Agreement anticipated a cap of $10.9 million for attorneys' fees out of the $60 million of recovery for the portion of the settlement allocated to ERISA class members. However, the ERISA attorneys received only $7.5 million of this $10.9 million allocation of ERISA recovery related attorneys' fees. The remaining $3.4 million went to the customer class attorneys. Although this is not directly related to the material omissions related to the Chargois payment, it is a measure of what the ERISA attorneys might well have expected and negotiated for had they known of the Chargois payment.

Beyond its dealings with ERISA Counsel, Labaton was not fully forthright and transparent with its Customer Class co-counsel. Bob Lieff, who was the participant from the Lieff firm involved in agreeing to share the Chargois obligation equally among the three customer class firms, testified that he was led to believe that Chargois was performing all of the work and services local counsel routinely do. Lieff 9/11/17 Dep., p. 58:18-24. [EX. 139]. Lieff further testified that he did not know that the Chargois payment grew out of a pre-existing obligation that Labaton had to Chargois that pre-dated the State Street case. *Id.*, pp. 73:14 – 74:3. He further testified that had he known that Chargois did no work and provided no value to the case, he would not have agreed to share the $4.1 million payment. *Id.*, p. 97:13-16. Lieff also testified that if he had known the history of the Chargois payment, he would have encouraged Labaton to inform the Court. *Id.*, p. 97:14-16.

Lieff's testimony is supported by a significant amount of contemporaneous evidence the nature of emails between Labaton, Lieff and Thornton and other

correspondence in which Chargois is consistently referred to as "local counsel" or "the local." *See e.g.*, LBS025771 (4/24/13 "Dublin email" referring to Chargois as "the local counsel who assists Labaton in matter involving Arkansas Teachers Retirement System) [EX. 140]; TLF-SST-040617-0618 (Bradley email to Lieff and Thornton regarding fee discussions with reference to "Arkansas local") [EX. 147]; TLF-SST-053117-3126 (email referencing payments to ERISA Counsel and "local Arkansas counsel"). [EX. 151]. Labaton never corrected this mischaracterization, and given the fact that it was consistently made in the context of persuading Lieff to share in the $4.1 million Chargois obligation, this clearly constitutes a materially misleading misrepresentation of the true and complete story behind the Chargois payment obligation.

In each of these instances of material omission and misrepresentation, contract principles require that the respective agreements be voided and that the parties' rights be adjusted. These contract principles not only stand on their own, but also inform a court's equitable authority, and given the factual underlayment here, a court could be expected to reform a contract to meet the parties' reasonable expectations. Thus, to the extent pure contract law principles may not supply a complete legal remedy, equitable principles do.

In order to achieve a just result, the Special Master recommends a three-fold finding: (1) that in agreeing to the fee allocation, the ERISA attorneys were materially misled by the omission of the Chargois payment (and its history) and that their share of the fee award should be increased; (2) because it has been well established beyond any question in this investigation that the ERISA attorneys bore no responsibility for either the double-counting on the customer class firms' lodestar petitions or the payment to

Chargois -- and, in fact, were intentionally kept in the dark about the payment to Chargois by Labaton -- the ERISA attorneys should receive reimbursement for having been dragged into this investigation through no fault of their own; and (3) in view of all of the history recounted herein, the Special Master recommends that any obligations the ERISA attorneys may have had to Labaton under the claw-back letter be abrogated and that the claw-back letter be declared void as to the ERISA attorneys.

As to Lieff, the appropriate resolution is more complicated. On the one hand, Lieff agreed to share in the Chargois payment and at least knew about Chargois, albeit not the full state of affairs. On the other hand, the Special Master believes that Lieff was misled into agreeing to share in the Chargois payment. Ordinarily, some recompense would be in order for this. However, at oral argument, Lieff's counsel (and the firm's General Counsel), Richard Heimann, when asked what if any relief he was seeking, indicated he was not looking for any repayment. (However, Bob Lieff, who was present at the oral argument, but apparently is no longer a member of the firm, thought there should be a payment back to the Lieff firm.) In view of all of these factors, the Special Master believes that the fairest result for the Lieff firm would be for it to be relieved of its obligations to Labaton under the claw-back letter as to Chargois, but no more. However, as addressed in the section on remedies for the double-counting, Lieff's own emails, and the deposition testimony of its lawyers, indicate that Lieff shares responsibility for the inadvertent mistake, and that part of the remedies will be dealt with separately.

The Thornton firm presents an even closer, more complicated, question. Although the evidence supports Mike Thornton's testimony that he, too, believed that Chargois was

serving as Labaton's local counsel and providing some service, Garrett Bradley's testimony to the same effect simply cannot be credited. As the Special Master has found elsewhere, and for the reasons set forth, Garrett Bradley knew most if not all of the history behind the Chargois payment and knew he performed no work on the case. But Garret Bradley was also serving as Of Counsel to Labaton.

In the end, the responsibility for Chargois must be Labaton's alone. They initiated the relationship with Chargois, benefitted from it over the years, and they made the decision to conceal it from the client, the class, co-counsel and the Court. Accordingly, they must bear the costs of the remedy occasioned by the non-disclosure of the Chargois Arrangement and payment.

The precise remedies for this conduct will be set forth separately.

Recommended Legal Findings for Breach of Duties to the Court

Previous sections of these Recommendations have detailed Labaton's failures in informing its client ATRS, the class, and its co-counsel of the Chargois Arrangement. However, Labaton's failure to disclose the Chargois Arrangement and payment to the Court is perhaps the most serious and far-reaching of all of its breaches of duty. Within the framework of our class action system, Courts have a fiduciary duty to the class members and serve as the final guardians of class members' rights. Particularly at the settlement approval stage, class counsel must assist the Court in performing that obligation to the class by providing it with all of the information necessary to discharge its fiduciary responsibilities.

As Lead Counsel here, Labaton had a legal and ethical duty to provide the Court with all the information it needed to make an informed decision as to the award of attorneys' fees out of the State Street settlement fund. This included disclosure of the identity of all attorneys -- including Damon Chargois -- who would be sharing in the award and what the share of each attorney would be. Labaton had a duty under the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct, as well as under federal case law, to allow the Court to conduct this essential role in protecting class members. In failing to disclose the Chargois Arrangement to the Court, Labaton breached this duty.

The Federal Rules of Civil Procedure mandate full and accurate disclosures to the Court, including Fed. R. Civ. P. 23(e)'s requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement and to a settlement-related fee petition, Fed. R. Civ. P. 23(e)(5) and (h)(2). As with the right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. Unfortunately, by not disclosing to the Court that $4.1 million of the settlement funds would be paid to an attorney who did no work on the State Street case, Labaton deprived the Court of information it needed to discharge its fiduciary obligations to protect the class's interests.

Professor William Rubenstein has opined in this case that Rule 23(h), by its incorporation of the procedures for making a claim for attorneys' fees under Fed. R. Civ. P. 54, places the burden on the Court to order disclosure of a fee agreement such as the

Chargois Arrangement, and, absent such a court order, that disclosure is not required. Professor Rubenstein places the entire blame for the non-disclosure of the Chargois payment in this case upon the Court because it failed to specifically inquire about fee agreements underlying class counsel's claim for an award of fees.

However, separate and apart from Rule 23(h) and its incorporation of Rule 54 procedures for making a claim for attorneys' fees, Fed. R. Civ. P. 23(e)(3) requires that "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money that they may have received elsewhere. *Manual of Complex Litigation*, § 21.631. [EX. 248].

In his treatise, Professor Rubenstein also recognized counsel's independent obligation of disclosure under Rule 23(e)(3). Section 15.12 of *Rubenstein and Newberg on Class Actions*, entitled, "Fee procedures at a class action's conclusion -- Disclosure of fee-related agreements requirement," first speaks to the (obvious) requirement to disclose any agreements as to fees when so ordered by the court. The Section goes on to recognize, however:

> [I]n addition to Rule 54's disclosure requirements, Rule 23(e) governing class action *settlement* -- not *fee* -- approval states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal." (emphasis in original; footnote omitted).
>
> *Newberg on Class Actions*, § 15.12. [EX. 236].

Although Rule 23(e)(3) references the settlement agreement itself, Professor Rubenstein himself observed that

> given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself -- such as any agreements about fees -- may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests. *There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class…Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.* (emphasis added)
>
> *Id.*

The Special Master recommends that the Court find that this was such a case. With its burden-shifting of Labaton's own pre-existing financial obligation to Chargois to the class and co-counsel, the Chargois Arrangement affected the class's interests in this case as it "allocates money that the class members may have received elsewhere," i.e., to Damon Chargois. There was an undisclosed agreement to pay $4.1 million out of the settlement funds -- funds that could otherwise be allocated to the class members -- to an attorney who did no work on the case whatsoever. As previously noted, the obligation to Chargois was Labaton's and Labaton's alone, and the payment to him, without disclosing it to the Court, significantly and adversely impacted the Court's ability to protect the class from an enormous payment for which the class received no value and of which the class representatives were never informed. This created a potential conflict between Labaton and the class, a conflict the Court could not protect the class against because it was hidden from the Court.

In order to assist the Court in performing its fiduciary function to protect the interests of the class, Labaton was obligated to disclose to the Court its pre-existing agreement to pay Chargois this substantial amount of the settlement fund. The Special Master finds that, given the facts here, Labaton's failure to do so was in derogation of the duties imposed upon it by Fed. R. Civ. P. 23(e)(3).

Beyond Labaton's failure to disclose the Chargois Arrangement to the Court, the Special Master is further troubled by what can only be construed as misleading statements in its declaration seeking a fee award. As part of his Lead Counsel obligation in this case, Lawrence Sucharow of Labaton filed a "Declaration in Support of Plaintiff's Assented-To Motion for Final Approval of the Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for Award of Attorney Fees." *See* Dkt. No 104. [EX. 3]. In that Omnibus Declaration, in two separate places, at footnotes 2 and 6, Sucharow purports to identify all of "Plaintiffs' Counsel." In footnote 2, Sucharow identifies as "Plaintiffs' Counsel," his own firm, Labaton Sucharow, and "the Thornton Law Firm LLP ("TLF"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), McTigue Law LLP ("McTigue Law"), and Zuckerman Spaeder LLP ("Zuckerman Spaeder")", *id*., note 2, p. 1. In footnote 6, Sucharow identifies Labaton Sucharow, Thornton, Lieff Cabraser, Keller Rohrback, McTigue Law, Zuckerman Spaeder, as well as, Beins, Axelrod, P.C. (which partnered with McTigue Law and Zuckerman Spaeder in representing the Henriquez plaintiffs); Richardson, Patrick, Westbrook & Brickman, LLC (former co-counsel for Henriquez plaintiffs); and Feinberg, Campbell & Zack, P.C. (local

counsel for McTigue Law in the Andover action). *Id*., note 6, p. 41. In Keller Rohrback's Declaration, Theodore Hess-Mahan of the Massachusetts firm of Hutchings Barsamian Mendelcorn LLP is identified as Keller Rohrback's local counsel. Within Labaton's lodestar report attached as Exhibit A to Labaton's individual fee declaration at Dkt. # 104-15, Sucharow further identifies fees paid to an "of counsel," P. Scarlato (Paul Scarlato of Goldman Scarlato, a Pennsylvania law firm). [EX. 88].

On the surface, these Declaration statements could lead the Court reasonably to believe that these are all of the lawyers being paid from class funds. However, there is one lawyer who was paid from class funds who is not mentioned anywhere in Sucharow's Omnibus Declaration, in Labaton's individual fee declaration -- which was also signed by Lawrence Sucharow -- or in Labaton's lodestar and reports annexed thereto. That one lawyer is Damon Chargois.

Sucharow has admitted that he knew of the obligation to pay Chargois a portion of the State Street fee award at least as of 2015; the fee petition was filed on September 15, 2016. The Special Master finds that this nondisclosure was considered and deliberate.

In deciding the amount of fee to award class counsel -- and to whom to award it -- the Court, as a fiduciary for the class, including unnamed class members, needed first to know -- and Sucharow and Labaton had a duty to tell it -- who would be participating in any fee the Court in its discretion might award from the class recovery and the basis for the claim. By not disclosing the intended payment of $4.1 million to Chargois, Sucharow and Labaton kept the Court in the dark and denied it the very information it needed in order to decide how much of the settlement funds should go to counsel, and which

counsel, and how much should go to the class. As Professor Gillers observed, "Quite simply, until the Court made that decision, there was no fee to divide." Gillers Supp. Report, p. 97. [EX. 233]. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the recovery to Chargois, who never appeared and who did no work, and made no contribution whatsoever to the success of the State Street litigation, whose Arrangement with Labaton preceded the State Street case by several years, and to direct that the money intended for Chargois should instead go to the class. The Court, however, never had an opportunity to make that decision because of the material omission of Chargois from Sucharow's Declaration.

Given this background, the Special Master considered at length whether to recommend that Labaton's failure to disclose Chargois' role and the agreement to pay him $4.1 million in the fee petition should be sanctioned under Fed. R. Civ. P. 11. While at least one court of appeals has found that Rule 11 applies both to disclosures and omissions, the First Circuit has not, and, having considered other persuasive arguments and factors raised by counsel to Labaton, the Special Master recommends that no violation of Rule 11 in Labaton's non-disclosure of the Chargois Arrangement be found.

However, beyond the imperative for disclosure in the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct required disclosure to the Court. Massachusetts Rule 3.3 imposes upon attorneys practicing in Massachusetts a "duty of candor toward the tribunal." Rule 3.3(a) provides in relevant part:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false

> statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

Comment 3 to Rule 3.3 makes clear that an attorney's failure to make a disclosure in an affidavit or in open court can be the equivalent of a misrepresentation within the purview of Rule 3.3(a).

That Sucharow had a duty to disclose the Chargois Arrangement to the Court is made even more clear by Comment 14A to Rule 3.3, which provides:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit . . . the proceeding loses its adversarial character and in some respects takes on the form of an *ex parte* proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in *ex parte* proceedings and should be guided by Rule 3.3(d).
>
> Mass. R. Prof. C. 3.3, cmt. [14A].

Proceeding from Comment 14A takes us to Rule 3.3(d), which provides:

> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse. The standard applied to *ex parte* proceedings is applicable in the context of a joint petition to approve a settlement of a class action. See Cmt. 14A to Mass. R. Prof. C. 3.3.

For all of these reasons, the Special Master recommends the Court find that Sucharow deliberately concealed the Chargois Arrangement from the Court and thereby

denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class. Accordingly, it is recommended the Court find that Sucharow's concealment of this very relevant information violated Massachusetts Rule of Professional Conduct 3.3.

In addition to Rule 3.3 of the Massachusetts Rules of Professional Conduct, there is an overriding general duty of candor owed by attorneys as officers of the court. As noted by Professor Gillers, while "the phrase 'candor to the Court' is not an unbounded source of duty, entirely untethered to rules, custom, or case law. . . the word 'candor' should at least guide a lawyer's understanding of his or her duties as officers of the court." Gillers' Supp. Report, p. 88. [EX. 233].

This broad duty of candor has been recognized by the First Circuit, which, in *Pearson*, 200 F.3d at 38, cited the Fourth Circuit in *Shaffer Equipment Co.,*11 F.3d at 457. In that case the court said, "[T]ruth is the object of the system's process…of dispensing justice…Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process."

It is for all of these reasons that the Special Master recommends that through his failure to disclose the $4.1 million Chargois Arrangement, the Court find that Sucharow violated his duty of candor as an officer of the court, and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class.

As stated in previous recommended findings as to the client, the class and co-counsel, it is recommended that the Court find that Labaton and Sucharow must bear the

sole responsibility for the non-disclosure -- and, in fact, the concealment -- of the Chargois Arrangement from the Court. The remedies for this breach will be set forth separately.

RECOMMENDED REMEDIES AND SANCTIONS

Before detailing the recommendations to provide remedies and redress for the conduct identified in this Report, it is appropriate to provide a preamble as context. One of the most troubling elements of the Chargois aspect of the investigation has been Labaton's response to the discovery of the conduct revealed in the investigation: Quite simply, it is inappropriate and insufficient to the severity and pervasiveness of the conduct. There has been no acceptance of responsibility for the calculating and secretive nature of the conduct and its adverse ramifications. There has been no expression of contrition. There has been no expression of remorse. And, there has been no expression of apology to the client, to the class members, to co-counsel or to the Court.

Rather, Labaton has met the Special Master's inquiry into the Chargois Arrangement and the $4.1 million payment with a phalanx of experts, who together with Labaton, have erected a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court). Although Labaton certainly has a right to present its best case -- and its arguments have been considered and, in some instances, used to inform the Special Master's findings and recommendations to the Court -- some acknowledgement of the potential harm this conduct has caused to class members, co-counsel and the Court would have been not only appropriate, but expected. Instead, Labaton and its experts have taken positions that speak only to its legal defenses, and not to what is in the best

interests of class members and the ability of courts to discharge their fiduciary responsibilities to the class. This approach is as disappointing as it is indicative of the culture of compartmentalization and concealment at Labaton that led to the Chargois Arrangement and its nondisclosure to the other participants in the case in the first place.

The remedies and sanctions recommended here will be delineated as they relate to specific conduct and the law firms associated with that conduct, as well as where the allocated funds will go.

Double-Counting on the Customer Class Firms' Lodestar Petitions ($4,058,000)

As indicated, with the exception of Garrett Bradley's Declaration statements, the Special Master has found that the mistakes made were largely inadvertent and the result of a combination of Labaton's internal compartmentalization (e.g., settlement attorney Nicole Zeiss not knowing anything about the agreement to share costs) and a lack of any formal agreement. Although the contemporary email traffic, the billing practices and deposition testimony all bear out that at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate, other lawyers at the firms were not aware at all of an agreement to allow Thornton to put the staff and contract attorneys on its lodestar, and no one ever attempted to memorialize this, even in an email.

Having said the double-counting was inadvertent does not end the need for a remedy, however. The notion of including the employees of one firm on the lodestar petition of another firm is fraught with the danger of miscounting and misrepresentation

to the court, just as happened here. The same cost-sharing could easily have been achieved by a simple agreement to share costs in some equitable way, rather than by the artifice of putting one firm's employees on another firm's lodestar petition. Further, careful preparation of the fee petition documents by comparing the lodestar petitions of each firm should have caught the mistake.

In the end, all three Customer Class firms must share the blame. The remedy for this is the disgorgement by all three firms in equal amounts of the entire approximately $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.

Garrett Bradley's Sworn Declaration Statements

The Special Master has found that Garrett Bradley's statements in his sworn declaration that accompanied the Thornton fee petition were knowingly false, that they were motivated by a desire to greatly enhance the Thornton lodestar and thereby justify a larger fee award, and that Bradley did not attempt to correct these statements, despite numerous opportunities to do so, until directly called upon by the Court at the March 7, 2017 hearing. The Special Master has found that these sworn declaration statements violated both Rule 11 of the Federal Rules of Civil Procedure and Bradley's duty of candor to the Court under Rule 3.3 of the Massachusetts Rules of Professional Conduct. The Special Master has further found that the sworn statements were material and contributed to the double-counting errors because, had Bradley made fully truthful statements describing the actual relationship of the staff attorneys to Thornton, rather than representing to the Court that they were Thornton employees and that their rates

were Thornton's current rates for them, it is likely that either or both Nicole Zeiss and/or the Court would have been alerted that something was amiss and the double-counting would have been caught.

For the falsity of the sworn declaration statements, the failure to come forward and correct them, and the impact it had on the fee proceedings, the Special Master recommends that significant monetary sanctions, and professional discipline be levied. As to monetary sanctions imposed under Rule 11, they are imposed against the Thornton firm (as provided by Rule 11) in a range of $400,000 to $1 million, approximately ten to twenty-five percent of the cost of the double-counting. As to the sanctions under Rule 3.3 of the Massachusetts Rules of Professional Conduct, these are individual and the Special Master recommends that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings. No additional monetary sanctions beyond those recommended for the violations of Rule 11 are recommended for the violations of Rule 3.3.

It is recommended that the monetary sanctions should be awarded to the class.

Hours and Rates

The Special Master recommends that, with the relatively minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar petitions were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the staff attorneys employed by Labaton and Lieff, who by virtue of their experience, work and level of contribution to

the case, merit the rates that were ascribed to them on the lodestar petitions. Therefore, other than as noted below, the Special Master recommends that no adjustment be made in hours and rates.

Michael Bradley: The first exception to this recommendation is to the rate of Michael Bradley. As noted, although the number of hours Bradley recorded is supported by reasonably reliable contemporaneous records, his submitted rate of $500/hour is not supportable by his experience, the work he did on the case, or the value he contributed to the case, particularly in relation to the other staff attorneys. Rather, he had no experience relevant to the case and the work he performed was simple, straightforward, and unmonitored document review. Further, although he undertook the work with no certainty of payment, he performed the work fully on his free time and when it was convenient for him to do so. Therefore, his rate should be more at the level of a paralegal, supplemented by the fact of his law degree and experience as a lawyer. The Special Master recommends that Bradley's rate be set at half of the submitted rate, or $250/hour. Bradley recorded roughly 406 hours, thus yielding a total lodestar of $101,500. In addition, Thornton received a 1.8 multiplier on the original fee. Thornton should not be entitled to this additional benefit calculated on the higher rate, and, thus, its lodestar, on which claimed Michael Bradley's hours, should be reduced accordingly and the difference between the original fee value ($ 365,760, after multiplier) and the amount reflective of a more appropriate hourly rate of $250 ($182,880, after multiplier) returned to the class. In making this calculation, we give equal weight, and apply the same multiplier, to Michael Bradley's hours as we do any other attorney who worked on the case.

Petition and Adjustment	Timekeeper	Rate	Hours	Lodestar Value	Multiplier	Total Fees
Original Petition	Michael Bradley	$500	406.4	$203,200.00	1.8	$365,760.00
Appropriate Adjustment	Michael Bradley	$250	406.4	$101,600.00	1.8	$182,880.00
						To class: $182, 880
Original Petition	Contract attorneys	$415, $515	2949.5	$1,325,588.00	1.8	$2,386,058.40
Appropriate Adjustment	Contract attorneys	$50	2949.5	$147,475.00	(at cost)	$147,475.00
						To class: $2,238,583.40

Contract Attorneys: The next exception is the rates of the so-called contract attorneys. For all of the reasons set forth in the Report, the Special Master recommends that law firms not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be reimbursed to law firms as an expense, and the firms compensated for that expense dollar-for-dollar. The seven contract attorneys, all retained by Lieff, recorded 2833.5 hours in this role, at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to

their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged and returned to the class. The Customer Class is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the class.

The Chargois Payment ($4.1 million)

As set out in this Report, because the Chargois Arrangement was solely Labaton's obligation and because Labaton has profited handsomely over the years from the ATRS relationship Chargois helped facilitate, and because Labaton is solely responsible for the non-disclosure of this relationship to ATRS, the class, ERISA counsel and the Court, the Special Master recommends that the appropriate remedy for the Chargois payment be disgorgement of entire $4.1 million Chargois amount, and that this disgorgement be solely the responsibility of Labaton.

Because the non-disclosure of the Chargois payment fell disproportionately upon the ERISA attorneys, who were told nothing about Chargois and who were required to negotiate their fee allocation without the knowledge that an attorney who performed no work on the case, bore no risk or client responsibility and never appeared in the case would receive an amount considerably more than any ERISA firm, the Special Master recommends that ERISA counsel should receive the bulk of this award. The Special Master recommends that the appropriate remedy for the non-disclosure of the $4.1 million is $3.4 million, an amount which reflects the difference between the $10.9 million

that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received. This amount is also supportable because it is the amount that went instead to the customer class counsel.

As further support for this $3.4 million reallocation remedy to the ERISA attorneys, the Special Master recognizes that this investigation has resulted in great expenditures of time and expense to the ERISA firms that have been drawn into it through no fault of their own, either as to the double-counting or as to the Chargois Arrangement. Normally, the Special Master would recommend that the ERISA attorneys submit their time and expenses incurred in having to participate in the investigation and recommend that the firms be reimbursed dollar-for-dollar. However, this would be a lengthy, time-consuming, and additionally burdensome process that would likely result in additional expense for these firms. Instead, in fashioning this recommended award, the Special Master has taken into consideration the time and expense incurred by the ERISA attorneys in participating in the investigation and believes that the recommended $3.4 million is sufficient to include the costs and expenses incurred by the ERISA attorneys in the investigation. Finally, the Special Master recommends that the $3.4 million be allocated amongst the ERISA law firms in the same proportion and in the same manner as the original fee award was allocated.

The $3.4 million award to ERISA counsel still leaves a balance from the $4.1 million of $700,000. The Special Master recommends that this amount should be allocated back to the class, which was deprived of its ability to make a determination as to whether to agree to the settlement which included the Chargois payment. In making

this recommendation, the Special Master notes that with the additional reallocations to the class recommended here, the class will receive well more than an additional $5.5 million to $6 million beyond that which it would receive under the original settlement.

One of the most difficult decisions in arriving at recommendations for appropriate redress and remedies for the Chargois conduct has been whether to recommend professional disciplinary sanctions for Labaton. In trying to strike a balance here, the Special Master recognizes that formal professional disciplinary sanctions for a firm like Labaton, which often represents public institutional investors with elevated standards of conduct for their outside counsel, could dramatically and adversely impact the firm's ability to provide legal services in its area of expertise, services which benefit both their class clients and often the broader public. Indeed, formal disciplinary proceedings could spell the end of the firm. Furthermore, as discussed in this Report, although the conduct here was of a serious and sustained nature and worthy of strong redress, the Special Master has noted that a number of the ethical and legal questions related to the conduct, particularly as to the Chargois payment, have been close calls and not always susceptible of easy resolution. Beyond this, the Special Master has noted that Labaton, as Lead Counsel for the class, helped to achieve a very laudable result for the class.

In weighing all of this in the balance, the Special Master believes that the monetary remedies recommended to address the Chargois conduct are proportionate and sufficient, and the more extreme step of recommending professional disciplinary action against Labaton and some of its lawyers is unnecessary to fulfill the objectives of what punishment should be in any case, which is sufficient to provide a measure of punishment

for the conduct, deter future conduct by both Labaton and other law firms, and cure any harm arising from the conduct, but not so extreme as to be disproportionate to the cause. The Special Master believes that a recommendation of professional disciplinary action, with its potential for bringing an end to the firm, would be a step too far. For these reasons, the Special Master recommends that no professional disciplinary action be taken.

Jurisdiction to Resolve Disputes Stemming from the Special Master's Recommendations

As between Labaton and Chargois, the Special Master takes no position as to how Labaton and Chargois should adjust their rights in light of the Special Master's findings and conclusions, and recommends that the Court not intervene. Although the Special Master believes that the underlying agreement between Chargois and the Labaton firm was questionable from its inception and holds the possibility of problems in the future, those issues should be left to be worked out, or adjudicated, among those parties.

The Special Master recommends that any disputes between the law firms or that involve the class that may arise out of the Special Master's Report should be subject to the continuing jurisdiction of this Court. The reasons for this are clear. The conduct that is the subject of this investigation took place in a case before this Court and the investigation and resulting Report and Recommendations of the Special Master was done at this Court's initiative and under this Court's supervision. Beyond this, if any dispute touches on the rights of members of the class, this Court has an ongoing fiduciary duty to the protect the class's interests. Given the lengthy history of this case and these

considerations, this Court is in by far the best position to adjudicate any resulting disputes.

Other Related Remedies and Issues

Costs of the investigation: Other than the allocation to the ERISA attorneys which is intended to include and cover their costs and fees incurred in this investigation, the customer class firms must each bear their own costs and fees for the investigation.

Although the Special Master is recommending that no professional disciplinary action be administered beyond Garrett Bradley, there nonetheless remains concern about future conduct by both Labaton and Thornton. The conduct uncovered in this investigation has not only been serious, it is endemic to the way these two firms have done business with their hyper-focus on business development and fee generation. In the case of Labaton, its almost obsessive secrecy and compartmentalization of responsibility -- with one part of the firm being completely in the dark about what another part of the firm is doing -- is in great measure what brought us to this investigation. Beyond this, its aggressive tactics in effectively hiring people to go out and solicit business, and paying them a finder's fee not only for a single case, but as a floating lien on all future cases, is disturbing in what it may portend for the practice of law. Further, although Labaton seems to have a competent General Counsel in Michael Canty (and, before him, Michael Stocker), they are not expert in the Rules of Professional Conduct. But, even if they were, Labaton attorneys apparently do not routinely consult with their General Counsel on ethics issues.

Thornton does not even have a General Counsel, much less an in-house lawyer well-grounded in the Rules of Professional Conduct. Further, Thornton has no established system or requirements for contemporaneous time-keeping so as to assure contemporaneous, accurate time-keeping. Nor does it have a process in place to evaluate, on a regular basis, and adjust if necessary, the firm's rates, unlike the other firms. As to its business development practices, Thornton lawyers appear to be largely unsupervised and unconstrained by the professional conduct norms. If Thornton is to continue to practice in large scale national class action cases, it needs to adopt policies and practices to ensure that it does not exceed professional conduct boundaries.

Going forward, both of these firms require someone from the outside to consult with them on professional conduct norms and to ensure that they comply with those norms. Whether the Court has the authority to order such a measure beyond this case is uncertain. However, both firms, and their clients, would greatly benefit from the imposition of on-going ethics supervision. The Special Master recommends that the two firms work with the Court to establish a consulting process that will ensure consistent ethical compliance. The Special Master notes that, according to a letter from counsel dated April 30, 2018, Labaton has already taken steps in this direction, and has taken additional steps to address the kinds of conduct that arose in this case. The Special Master recommends that Labaton continue its progress and take additional steps to build on these efforts.

Lessons Learned and Best Practices for the Future

This investigation has been a laborious, protracted, and painful process for all involved. But, beyond the remedies recommended here, it will have been a worthwhile undertaking if several lessons can be learned from the investigation and principles established for best practices in large class action cases. The Special Master sets out a number here, which are not intended to be an exhaustive list.

First, it appears everyone agrees that the practice -- to the extent anyone else did it -- of sharing costs by allocating attorneys to other firms who are not their employers and putting employees from one firm on another firm's lodestar petition is a recipe for confusion and mischief. While the need to share costs and the concomitant risk according to some formula in these large and protracted class actions is apparent, there are myriad ways this can be accomplished, just as there are ways to fairly share fees without allocating another firm's attorneys to a different firm as a means of "jacking up" that firm's lodestar petition.

Next, the practice revealed in this case of retaining a person to open doors to clients and then paying that person a percentage of every future case, whether or not that person does any work on a case or performs any services for the client, is unseemly and a violation of ethical rules -- even if that person happens to have a law degree. As observed elsewhere, it amounts to paying a finder's fee and providing that finder a floating lien on every case. Hopefully, this investigation will make clear the dangers to

the profession in these types of arrangements and these will cease to be an acceptable part of business development in our profession.

The Special Master here is admittedly an outsider to Massachusetts law practice with its own unique history and traditions. However, the practice of "bare referrals" – permitting a lawyer to receive a referral fee for doing no work and having no attachment to the case or the client -- seems to invite abuses such as the ones found here which blur the lines between legitimate referrals that promote the retention of more competent lawyers and those which cross the line to outright solicitation. One step that might be helpful would be if the Massachusetts Board of Bar Overseers and Massachusetts courts were to make clear that Rule 7.2(b) applies to lawyers and that lawyers cannot receive "fees" from other lawyers simply for recommending a lawyer, unless there were a valid agreement under Rule 1.5(e) consented to in writing by the client after being fully informed.

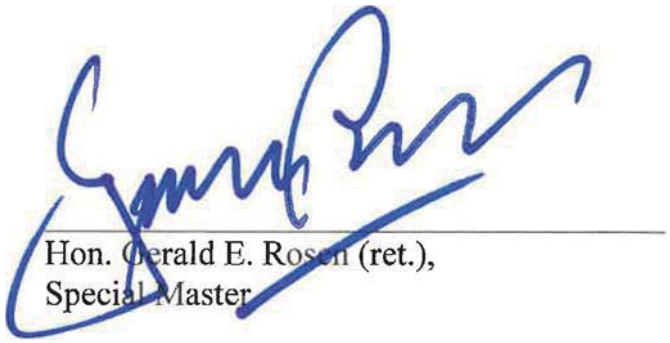
Final Thoughts on Remedies

The Special Master recognizes that not everyone will agree with the remedies and sanctions recommended here. Some may say they were overly harsh, given the result in the underlying case and that the conduct revealed here was largely only about how money was to be divided up among lawyers in a successful case. Further, the Special Master anticipates that the law firms and lawyers most rigorously redressed will likely disagree with at least some of the findings and recommended remedies.

On the other hand, the Special Master also recognizes that others may feel the recommended remedies do not go far enough to address some of the more egregious conduct. These people may criticize the recommendations by pointing out that even after the imposition of the monetary remedies recommended here, the Labaton, Lieff and Thornton law firms will still be left with not only their base lodestar claim, but a substantial multiplier. The Special Master calculates that even after the allocation of all monetary amounts, and the costs of the investigation, the customer class firms will still receive its base lodestar plus a significant multiplier. Beyond this, some will no doubt point out that even with all of the questionable conduct here, the total reduction in fees for the firms is only roughly 12%. To the man on the street, this may seem insufficient redress for the conduct identified. And, no doubt some observers will criticize the recommendations here for not recommending additional professional disciplinary action beyond that which is recommended here. These critics may well say that the Special Master has given a pass to some of the lawyers for some of the conduct by not recommending more extensive disciplinary action.

In response, the Special Master would point out that the intent here has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and the harm. In this context, the Special Master notes that the recommendations here, if followed, would return in a range of approximately $7.4 to $8.1 million to the class. Beyond this, the Special Master would remind critics that, despite the questionable conduct, the result achieved for the class was a very good one and that the lawyers

deserve great credit for that. The fact that the customer class lawyers retain a multiplier on top of their lodestar is an appropriate measure of their work on the case and the result they achieved.



Hon. Gerald E. Rosen (ret.),
Special Master

DATED: May 14, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff, **No. 11-cv-10230-MLW**
Hon. Mark L. Wolf

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs, **No. 11-cv-12049-MLW**

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs, **No. 12-cv-11698-MLW**

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

EXECUTIVE SUMMARY

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Introduction

This investigation, conducted in the post-settlement phase of the case, has raised a number of significant issues that are important to the conduct and administration of large class actions generally and this case in particular. Among these issues are the appropriate rules and policies governing attorney fee petitions, the approach plaintiffs' counsel use in their fee petitions -- including appropriate billing rates -- and the obligations of lead counsel to act with candor and transparency toward their clients, the class, the Court, and co-counsel, in general, and as to any financial obligation that will be paid from class funds in particular. After a lengthy investigation, the Special Master finds that in several significant areas, the Court was not provided accurate and reliable information in the fee petitions and at the fairness hearing and, unfortunately, these failings had profound and adverse ramifications throughout the fee approval process. The redress the Special Master recommends at the conclusion of the Report is intended, to the extent possible, to remedy these failings.

At the outset, the Special Master makes two observations. First, the Special Master recognizes the important role class actions and plaintiffs' class action attorneys play in protecting and enforcing the rights of consumers, injured parties and the public in general. To adequately fulfill this role, class action plaintiffs require sophisticated, well-resourced attorneys who should be compensated at rates comparable to those of the large, sophisticated, well-resourced defense firms who will in the vast majority of cases be opposing them. Second, an equally important part of the class action framework is ensuring the integrity of the fee petition process. Because the fee petition process is often

non-adversarial, as it was in this case, for the system to work properly, honesty, reliability and transparency are essential to enable the Court to adequately fulfill its assigned gatekeeping and fiduciary responsibilities to class members. This case and the evidence adduced during the Special Master's investigation fully exemplifies the importance of both of these policy objectives.

The underlying case here was a class action alleging unfair and deceptive practices in conducting complex foreign exchange transactions and required highly skilled and sophisticated counsel. After much work, dedication and exceptional effort in the discovery and mediation process, the parties ultimately reached a $300 million settlement. Given the risks, complexities and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by skilled and dedicated plaintiffs' counsel, was an excellent result for the class. The Court approved the settlement on November 2, 2016. Of the $300 million, plaintiffs' counsel were awarded $74,541,250.00 in attorneys' fees and $1,257,699.94 for expenses. By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved.

Unfortunately, this investigation has shown that all other things were not equal. Almost immediately after approval of the settlement, the laudable result obtained for the class became tainted when questions began to arise as a result of media inquiries concerning the fee award which, in turn, caused the Court to appoint a Special Master to

investigate and prepare a Report and Recommendations concerning all issues relating to the attorneys' fees, expenses and service awards the Court had approved in the case. The Special Master's investigation has spanned a period of some fourteen months and encompassed written discovery, the production of approximately 200,000 pages of documents, 34 witness interviews and 63 depositions. Beyond this, the law firms that were the subject of the investigation were given extensive opportunities to contribute to the legal and factual record through briefing, providing expert opinions and oral argument, input which was helpful to the Special Master in obtaining a more complete view of the factual, legal and ethical issues raised in the investigation.

The investigation is now complete. The Special Master's Report and Recommendations detail a mixed narrative of good intentions, great talent, and undeniable accomplishment and result, undermined by serious albeit inadvertent mistakes compounded by a troubling disdain for candor and transparency that at times crossed the line into outright concealment of important material facts, including the payment of an enormous amount of money from class funds to a lawyer who never appeared in the case, did no work on the case, and whose identity was intentionally hidden from the clients, the class, co-counsel and the Court.

Exacerbating matters is the fact that this payment grew out of an obligation that long pre-dated the *State Street* case and was the sole obligation of one law firm -- an obligation that this law firm shifted to the class and to its co-counsel.

In short, this Report chronicles a lamentable and dismaying tale of a great result achieved by fine and highly effective lawyering that became tainted and entangled in a

web of concealment and highly questionable ethical practices by experienced attorneys who should have known better.

Having heard and considered the testimony of the witnesses, many of whom were designated as experts, and the arguments of counsel, and having reviewed and considered the parties' interrogatory responses, the documents they produced, and their supplemental submissions, the Special Master makes his Findings of Fact, Conclusions of Law, and Recommendations to the Court. To the extent that any Findings of Fact constitute Conclusions of Law, they are adopted as such. To the extent that any Conclusions of Law constitute Findings of Fact, they are so adopted.

Overview of the Procedural Background

The underlying complex class action began as three separately-filed class action complaints against State Street Bank and Trust Company ("State Street") that were subsequently consolidated for pretrial purposes. Each of the actions alleged that State Street, as the custodian to individual institutional investors and pension fund accounts, engaged in unfair and deceptive practices in conducting "indirect" or "standing instruction" foreign currency exchange ("FX") transactions on behalf of its customers, without disclosure to its clients that these trades generated mark-ups that inured to the benefit of State Street. Following extensive discovery, resulting in document review of millions of pages of materials, coordinated with a protracted mediation process, all parties, including the governmental agencies, reached a global settlement of $300 million.

At the preliminary approval hearing on August 8, 2016, the Court certified a class for settlement purposes. The settlement class consisted of both institutional investors

who had accounts with Defendant State Street, the class representative of which was the Arkansas Teachers Retirement System ("ATRS"), (the so-called "customer class"), as well as institutional accounts representing ERISA pension plans whose accounts were held for investment by State Street, the class representatives of which were Andover Trust and four individuals, (the so-called "ERISA" class).[1] The Court had previously consolidated these separate actions for pretrial purposes, including discovery conducted concurrently with mediation (the "Hybrid Mediation"), which contributed greatly to the global settlement. In addition to the class members, the global settlement included several governmental agencies which had become involved with, although never formally intervened in, the *State Street* case, including the Department of Labor ("DOL"), the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ"). Labaton, Sucharow LLP ("Labaton") had previously been designated Lead Class Counsel; separate lead counsel was not named for the ERISA portion of the settlement class, although in important ways, three law firms – Keller Rohrback, Zuckerman Spaeder, and McTigue Law -- performed what were essentially lead counsel functions for the ERISA "class."

At the November 2, 2016 fairness hearing, the Court approved the $300 million settlement for class members, as well as an award to all Plaintiffs' counsel of attorneys' fees. The attorneys fee award was based upon a Fee Petition submitted to the Court and

[1] The parties have at times colloquially referred to these two groups as the "Customer Class" and the "ERISA Class," and they had separate counsel representing them. However, they were never formally divided into separate classes or sub-classes, and were combined into a single settlement class for purposes of the fairness hearing and approval of the settlement and attorneys' fees.

supported by separate sworn declarations for all Class Counsel. The lodestar petition submitted by Plaintiffs' counsel claimed a total of 86,113 hours for nine law firms, and set out a lodestar claim of $41.3 million at the fairness hearing. Based upon representations made in the Fee Petition and at the fairness hearing, the Court awarded approximately $74.5 million in attorneys' fees, finding that award to be fair and reasonable using the percentage of fund method and cross-checking it against the lodestar value. The fee represented 24.8% of the total $300 million settlement fund. The total fee reflected a multiplier of 1.8 times lodestar, which the Court specifically found to be reasonable. The Court also awarded expenses of $1.2 million, including service awards to the plaintiff class representatives in an amount totaling $85,000.

By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class' law firms, a view with which the Special Master wholly agrees. Unfortunately, this laudable result for the class became tarnished when reports of irregularities in the attorneys' fee petitions began to surface shortly after approval. Following media inquiries to Plaintiffs' Counsel, on November 10, 2016, the Court received correspondence signed by Attorney David Goldsmith ("Goldsmith") of Labaton on behalf of the plaintiffs firms which revealed that the Fee Petition and accompanying submissions of a number of Customer Class Counsel law firms, contained "certain quantitative inaccuracies," essentially double-counting more than 9,300 hours of "staff attorneys'" ("SA's") time totaling over $4 million in lodestar fees for attorneys involved in the document review process. This occurred because the same hours for the same staff

attorneys were claimed on the lodestar reports of Customer Class firms Thornton Law Firm ("Thornton"), on the one hand, and either Labaton or Lieff Cabraser ("Lieff"), on the other hand. Goldsmith indicated in his letter to the Court that these inaccuracies were discovered "in the course of internal reviews conducted in response to a media inquiry," and that this double-counting was inadvertent.[2] Goldsmith Ltr Nov 10, 2016 to Hon. Mark L. Wolf.

Shortly thereafter, the *Boston Globe* reported on the "double-counting" issue addressed by Goldsmith, but also raised additional questions about the accuracy and reliability of the attorneys' fees, including issues regarding the rates charged for the staff attorneys and the "contract attorneys" (or attorneys booked through private agencies (referred to herein as "agency attorneys") as well as the work in the case by the brother of Thornton managing partner Garrett Bradley, Michael Bradley -- who was not employed by Thornton -- including the $500 per hour rate at which Michael Bradley's work was included in Thornton's lodestar.

On February 6, 2017, the Court responded by issuing an Order indicating it was considering the appointment of a Special Master to inquire into these reports. Following a hearing on March 7, 2017, the Order entered on March 8, 2017 appointing retired

[2] The letter did not attempt to explain how or why the double-counting had occurred -- only that it had occurred and that it was inadvertent.

federal judge Gerald Rosen as Special Master[3] to investigate and prepare a Report and Recommendations as to:

> the accuracy and reliability of counsels' fee petitions; (2) the accuracy and reliability of representations made in David Goldsmith's November 10, 2016 letter to the Court; (3) the accuracy and reliability of representations made by parties requesting service awards; (4) the reasonableness of attorneys' fees, expenses, service awards previously ordered and whether any of them should be reduced; and (5) whether any misconduct occurred in connection with the award of attorneys' fees, and if so, whether such misconduct should be sanctioned. Court's March 8, 2017 Order, pp. 2-3.

The Special Master has conducted his investigation consistent with the March 8th Order and with the Court's mandate firmly in mind. The investigation has consisted of discovery interrogatories, reviewing approximately 200,000 documents relating to the attorney fees petitions, conducting 34 witness interviews and 63 depositions of Class Counsel, class representatives, staff attorneys, expert witnesses and others involved in this matter. Pursuant to the authority of the Court's Order, the Special Master engaged William F. Sinnott of the firm of Barrett & Singal as his counsel, attorney John Toothman as a technical advisor and ethics expert Professor Stephen Gillers.

Unfortunately, the Special Master's investigation revealed additional serious issues beyond the double-counting disclosed to the Court by the Goldsmith letter and those raised by the *Boston Globe*, but which clearly fall within the scope of investigating the reasonableness of the award of attorneys' fees and the accuracy and reliability of the fee petitions, and are therefore included in this Report. The most significant of these

[3] Judge Rosen was appointed without objection by any of the law firms. One firm, the McTigue Law Firm, initially filed an objection to the appointment of Judge Rosen as Special Master, but withdrew the objection at the March 7, 2017 hearing.

issues, as will be discussed later in this summary, arises out of the nondisclosure of a $4.1 million payment made to a lawyer in Texas who never appeared in any way in the *State Street* docket and performed no work whatsoever on the case. The discovery of this concealed financial obligation, several months into the investigation, drove much of the remaining investigation and culminated in expert reports and testimony[4] implicating very serious questions of class action law, ethical obligations owed both among counsel and to the Court, and fundamental concerns about how Courts should be assisted by class counsel in fulfilling their fiduciary obligations to the class.

The overall investigation has revealed that the above-referenced inaccuracies, misstatements and omissions of material facts were, in varying degrees, the responsibility of particular Customer Class firms and counsel, with some counsel -- particularly the ERISA lawyers -- bearing no responsibility for any of the inaccuracies, misstatements or omissions to the Court. Because each of the three Customer Class law firms bears widely varying degrees of responsibility for these deficiencies, the relative culpability of the Customer Class Counsel is addressed separately below. This summary next provides an overview of the Findings of Facts, Conclusions of Law and the Special Master's Recommendations, all of which are discussed in detail in the body of this Report.

Summary of the Special Master's Findings, Conclusions and Recommendations

As a starting point, the Special Master finds that, unfortunately, the Court was not provided accurate and reliable information in the Fee Petition and at the fairness hearing

[4] Reports and testimony were submitted by one expert retained by counsel for the Special Master and by eight experts retained by counsel for the customer class law firms.

in several key areas with respect to the attorneys' fees. As this was a fully consensual settlement with no objectors and with the defendants playing no adversarial role, the accuracy, reliability and completeness of the information provided to the Court in the fee petitions and at the fairness hearing was absolutely essential in order for the Court to properly and fully exercise its gatekeeper function to protect the class members, to whom the Court owes fiduciary duties under established law. *See Bezdek v Vibram, USA,* 809 F. 3d 78 (1st Cir. 2015). In this context, the Special Master's Findings and Conclusions are made more complicated and nuanced because, in varying degrees, the assorted categories of inaccuracies, misstatements and omissions were the responsibility of different Class Counsel firms.

As noted, some Class Counsel, including the ERISA counsel, bear no responsibility whatsoever for any of the inaccuracies, misstatements or omissions – and, indeed, were themselves the unknowing object of certain omissions -- while other firms bear different levels of responsibility for different aspects of the inaccuracies, misstatements and omissions. For example, Labaton, in its role as Lead Class Counsel, must bear particular responsibility for the misstatements as to the double-counting, although its responsibility on this issue is somewhat mitigated by the fact that the double-counting was unintentional and inadvertent, as Labaton's error was largely limited to failing to catch the duplication of the hours in the lodestar petitions of Labaton, Thornton and Lieff. Having said this, Labaton cannot be absolved of primary responsibility as it was Labaton's responsibility to ensure the accuracy of its Declaration and of the contributing declarations of the other firms in its role as Lead Counsel.

However, and much more troubling, Labaton failed to disclose to its client, to the class, to the Court, to the ERISA clients and counsel, and to the government regulatory agencies, that a significant portion of the attorneys fee award from the settlement fund would be paid to a lawyer in Texas who never appeared in the case, performed no legal services whatsoever, and whose existence was unknown to anyone beyond a few lawyers with the three customer class firms.[5] This payment derived from a contractual obligation Labaton incurred to this lawyer years before the *State Street* litigation commenced, an obligation which had nothing to do with the *State Street* case and which provided no value to the class or co-counsel. This obligation, which the three Customer Class firms later agreed would "come off the top" of the attorneys' fee award, along with the payments to the ERISA law firms and, would be shared equally among them upon settlement of the *State Street* case, resulted in this attorney, Damon Chargois, receiving 5.5 percent of the entire attorneys' fee award, totaling $4.1 million. It also resulted in Labaton being able to deflect its own obligation onto the class and co-counsel.

Before delving deeper into the various inaccuracies, misstatements and omissions and the relative responsibility for them, it bears repeating that together Class Counsel achieved an excellent settlement for the class for the reasons the Court recognized at the fairness hearing, including that the legal theory of the case was novel, the risks were great

[5] It appears that Labaton did not even fully inform the other Customer Class firms of the true nature of the obligation to this Texas lawyer, as several attorneys from Thornton and Lieff testified that they were led to believe that this attorney was serving as "local counsel" and had some active role in the *State Street* case. This, despite the fact that they had agreed to share in the payment to him. One of the attorneys from Lieff testified that, had he known of the true nature of the relationship, he would not have agreed to share in the $4.1 million payment, and would have encouraged Labaton to inform the Court of the obligation.

and counsel had successfully condensed combined document discovery and mediation in a truncated process and negotiated with counsel for State Street and with the government regulators to create a sizeable fund for the class.

Perhaps the most lamentable and dismaying aspect of this investigation is that this laudable result, achieved by fine lawyering, became entangled in a web of concealment, inaccuracies, and questionable ethical practices by experienced attorneys who should have known better. The very positive outcome achieved for the class cannot excuse the failings of the customer class law firms in discharging their duties of full candor and disclosure to the Court, to the class, to other counsel, and even to their own clients.

The Relative Responsibility of the Law Firms for the Double-Counting

As Labaton has conceded, the Fee Petition included double-counting of staff attorneys' hours by several firms; specifically, the same hours for the same lawyers -- largely at higher rates -- for the same work appeared in the Thornton lodestar, on the one hand, and in either the Lieff or Labaton lodestar reports, on the other hand. The explanation for this "oversight" begins with Thornton's inclusion of hours of staff attorneys (and several agency attorneys) who were employees of Labaton and Lieff and "loaned" to Thornton for document review purposes so as to spread the cost burden of the case across the three firms. In fact, the term "loaned" to describe the arrangement is itself a misnomer, as these attorneys were never in any sense working directly for Thornton. Rather, they were at all times supervised and housed at Labaton and Lieff. Thornton was

simply billed for the actual cost of these attorneys at periodic intervals, and paid these invoices.[6]

While there was never an explicit agreement among the three firms that Thornton would claim these hours on its lodestar, there was an apparent understanding among some (but not all) Labaton and Lieff partners to that effect. Each of the three firms bears different degrees of responsibility for the double-counting and, accordingly, the firms' respective roles are addressed *seriatim* here.

Lieff

Lieff, during the deposition of partner Dan Chiplock, has acknowledged that it made a mistake in claiming the hours of the staff attorneys and agency attorneys loaned to Thornton on its lodestar. Contemporaneous evidence also indicates that Lieff anticipated that its staff attorneys would be included on Thornton's petition. Notwithstanding this error, Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting. Lieff had, early in this litigation, agreed to the "loaning" of its staff attorneys and agency attorneys to Thornton as a means of sharing the costs and risks of employing these attorneys and the litigation as a whole. While the agreement to "loan" the staff and agency attorneys to Thornton was, perhaps, an ill-considered judgement since the cost-sharing of this case could have been achieved easily in other ways, it cannot be said that the agreement to

[6] The evidence indicates that Thornton lawyers never supervised or even met these staff attorneys and agency lawyers, as they worked in other cities, largely New York and San Francisco, while Thornton was based in Boston.

share costs through this mechanism was a significant cause of the double-counting. Thus, while Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent. [7]

Thornton

Thornton bears significant responsibility for the double-counting of hours and for the misstatements which contributed to these errors. The Thornton declaration, signed and sworn by attorney Garrett Bradley and filed in support of its fees, contains statements that are palpably false.[8] The assertions in the Bradley Declaration as to the staff attorneys and the agency attorneys are misrepresentations, since the attorneys that are the subject of the double-counting were neither employed by Thornton (unlike Labaton and Lieff) nor were the rates claimed "the same as …my firm's regular rates charged for their services," as represented to the Court in the Fee Petition. Nor were the hourly rates claimed in the lodestar, and the resulting lodestar calculations "based on their current billing rates." Bradley Declaration, ¶ 4. Indeed, they hardly could have been, since the staff and agency

[7] It bears emphasis here that none of the ERISA law firms knew anything about the agreement among the customer class law firms to "loan" the staff attorneys to Thornton, nor did they know of the cost-sharing arrangement, and certainly were not in any position to catch the double-counting of the staff attorneys time. The ERISA firms bear no responsibility for the double-counting.

[8] The Thornton declaration states under oath in paragraphs 3 and 4:

> 3. The schedule attached hereto as Exhibit A is a summary indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation is based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court. Time expended in preparing this application for fees and payment of expenses has not been included in this request.
> 4. The hourly rate for attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

attorneys did not work for Thornton and could not have "regular rates" or "current billing rates" with that firm. The same is true of Michael Bradley, who was similarly not employed by Thornton and had no "regular rate" with that firm. Thus, to this extent, there is nothing "inadvertent" about these sworn statements to the Court; they are simply blatant falsehoods.

While Thornton reasonably asserts that Labaton and Lieff, not Thornton, mistakenly claimed the loaned staff attorneys' and agency attorneys' hours in their lodestars, its misleading Declaration contributed to this substantial billing error. It is probable that, had Thornton's petition contained fully truthful and accurate statements describing the actual affiliation and rates of the loaned staff attorneys and agency attorneys, Labaton Settlement Attorney Nicole Zeiss, or the Court, would have been alerted that something was amiss and thereby have detected the double-counted hours.

Notwithstanding the apparent informal agreement among the customer class firms to allow Thornton to claim the subject hours in its lodestar, this arrangement was ripe for confusion, error and abuse, and the three firms must share responsibility for agreeing to it. Indeed, the manner in which Thornton implemented this agreement appears designed from the inception to exaggerate its lodestar. Thornton specifically reimbursed the other two firms for the staff attorneys and agency lawyers "loaned" to them on a straight cost-only basis yet subsequently claimed them on its own lodestar report at rates much higher than Thornton had actually paid the two firms in cost reimbursement, and even higher hourly rates than Labaton and Lieff claimed for most of these same staff attorneys on their own reports. Moreover, discovery and deposition testimony reflects that Thornton

attorneys, particularly Garrett Bradley, were hyper-focused on attempting to increase, or "jack up," the Thornton lodestar in this case as a means of increasing the firm's ultimate claim for attorneys' fees.[9]

Additionally, Thornton bears further, and sole, responsibility for the inclusion of Michael Bradley's substantial time--over 400 hours at a rate of $500 per hour for a total cost of $203,200 in its lodestar petition. Michael Bradley's time is simply not supported by the declaration that his time was "the same as regular rates charged for [his] services." Not only was Michael Bradley not employed by Thornton and had no regular rate with that firm, his work is largely unverifiable as it was done in his free time at his office, not at Lieff or Labaton with all the other staff attorneys, and was done at irregular intervals, such as ten hours a week over several years when he had time to fit the work in. Further, unlike the Labaton and Lieff staff attorneys, Michael Bradley prepared no legal memoranda or deposition preparation files concerning issues in the case. Further, Michael Bradley lacked the relevant experience and expertise in massive document review that the Lieff and Labaton staff attorneys had, and it is not clear that he participated in the extensive case training provided to the staff attorneys from Labaton and Lieff. These facts, taken together, raise serious questions as to the level of any substantive contribution to the case on his part. In addition, although Bradley did perform the work on a contingency basis—and he accepted the risk that he would not be

[9] Other evidence received by the Special Master directly reflects a concern on the part of Bradley and Thornton to inflate their lodestar in this case, a result in part of a belief on Bradley's part that Thornton's lodestar was undervalued in the earlier-settled Bank of New York Mellon case, a similar foreign exchange trading fraud case in which both Thornton and Lieff were involved at the same time this matter was pending, and that he wanted to make up for this in the *State Street* case.

paid if there was no recovery--the fact that most of the matters he had been retained for in his practice were in the $55 to $250/hour range makes his $500/hour rate particularly unwarranted.

Labaton

Finally, as to allocation of responsibility for the double-counting, Labaton must bear ultimate responsibility. The Labaton lawyer with primary responsibility for preparing the fee petition, Nicole Zeiss, knew nothing of the agreement among the three firms to share costs through the invoicing to Thornton of the costs of the staff and agency attorneys because she was never told anything. To this extent, Zeiss had no advance knowledge of the arrangement such that she would have been on alert to scrutinize the petitions of the firms to ensure that there was no double-counting of staff attorneys' or agency attorneys' time on multiple lodestar reports.

Beyond this, as noted, there was never an explicit or written agreement by Labaton and Lieff to allow Thornton to claim the time for these attorneys on its lodestar, much less at the enhanced rates it claimed them. David Goldsmith, one of the lead Labaton lawyers responsible for prosecuting the substantive case and who also worked with Zeiss on the fee petition, testified that although he knew of some general agreement to "sponsor" the staff and agency attorneys to Thornton as a means of sharing the costs of the case, as far as he knew, there was never an agreement to allow Thornton to claim these lawyers on its lodestar report.

Thus, to the extent that the two Labaton lawyers most responsible for preparing the Fee Petition to the Court had no knowledge that Thornton might include the lawyers on its lodestar, the double-counting was "inadvertent" as to Labaton in this sense.

However, this only insulates Labaton from a finding of intentional misrepresentation or misstatement -- it does not ultimately excuse Labaton from responsibility for the double-counting. Labaton was Lead Class Counsel and as such was ultimately responsible for preparing an accurate and reliable fee petition that the Court could rely upon to perform its gatekeeping function and discharge its fiduciary duties to the class. This responsibility would surely encompass catching and rectifying any mistakes or misstatements -- and certainly those of the magnitude of 9300 double-counted hours totaling more than $4 million in lodestar. A careful cross-checking of the lodestar petitions of the firms would have revealed the double-counting. This was Labaton's responsibility as Lead Counsel, and it did not meet this responsibility. Thus, although the double-counting and resultant misstatements to the Court as to the total lodestar were not intentional, and the misrepresentations in the Thornton declaration likely contributed to the administrative confusion, it was, nevertheless, a serious mistake for which Labaton must bear ultimate responsibility.[10]

[10] As noted elsewhere, Labaton's responsibility is enhanced because, in a very real sense, its secrecy and compartmentalized approach to all aspects of its practice contributed greatly to the double-counting errors. As manifested here, the lawyer ultimately responsible for preparing all of the settlement documents, including the fee petition, was walled off from important aspects of the substantive prosecution and administration of the case; in the context of the administration of the case, Nicole Zeiss knew nothing about the arrangement between the three customer class law firms to share the costs of the case through the allocation of the staff attorneys and agency lawyers. This compartmentalization clearly contributed to the double-counting errors, as it did to other problems discussed elsewhere in this report.

Hours and Rates.

The Court has called upon the Special Master to determine the accuracy and reliability of representations made to the Court in connection with the fee petition and the reasonableness of the fees previously ordered.[11] In concluding that the amount of fees requested was reasonable, the Court reviewed in detail the relevant factors to determine reasonableness outlined in *Johnson v. Georgia Hwy. Express*, 488 F.2d 714 (5th Cir. 1974) and *Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541 (1984), highlighting the submission of the number of hours spent, the result achieved for the class, the novel theory pursued, the potential difficulty of achieving class certification, the global settlement reached with the ERISA class, the arduous discovery and mediation processes that proceeded in tandem, and the involvement and agreement of the regulatory bodies involved, namely the DOL, the SEC, and the DOJ.

But beyond these factors, including those used to guide the application of the percentage of fund and lodestar cross-check, any determination of the reasonableness of attorneys' fees depends entirely in the first instance on the accuracy and reliability of rates and hours submitted to the Court in the lodestar reports of the parties. As detailed in the Report, the Special Master conducted a comprehensive review of the billing hours submitted in the *State Street* case and the rates of the attorneys associated with the billings.

[11] The transcript of the November 2, 2016 Hearing bears out that the Court accepted Class Counsel's calculation of fees and expenses, including service awards to the plaintiff representatives, as 25.27% of the gross settlement fund. See 11/2/16 Hearing Tr., pp. 23-24; 35-36. The Court also applied the lodestar cross-check to the fees, and found the fees reasonable. Id. at 35-36.

The Special Master agreed with counsel that for a number of compelling reasons, including the complexity of FX trading claims, the need for counsel experienced in securities class action matters, and the inclusion of ERISA claims, national billing rates should apply to the work performed in the *State Street* case.

In determining whether the appropriate national rate was used in the *State Street* case, the Special Master considered that such national rates must be consistent with the rates typically charged by counsel practicing in the subject matter -- here complex securities/financial fraud litigation -- in those geographic markets where securities and financial fraud litigation are typically brought. Like regional rates, national rates should be commensurate with the legal rates for attorneys of comparable skill, experience, and reputation litigating substantially similar matters. Employing a variety of resources and considering a variety of indicia, the Special Master compared the rates charged in the *State Street* case for partners, associates, staff attorneys and contract attorneys with those charged in similar matters. In reviewing comparable rates and determining appropriate billing rates in this matter, the Special Master examined national surveys focused on the four major cities associated with the firms in this case: New York City, San Francisco, Washington, D.C. and Boston, and also received rate information from WilmerHale, which represented State Street in the litigation.

The Special Master recommends that, for the reasons summarized above and set forth in great detail in the Report, with the minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar reports were submitted to the Court are reasonable and accurate, and consistent with

applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff.

Contrary to the picture painted in the Boston Globe article, with the exception of Michael Bradley, whose work is discussed below, these staff attorneys did much more than "low level" document review. As noted, they all were attorneys with years of experience, and the majority of them had specialized knowledge or skills in FX/securities areas. A number of them had worked on BONY Mellon which raised similar issues to those in the *State Street* case. They all made substantive contributions to the case. They did not simply do first-level document review; they also digested complex information and prepared topical memoranda and witness memoranda for depositions -- the same kind of work done by associates at large firms. Rather than referring to them as staff attorneys, it would be more accurate to refer to them as "non-partnership-track" attorneys.

Adjustments should, however, be made to the following:

Michael Bradley, whose submitted rate of $500/hour is not supportable by his experience, the work he did on the case, or the value he contributed to the case, particularly in relation to the other staff attorneys.

Contract Attorneys: The law firms should not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be

reimbursed to law firms as an expense, and the firms compensated for that expense dollar-for-dollar.

Marking Up of Staff/Agency Attorneys' Lodestar Hours

Finally, no explanation is offered for the different hourly rates at which the staff attorneys and agency attorneys were billed in the respective lodestars, or the discrepancy of those rates with the representations in the various Customer Class Counsel declarations to the Court. For example, the Declaration of Labaton's Larry Sucharow contained representations to the Court that "the lodestar calculations [are] based … on their current billing rates." Sucharow Dec. Par. 176. These same representations are made in the Lieff and Thornton declarations as well. These staff attorneys were paid an average of $55, and included some agency (contract) attorneys, contracted with an outside agency for between $35 and $55 per hour. While strong arguments support marking up staff attorneys who are full-time employees of a law firm and similarly situated in relation to the qualifications of and the work product output of law firm's partnership-track associates -- who, of course, are routinely marked up -- there is not nearly the same justification for marking up outside lawyers who are employed by an agency and "rented" to a law firm for a specific task. As noted above, these agency lawyers are more in the nature of an expense and should be treated as such.[12]

[12] It is true that some courts have approved mark-ups for such agency attorneys, although largely without analysis or detailed discussion. This does not seem to be a sound approach-- particularly when marked up again by a multiplier of almost 2.0, as was done here--and is fully discussed in the Report and Recommendations.

Service Fees

Not everything about the Fee Petition was tainted. The Special Master specifically finds that the service awards to the class representatives were fully justified based on their participation in the preparation of the case, specifically in the discovery and in the mediation sessions and that the class representatives, and particularly ATRS Executive Director George Hopkins, added great value to the case and the eventual excellent result.

A Breakdown in the Role of Lead Class Counsel

Many of the problems in this case stem from the way in which Labaton internally divides and manages its work in cases in which it serves as lead class counsel. In exercising its role as Lead Counsel, Labaton compartmentalized the roles of its lawyers working on this matter, which led to an overall lack of oversight by Lead Counsel for the class -- a repeated pattern of one hand not knowing what the other hand was doing. The example of Nicole Zeiss, who acted as "settlement counsel," having a complete lack of knowledge of the cost-sharing arrangement with Thornton as to the staff attorneys and the agency lawyers has already been noted. That she did not have all the facts she needed in order to have the necessary awareness of the full picture during her review of the various Fee Petition documents to check for the possibility of such double-billing is a serious systemic fault of Labaton.

The case could be made that Zeiss and her team should nevertheless have caught the double-counting errors -- Labaton as lead counsel ultimately bears full responsibility for this error -- but Zeiss' job was made considerably more difficult by not having been told of the "loaning" arrangement in advance of preparing the Class Counsel Fee Petition.

While the problem was potentially exacerbated by the false statements in the Thornton declaration, which did not alert Zeiss (or the Court) that Labaton and Lieff's employees were being included on Thornton's lodestar, such compartmentalization clearly contributed to no Labaton lawyer catching the double-counting problem once another firm claimed those attorneys in its report. This separation of functions resulted in the firm providing little effective oversight as Lead Counsel. Rather, it is clear that at critical times in the litigation, the knowledge of one Labaton partner on a range of significant issues was never conveyed to other Labaton partners representing the class. Certainly, Lead Counsel must exercise greater diligence in their role to eliminate the possibilities for such oversights and to safeguard the class they represent.[13]

The Chargois Arrangement

Beyond the double-counting and lodestar misstatement matters discussed above, a more serious issue was discovered during the Special Master's investigation: Labaton had a pre-existing agreement with a Texas lawyer, Damon Chargois ("Chargois"), who years earlier had facilitated an introduction to ATRS for Labaton. In return, Labaton had promised Chargois 20 percent of all legal fees awarded Labaton for any case in which Labaton was lead, or co-lead, counsel, and ATRS was a lead plaintiff (the "Chargois Arrangement"). In this case, that previously existing agreement resulted in Chargois—who made no appearance, did no work, and did not participate in the case in any way,

[13] Another prominent example of Labaton's compartmentalization and secrecy involved the Chargois Arrangement, which will be discussed in the following section: Labaton lawyers claim to have left the Chargois Arrangement to Eric Belfi and Chris Keller as "relationship counsel." But, other attorneys such as David Goldsmith who were responsible for the substantive work on the case, were told nothing about the Chargois Arrangement.

receiving 5.5% of the total award of attorneys' fees, or $4.1 million, from the class settlement fund. As noted above, this previous agreement was derived from a contractual obligation which Labaton had incurred to this lawyer years before the *State Street* litigation commenced. This obligation had nothing to do with the *State Street* case and provided no value to the class or co-counsel. Rather, Labaton shifted this long-standing obligation onto the State Street class and its State Street co-counsel.

The investigation revealed that Labaton engaged in consistent, conscious, and calculated efforts to conceal Chargois from almost all participants in the *State Street* litigation: its client, the class, ERISA counsel, and most importantly, the Court, who assumed a fiduciary role to protect absent class members. Labaton even failed to fully inform its Customer Class co-counsel, who were sharing equally in the $4.1 million payment to Chargois, of Chargois' actual role (or lack of a role) in the *State Street* case.

The three Customer Class law firms did agree to share this obligation, one-third each, and agreed it would come "off the top" of the total award of attorneys' fees, along with the fees for ERISA counsel, from the common fund. Further, the Customer Class Counsel specifically agreed that the Court need not be told of the allocation of fees, which meant that the Court would not be told of the Chargois Arrangement, notwithstanding that the Court specifically asked about attorneys' fees at the fairness hearing, albeit not specifically the allocation itself.

The Customer Class Counsel further agreed that the ERISA Counsel -- and, therefore, the ERISA party representatives -- should also not be told of the Chargois Arrangement or the payment of class settlement funds to Chargois. This is significant

because ERISA Counsel testified that had they known of the Chargois payment and its history, they would have been obligated to tell their clients and they believe their clients would not have agreed. They also testified that had they known of the Chargois Arrangement and payment, the ERISA Attorneys would not have agreed to the fee allocation that provided them 9% (later 10%) of the total attorneys' fee award, in amounts that meant Chargois would receive considerably more than any ERISA law firm that worked on the case and contributed great value to the class.

Beyond this, because ERISA Counsel Lynn Sarko was the lawyer responsible for dealing with the DOL, the decision not to tell ERISA counsel about Chargois also meant that DOL would not be told of the Chargois payment. This was a particularly critical omission, with far-reaching ramifications. ERISA Counsel, and the DOL, were instrumental in effectuating the global settlement reached in this case. ERISA Counsel have uniformly testified that if they had known that $4.1 million of the settlement funds would be paid to a lawyer who performed no work on this case, not only would they not have settled the matter, they would have told the DOL of the agreement with Chargois, and they believe the DOL would not have agreed to settle. This fact is important because State Street was insisting on a global settlement, including with the ERISA claimants and the government agencies, and State Street would not have been willing to settle without these government agencies', and especially DOL's, agreement to the terms.

While Labaton attempts to justify the payment to Chargois as arising from Chargois' introduction of a Labaton attorney to an ATRS official in 2008, and hence in the nature of a "referral fee," the Chargois payment fits none of the elements of a referral

fee. First, the Chargois obligation was not disclosed to the ATRS client -- nor to the ERISA parties -- and cannot be justified as anything other than what it was: an undisclosed obligation of Labaton in the nature of a continuing "finder's fee" to use class funds to satisfy its own pre-existing obligation. In addition to not disclosing the Chargois Arrangement to George Hopkins, the ATRS Executive Director and class representative of Labatons's client, ATRS, Labaton further failed to disclose that ATRS specifically declined to accept Chargois in a joint-bid made with Labaton to be monitoring counsel for ATRS, making the Chargois Arrangement even more material.

In fact, Labaton has paid fees to Chargois in nine other class action cases in which it served as lead counsel, not disclosing to ATRS the payments in eight of the cases. In only one such matter did Chargois file an appearance; in each of the others, his role was the same as in this case -- he filed no appearance, was unknown to the client, did no work in the case and, even though the settlement fund was used to pay his fee, his payment was not disclosed to the Court.

This Arrangement, and the failure to disclose it and the $4.1 million payment from class funds, to the Court, to the class, to the clients, to the government regulatory agencies and to ERISA counsel, is the most troubling aspect of this investigation and raises serious and profound questions about the accuracy and reliability of the Fee Petition and the individual declarations supporting it, as well as the reliability of Labaton's November 10, 2016, letter to the Court, in which Labaton again did not disclose to the Court the Chargois relationship and payment, despite that the November

10th letter provided a natural opportunity to advise the Court of any additional irregular or unusual aspects to the Fee Petition beyond the inadvertent double-counting of hours.

The Special Master believes that if the Court had been fully apprised of the obligation and all the attendant facts, including the lack of participation of Chargois and the nondisclosure to the client, the class and the ERISA parties, the Court would have raised serious questions about the Chargois payment and would have had deep reservations about approving it. At a minimum, the Special Master believes that the Court would have insisted that the class members be informed and given the opportunity to object.

What follows is a summary overview of the legal and ethical framework that informs the findings set out in this Report that Labaton failed in its duties to inform its client, the class, co-counsel/ERISA counsel, and the Court.

Duty to Inform the Client

We begin with Labaton's duties to its direct client, ATRS. As with any client, Labaton had a fundamental duty to keep ATRS reasonably informed about the status of the *State Street* matter. Mass. R. Prof. C. 1.4(a)(1)(3). In the context of a class action case, a class representative, like ATRS, must be given the information it needs to adequately perform its fiduciary duties to the class. Fed. R. Civ. P. 23(a)(4). This includes who will receive a portion of the final settlement award funding the common fund. Thus, Labaton had a duty to inform ATRS as its client, and even more so as a representative for the class, that Chargois would receive 20% of Labaton's share of the total fee award. Massachusetts Rule 1.5(e), governing attorney conduct as to fees, speaks

directly to this issue and imposes an unequivocal duty to secure client consent before dividing fees with lawyers outside the firm. By failing to fully inform Hopkins or ATRS of the Chargois Arrangement, in detail, Labaton breached its duty to inform its client, ATRS, as set forth in Rule 1.5(e). For reasons detailed fully in the body of this Report, the Special Master rejects Labaton's experts' strained explanation that Labaton satisfied, if only imperfectly, the Rule as written in 2011, through its piecemeal notice to the client in 2007-2008[14]or through the vague and generic language of its February 8, 2011, engagement letter with ATRS.

Nor are we persuaded that George Hopkins' statement to Belfi that he did "not want to know" (or otherwise be involved with the specifics of Labaton's fee agreements) relieved Labaton of its ethical obligation to inform ATRS about Chargois. A client's request not to be informed does not constitute consent under Rule 1.5(e). Even Labaton's experts acknowledged that a client's desire, however explicit, not to know certain facts does not relieve lawyers of their ethical duty to inform that client of fee-sharing. Such burden-shifting is especially inappropriate where the client is serving in a fiduciary role and owes ethical duties of his own to the class he represents. In that sense, a client like Hopkins speaks not only for himself but for the absentee class members, a duty that the record shows Hopkins took very seriously. Labaton, therefore, had a clear obligation to affirmatively inform Hopkins of the critical details of the Chargois Arrangement -- that Chargois would receive considerable payment if Labaton successfully recovered fees,

[14] The Chargois and Heron law firm appeared with Labaton on a joint application to be one of a ATRS' monitoring counsel. Labaton was accepted; Chargois and Heron was not.

though he had no obligation to work on the case -- and secure his written consent. Hopkins' instruction to Belfi did not waive that critical duty, much less rise to the level of informed consent contemplated by Rule 1.5(e).[15]

Although the Special Master believes that Labaton had a professional obligation to tell its client ATRS, a class representative, the salient details of the Chargois Arrangement so that the client could make an informed determination as to whether to give consent and as to how this might impact its obligations as class representative, rather than taking measures to keep the information from the client, the intersection of the law and the facts in this matter does not rise to the level of requiring disciplinary action. The obligations to the client, and the timing of them, were simply too unclear at the time to merit the imposition of professional discipline or any kind of disciplinary sanction.

Closely related to the issues surrounding Rule 1.5(e) are questions of whether Labaton violated Rule 7.2(b), the rule forbidding a lawyer from giving "anything of value to a person for recommending the lawyer's services." The reason Rule 1.5(e) is implicated in this discussion is that subsection (5) of Rule 7.2(b) includes an exception to the prohibition of paid recommendations for valid division-of-fee agreements under Rule 1.5(e). Rule 7.2(b)(5). In other words, if there is a valid division-of-fee award under Rule 1.5(e), it is permissible to pay a lawyer for recommending another lawyer without implicating Rule 7.2(b)'s proscriptions.

[15] A Declaration filed by Hopkins at the end of the investigation reporting that he had told Eric Belfi not to inform him of fee allocations and purporting to ratify on behalf of ATRS the Chargois payment, does not cure the problem and it obviously cannot speak for the class.

As noted, Professor Gillers believes that there was not compliance with Rule 1.5(e) and, therefore, goes on to analyze whether the Chargois Arrangement, and the history of how the Arrangement began, constitute a violation of Rule 7.2 (b). He believes that there was a violation. Contrary to the opinions of two of Labaton's experts (Wendel and Lieberman) -- who believe that Rule 7.2(b) does not apply to lawyers at all because a lawyer is not a "person" for purposes of the Rule -- Professor Gillers opines that payments by a lawyer to another lawyer for recommendations that do not comply with Rule 1.5(e) are within the proscriptions of Rule 7.2(b). In other words, Professor Gillers believes that a lawyer is a "person" under the Rule. Professor Gillers, commonsensically, points out that if the word "person" was intended to exclude lawyers from its ambit, there would be no need for the exception in Rule 7.2(b)(5) for fee agreements that divide fees between lawyers. Beyond this, the Rule or its comment use the word "non-lawyer" five times, and if the drafters of the Rule wished to limit the category of covered persons to non-lawyers, they would have used the word non-lawyer, rather than "person." Thus, the purpose of using the word "person" was to make clear the Rule covered both lawyers and non-lawyers.

Further, Labaton's experts say that the entire history of the Rule was directed toward advertising and solicitation for lawyers by touts, taxi drivers and other non-lawyers, and was not intended to cover recommendations by a lawyer to others for the services of another lawyer. Therefore, as noted, they reason, a lawyer is not a "person" within the meaning of the Rule. Two experts (Joy and Green) opine further that because the Rule covers only the "recommending" of a lawyer's services, and what Chargois did

was to introduce Labaton to ATRS and facilitate a relationship, the Chargois Arrangement is not the product of a "recommendation" and, therefore, not covered under the Rule. Finally, and more persuasively, two of Labaton's experts (Green and Lieberman) pointed out that a lawyer has never been disciplined in Massachusetts under Rule 7.2(b) for paying another lawyer for "recommending" that lawyer and there are no cases in Massachusetts -- or in fact in any jurisdiction in the country -- that have ever been brought against a lawyer for this type of a violation of Rule 7.2(b).

In the Conclusions of Law section, the Special Master finds that Professor Gillers has the stronger argument on this point as a strict matter of law and statutory construction. In reaching this decision, it resonates with the Special Master that the Rule creates a specific exception for valid fee divisions between lawyers and if lawyers were not intended to be covered by the Rule, this exception would be unnecessary. When one of Labaton's experts (Professor Green) was questioned about this, he simply said the language was "surplusage"; another expert (Mr. Lieberman) said it was "redundant" drafting. The Special Master cannot accept these rather facile explanations -- one must presume that drafters of laws mean what they say and do not adorn statutes, regulations and rules with unnecessary language -- and finds that Rule 7.2(b) covers recommendations made by lawyers for the services of other lawyers, unless there is compliance with Rule 1.5(e). Further, after a careful review of the record, the Special Master is persuaded that the entire origin and nature of the Chargois Arrangement fit easily within the ambit of Rule 7.2(b) and, therefore, the payments by Labaton to Chargois for his recommending of Labaton at the inception of the Labaton/ATRS

relationship falls within Rule 7.2(b)'s proscriptions. Therefore, because, as discussed, the fee division agreement did not comply with Rule 1.5(e), the entire Chargois Arrangement violated Rule 7.2(b).

However, this does not end the discussion, as it begs the question of whether professional discipline is merited to address the conduct. The Special Master concludes that it does not, for several reasons. First, as noted, the question of compliance with Rule 1.5(e) is a very close question upon which reasonable experts and lawyers may differ and if there was compliance with that Rule, there was no violation of Rule 7.2(b). Because the violation of Rule 1.5(e) found here does not merit professional discipline, it would be hard to say that the connected violation of Rule 7.2(b) merited discipline. Beyond this, the Special Master is struck by the fact that apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer under Rule 7.2(b) for paying another lawyer for a "recommendation." Although Professor Gillers analysis and opinion makes absolute sense, this goes to the question of notice to the practicing bar. Perhaps going forward, if the Court adopts Professor Gillers' and the Special Master's views on this Rule, the practicing profession will be on notice that bare recommendations that are not made pursuant to a valid division-of-fee agreement under Rule 1.5(e) could subject lawyers to discipline under Rule 7.2(b). But, because this appears to be an issue of first impression and not one of which the profession might have been well- advised in advance, it would not be appropriate to impose professional discipline in these circumstances. Accordingly, no professional discipline or sanctions is warranted here and none is recommended.

Duty to Inform the Class

Labaton was Lead Counsel for the class and therefore owed a fiduciary duty to inform the unnamed customer and ERISA members of the class, whom they represented after the Court certified the class for settlement purposes on August 8, 2016, of the existence of the Chargois Arrangement and its terms, including that an attorney who did no work on the case would receive $4.1 million from the settlement fund. The unnamed members of the certified class were entitled to know about the Chargois Arrangement before they were called upon to decide, with the benefit of legal advice if they desired, whether to opt out or object to the settlement or to the fee request made by Customer Class Counsel. Both decisions would precede the Court's decision on any fee award.

On August 8, 2016, David Goldsmith of Labaton appeared before Judge Wolf for the "plaintiffs and the settlement class." Michael Thornton of Thornton and Daniel Chiplock of Lieff Cabraser appeared for the same clients. "We are here," the Court said, "with regard to the motion for preliminary certification of class action and preliminary approval of the proposed class settlement." The Court concluded that it was "appropriate to certify a class for settlement purposes." It then certified "the proposed class for settlement purposes only."

Previously, in January 2012, the Court had appointed Labaton as "interim lead counsel to act on behalf of all plaintiffs and the proposed class," and had appointed Thornton as "liaison counsel for plaintiff and the proposed class" and Lieff Cabraser to "serve as additional attorney for the plaintiff and the proposed class." When the Court

certified the settlement class on August 8, 2016, the firms continued to hold these positions.

Once the class was certified (if not before), there was an attorney-client relationship between class counsel and the absent class members; at least as of August 8, 2016, Class Counsel Labaton, Lieff, and Thornton had attorney-client relationships with the certified settlement class and its members.

As fiduciaries and lawyers for the unnamed certified class members -- and lawyers are fiduciaries for their clients as a matter of law -- customer class counsel had a duty to give their clients information relevant to decisions that belonged to the client. One of the most significant decisions that belongs to a client is whether or not to settle a case. This is the very decision the Notice of Pendency presented to the recipients -- i.e., whether to settle on the terms in the Notice or to object. Under Fed R. Civ. P. 23(e)(2), the settlement must be "fair, reasonable and adequate," and under Fed. R. Civ. P. 23(e)(5), class members must have the right to object to the settlement. According to Lieff's expert Prof. Rubenstein, "notice must be sufficiently clear and informative to make those opportunities meaningful."[16]

The right of class members to make an informed decision on whether to object to a fee award is not simply a procedural safeguard. Rather, and significantly, it is grounded in counsels' ethical duties under the Rules of Professional Conduct. Mass. R. Prof. C. 1.2(a) provides in part: "A lawyer shall abide by a client's decision whether to accept an

[16] Counsel's independent obligation of disclosure under Rule 23(e)(3) is discussed in this summary *infra* under Duties to Inform the Court.

offer of settlement of a matter." Mass. R. Prof. C. 1.4(a)(1) provides: "A lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f) is required by these Rules." Mass. R. Prof. C. 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Rule 1.0(f) provides: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See also Restatement (Third) of Law Governing Lawyers* (2000), §§ 20(3) and 22(1).

Here, class members were told their "legal rights," which included their right to object to the anticipated fee application, but they were not given material information that could reasonably have prompted an objection.[17] The class members could assume that ATRS was fulfilling its fiduciary duties to the class but ATRS did not know about the Chargois Arrangement. The Notice told them that the Court had appointed Labaton Sucharow for the Settlement Class, of which they were told they were members. They could rightfully assume that Labaton was protecting their interests as its clients. However, Labaton had chosen to withhold important information that might have prompted objections. Labaton's decision to do so placed its own interest in discharging the pre-existing obligation to Chargois ahead of its client's (the class's), and thereby

[17] Supporting the fact that the Chargois payment was material is the testimony of ERISA counsel Lynn Sarko that, had he known of it, he would have had to tell his class representative clients and that he believes they would not have agreed to the payment.

deprived its client the class members of a meaningful opportunity to be informed and potentially to object. In this, Labaton failed in its duty to the class, and shifted its own obligation to Chargois – which contributed no value to the class – onto the class.

Duty to Inform Co-Counsel

Labaton's evasion of is disclosure obligations extended to and materially affected both its fellow customer class counsel and the ERISA counsel -- all of whom relied significantly on Labaton in its role as court-appointed Lead Counsel-- by preventing the Co-Counsel firms from executing their own duties to the Court, to their clients and to the class. Moreover, Labaton's neglect of its duties as Lead Counsel, and its conscious effort to conceal the existence, or true nature, of the Chargois obligation, prevented the Co-Counsel firms from meaningfully assenting to the fee allocation arrangements to which they ultimately consented on the basis of misinformation or outright omission. Labaton's failures in its duties as thus prevented its co-counsel from carrying out their own obligations in the *State Street* litigation, and call into serious question the validity of multiple fee agreements reached between the firms.

Testimony provided during the investigation confirms that that the nondisclosure or incomplete disclosure was also significant to Labaton's co-counsel. Attorney Robert Lieff, for example, testified that he would not have agreed to share in the Chargois' payment had he known that Chargois was providing no legal services and adding no value, in the *State Street* case. Lieff also testified that "it would have been appropriate to convince Larry [Sucharow] or his firm to go to the Court and tell the Court what we have here." As noted, ERISA Counsel testified that they would have proceeded differently in

multiple material respects – including disclosing the Arrangement to their clients and to government agencies had they been aware of it, as well as not agreeing to the 9% (later 10%) allocation of fees to ERISA Counsel.

In response, Labaton has maintained that it had no obligation to disclose the Chargois Arrangement to ERISA Counsel because the agreement had no impact on ERISA Counsel's fee, and that it had no duty to disclose further details to Lieff and Thornton because those firms had a sufficiently detailed understanding of the agreement. Here, Labaton's position is circular and ignores the important duties the firm owed to its co-counsel firms. The only reason Labaton's nondisclosure may not have impacted ERISA Counsel's fees is the fee agreement -- but that agreement was reached in the absence of knowledge of the Chargois payment.

General principles of fairness and professional responsibility toward co-counsel, and toward the Court, suggest that Labaton was required to disclose the Chargois Arrangement to co-counsel, as do contract and equitable principles. Co-counsel in a large class action litigation share responsibility to the clients and to the class. The co-counsel firms here relied heavily on Labaton to effectively carry out their own duties to each of these groups. To the extent that Labaton's nondisclosures affected the ability of other firms to carry out their duties to the class, and, in the case of the ERISA Attorneys, to their clients the ERISA class representatives, Labaton failed in its responsibility as Lead-Counsel to act fairly and in the interests of all parties and their counsel.

Contract and equitable principles may also be applicable to the enforceability, or voidability, of the fee sharing agreement among Customer Class Counsel, and the

agreement between the Customer Class Counsel and ERISA counsel. This may be especially apt in circumstances where, as here, Co-Counsel relied upon Lead Counsel to provide timely and accurate information in negotiating their fee agreement, and the failure to fully inform Co-Counsel of the Chargois Arrangement and payment was a material omission.

Finally, Labaton's calculated concealment of the Chargois Arrangement from ERISA Counsel also put counsel in a risky and untenable situation with respect to DOL and the other two government agencies who participated in this settlement. By its material omissions, Labaton failed in its duty to inform co-counsel of the Chargois Arrangement.

Duty to Inform the Court

Perhaps most importantly, Labaton had a duty under the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct, as well as under federal case law, to fully disclose the Chargois Arrangement to the Court. Labaton's failure to disclose the Chargois Agreement to the Court is perhaps the most serious and far-reaching of all the breaches of duty. Courts serve as the final backstop and gatekeeper in protecting class members and in our class action system; this is a fiduciary duty of the Court to the class members.

Full and accurate disclosure to the Court is the underpinning of Fed. R. Civ. P. 23(e)'s requirement that the settlement be "fair, reasonable, and adequate," Fed. R. Civ. P. 23(e)(2), and the guarantee that class members have the right to object to the settlement and any attendant fee petition, Fed. R. Civ. P. 23(e)(5) and (h)(2). As with the

right to object to the settlement itself, the right to object to a fee motion also means that class members must be given sufficient information to do so. Unfortunately, by not disclosing to the Court that $4.1 million of the settlement funds would be paid to an attorney who did no work on the *State Street* case, on account of a pre-existing obligation of the class's lead counsel -- an obligation which provided no value to the class -- Labaton deprived the Court of information it needed to discharge its fiduciary obligations to protect the class's interests.

Professor William Rubenstein has opined in this case that the failure of the class to be informed of the Chargois payment is entirely the Court's responsibility. This is because Rule 23(h), by its incorporation of the procedures for making a claim for attorneys' fees under Fed. R. Civ. P. 54, places the entire burden on the Court to order disclosure of a fee agreement such as the Chargois agreement in this case, and, absent such a court order, disclosure is not required. In other words, it is Professor Rubenstein's position that the Court must order disclosure, or at least ask the attorneys about fee allocations, and if it does not order or ask, class counsel have no duty to disclose such payments. However, separate and apart from Rule 23(h) and its incorporation of Rule 54 procedures for making a claim for attorneys' fees, Fed. R. Civ. P. 23(e)(3) requires that "parties seeking approval of a class action settlement must file a statement identifying any agreement made in connection with the proposal." As explained in the *Manual of Complex Litigation*, this provision requires disclosure of agreements that may affect the interests of the class members by allocating money that they may have received elsewhere. *Manual of Complex Litigation* (4th ed.) § 21.631.

In his treatise, Professor Rubenstein also recognized counsel's independent obligation of disclosure under Rule 23(e)(3). Section 15.12 of *Rubenstein and Newberg on Class Actions*, entitled, "Fee procedures at a class action's conclusion -- Disclosure of fee-related agreements requirement," first speaks to the (obvious) requirement to disclose any agreements as to fees when so ordered by the court. The Section goes on to recognize, however:

> [I]n addition to Rule 54's disclosure requirements, Rule 23(e) governing class action settlement -- not fee -- approval states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal."

Rubenstein and Newberg on Class Actions, § 15.12 (5th ed.) (footnote omitted).

Although Rule 23(e)(3) references the settlement agreement itself, Professor Rubenstein then goes on to observe that

> given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself -- such as any agreements about fees -- may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests. There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class. . . . Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.

Id.

This was certainly such a case. With its burden-shifting of a pre-existing obligation of Labaton to the class, the Chargois Arrangement affected the class's interests

in this case as it "allocates money that the class members may have received elsewhere," i.e. to Damon Chargois.

Here, we have an undisclosed agreement to pay $4.1 million out of the settlement funds -- funds that could otherwise be allocated to the class members -- to an attorney who did no work on the case whatsoever. In order to assist the Court in performing its fiduciary function to protect the interests of the class, Labaton was obligated to disclose to the Court its pre-existing agreement to pay Chargois this substantial amount of the settlement fund. Labaton's failure to do so was in derogation of the duties imposed upon it by Fed. R. Civ. P. 23(e)(3).

The Special Master has considered at length whether Labaton's failure to disclose Chargois' role and the agreement to pay him $4.1 million in the fee petition should be sanctionable under Fed. R. Civ. P. 11. While at least one court of appeals has found that Rule 11 applies both to disclosures and material omissions, the First Circuit has not, nor has any district court in the First Circuit, and, together with other arguments and factors raised by counsel to Labaton, the Special Master finds it must stop short of finding a violation of Rule 11 in Labaton's nondisclosure of the Chargois Arrangement.

But this does not end the analysis of whether Labaton breached duties to the Court. As part of his Lead Counsel obligation in this case, Lawrence Sucharow of Labaton filed a "Declaration in Support of Plaintiff's Assented-To Motion for Final Approval of the Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for Award of Attorney Fees." *See* Dkt. No 104. In that Omnibus Declaration, in two separate places, at footnotes 2 and 6,

Sucharow purports to identify all of "Plaintiffs' Counsel." In footnote 2, Sucharow identifies as "Plaintiffs' Counsel," his own firm, Labaton Sucharow, and "the Thornton Law Firm LLP ("TLF"), Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser"), Keller Rohrback L.L.P. ("Keller Rohrback"), McTigue Law LLP ("McTigue Law"), and Zuckerman Spaeder LLP ("Zuckerman Spaeder")", *id*., n. 2, at p. 1. In footnote 6, Sucharow identifies Labaton Sucharow, TLF, Lieff Cabraser, Keller Rohrback, McTigue Law, Zuckerman Spaeder, as well as, Beins, Axelrod, P.C. (which partnered with McTigue Law and Zuckerman Spaeder in representing the Henriquez plaintiffs); Richardson, Patrick, Westbrook & Brickman, LLC (former co-counsel for Henriquez plaintiffs); and Feinberg, Campbell & Zack, P.C. (local counsel for McTigue Law in the Andover action). *Id.*, n. 6, at p. 41. In Keller Rohrback's Declaration, Theodore Hess-Mahan of the Massachusetts firm of Hutchings Barsamian Mendelcorn LLP is identified as Keller Rohrback's local counsel. Within Labaton's lodestar report attached as Exhibit A to Labaton's individual fee declaration at Dkt. No. 104-15, Sucharow further identifies fees paid to an "of counsel," P. Scarlato (Paul Scarlato of Goldman Scarlato, a Pennsylvania law firm).

On the surface, these Declaration statements could lead the Court reasonably to believe that these are all of the lawyers being paid from class funds. However, there is one lawyer who was paid from class funds who is not mentioned anywhere in Sucharow's Omnibus Declaration, in Labaton's individual fee declaration -- which was also signed by Lawrence Sucharow -- or in Labaton's lodestar and reports annexed thereto. That one lawyer is Damon Chargois.

Sucharow has admitted that he knew of the obligation to pay Chargois a portion of the *State Street* fee award at least as of 2015; the Fee Petition was filed on September 15, 2016. The Special Master finds that this nondisclosure was considered and deliberate.

In deciding the amount of fee to award Class Counsel -- and to whom to award it -- the Court, as a fiduciary for the class, including unnamed class members, needed first to know -- and Sucharow and Labaton had a duty to tell it -- who would be participating in any fee the Court in its discretion might award from the class recovery, and the basis for the claim. By not disclosing the intended payment of $4.1 million to Chargois, Sucharow and Labaton kept the Court in the dark and denied it the very information it needed to decide how much of the settlement funds should go to counsel, and which counsel, and how much should go to the class. As Professor Gillers observed, "[q]uite simply, until the Court made that decision, there was no fee to divide." Gillers Report at p. 73. The Court had the authority, as an exercise of its equitable power and fiduciary duty to the class, to deny any part of the class funds to Chargois, who never appeared and who did no work, made no contribution whatsoever to the success of the *State Street* litigation, and whose only connection to the case was through Labaton's own pre-existing obligation, and instead to direct that the money intended for Chargois should instead go to the class. The Court, however, never had an opportunity to make that decision because of the material omission of Chargois from Sucharow's Declaration.

Beyond any obligation for disclosure under the Federal Rules of Civil Procedure, the Massachusetts Rules of Professional Conduct required disclosure to the Court. Mass.

R. Prof. C. 3.3 imposes upon attorneys practicing in Massachusetts a "duty of candor toward the tribunal." Rule 3.3(a) provides in relevant part:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

Comment [3] to Rule 3.3 makes clear that an attorney's failure to make a disclosure in an affidavit or in open court can be the equivalent of a misrepresentation within the purview of Rule 3.3(a).

That Sucharow had a duty to disclose the Chargois Arrangement to the Court is made even more clear by Comment [14A] to Rule 3.3, which provides:

> When adversaries present a joint petition to a tribunal, such as a joint petition to approve the settlement of a class action suit . . . the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

Mass. R. Prof. C. 3.3, Cmt. [14A]. Proceeding from Comment [14A] takes us to Rule 3.3(d), which provides:

> (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

In addition to Rule 3.3 of the Massachusetts Rules of Professional Conduct, there is also an overriding general duty of candor owed by attorneys as officers of the court. As noted by Professor Gillers, while "the phrase 'candor to the Court' is not an unbounded source of duty, entirely untethered to rules, custom, or case law. . . the word 'candor' should at least guide a lawyer's understanding of his or her duties as officers of the court." This broad duty of candor has been recognized by the First Circuit, which, in *Pearson v. First NH Mtg. Corp*., 200 F.3d 30 (1st Cir. 1999) cited the Fourth Circuit in *United States v. Shaffer Equipment Co*.,11 F.3d 450, 457 (4th Cir. 1993), in which the court said, "[T]ruth is the object of the system's process…of dispensing justice…Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process."

It is for all of these reasons that the Special Master concludes that through his failure to disclose the $4.1 million Chargois Arrangement, Sucharow violated his duty of candor as an officer of the Court, and thereby denied the Court the opportunity to meaningfully carry out its fiduciary role and gatekeeping function to protect the interests of the class.

Special Master's Recommendations

Before detailing the Special Master's recommendations to provide remedies and redress for the conduct identified in this Report, the Report provides a preamble as context. One of the most troubling elements of the Chargois aspect of the investigation has been Labaton's response to the discovery of the conduct revealed in the investigation. Quite simply, the response is inappropriate and insufficient in light of the severity and

pervasiveness of the conduct. There has been no acceptance of responsibility for the calculating and secretive nature of the conduct and its adverse ramifications. There has been no expression of contrition. There has been no expression of remorse. And there has been no expression of apology to the client, to the class members, to co-counsel or to the Court.

Instead, Labaton has met the Special Master's inquiry into the Chargois Arrangement and the $4.1 million payment with a phalanx of experts, who together with Labaton, have erected a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court). Although Labaton certainly has a right to present its best case -- and its arguments have been considered and, in some instances, used to inform the Special Master's findings and recommendations to the Court -- some acknowledgement of the potential harm this conduct has caused to class members, co-counsel and the Court would have been not only appropriate, but expected. Instead, Labaton and its experts have taken positions that speak only to its legal defenses, and not to what is in the best interests of class members. This approach is as disappointing as it is indicative of the culture of compartmentalization and concealment at Labaton that led to the Chargois Arrangement and its nondisclosure to the other participants in the case in the first place.

With this context in mind, the Report provides a comprehensive set of Recommendations informed by the previously-delineated findings of fact and conclusions of law. In important respects, formulating these recommendations was the most difficult and challenging undertaking of the Special Master because it required that the interests of the class, the law firms, individual attorneys, the public and the judicial

process be weighed and in some respects, balanced, in order to recognize the valuable role of class action proceedings while addressing misconduct and questionable practices in an uncompromising fashion. The Special Master believes that his Recommendations achieve that balance and those objectives.

After presenting recommended legal findings with respect to inaccuracies, misstatements and omissions of material facts, to include double-counting and the breaches of duty to the client, class, co-counsel and the Court arising from the Chargois Arrangement, the Special Master recommends remedies and sanctions to address these failings:

1. Double-Counting on the Customer Class Law Firms' Lodestar Petitions ($4,058,000).

   All three customer class firms will share responsibility. The remedy for this is the disgorgement in equal amounts of the entire $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.

2. Garrett Bradley's Sworn Declaration Statements.

   The Special Master recommends that significant monetary and professional sanctions be levied. As to monetary sanctions imposed under Rule 11, they are imposed against the Thornton firm (as provided by Rule 11) in an amount within a range between $400,000 and $1 million, approximately ten to twenty-five percent of the value of the double-counting. As to the sanctions under Rule 3.3 of the Massachusetts Rules of Professional Responsibility, these are individual and the Special Master recommends that Garrett Bradley be referred the Massachusetts Board of Bar Overseers for appropriate disciplinary proceedings. The Special Master recommends that these monetary sanctions be awarded to the class.

3. Hours and Rates.

   The Special Master recommends that, for the reasons set forth in great detail in the Report, with the minor exceptions noted herein, the Court find that the hours and rates of the attorneys of each of the law firms for whom lodestar

petitions were submitted to the Court are reasonable and accurate, and consistent with applicable market rates for comparable attorneys in comparable markets for comparable work. This includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff. Adjustments should, however, be made to the following:

- **Michael Bradley**: Michael Bradley, whose submitted rate of $500/hour is not supportable by his experience, the work he did on the case, or the minimal value he contributed to the case, particularly in relation to the other staff attorneys. Bradley's rate should be set at half of the submitted rate, or $250/hour. Bradley recorded roughly 406 hours, thus yielding a total of $101,500. It is recommended that Thornton, which received a multiplier of roughly 1.8 on his original fees, be disgorged any monetary benefit afforded to it by applying an artificially inflated rate. Thornton's lodestar on which it claimed Michael Bradley's hours should be reduced by $182,180, equal to the difference between the lodestar-generated marked-up hourly rate ($500) and the more appropriate hourly rate of $250. In making this calculation, Special Master gives equal weight, and applies the same multiplier, to Michael Bradley's hours as to any other attorney who worked on the case. The Special Master recommends that this overpayment amount be awarded to the class.

- **Contract Attorneys**: The law firms should not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be reimbursed to law firms as an expense, and the firms compensated for that expense dollar-for-dollar. The seven contract attorneys, all retained by Lieff, recorded 2833.5 hours at rates varying between $415 and $515. The total billings for contract attorneys was $1,298,198, or approximately $1.3 million. In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2,336,756, or approximately $2.3 million for the time of the contract attorneys. It is recommended that this amount be disgorged and be returned to the class. The Customer Class Counsel is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the class.

4. <u>The Chargois Payment ($4.1 million).</u>

Because the Chargois Arrangement was solely Labaton's obligation and because Labaton has profited handsomely over the years from the ATRS relationship Chargois helped facilitate, and because Labaton is solely responsible for the nondisclosure of this relationship to ATRS, the class, ERISA counsel and the Court, the Special Master recommends that the appropriate remedy for the Chargois payment be disgorgement of entire $4.1 million Chargois amount, and that this disgorgement be solely the responsibility of Labaton. The Special Master recommends that ERISA counsel should receive the bulk of this award, or $3.4 million, an amount which reflects the difference between the $10.9 million that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received. This amount is also the amount that went instead to the customer class counsel.

The Special Master, in making this recommendation, has also considered the significant value the ERISA attorneys added to the class recovery. Taking into consideration the considerable time and expense incurred by the ERISA attorneys in participating in the investigation, the Special Master believes that the recommended $3.4 million is sufficient to include the costs and expenses incurred by the ERISA attorneys in this investigation. Finally, the Special Master recommends that the $3.4 million be allocated amongst the ERISA law firms in the same proportion and in the same manner as the original fee award was allocated. The $3.4 million award to ERISA counsel still leaves a balance from the $4.1 million of $700,000. The Special Master recommends that this amount be allocated back to the class, which was deprived of its ability to make a determination as to whether to agree to the settlement which included the Chargois payment.

5. Guidance on Ethics Issues.

The Special Master believes there is a need for a mechanism to provide ethical guidance to Labaton and Thornton on ethical issues in the future, recognizing that formal professional disciplinary sanctions for a firm like Labaton, which often represents public institutional investors with elevated standards of conduct for their outside counsel, could dramatically and adversely impact the firm's ability to provide legal services in its area of expertise, services which benefit both their class clients and often the broader public. Indeed, the Special Master recognizes that professional disciplinary sanctions could be a death-knell to a firm like Labaton, and the Special Master believes that would be a disproportionate penalty here. Nevertheless, Labaton and Thornton require someone from the outside to consult with them on professional conduct norms and to ensure that they comply with those norms. The Special Master recommends that the two firms work with the Court to establish a consulting

process that will ensure consistent ethical compliance. The Special Master notes that, according to its April 30, 2018 letter, Labaton has already taken steps in this direction, and has taken additional steps to address the kinds of conduct that arose in this case. The Special Master recommends that Labaton continue its efforts in this direction and that Thornton adopt policies and comparable practices to ensure that, going forward, it does not exceed professional conduct boundaries.

Lessons Learned and Best Practices Recommendations

During the course of the investigation, the Special Master invited the law firms to reflect upon lessons learned in this case and to offer recommendations as to best practices for their firms and for class action practice in general, a number of which the Special Master, in turn, presents to the Court for its review, including:

1. Ceasing the practice of allocating attorneys to other firms who are not their employers and of putting employees from one firm on another firm's lodestar report. At least one of the firms has reported that it now prohibits the practice of allowing its staff attorneys to be reimbursed by another firm.

2. Putting practices in place to eliminate the communication gaps and compartmentalization (or "silo-ing," as some firm attorneys referred to it) among law firm attorneys that contributed to failures in this case, including double-counting. In addition, lead counsel should begin discussions on preparing lodestar numbers immediately after the Court grants preliminary approval, should compare all lodestar numbers before submission, and should ensure that lodestar reporting protocol is followed.

3. Implementing internal measures to ensure quality control of lodestar submissions (including removal of time spent preparing fee petition). Labaton reports that it has "expanded the checklist" for its settlement attorney in preparing fee petitions; it will also require its accounting office to directly identify staff attorney costs and will assign specific reviewers to track costs throughout the litigation.

4. Implementing external measures to ensure quality control of lodestar submissions among firms in large class action cases, including

   - Circulating draft declarations to co-counsel for close scrutiny;

- Replacing unclear language with new, model language;
- Lead counsel imposing semi-routine lodestar reporting requirements; and;
- Seeking interim data throughout the lifetime of the case.

5. Implementing better communication among firms on cost-sharing, including memorializing such agreements in-writing and including any cost-sharing arrangements in the individual declarations.

The firms offered additional meritorious recommendations for *the courts* to implement, including:

6. Appointing an executive committee comprised of co-counsel;
7. Defining standards at the beginning of litigation detailing what is expected of counsel;
8. Providing necessary guidance as to critical criteria in the fee petition; and
9. Ordering periodic fee monitoring requirements such as those required by Judge David Proctor in the Northern District of Alabama.

In addition to the preceding best practices offered by counsel, the Special Master recommends the following:

10. That firms report all fee allocation agreements among counsel to the Court—without being asked.
11. That lead counsel include sufficient information to a class of fee allocation agreements between counsel such that class members may make informed decisions as to whether to object or opt out of class settlements.
12. That firms no longer retain an individual to obtain introductions to clients and then pay that person a percentage of every future case, whether or not that person does any work on a case or performs any services for the client, even if that person happens to have a law degree.

13. That fee allocation agreements between class counsel be in writing and based upon full disclosure of all material terms, and that Lead Counsel be responsible for ensuring this.

14. That Massachusetts limit the practice of "bare referrals", i.e. permitting a lawyer to receive a referral fee for doing no work and having no attachment to the case or the client, which invites abuses such as those found here and which blurs the lines between legitimate referrals that promote the retention of more competent lawyers and those which cross the line to outright solicitation. One step that might be helpful would be if the Massachusetts Board of Bar Overseers and Massachusetts courts were to make clear that Rule 7.2(b) applies to lawyers and that lawyers cannot receive "fees" from other lawyers simply for recommending a lawyer, unless there were a valid agreement under Rule 1.5(e), consented to in writing by the client after being fully informed in the material terms of the fee-sharing agreement.

The Special Master concludes by stating that in the focus of this investigation has been to identify true professional misconduct, to remedy wrongs and to put the law firms and the class in a position that is proportionate to the conduct and the harm. In this context, the Special Master notes that the recommendations here, if followed, would return between $7.4 and $8.1 million to the class. Beyond this, the Special Master reiterates that, despite the questionable conduct, the result achieved for the class in this settlement was an excellent one and that the firms and their lawyers deserve great credit.

DATED: May 14, 2018

Hon. Gerald E. Rosen (ret.),
Special Master

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

MEMORANDUM AND ORDER

WOLF, D.J. June 28, 2018

On June 21, 2018, I issued an Order stating that, "[f]or the reasons that will be explained in a forthcoming Memorandum and Order, Labaton Sucharow, LLP's motion seeking my recusal pursuant

to 28 U.S.C. §455(a) is hereby DENIED because a reasonable person could not question my impartiality." Docket No. 315. The reasons for that decision are described in this Memorandum.[1]

I. SUMMARY

I have been presiding in this class action since 2011. In 2016, I approved a settlement of the case and awarded Lead Counsel Labaton Sucharow LLP ("Labaton") and other law firms that represented the class $75,000,000 in attorneys' fees. A subsequent letter from Labaton informed me of what were characterized as "inadvertent errors" in the fee petition and affidavits Labaton had filed. A Boston Globe article raised further questions about the reliability of the representations that were made in the fee petition.

In 2017, with the agreement of Labaton and the other law firms representing the class, I took the evidently then unprecedented step of appointing a Master to investigate whether false and misleading statements had been made in the petition for fees and related issues. I directed the Master, Retired United

[1] I issued the Order in advance of this Memorandum because I wanted to eliminate any doubt about my authority to conduct the previously scheduled June 22, 2018 hearing on proposed redactions to the Master's Report and Recommendation. This also provided the proper sequence for deciding whether to make public some information Labaton had requested remain sealed that is necessary to discuss in this Memorandum. In view of the tight time frame for deciding the underlying questions of redaction, I also needed more time to complete drafting this Memorandum.

States District Judge Gerald Rosen, to report the results of his investigation and to make recommendations concerning whether the fee award should be reduced and whether sanctions should be imposed on any of the attorneys.

In May 2018, the Master submitted his Report and Recommendation (the "Report") under seal to permit the law firms to propose redactions.[2] The Master has recommended, among other things, that Labaton and some of the firms associated with it be ordered to disgorge more than $10,000,000. The Master also found that Garrett Bradley of the Thornton Law Firm ("Thornton"), and of Counsel to Labaton, included statements that he knew were false in his affidavit in support of the fee petition. The Master recommends that I find Garrett Bradley violated Federal Rule of Civil Procedure 11, impose a sanction on Thornton of $400,000 to $1,000,000, and refer Garrett Bradley to the Massachusetts Board of Bar Overseers for disciplinary action.

The law firms have an opportunity to object to the Master's findings and recommendations. The presiding judge must decide any objections de novo. As Labaton wrote in requesting my recusal, the decisions on objections could have "serious and far reaching adverse ramifications for at least some of the law firms." Docket No. 216-1 at 2.

[2] On June 28, 2018, the Report was ordered unsealed, with limited redactions not referenced in this Memorandum. See Docket No. 357.

Labaton has filed a motion asserting that the Master's appointment should be deemed concluded. That motion is not yet fully briefed and remains to be decided. However, if it is granted the Master would not have the opportunity to respond to objections to his recommendations.

Labaton has also moved for my disqualification pursuant to 28 U.S.C. §455(a). Labaton's motion relies primarily on a colloquy at sidebar during a May 30, 2018 hearing that included questioning of George Hopkins, the Executive Director of class representative Arkansas Teacher Retirement System ("ATRS").

In a class action, the presiding judge has a duty to assure that the class is represented by an entity or individual whose interests are typical of those of the members of the class and who will vigorously advocate the interests of the class through qualified counsel. This means, among other things, that the presiding judge should examine the adequacy of representation at all stages of the litigation, particularly if there has been a material change in circumstances. My questioning of Hopkins in open court was intended to obtain information relevant to determining whether ATRS continues to be an adequate representative of the class.

My questions to Hopkins were based, in meaningful measure, on a concern that ATRS' long and continuing relationship with Labaton might keep it from vigorously advocating the interests of

the class concerning whether Labaton and other firms should be ordered to disgorge more than $7,400,000 for the benefit of the class, and whether Labaton should be required to disgorge an additional $4,100,000 as well. The Master's Report revealed that $4,100,000 of the $75,000,000 fee award had been paid to Damon Chargois, a lawyer in Texas who had done no work on the case, and whose name was not disclosed to ATRS, the class, or the court. That payment reportedly resulted from the efforts of Chargois and his partner in Arkansas, Tim Herron, in introducing Labaton to ATRS. Chargois described that role in a message to Labaton, stating:

> We got you ATRS as a client after considerable favors, political activity, money spent and time dedicated in Arkansas, and Labaton would use ATRS to seek lead counsel appointments in institutional investor fraud and misrepresentation cases. Where Labaton is successful in getting appointed lead counsel and obtains a settlement or judgment award, we split Labaton's attorney fee award 80/20 period.

Report (Docket No. 224) at 125 n.111.

Hopkins stated to the Master that he did not believe that the fee to Chargois should have been disclosed to ATRS or the class. This prompted the Master to write that, "[w]e cannot see how, in light of a clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately represent the class moving forward." Id. at 258, n.207.

While the merits of the Master's views remain to be decided, on May 30, 2018 I anticipated that the conduct of Hopkins on behalf of ATRS would become an issue in these proceedings, and that ATRS' interests might be aligned with Labaton's interests, which now conflict with the financial interests of the class. In addition, the Boston Globe had investigated and reported on campaign contributions to a Massachusetts county treasurer and the state treasurer by Labaton and Thornton before receiving lucrative contracts to represent funds chaired by those officials in class actions. It also reported that federal prosecutors were investigating Thornton's political campaign contributions. The Master in seeking instruction had told me that federal prosecutors were investigating whether Thornton had made an illegal payment to a pension fund official and asked him to provide information obtained in his investigation.[3] The Boston Globe article and the criminal investigation caused me to expect that there would be questions by the media at least about the origins of Labaton's relationship with ATRS when the Master's Report was unsealed. Each of these matters is relevant to whether ATRS remains a typical and adequate class representative.

In response to my questions on May 30, 2018, Hopkins testified that he did not believe that ATRS should take a position

[3] I instructed the Master not to provide information to the prosecutors voluntarily.

on whether Labaton and other lawyers should be ordered to return some of the fees awarded to the class. He also said ATRS was not, as class representative, receiving legal advice from anyone other than Labaton.

Without being asked, Hopkins also stated that, when he became Executive Director of ATRS, Labaton was one of several firms retained to monitor ATRS' investments and possibly represent ATRS in class actions, and that "political leaders" had persuaded Hopkins to give high priority to such cases. In response to questions about this, Hopkins said that he had over the years discussed class actions, Labaton, and this case with Stephen Faris. According to Master's Report, Faris, as an Arkansas State Senator, had introduced Labaton to ATRS. Hopkins also testified that he had met with Faris on May 28, 2018 -- Memorial Day -- and discussed the May 30, 2018 hearing with him.

After questioning Hopkins, I summarized my concerns about whether ATRS remained a typical and adequate class representative. I noted that the Master's Report raised questions, which were only questions, about the origins of Labaton's relationship with ATRS, and expressed concern that such an issue might diminish ATRS' incentive to represent the class vigorously. I concluded by saying that my paramount responsibility is to assure that the class is represented by a lead plaintiff whose role is not complicated by unique issues and potential conflicts of interest.

I provided Hopkins a week to report on whether ATRS wished to continue as a class representative and, if so, whether it intended to continue to get advice from Labaton or to obtain new counsel.

Counsel for Labaton then requested a sidebar conference, which was not public. I explained the reasons for my questions to Hopkins about Chargois and Faris. I said that while they may not be questions to be resolved in this case, I believed it was foreseeable that when the Report became public, there would be questions about the origins of the relationship between Labaton and ATRS, and whether "all of those millions of dollars stopped with Mr. Chargois." May 30, 2018 Tr. at 2. I expressed concern that such questions could affect ATRS' adequacy as class representative. In response to questions from Labaton's counsel, I stated that I had not formed the opinion that money was going to Faris or anyone else, or that public corruption had occurred. I reiterated that I was concerned that when the Report was made public ATRS would become part of the controversy, and that caused me to question whether ATRS remained an appropriate representative of the class. I said: "[R]emember what this is about. Who is representing the class?" Id. at 8.

Labaton has moved for my disqualification based primarily on the colloquy at sidebar. Labaton does not contend that I am actually biased or prejudiced, or claim that I actually have personal -- meaning extrajudicial -- knowledge of any disputed

evidentiary fact. Therefore, it does not seek my disqualification pursuant to 28 U.S.C. §455(b)(1).

Instead, Labaton suggests that a reasonable person could believe I am biased or prejudiced, or that I have personal knowledge of disputed facts. Therefore, Labaton seeks my recusal pursuant to 28 U.S.C. §455(a), which requires disqualification if the judge's impartiality might reasonably be questioned.

As the First Circuit has written, §455(a) "seeks to balance two competing policy considerations: first, that courts must not only be, but seem to be, free of bias or prejudice; and second, the fear that recusal on demand would provide litigants with a veto against unwanted judges." In re: Boston's Children First, 244 F.3d 164, 167 (1st Cir. 2001) (internal citations and quotations omitted).

A motion for disqualification under §455(a) must be decided from the perspective of a fully informed, reasonable person. "[U]nder §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute." Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring in judgment); United States v. Snyder, 235 F.3d 42, 48 (1st Cir. 2000) (quoting Liteky); In re United States, 158 F.3d 26, 34 (1st Cir. 1998) (same).

Almost always, an extrajudicial source is required to justify recusal under §455(a). See Liteky, 510 U.S. at 551. An extra-judicial source typically involves ex parte communications in which "a judge receives information that does not enter the record, the reliability of [which] may not be tested through the adversary process." United States v. Craven, 239 F.3d 91, 103 (1st Cir. 2001). As I explained would occur at the March 7, 2017 hearing at which the Master was appointed, I had periodic ex parte communications with the Master to discharge my administrative duties, under Federal Rule of Civil Procedure 53(a)(3), to protect against unreasonable expense and delay in these proceedings. In that process I was told about the existence of the $4,100,000 payment to a lawyer who did not work on this case. This information was provided to me so I could determine whether to authorize the Master to retain an advisor on the ethical issues that payment raised and decide whether to grant extensions of the deadline for submission of the Master's Report. I did not discuss with the Master the substance or merits of the ethical issues, which are addressed at length in his 377-page Report, or the substance or merits of any other issues.

As indicated earlier, the Master also informed me that federal prosecutors in Massachusetts had asked him for information in connection with their investigation of Thornton. He did so to seek instruction on how to respond to the request. I directed

the Master to tell the prosecutors that he was not authorized to provide them documents or information; rather, if they wanted to pursue the matter, they would have to file a motion to be decided by me or issue a grand jury subpoena. The prosecutors have done neither.

For the reasons described in detail in this Memorandum, a fully informed, reasonable person could not question my impartiality. Therefore, my recusal under §455(a) is not justified. Accordingly, I have a duty to continue to preside in this case, in part to avoid encouraging the perception that litigants can manipulate the system to jettison an impartial judge in the hope of getting another more to their liking. See In re: Allied Signal, 891 F.2d 967, 970 (1st Cir. 1989) (Breyer, J.). Therefore, on June 21, 2018 I issued an order denying Labaton's motion for my recusal.

II. THE MOTION AND THE APPLICABLE STANDARDS

Labaton filed a motion asking me to decide whether my disqualification is mandated by §455(a), which requires recusal if in this case my "impartiality might reasonably be questioned."[4] Labaton did not contend that I am actually biased or prejudiced,

[4] No other law firm joined Labaton's motion seeking my recusal. Labaton did not request discovery concerning its motion. Nor did Labaton request a hearing on it as required by Rule 7.1(d) of the Local Rules of the United States District Court for the District of Massachusetts if a party "wishes to be heard." I found, in any event, that a hearing on the motion was not necessary.

or that I have personal, meaning extrajudicial, knowledge of disputed evidentiary facts, any of which would require my recusal under 28 U.S.C. 455(b)(1). Nevertheless, Labaton suggested that I decide whether a reasonable person might question my impartiality. See In re Bulger, 710 F.3d 42, 46 (1st Cir. 2013) (in some circumstances, "a reasonable person may question impartiality without the presence of any evidence the judge is subjectively biased").

Labaton stated that its motion was primarily based on the colloquy at sidebar following my questioning George Hopkins, the Executive Director of ATRS. See Docket Nos. 275 at 2, 276 at 2. It wrote that the motion "secondarily relate[d]" to whether the court's impartiality could reasonably be questioned concerning challenges Labaton intended to make to the cost and the performance of the Master. Docket No. 275 at 2; see also Docket No. 276 at 1. On June 19, 2018, Labaton has filed a motion seeking, among other things, a ruling that the Master's role in this case has ended. See Docket No. 302.

It is the duty of the presiding judge, rather than another judge, to decide whether his disqualification is required by §455(a). See In re Martinez-Catala, 129 F.3d 213, 220 (1st Cir. 1997). As the First Circuit has explained:

> It might seem odd that recusal issues should be decided by the very judge whose recusal is in question. But there are other

> considerations at work, including desire for expedition and a concern to discourage judge shopping.

Id.

In 1989, then-Judge Stephen Breyer wrote with regard to a motion to disqualify under §455(a) that:

> We draw our legal standards for review of a district judge's decision not to disqualify himself from [] In re United States, 666 F.2d [690]. We there held (1) that "a charge of partiality must be supported by a factual basis," (2) that "disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality," and (3) that this court of appeals will allow the district judge "a range of discretion" in making these determinations. Id. at 695 (emphasis in original). Only if the district court's decision to sit "cannot be defended as a rational conclusion supported by reasonable reading of the record" will we insist upon disqualification. Id. (emphasis added).

In re Allied-Signal, 891 F.2d 967, 970 (1st Cir. 1989) (emphasis in original).

The standard for determining a motion for disqualification under §455(a) is "[w]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. §455, but rather in the mind of the reasonable man." United States v. Voccola, 99 F.3d 37, 42 (1st Cir.

1996) (quoting United States v. Cowden, 545 F.2d 257, 265 (1st Cir. 1976)). Therefore, the disqualification issues must be analyzed from the perspective of "an objective, knowledgeable member of the public," rather than from the perspective of a person involved in, or directly affected by, the case. El Fenix de Puerto Rico v. M/Y JOHANNY, 36 F.3d 136, 141 (1st Cir. 1994) (quoting In re United States, 666 F.2d at 695)).

This test asks "whether a reasonable person, fully informed of all the facts, would doubt [the judge's] impartiality." In re United States, 158 F.3d at 31 (emphasis added); see also United States v. Vazquez-Botet, 532 F.3d 37, 48 (1st Cir. 2008); El Fenix de Puerto Rico, 36 F.3d at 141; Home Placement Serv., Inc. v. Providence Journal Co., 739 F.2d 671, 676 (1st Cir. 1984). The proper perspective has been described as that of "the reasonable man on the street ... who knows the full facts even if those facts are not known on the street." Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369, 374 (D. Me. 1986) (Aldrich, J., sitting by designation).

The conduct that has prompted the motion for recusal is not to be considered in isolation. Rather, the record as a whole must be considered. See In re Cargill, Inc., 66 F.3d 1256, 1260 (1st Cir. 1995) (reviewing recusal in light of "careful perscrutation of the record"); In re Allied-Signal, 891 F.2d at 972 (considering that law clerks whose brothers were plaintiffs' counsel had worked

on the complex case since it began and were unusually useful "in bringing Phase One [of the case] to trial"); cf. United States v. Ayala-Vazquez, 751 F.3d 1, 23 (1st Cir. 2014) ("[W]hen a defendant claims he has been prejudiced through a trial judge's interventions at trial, '[c]harges of partiality should be judged not on an isolated comment or two, but on the record as a whole[.]'") (quoting United States v. Polito, 856 F.2d 414, 418 (1st Cir. 1998))).

In deciding a motion to recuse under §455(a), "the district court is not to use the standard of 'Caesar's wife,' the standard of mere suspicion." In re Allied-Signal, 891 F.2d at 970; see also In re Bulger, 710 F.3d at 47 (same); Cigna Fire Underwriters Co. v. MacDonald & Johnson, Inc., 86 F.3d 1260, 1271 (1st Cir. 1996) (same). Rather, as Justice Anthony Kennedy has written, and the First Circuit has reiterated:

> [Section] 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under §455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Liteky, 510 U.S. at 557-58, (Kennedy, J., concurring in the judgment) (emphasis added); see also Snyder, 235 F.3d at 48 (quoting Liteky, 510 U.S. at 557-58); In re United States, 158 F.3d at 34 (same). In essence, "the presumption is that a judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath." In re Aguinda, 241 F.3d 194, 204 (2d Cir. 2001).[5] However, the First Circuit has explained that "doubts ordinarily should be resolved in favor of recusal." In re United States, 158 F.3d at 30.

In Liteky, the Supreme Court wrote that for the purpose of §455(a) analysis:

> [I]t may not be too far off the mark as a practical matter, to suggest that "extrajudicial source" is the only basis for establishing disqualifying bias or prejudice. It is the only common basis, but not the exclusive one . . . .

510 U.S. at 551 (emphasis in original). A disqualifying appearance of bias or prejudice under §455(a) can be based on information the judge acquires in the litigation, but only if "it is so extreme as to display clear inability to render fair judgment." Id.

The "high threshold" required for recusal under §455(a) recognizes certain realities. In re United States,

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[5] See also First Interstate Bank of Arizona, N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 988 (9th Cir. 2000) ("[J]udges are presumed to be impartial and to discharge their ethical duties faithfully so as to avoid the appearance of impropriety.").

158 F.3d at 34 (quoting Liteky, 510 U.S. at 557-58). As the First Circuit has explained, "[i]n the real world, recusal motions are sometimes driven more by litigation strategies than by ethical concerns . . . . [C]ourts cannot afford to spawn a public perception that lawyers and litigants will benefit by undertaking such machinations." In re Cargill, 66 F.3d at 1262-63. Therefore, again, as then-Judge Breyer wrote:

> [W]hen considering disqualification, the district court is not to use the standard of Caesar's wife, the standard of mere suspicion. This is because "the disqualification decision must reflect not only the need to secure public confidence through proceedings that appear to be impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied-Signal, 891 F.2d at 967; see also In re Bulger, 710 F.3d at 47; In re United States, 441 F.3d 44, 67 (1st Cir. 2006) (same); Cigna Fire Underwriters Co., 86 F.3d at 1270 (same). This is because §455(a) "seeks to balance two competing concerns: first, the courts must not only be, but seem to be, free of bias and prejudice, and second the fear that recusal on demand would provide litigants with a veto against judges." In re: Boston's Children First, 244 F.3d at 167 (internal citations and quotations omitted).

In addition, because "litigants have an incentive to judge-shop, [ ] a judge should not grant a recusal motion simply because a claim of partiality has been given wide-spread publicity." In re Aguinda, 241 F.3d at 206; see also In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1309 (2d Cir. 1988). Because it is important not to allow, or appear to allow:

> litigants or third parties [the power] to exercise a negative veto over the assignment of judges ... [the] inquiry cannot stop with the questions [such as] . . . would the judge have avoided controversy and the need for appellate review if he had stepped aside?

In re United States, 666 F.2d at 694-95.

Moreover, §455(a) "should not be used by judges to avoid sitting on difficult or controversial cases." Snyder, 235 F.3d at 45 (quoting H.R. Rep. No. 1453, 93d Cong., 2d Sess., 1974 U.S. Code Congr. & Admin. News 6351, 6355); see also United States v. Salemme, 164 F. Supp. 2d 86, 94 (D. Mass. 1998).[6]

[6] Where, as here, the only basis for a motion for disqualification is §455(a), the parties agree that the judge is actually impartial and the only issue is one of perception. Therefore, after full disclosure of the facts by the judge, on the record, the parties are permitted to waive a §455(a) ground for recusal under 28 U.S.C. §455(e), but not a ground under §455(b), which addresses actual impediments to the judge's ability to preside impartially. See, e.g., In re Cargill, 66 F.3d at 1261 ("The relevant statute, 28 U.S.C. §455(e), plainly contemplates that a party may waive an appearance-of-impropriety ground for disqualification."); Salemme, 164 F. Supp. 2d at 93-94. Such waivers permit a case to proceed without interruption or delay.

III. THE RELEVANT FACTS

A fully informed, reasonable person would know the following facts.

A. The Appointment of the Master

After a hearing on November 2, 2016, I approved a $300,000,000 settlement in this class action alleging that defendant State Street Bank overcharged its customers in connection with certain foreign exchange transactions. I employed the "common fund" method to determine the amount of attorneys' fees to award, meaning that I "shape[d] the counsel fee based on what [I] determined [was] a reasonable percentage of the fund recovered for [the class]." In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 305 (1st Cir. 1995). I found to be reasonable a requested award to class counsel of $74,541,250 in attorneys' fees and $1,257,697.94 in expenses. That award represented about 25% of the common fund.

Like many judges, and consistent with my longstanding practice, I tested the reasonableness of the requested award, in part, by measuring it against what the nine law firms representing plaintiffs stated was their total "lodestar" of $41,323,895.75. See Nov. 2, 2016 Transcript ("Tr.") at 30-31, 34; see also Manual for Complex Litigation (Fourth) §14.122 (2004) ("the lodestar is ... useful as a cross-check on the percentage method" of determining reasonable attorneys'

fees); Vizcaino v. Microsoft Corp., 290 F.3d 1043, 1050 (9th Cir. 2002)("[T]he lodestar may provide a useful perspective on the reasonableness of a given percentage award."). Plaintiffs' counsel represented that the total requested award involved a multiplier of 1.8 of their lodestar, which they argued was reasonable in view of the risk they undertook in taking this case on a contingent fee. See Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees (Docket No. 103-1) at 24-25 (the "Fees Award Memo").

A lodestar is properly calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. See Blum v. Stenson, 465 U.S. 886, 889, 891 (1984). The Supreme Court has instructed that "[r]easonable fees ... are to be calculated according to the prevailing rates in the relevant community." Id. at 895. "[T]he rate that private counsel actually charges for her services, while not conclusive, is a reliable indicum of market value." United States v. One Star Class Sloop Sailboat, 546 F.3d 26, 40 (1st Cir. 2008) (emphasis added). The First Circuit cited a common fund case, In re Cont'l Ill. Sec. Litig., 962 F.2d 566, 568 (7th Cir. 1992), for this proposition. Id.

In the memorandum in support of the fee request, Labaton represented that to calculate the lodestar counsel had used "current rather than historical billing rates," for attorneys

working on this case. Fees Award Memo. at 24. Similarly, in the related affidavits filed on behalf of each law firm counsel stated that "the hourly rates for the attorneys and professional support staff in my firm ... are the same as my firm's regular rates charged for their services...." For example, Garett Bradley made this statement under oath in his affidavit on behalf of Thornton. See Docket No. 104-16 at ¶4. Lawrence Sucharow made the same statement under oath in his affidavit on behalf of Labaton. See Docket No. 104-15 at ¶7. The affidavits on behalf of each law firm, including Bradley's for Thornton, stated that the calculations were based on contemporaneous time records, which were available to be reviewed by me. See Bradley Aff. (Docket No. 104-16) at ¶3. In view of the well-established jurisprudence and the representations of counsel, I understood that in calculating the lodestar plaintiffs' law firms had used the rates they each customarily actually charged paying clients for the services of each attorney, and were representing that those rates were comparable to the rates actually charged by other attorneys to their clients for similar services in their community.

On November 10, 2016, David J. Goldsmith of Labaton, on behalf of plaintiffs' counsel, sent me a letter. See Docket No. 116. Goldsmith noted that I had used the lodestar calculated by counsel as a check concerning the reasonableness of the percentage of the common fund requested for attorneys' fees. Id. at 3, n.4. He stated

that as a result of an "inquiry from the media" "inadvertent errors [had] just been discovered in certain written submissions from Labaton Sucharow LLP, Thornton, and Lieff Cabraser Heiman & Bernstein LLP supporting Lead Counsel's motion for attorneys' fees...." Id. at 1. Goldsmith reported that the hours of certain staff attorneys, who were paid by the hour primarily to review documents, had been included in the lodestar reports of more than one firm. Id. at 1-2. More specifically, the letter stated that lawyers located at Labaton's and Lieff's offices were counted by Thornton and should have been included only in Thornton's lodestar. Id. at 2. Goldsmith also wrote that in some cases different billing rates had been attributed to particular staff attorneys by different firms. Id. at 3.

This double-counting resulted in inflating the number of hours worked by more than 9,300 and inflating the total lodestar by more than $4,000,000. Id. at 2-3. As a result, Goldsmith stated a multiplier of 2, rather than 1.8, should have been used to test the reasonableness of the request for an award of $74,541,250 in attorneys' fees. Id. at 3. He asserted that the award nevertheless remained reasonable and should not be reduced. Id.

The letter did not indicate that the reported lodestar was not based on what plaintiffs' counsel, or others in their community, actually customarily charged paying clients for the type of work done by the staff attorneys in this case. Nor did the

letter raise any question concerning the reliability of the representations concerning the number of hours each attorney reportedly worked on this case.

Such questions, among others, were raised by a December 17, 2016 Boston Globe article headlined "Critics hit law firms' bills after class action lawsuits." See Docket No. 117, Ex. B. For example, the article reported that the staff attorneys involved in this case were typically paid $25-$40 an hour. In calculating the lodestar, it was represented to the court that the regular hourly billing rates for the staff attorneys were much higher—for example, $425 for Thornton, see Docket No. 104-15 at 7-8 of 14, and $325-440 for Labaton, see Docket No. 104-15 at 7-8 of 52. A representative of Labaton reportedly confirmed the accuracy of the article in this respect. See Docket No. 117, Ex. B at 3.

The Boston Globe also published a January 28, 2017 article headlined "Firms profit from Garret Bradley's ties," which is relevant to the Labaton's request for my recusal. The article stated that the Plymouth County Treasurer Thomas J. O'Brien was:

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

Andrea Estes, "Firms profited from Garrett Bradley's ties," Boston Globe (Jan. 28, 2017).[7] The article further reported that, "[f]ourteen times in the past decade, the Plymouth County retirement system has filed [class action] lawsuits on the advice of lawyers from Labaton and Thornton." Id. Reportedly, "[c]ourt records show that the retirement fund has collected a grand total of $40,035 from all lawsuits combined while the lawyers had received 1,000 times that amount: $41.4 million." Id.

The article also states that "in Massachusetts, no one is better at persuading investors to join class action lawsuits than O'Brien's friend, [Garrett] Bradley, the managing partner of the Thornton Law Firm and, until his sudden departure a few months ago, assistant majority leader in the state House of Representatives." Id. Thornton's lawyer explained that Bradley's role was to "drum up business," for Thornton and Labaton. Id. "O'Brien said his county's decision to join so many Labaton lawsuits has nothing to do with political favors." Id. (emphasis added).[8]

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[7] The Boston Globe article is not cited for the truth of the statements in it. It is quoted because the information it contains is relevant to what a fully informed person would know, and to whether the statements in the sidebar conference on May 30, 2018 on which Labaton primarily relies in seeking my recusal could cause a knowledgeable, reasonable person to doubt my impartiality.

[8] The Master's Report at 125, n.111, states that Chargois, the attorney in Texas who received more than $4,000,000 of the

The January 28, 2017 Boston Globe article also raised questions about more than $30,000 in campaign contributions Thornton and Labaton made to Massachusetts Treasurer Timothy Cahill. Reportedly, several months after those contributions, the state pension fund Cahill chaired hired Labaton. Andrea Estes, "Firms profited from Garrett Bradley's ties," Boston Globe (Jan. 28, 2017). Labaton reportedly subsequently filed two successful class action lawsuits for the pension fund. Id. As a result, Labaton reportedly received $60,000,000, and shared $9,000,000 with Thornton, while the pension fund collected $681,763. Id. The article also reported that after the Boston Globe began asking questions about Bradley's work with the pension fund, "he took the drastic step [of] . . . abruptly resign[ing] from the state Legislature . . . ." Id.[9]

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attorneys' fees I awarded although he did no work on this case, wrote in a 2014 email to Labaton that:

> Our deal with Labaton is straightforward. We got you ATRS after considerable favors, political activity, money spent and time dedicated in Arkansas and Labaton would use ATRS to seek lead counsel appointments in institutional fraud and misrepresentation cases. When Labaton is successful in getting a settlement or judgment award, we split Labaton's attorney fee award 80/20 period.

[9] The Boston Globe subsequently published another article that reiterated and amplified its report concerning Thornton and Labaton campaign contributions to Plymouth County Treasurer O'Brien and Massachusetts Treasurer Cahill before being hired to conduct class action litigation that was lucrative for the lawyers.

In addition, the January 28, 2017 Boston Globe article stated that:

> Bradley and his Thornton colleagues are now facing a federal criminal investigation into their firm's massive political donations program. The US attorney wants to know whether the law firm illegally reimbursed the firm's attorneys for donations, including those to politicians who oversee pension funds.

Id.

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

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See Andrea Estes, "Former top Mass. lawmaker often helped his business, family," Boston Globe (May 30, 2017). That article stated that "[a] federal grand jury is now looking into millions of dollars in reimbursements for campaign contributions, which may violate laws that require political donations be made in the name of the actual donors." Id.

ten times more than the hourly cost, before overhead, to the law firms representing plaintiffs.

In addition, I noted that the article raised questions concerning whether the hours reportedly worked by plaintiffs' attorneys were actually worked. Id. Most prominently, the article accurately stated that Michael Bradley, the brother of Thornton Managing Partner Garrett Bradley, was represented to me to be a staff attorney employed by Thornton who worked 406.40 hours on this case. See Docket No. 104-15 at 7. Garrett Bradley also represented that the regular rate Thornton charged for his brother's services was $500 an hour. Id. However the article stated, without reported contradiction, that "Michael Bradley ... normally works alone, often making $53 an hour as a court appointed defender in [the] Quincy [Massachusetts] District Court." Docket No. 117, Ex. B. These statements caused me to express concern about whether Michael Bradley actually worked more than 400 hours on this case and about whether Thornton actually regularly charged paying clients $500 an hour for his services.

I also stated that the acknowledged double-counting of hours of staff attorneys and the matters discussed in the December 17, 2016 Boston Globe article raised broader questions about the accuracy and reliability of the representations plaintiffs' counsel made in their calculation of the lodestar generally. These questions -- which I said were only questions -- caused me to

express concern about whether the award of almost $75,000,000 in attorneys' fees was reasonable. Therefore, I informed the parties that I proposed to appoint Retired United States District Judge Gerald Rosen as a Master to investigate and provide a Report and Recommendation on all issues relating to the award of attorneys' fees in this case.

On March 7, 2017, pursuant to the February 6, 2018 Order, I held a hearing concerning my proposed appointment of Judge Rosen as Master and related issues. The hearing began with argument concerning the motion filed by Ted Frank of the Competitive Enterprise Institute to participate in these proceedings, including as a guardian ad litem for the class with the authority to serve as an adversary to the plaintiffs' law firms in any proceedings before the proposed Master. In successfully opposing this request, counsel for Labaton, Joan Lukey, argued that Judge Rosen could retain someone "to ask cross-examination questions in an adversarial or quasi-adversarial model," and, therefore, neither the class nor the Master would need Frank's assistance. Mar. 7, 2017 Tr. at 40. Lukey added that Judge Rosen was "obviously very skilled and has been in the role of a judge for many, many years." Id. She expressed appreciation for "the opportunity to present to a special master of his qualifications." Id. at 41. Therefore, Labaton had "no objection to Judge Rosen" being

appointed as Master. Id. at 41, 43. Nor did anyone else object to Judge Rosen's appointment. Id.

Labaton also agreed to my proposal that it return $2,000,000 to the District Court so that I could review bills and authorize payment of the reasonable cost of the Master and those he employed. Id. at 44, 65. I told the law firms that if more than $2,000,000 was needed, I would give notice and provide an opportunity for them to be heard concerning where the funds should come from. Id. at 65.

Federal Rule of Civil Procedure 53(a)(3) provides, in part, that in appointing a master the court must "protect against unreasonable expenses or delay." Therefore, on March 7, 2017, I informed the parties that "I [would] monitor who is being employed [by the Master] and what the proposed rates are." Id.

I also told the parties that I anticipated that it would be necessary for me to have some ex parte communications with the Master. Id. at 68. I explained, however, that:

> I want to minimize any ex parte communications with me because I'll need to decide objections to [the Master's] report and recommendation. So, I intend to limit ex parte communications to what I call administrative matters at this point, fee requests or procedural matters, if there are any.

Federal Rule of Civil Procedure 53(b)(2)(B) requires that an order appointing a master state "the circumstances, if any, in which the master may communicate ex parte with the court or a party."

Therefore, my Order appointing the Master addressed this issue, stating, in pertinent part, that:

> The Master may communicate ex parte with the court on administrative matters. The Master may also, ex parte, request permission to communicate with the court ex parte on particular substantive matters. Requests for ex parte communications with the court on substantive matters should be minimized. See Fed. R. Civ. P. 53(b)(2)(B).

Docket No. 173, ¶6. As explained below, my ex parte communications with the Master have involved only administrative matters.

The March 7, 2017 hearing also included discussion of some of the issues that prompted the appointment of the Master. Counsel for Thornton, Brian Kelly, stated that my concerns about the representations that had been made in the requests for attorneys' fees were "justifiable." Mar. 7, 2017 Tr. at 71. He represented that Michael Bradley had actually worked more than the number of hours attributed to him in the fee petition, but did not have conventional time sheets to document his time. Id. at 72. Kelly and Michael Bradley each also stated that Michael Bradley was not an employee of Thornton, and that neither the firm nor Michael Bradley had, as represented under oath in Garrett Bradley's affidavit in support of the fee petition, ever billed for his time at the rate of $500 per hour. Id. at 73-74. Although he claimed that Thornton's regular rate for Michael Bradley was $500 an hour, Garrett Bradley could not identify any case in which a client had

been charged that rate, and identified only one Thornton case in which his brother was billed at a rate of as much as $300 an hour. Id. at 88-90.

As indicated earlier, Sucharow of Labaton had stated in his sworn affidavit in support of the request for attorneys' fees that: "[t]he hourly rates for attorneys and professionals in [Labaton], included in Exhibit A [to my affidavit] are the same as my firm's regular rates charged for their services which have been accepted in other complex class actions." Sucharow Aff. (Docket No. 104-15), ¶7; Mar. 7, 2017 Tr. at 79. At the March 7, 2017 hearing, however, Sucharow acknowledged that the rates characterized as Labaton's "regular rates charged for [the] services" of the attorneys who worked on this case had never been charged to paying clients because his firm always worked on a contingency fee basis and had no "billable clients." Mar. 7, 2017 Tr. at 79.

Similarly, Garrett Bradley acknowledged that Thornton had never billed a paying client $425 an hour for a staff attorney and, indeed, the staff attorneys he had represented in his affidavit worked for Thornton actually worked at, and were paid by, Labaton and Lieff. Id. at 88.

Although I did not say so at the time, the statements of Sucharow and Garrett Bradley heightened my concern about whether false and misleading statements had been made under oath.

I did, however, note at the March 7, 2017 hearing that the propriety of the hourly rates attributed to "staff" and "contract" attorneys for the purpose of calculating lodestars for use in class actions had become the subject of litigation recently in several cases in the Southern District of New York and mentioned several of them. Mar. 7, 2017 Tr. at 94; In re Weatherford Int'l Sec. Litig., 2015 WL 127847, at *1 (S.D.N.Y. 2015); In re Citigroup Inc. Sec. Litig., 965 F. Supp. 2d 369 (S.D.N.Y. 2013); In re Citigroup Inc. Bond Litig., 988 F. Supp. 2d 371 (S.D.N.Y. 2013); In re Beacon Assocs. Litig., 2013 WL 2450960 (S.D.N.Y. 2013); City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp., 954 F. Supp. 2d 276 (S.D.N.Y. 2013). In one case, which involved a firm involved in the instant case, Keller, Rohrbach, the court wrote:

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

Beacon Assocs., 2013 WL 2450960, at *18.

The lodestars and requested fee awards were reduced in some of the cases in the Southern District of New York. See, e.g., In re Weatherford Int'l Sec. Litig., 2015 WL 127847, at *2; In re Citigroup Inc. Sec. Litig., 965 F. Supp. 2d at 373-74. However,

none of those cases resulted in the appointment of a master to investigate the veracity of the fee applications and related matters, including possible sanctions. I am evidently the first judge to have done that.

B. Communications After the Appointment of the Master

As discussed at the March 7, 2017 hearing and authorized by the March 8, 2017 Order appointing the Master, I had periodic ex parte communications with the Master about administrative matters.[10] Some of these discussions concerned the bills of the Master and those he had been authorized to employ. They also included discussion of additional individuals or organizations the Master proposed to employ and the justification for doing so. These discussions at times included identification of the issues that in the Master's view justified the retention, but not the substance or merits of those issues. The existence of certain issues, but not their merits, were also discussed in connection with the Master's several requests for extensions of the original October 10, 2017 deadline. Oct. 2, 2017 Order, Ex. A (Docket No. 207-1); Dec. 14, 2017 Order, Ex. A (Docket No. 214-1); Mar. 1, 2018 Order, Ex. A (Docket No. 216-1); Apr. 23, 2018 Order, Ex. A.

[10] Some of the discussions with the Master included his counsel, William Sinnott. References in this Memorandum to communications with the Master include some communications with both the Master and Sinnott.

More specifically, the court periodically discussed with the Master issues concerning the bills for his fees and expenses. The most significant such discussion was disclosed in a May 25, 2017 Memorandum and Order in which I approved an increase in the Master's hourly rate from $800 to $900. See Docket No. 206. In that Order, I wrote:

> The court did not give plaintiffs' counsel prior notice of this issue and the Special Master's request because doing so would involve disclosing his bills and, therefore, injure the confidentiality of the Special Master's investigation, which is the reason for the ex parte submissions of those bills. However, if plaintiffs' counsel object promptly to the Special Master's rate being raised to $900 an hour or to the process by which the decision to do so has been made they may file a motion requesting that the court reconsider its approval of the increased rate.

Id. at 2-3.

On October 24, 2017, I issued an order requiring Labaton to return an additional $1,000,000 to the court for the cost of the Master. See Docket No. 208. On April 23, 2018, I ordered Labaton to return another $800,000 more to fund the Master's foreseeable future fees and expenses. See Docket No. 217. For the reasons explained in the May 25, 2017 Order raising the Master's hourly rate, I did not give Labaton prior notice and an opportunity to be

heard concerning the additional payments.[11] I did, however, order that "any request for reconsideration" of the October 24, 2017 Order requiring the $1,000,000 payment "shall be filed by October 31, 2017." Docket No. 208 at 4, ¶3. No objection was then filed. I did not include a similar provision in the April 23, 2018 Order. However, it is evident Labaton understood that it could object as it made the $800,000 payment under a reservation of rights to contest that payment, see Docket No. 222, and on June 19, 2018 it did so. See Docket No. 302.

I also had discussions with the Master in which he identified issues that had emerged that would impede his ability to file his Report by the original October 10, 2017 deadline, and later extensions of the deadline. Those discussions also involved the Master's request for authorization to retain Professor Stephen Gillers to advise him on the issues relating to Chargois. As indicated earlier these discussions did not include the merits of the issues that were identified.

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[11] I now realize that Federal Rule of Civil Procedure 53(b)(4) requires that the court give the parties notice and an opportunity to be heard before amending an order appointing a Master. The better practice would have been to devise a way to give the law firm prior notice of the additional payments I was considering ordering in some fashion that would have maintained the confidentiality of the Master's investigation. I do not believe, however, that the fact that I did not give the law firms prior notice, when they knew they could seek reconsideration of my orders, would cause, or contribute to causing, a reasonable person to question my impartiality.

More specifically, in August 2017, the Master told me that after depositions had been completed his team had found emails regarding a lawyer in Texas that would require reopening some depositions and additional discovery, which he expected the law firms would oppose. Therefore, the Master anticipated requesting an extension of the October 10, 2017 deadline for filing his Report.

In September 2017, the Master told me that he did indeed need such an extension and that the parties had agreed to it. To justify his request, the Master explained that the Texas lawyer had been paid 5.5% of the approximately $75,000,000 in attorneys' fees I had awarded, and that the payment had not been disclosed all of plaintiffs' lawyers or to me. I told the Master I wanted him to conduct a thorough investigation and to complete it as soon as reasonably possible. I agreed to extend the deadline for his Report to December 15, 2017, and directed the Master to send me a letter concerning his request. He did so and I made the letter part of the public record in granting the requested extension to December 15, 2017. See Docket Nos. 207 and 207-1.

In October 2017, the Master informed me that he had entered a Protective Order that, among other things, provided the parties an opportunity to request that parts of his Report be sealed. I agreed to revise the Order appointing the Master to provide such an opportunity and did so. See Docket No 208.

The Master subsequently requested authorization to retain Gillers, an expert in legal ethics, at the rate of $900 an hour, although his retention would further delay the submission of the Master's Report because of Gillers' limited availability. In support of his request, the Master explained that Labaton had retained two experts, including Harvard Law School professor William Rubenstein,[12] who opined that the payment to the Texas lawyer was an ethically permissible "referral fee" which was not required to be disclosed to the court. Gillers, I was told, would provide a contrary opinion that the Master believed was important to present. The reasons for the conflicting expert opinions were not disclosed or discussed. I authorized the retention of Gillers.

The Master subsequently informed me that he had told the law firms that he had retained Gillers. He also said that he agreed to allow Labaton to take Gillers' deposition and to present argument concerning Gillers' opinions to the Master. He explained that while this would take time, the issues were threatening to Labaton and he wanted to consider its views fully before submitting his Report. I directed the Master to send me a letter memorializing his request. He did so. On December 14, 2017, I issued an order

[12] I have a vague memory that, sometime after the Master was appointed, I received an email or letter from Rubenstein inviting me and, I believe, other judges to an event, possibly at his home. I cannot find the email or letter and may be mistaken about whether it came from Rubenstein. However, any such message did not mention his involvement in this case.

extending the deadline for the Master's Report to March 15, 2018, and attached his letter to it. See Docket No. 214, 214-1.

In late February 2018, the Master told me that he had provided Gillers' report to the law firms, which were shocked by his opinions and wanted eight more weeks to respond to them. However, I expressed my reluctance to extend the deadline for the Masters Report beyond March 15, 2018, which was six months later than the original deadline. I noted that, under Federal Rule of Evidence 53(f)(1), I have the authority to take evidence concerning an objection, and that was an alternative to law firms presenting additional evidence and argument to the Master. Nevertheless, I agreed to the Master's request for an extension to April 23, 2018, and directed him to submit a letter memorializing it. He did so. I issued an order granting the request, appending the Master's letter to it. See Docket Nos. 216, 216-1.

I subsequently had several discussions with the Master concerning the mechanics of preparing his Report, and the record of his activities, and submitting at least the Report in electronic form. This resulted in my issuing an Order extending the deadline for filing the Report to May 14, 2018, and attaching the Master's letter requesting the extension to it. See Docket Nos. 217, 217-1.

I also had limited discussions with the Master on another subject. In January 2018, he informed me that he had been

contacted by prosecutors in the Office of the United States Attorney for the District of Massachusetts. The Master said that the prosecutors were investigating Thornton, including whether a possible illegal payment had been made to an official of a pension fund. They wanted to obtain information from the Master. The Master said that he did not provide the prosecutors any information beyond telling them that his Report was then due on March 15, 2018. He said he had told the prosecutors that he would consult me about their request.

The Master and I noted that prosecutors' investigation suggested questions about whether any of the money paid to the Chargois had been used to make political contributions or other payments, and the potential for the criminal investigation to expand to include Chargois. I told the Master that I was reluctant to authorize any informal cooperation with the prosecutors. I directed the Master to tell them to send him a letter so I could consider a specific request.

The prosecutors sent the Master a letter requesting that they be given immediately copies of the depositions and witness statements he had, and that they be provided any other relevant documents after his Report was filed. The Master sent the letter to me. I then instructed the Master to tell the prosecutors that he was not authorized to provide them information or documents voluntarily. Rather, if they wanted any documents or information

before his Report became public they would have to issue a grand jury subpoena or file a motion to be decided by me. The prosecutors have done neither.

After it was publicly reported that the Master's Report had been filed under seal, one of the prosecutors told a member of my staff that she would like to speak with me. She did not identify the matter she wanted to discuss. I instructed that member of my staff to tell the prosecutor that if the requested discussion related to this case, I would not speak to her. I have not heard further from the prosecutor.

In addition, in August 2017, I received an email from the National Association of Legal Fees Analysis inviting me to participate, with other judges, in a CLE webinar, "View from the Bench: Awarding Attorneys' Fees in Federal Litigation." I responded, "[t]hank you for this invitation, which I am unable to accept."

C. Events Following the Submission of the Master's Report

On May 14, 2018, the Master filed his Report and Recommendation, an Executive Summary of it, and Exhibits. See Docket No. 224 (under seal). I allowed that submission to be submitted temporarily under seal so the lawyers could propose redactions and I could decide which, if any, were justified. See Docket No. 220.

On May 16, 2018, I directed the Master to provide the plaintiffs' law firms the sealed submissions and ordered that any proposed redactions be submitted under seal by May 31, 2018. See Docket No. 223. In my Memorandum and Order, I provided a framework for proposing redactions which included, but was not limited to, the following principles. The public has a right documents and information on which a judge relies in making judicial decisions. Id. at 3 (quoting F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 408 (1st Cir. 1987)). The public's right to inspect such records is not absolute, but only the most compelling reasons can justify non-disclosure of judicial records. Id. I noted that "[a] properly invoked attorney-client privilege may be sufficient to overcome the presumption of public access. Id. at 4 (citing Seidle v. Putnam Inv., Inc., 147 F.3d 7, 9-10 (1st Cir. 1998)) (emphasis added). Although not explained in the Memorandum, the attorney-client privilege belongs to the client, not the attorney, and, therefore, the client must invoke it. See Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir. 2002); United States v. Mass. Inst. of Tech., 129 F.3d 681, 684 (1st Cir. 1997).

On May 16, 2018, the Master informed me that State Street should also be provided the sealed submissions and an opportunity to propose redactions. On May 17, 2018, I issued an order authorizing both. See Docket No. 225. The same day, Labaton filed an objection to State Street receiving the unredacted Report and

related documents. See Docket No. 227. I immediately vacated my earlier Order, and directed the parties to discuss their interests and recommend a means of accommodating them. See Docket No. 228.

Labaton also raised issues concerning the scope of the record to be filed by the Master. I directed the law firms to discuss these issues with the Master. See Docket Nos. 222, 226.

On May 24, 2018, several of the law firms, including Labaton, filed a motion requesting that the deadline for their proposed redactions be extended to June 11, 2018. On May 25, 2018, the Friday before Memorial Day, I issued an Order extending the deadline for proposed redactions to June 5, 2018, without prejudice to a possible further extension to June 11, 2018. See Docket No. 223. I scheduled a hearing on the motion for May 30, 2018. The Order also stated, in part, that:

> George Hopkins, Executive Director of Arkansas Teacher Retirement System ("ATRS"), and anyone else required to act for ATRS in this case shall attend [the hearing]. The Master's Report and Recommendation (Docket No. 224 under seal), including pages 89 to 124 and 368 to 371, and Executive Summary (Docket No. 224-1 under seal), including pages 25 to 29 and 50 to 51, raise questions concerning: whether ATRS properly discharged its duties as Lead Plaintiff, see, e.g., Garbowski v. Tokai Pharma., Inc., 2018 WL 1370522 (D. Mass. 2018)(Wolf, D.J.); whether ATRS should be replaced as Lead Plaintiff; whether there is now a conflict between the interests of [Labaton, Lieff, and Thornton] and the class; and whether new class counsel should be appointed to provide independent advice to the class whether or not ATRS continues as Lead

> Plaintiff. Mr. Hopkins and any other representatives of ATRS shall be prepared to discuss these issues at the May 30, 2018 hearing.

Id. at 2-3.

In Garbowski, I had recently described the duties of a lead plaintiff in a Private Securities Litigation Reform Act case, which I understand to be comparable to the duties of a class representative in any federal class action. As required by Federal Rule of Civil Procedure 23(a)(3), a class representative's interests must be typical of those of the class. See Garbowski v. Tokai Pharms., Inc., 302 F. Supp. 3d 441 at *4 (D. Mass. 2016). In addition, a class representative must fairly and adequately protect the interests of the class. See Fed. R. Civ. P. 23(a)(4); Garbowski, 302 F. Supp. 3d at *3.

As the D.C. Circuit has explained:

> Basic consideration of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment. Two criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel. Senter v. General Motors Corp., 532 F.2d 511, 524-25 (6th Cir. 1976).

Nat. Ass'n of Regional Medical Programs, Inc. v. Mathews, 551 F.2d 340, 345 (D.C. Cir. 1976); see also 7A Wright & Miller, Fed. Prac. & Proc. §§1765, 1768 (3d ed. 2018).

Therefore, as I wrote in Garbowski, in assessing adequacy, "the court must [] consider whether the proposed lead plaintiff 'has the ability and incentive to represent the interests of the class vigorously, [whether he] has obtained adequate counsel, and [whether] there is a conflict between [lead plaintiff's] claims and those asserted on behalf of the class.'" Garbowski, 302 F. Supp. 3d at *4 (quoting In re Cendant Corp., 264 F.3d 201, 263 (3rd Cir. 2001)). Among other things, an adequate class "representative must be able to ensure that counsel do not 'litigate with a view toward ensuring payment for their services without sufficient regard to whether their clients are receiving adequate compensation in light of evidence of wrong doing." Id. (quoting S. Rep. 104-98 (1995) at 6) (citing In re Cendant Corp., 264 F.3d at 255).

I was concerned about whether ATRS and Hopkins now satisfy the typicality and adequacy requirements to continue to serve as lead plaintiff. The matters that prompted the appointment of the Master raised serious questions about the veracity, and possibly the legality, of statements made by Labaton and Thornton, among others, in connection with the fee petition. In his Report the Master recommends that Labaton, Thornton, and Lieff be ordered to

return to the class the more than $4,000,000 in the claimed lodestar that resulted from double counting the hours of contract attorneys. The Master also recommends that those firms be directed to return to the class approximately $2,300,000 because of what he characterizes as improperly inflated rates attributed to the contract attorneys. In addition, the Master recommends that Labaton be ordered to disgorge the $4,100,000 paid Chargois, with $3,400,000 going to the attorneys for the ERISA class and the balance to the class.[13]

The court understands that Labaton, at least, will object to the Master's recommendations. The court will be open-minded concerning the merits of those objections. However, there is now a conflict between the interests of the class and the interests of its Lead Counsel, Labaton. This makes it particularly important that any class representative have interests that do not conflict with the interests of the other class members, and have the ability and incentive to represent the class vigorously with regard to whether Labaton and the other law firms should be required to disgorge funds for the benefit of the class.

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[13] The Master also recommends that a sanction of between $400,000 and $1,000,000 be imposed on Thornton, that Garrett Bradley be referred to the Massachusetts Board of Bar Overseers for disciplinary action, and that Thornton be required to disgorge for the benefit of the class about $188,000 because Michael Bradley was included in Thornton's lodestar at an improperly inflated rate of $500 an hour.

ATRS has employed Labaton since 2008. It has a contract to continue to do so. This relationship alone raises questions about whether ATRS is typical and will vigorously represent the interests of the class, uninfluenced by the competing interest of Labaton in the Master's recommendation that Labaton, Lieff, and Thornton be required to disgorge more than $10,000,000.

These questions are magnified by the Master's recommendation that the court find that Labaton, Thornton, and Lieff had a duty to disclose to ATRS, the class, and the court the $4,100,000 paid to Chargois in connection with this case. Hopkins has stated that he did not expect to be told of this payment and had no responsibility to learn of it. See Report at 257, n.7. This may or may not prove to be correct. However, Hopkins' position prompted the Master to write that:

> The class had a right to know that Lead Counsel intended to, and did, pay $4.1 million out of settlement funds to a person who performed no work in this case, as a result of Lead Counsel's own pre-existing obligation, whether or not the payment itself was permitted under Massachusetts ethical rules. We cannot see how, in light of a clear dereliction of his fiduciary duties to the class, Hopkins can fairly and adequately protect the class's interests moving forward.

Id.; see also May 30, 2018 Tr. at 17 (Mr. Sinnott stating, "there was testimony by Mr. Hopkins that was very troubling . . . with respect to what he saw as his role with respect to the class and the members."). Therefore, it is foreseeable that the conduct of

Hopkins on behalf of ATRS will be an issue in future proceedings and that, to some extent, his interests will be aligned with Labaton's interests, which now conflict with the financial interests of the class.

When, on May 25, 2018, I ordered Hopkins to participate in the May 30, 2018 hearing, I also anticipated that the Master's Report would raise questions concerning the origins of the relationship between Labaton and ATRS. As explained earlier, the Boston Globe had published several articles suggesting that campaign contributions and use of Garrett Bradley's political connections had generated class actions brought by pension funds overseen by the Massachusetts and Plymouth County Treasurers, which resulted in more than $100,000,000 in fees for Labaton, and many millions of dollars were reportedly given to Thornton. Those articles mentioned this case and the Master's investigation.

The Master's Report includes similar information with regard to Labaton's relationship with Chargois concerning ATRS. According to the Master, Labaton had agreed to pay Chargois 20% of any fee it earned from representing ATRS as lead counsel in any class action. See Report at 125. Labaton reportedly had a similar agreement with Thornton. See id. at 93 & n.76. As indicated earlier, the Report includes a message Chargois reportedly wrote to Labaton on October 18, 2014, stating:

> Our deal with Labaton is straightforward. We got you ATRS as a client after considerable favors, political activity, money spent and time dedicated in Arkansas, and Labaton would use ATRS to seek lead counsel appointments in institutional investor fraud and misrepresentation cases. Where Labaton is successful in getting appointed lead counsel and obtains a settlement or judgment award, we split Labaton's attorney fee award 80/20 period.

Id. at 125, n.111 (emphasis added). The Special Master stated that he "did not investigate further into the background facts alleged by Chargois in this email as to how to Chargois/Labaton/ATRS relationship was originated and developed" because, in his view, "[t]his subject [was] beyond the scope of the Special Master's assignment from the Court." Id.

The truth of Chargois' statements may be disputed by Labaton. I will open-mindedly decide any objection to them de novo.

However, the substantial interest of the media in the origins of Labaton and Thornton's relationship with pension fund clients, and the Department of Justice investigation of Thornton caused me to expect that when the Master's Report is unsealed, questions will be raised about the origins of ATRS' relationship with Labaton.[14] Regardless of their merit, such questions would

[14] A statement made at the May 30, 2018 hearing by Lukey indicates that my prediction would, without the motion for recusal, have proven to be correct. She said that after I "issued the [May 25, 2018] order requiring Hopkins presence, it generated, as unfortunately often occurs, some pretty extraordinary and inflammatory online media reactions, including language such as

contribute to making ATRS atypical of the class and possibly an inadequate class representative.

At the May 30, 2018 hearing, I developed a process and schedule for briefing proposed redactions in stages and granted the earlier motion to extend to June 11, 2018 the deadline for submitting proposed redactions. See Docket No. 237. I also scheduled a June 22, 2018 hearing to address the proposed redactions that would be closed to the public. Id.

I concluded the May 30, 2018 hearing with questions to Hopkins. Having listened to the previous colloquy, Hopkins stated that he was "totally aware" that there now "may be a conflict between the interests of Labaton and the other lawyers, who want to vindicate the propriety of everything they did and keep the money, and the class that would benefit if [the Judge] ordered some of that money paid back." May 30, 2018 Tr. at 69-70. He also stated that as class representative, he was not then getting legal advice from anyone other than Labaton. Id. at 67. He did not think that he was receiving legal advice from Lukey. Id. at 66. In any event, he stated that he understood that the client would have to

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Hopkins must have done something explosive or there must have been shenanigans." May 30, 2018 Tr. at 10. Similarly, in one of Labaton's memos in support of its proposed redactions it wrote that "[t]he press has paid considerable attention to this case, has scrutinized public filings, and has investigated information disclosed in this public filings." See Docket No. 254-1 (under seal) (emphasis added).

assert any attorney-client privilege, and that he would do so only to protect some "viable interest" and not to cover-up for anyone. Id. at 68.

With regard to ATRS role, Hopkins testified that a class representative "should be very cautious about trying to allocate attorneys' fees between law firms and a class." Id. at 74. More specifically, he did not believe that ATRS should take a position on whether Labaton and other lawyers should be ordered to return some of the fees awarded to the class. Id. at 70.

In addition, Hopkins said that he did not believe that as class representative he had a responsibility to inquire about how the attorneys divided a fee award, including whether any referral fees were being paid. Id. at 71. He stated that it was the court's duty to do so, and that I had subsequently ordered disclosure of such information in another case in which ATRS is lead plaintiff, ATRS v. Insulet Corp., C.A. No. 15-12345. Id. at 73.[15]

In response to my question about why Hopkins wanted ATRS to continue to serve as class representative, Hopkins asked for and

[15] As explained earlier, in 2017, I had been informed of the payment to Chargois by the Master in connection with his requests for more time to complete his work and to retain Gillers. This educated me to understand that there may be substantial fees shared with lawyers in class actions that are not disclosed to the court in a request for an award of attorneys' fees. Therefore, at the March 9, 2018 hearing for preliminary approval of the proposed settlement in Insulet, I asked if there were attorneys who had not filed an appearance that would share in the fee award. See C.A. No. 15-12345, Docket No. 15 at 15.

received opportunity to provide "a little history." May 30, 2018 Tr. at 50. He said he became Executive Director of ATRS in 2009, after serving in the State Senate. Id. Labaton already had a contract with ATRS. Id. at 52. When he took office, Hopkins did not think that he should give priority to class action law suits. Id. at 52, 53. However, "political leaders" persuaded him to do that. Id.

When asked who those political leaders were, Hopkins said David Malone, a former Executive Director of ATRS with whom he had served in the Senate, several legislators, members of the Governor's staff, and officials in the Department of Finance Administration of Arkansas. Id. at 53-54. In response to my question, Hopkins said he knew Faris, who the Master reports was prompted by Chargois and his partner Herron to introduce ATRS to Labaton, earning Chargois $4,100,000 in this case and, according to Chargois, a right to 20% of Labaton's fees in all other ATRS' cases in which Labaton represented ATRS. Report at 91-94. Hopkins stated that: Faris was a State Senator when he became Executive Director of ATRS; the Senate indirectly supervised ATRS; Hopkins had discussed class action lawsuits, including the State Street case, with Faris; but Faris was not one of the legislators who convinced Hopkins to give high priority to class actions. May 30, 2018 Tr. at 53-56, 61. Hopkins said that he had discussed Labaton, and other firms, with Faris. Id. at 59.

However, until Hopkins learned it from the Master's investigation, he did not know that Faris had introduced Labaton to ATRS. Id. at 58, 61. The Master's Report prompted Hopkins to speak to Faris about his introduction of Labaton to ATRS and Faris confirmed he had done so. Id. at 59-60. However, Faris never mentioned Herron to Hopkins. Id. at 60.

In response to further questioning, Hopkins testified that he spoke to Faris about his introducing Labaton to ATRS right after Hopkins' deposition in the Master's proceedings. Id. at 61. Hopkins also said that, after I had on May 25, 2018 ordered him to appear at the May 30, 2018 hearing, Hopkins met in his office with Faris at 9:00 a.m. on Memorial Day, May 28, 2018 and they discussed the hearing. Id. at 62-63.

I concluded my colloquy with Hopkins by raising questions to be considered by ATRS and, if necessary, further by me concerning whether ATRS should be allowed to continue as class representative. They included questions about whether it would injure ATRS' reputation, and possibly its opportunities to serve as lead plaintiff in other cases, if I found Labaton engaged in misconduct. Id. at 73. Hopkins said he had not considered these issues. Id.

I subsequently summarized my concerns about whether ATRS should continue as class representative and told Hopkins I would give him an opportunity to consider whether it wished to do so. Id. at 78. I noted that: ATRS selected Labaton and other lawyers

whose conduct had been called into question; the Master recommended that I order those lawyers to return to the class a significant amount of money; ATRS had a continuing relationship with those lawyers and is still getting advice from them; and ATRS has not consulted any lawyer who does not have a stake in these proceedings about what would be in the best interest of the class ATRS represents. I also said:

> I don't want to get into more detail about this, but you know that questions have been raised by the Report and Recommendation about the origins of Labaton's relationship with Arkansas Teacher, and they're just questions. But to the extent that those issues are litigated in this case, they could be at least embarrassing to Arkansas Teacher.
>
> And that may give you an incentive, even if you're confident that you would resist it, to not vigorously represent the class the way somebody who did not have this historic relationship in these issues would.

Id. at 79. I concluded by saying:

> [M]y paramount responsibility is to the class and to make sure - try to assure that at this point it's represented by a lead plaintiff who's typical and adequate, and will not have its or his role representing the class complicated by unique issues and potential conflicts of interest. That's my concern. I would like you to think about that.

Id. Therefore, I ordered Hopkins to report, by June 6, 2018, whether ATRS wished to continue to get advice from Labaton or from other counsel. Id. at 81; Docket No. 237.

Lukey then requested the sidebar conference, which is the primary basis for the motion for my recusal. At the sidebar I explained the reasons for some of my questioning of Hopkins. I noted that according to the Master's Report: Labaton had asked Chargois to introduce it to institutional investors in Arkansas; Chargois did not know any institutional investors; Chargois did, however, ask his partner in Arkansas, Herron, who also did not know any institutional investors; Herron knew State Senator Faris; Faris introduced Labaton to ATRS; ever since Chargois has been entitled to 20% of Labaton's fees in ATRS cases despite not doing any work on them; and, there was an assiduous effort to keep that from counsel in this case and others. May 30, 2018 Sidebar Tr. at 1.[16]

The following colloquy ensued:

> THE COURT: And I think that - and they may not be questions to be resolved in this case, but I think it is foreseeable that when the Report becomes public, there are going to be questions about the origin of this

[16] As explained in my June 11, 2018 Order (Docket No. 240), the side bar conference was originally sealed because the colloquy did not relate to any pending motion to be decided by me. That discussion became central to Labaton's sealed motion for recusal, which relates to respect for the legal system. Therefore, the presumption of a public right to court records on which judicial decisions are based became relevant. See Standard Fin. Mgmt. Co., 830 F.2d at 408-09. Accordingly, I provided Labaton an opportunity to advocate for continued impoundment of the sidebar conference and the references to it in Labaton's submissions concerning recusal. See Docket No. 280, ¶1. Labaton instead stated that it did not object to unsealing the transcript and submissions. See Docket No. 292. I did so. See Docket No. 300.

> relationship and whether all those millions of dollars stopped with Mr. Chargois.
>
> Mr. Kelly was a prosecutor, and Arkansas these days is -- ears may perk up.
>
> But that was part of the motive [for some of my questions].
>
> I don't know what Mr. Sinnott would say.
>
> I do not object to you saying what you want to say, and future proceedings will be what they'll be, but --
>
> MS. LUKEY: Your honor, are you suggesting there was impropriety involving Senator Faris with the monies being paid? Because there is nothing. I mean nothing.
>
> THE COURT: I'm suggesting that those questions -- yes those questions occurred to me when I read it.
>
> I don't know that they will be resolved here, but I am concerned that when the relationship between Arkansas Teacher and Labaton is disclosed, and Arkansas Teacher's is going to be defending itself, and its interests are different than the interest of the class.

Id. at 2. Lukey then said that she was "in shock" and "appalled" that I seemed to be suggesting "public corruption," and asserted that the Master in his Report "made no such suggestion." Id. at 4-6. Lukey then asked me if I had "formed the opinion that "some form of public corruption occurred," id. at 7, or "that money was going back to Senator Faris or somebody else," id. at 8. I responded:

> No.
>
> But I've formed the opinion that those are questions that are raised, and they may well not be questions that would be resolved or could be resolved in this case. But I can foresee the reasonable likelihood that the conduct of Arkansas Teacher is going to become part of the controversy, and it causes me to have questions about whether it's an appropriate lead plaintiff.
>
> Who is representing - remember what this is about. Who is representing the class?

Id. at 8.

After further colloquy relating to whether ATRS should continue as class representative, Lukey asked for an opportunity to say publicly that the alleged "misconduct" at issue in the Sealed Report and Recommendation related to whether Labaton had paid Chargois a permissible "referral or origination fee." Id. at 13. I authorized Lukey to make her public statement and said I would permit Sinnott to respond that the payment was an impermissible "finder's fee." Id. at 13-14.

They each did so. See May 30, 2018 Tr. at 82-84. I then stated, "I don't have answers to any of these questions now, but I did put to Mr. Hopkins questions that I think are important in the discharge of my duty to try to ensure that the class is properly represented and to try to get these issues resolved sooner rather than later -- so the Court can get the benefit of the views of the class." Id. at 84. This was followed by a brief lobby conference.

On June 6, 2018, Hopkins filed an affidavit stating that he had obtained advice from independent counsel, Thomas Hoopes, and that ATRS wished to continue as class representative, receiving continuing advice from Mr. Hoopes. See Docket No. 258. On June 8, 2018, Labaton filed its motion seeking my recusal under §455(a).

IV. ANALYSIS

As explained earlier, Labaton does not contend that I am actually biased or prejudiced, or that I actually have personal knowledge of disputed evidentiary facts, any of which would require my recusal under §455(b)(1). Rather, Labaton suggests that a reasonable person would doubt that I am not biased or prejudiced, or do not have personal knowledge of disputed evidentiary facts. Therefore, it argues that my recusal is required by §455(a). This issue must be decided from the perspective of a fully informed member of the public, rather than the perspective of a litigant or the judge. See Voccola, 99 F.3d at 14; El Felix de Puerto Rico, 36 F.3d at 141; In re United States, 660 F.2d at 695.

As noted earlier, I am required to "undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation ...." Nat. Ass'n, 551 F.2d at 334. As the D.C. Circuit's statement indicates, an organization that is an adequate class representative at the outset of a case may be an inadequate representative as the case evolves. See also 7A Wright & Miller,

§1765 ("If later events demonstrate that representatives are not adequately protecting the absentee[] [class members], the court may take whatever steps it deems necessary under Rule 23(c) or 23(d) at that time."). Therefore, following the submission of the Master's Report I had a duty to consider whether ATRS now has "antagonistic or conflicting interests with unnamed members of the class" and whether ATRS still "appear[s] able to vigorously prosecute the interests of the class through qualified counsel." Nat. Ass'n, 551 F.2d at 345.

As also explained earlier, Labaton relies primarily on the colloquy at the then non-public May 30, 2018 sidebar conference in seeking my recusal. In open court I had asked Hopkins a series of questions relating to the issues identified in my May 25, 2018 Order, to obtain information relevant to whether ATRS continued to be a typical and adequate representative of the class. Without being asked, Hopkins stated that "political leaders" in Arkansas persuaded him to give high priority to bringing class action law suits. In view of its contract with ATRS, Labaton was positioned to become Lead Counsel in at least some of such suits and, as a result, receive millions of dollars. When asked about those political leaders, Hopkins identified one by name and others by office. As explained earlier, he did not mention then former State Senator Faris. Faris is the sole legislator named in the Master's Report. He was identified in the Report as the person that

Chargois' partner Herron had influenced to introduce Labaton to ATRS. That introduction, according to the Master, resulted in an agreement that Chargois would receive 20% of all fees awarded to Labaton for serving as Lead Counsel in ATRS cases, including a payment of $4,100,000 relating to this case. In response to further questions, Hopkins testified that he had over the years discussed with Faris class actions, Labaton, and questions relating to Labaton's conduct that had emerged in this case. Hopkins also revealed that after being ordered on May 25, 2018 to be prepared to testify at the May 30, 2018 hearing, he had met in his office with Faris on May 28, 2018 -- Memorial Day -- and discussed the hearing.

As I repeatedly explained in open court, my questions to Hopkins were intended to develop information concerning his understanding of ATRS' duties as a class representative in the present posture of this case, how ATRS would discharge its duties if allowed to continue as class representative, and whether ATRS is now a typical and adequate representative of the class. The Boston Globe had publicly reported on its investigation of campaign contributions made by Thornton and Labaton, and on the alleged exploitation of Garrett Bradley's position in the Massachusetts House of Representatives to get Labaton and Thornton business that generated many millions of dollars in attorneys' fees from Massachusetts pension funds. The Boston Globe has also reported

that federal prosecutors were investigating Thornton's campaign contributions. In addition, I had learned from that Master that federal prosecutors in Massachusetts were investigating whether Thornton had made an illegal payment to a pension fund official.[17] Therefore, I foresaw that it was likely that, when the Master's Report became public, questions would be raised by the media, at least, about the origins of ATRS' relationship with Labaton. Any such questions would contribute to ATRS being unique, rather than typical of the class, and possibly an inadequate representative of the class in the current proceedings.

I explained and amplified this concern at the then confidential sidebar conference Lukey requested. Having in mind the Boston Globe articles and the United States Attorney's investigation, I said it was foreseeable that when the Master's Report became public there would be questions about the origins of Labaton's relationship with ATRS, and whether all of the millions of dollars paid to Chargois had stopped with him. I again explained that these issues related to whether ATRS remained a typical and adequate class representative. In response to Lukey's questions, I stated I had not formed an opinion on whether money

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[17] I knew that an official act by a public official as a quid pro quo -- meaning in explicit exchange for -- for an otherwise legitimate campaign contribution is a form of extortion in violation of 18 U.S.C. §1951. See McCormick v. United States, 500 U.S. 257, 275 (1991); 18 U.S.C. §1951.

was going back to Faris or anyone else, or on whether public corruption had occurred. I added again that I foresaw that such questions would be raised when the information in the Master's Report was unsealed. I stated that while they might not be questions that could be resolved in this case, such questions would make ATRS part of the controversy and, therefore, possibly no longer an appropriate class representative.

My information concerning the roles of Herron and Faris in the genesis of Labaton's relationship with ATRS came exclusively from the Master's Report. In the process of deciding whether to extend the deadline for the submission of the Master's Report and whether to authorize him to employ Gillers, I did learn that more than $4,000,000 had been paid to Chargois. This matter is, however, far more fully described in the Master's Report.

As explained earlier, in almost all cases a meritorious motion for recusal under §455(a) must be based on a judge's acquisition of information extra-judicially. See Liteky, 510 U.S. at 551. A disqualifying appearance of bias or prejudice can be based on information the judges acquires in the litigation, but only if "it is so extreme as to display clear inability to render fair judgment." See id. Therefore, if the motion does not assert a judge has information from an extrajudicial source, a "high threshold" must be met to justify recusal. Id. at 558 (Kennedy, J., concurring). More specifically, "under §455(a), a judge should

be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair minded person could not put aside when judging the dispute." Id.; see also Snyder, 235 F.3d at 48 (quoting Liteky, 510 U.S. at 557-58); In re United States, 158 F.3d at 34 (same). A reasonable person could not believe that my statements at the May 30, 2018 hearing, in open court or at the sidebar, meet this standard.

The conclusion that a reasonable person could not question my impartiality is not qualified by Labaton's suggestion that such a person could believe that I had improper, ex parte communications with the Master. Labaton cites no case in which a judge's recusal has been required based on his interactions with a Master. Indeed, there does not appear to be any such reported case.

In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004) is, however, an illuminating decision. As indicated earlier, pursuant to Federal Rule of Civil Procedure 53(a)(3), "in appointing a master, the court . . . must protect against unreasonable expense or delay." Fed. R. Civ. P. 53(a)(3).

In In re Brooks, the D.C. Circuit found that the district judge's recusal was not required under §§455(a) or (b)(1) because of his ex parte communications with a Master. The court noted that those provisions require a judge's recusal when he has "personal knowledge of disputed evidentiary facts" or when his "impartiality might reasonably be questioned." 383 F.3d at 1041. The movant

submitted time records "that reveal[ed] seven private meetings [between the Master, and] the Court for a total of approximately eight hours." Id. It alleged that the Master had impermissibly informed the court of the content of meetings the Master had with certain individuals involved in his investigation concerning federal officials' handling of monies held in trust for Native Americans.

However,

> [t]he district court stated: "[i]t is not only appropriate but necessary for the Court, as principal, to consult with its agents regarding the manner in which they are carrying out their assigned duties .... [T]hroughout these regular consultations, the Court discussed with the Master the general nature of the ongoing tasks that the Master was involved with, in order to ensure that the Master was responsibly carrying out the duties to which he was assigned." . . .
>
> "In the course of a typical meeting, for example, the [Master] might inform the Court that he planned to travel to New Mexico to meet with the Office of the Special Trustee, and receive a briefing about their role in the historical accounting process. Or he might explain that he traveled to Billings, Montana to meet with title records office personnel, examine their hard copy records, and review the pilot [Trust Asset and Accounting Management System]. Or he might inform the Court that he had been briefed by the Deputy Commissioner of the Bureau of Indian Affairs about the organization of their office." . . .
>
> "[T]he only reason that the Court knew anything about the ... meeting [in question], or the background relating to that meeting, is that the [Master] was compelled to 'present[] the facts surrounding the request of the Deputy Secretary' to hold the meeting, in order that the Court could make an informed decision about whether to authorize the [Master's] attendance at the meeting."

Id. at 1041-42 (citations omitted).

The D.C. Circuit wrote that "the district court reasonably explained that in referring to the "nature, extent, and substance of [the Master] meetings" with third parties, the court was concerned with the subject matter, not the actual content, of those meetings." Id. at 1043. It stated that:

> [M]oreover, it is not surprising that the district judge met many times with the Special Master and . . .; he had to oversee and to coordinate [the Master's] efforts on the court's behalf during four years of complicated and contentious litigation. Keeping a careful inventory of the tasks they had performed appears sensible, particularly in the light of the defendants' several challenges to [the Master's] requests for compensation.

Id. at 1043. The D.C. Circuit stressed that "the district judge has described the nature of the ex parte contacts, and stated unequivocally that those contacts were of a procedural and not a substantive nature." Id. at 1044. It concluded, therefore, that the judge's contacts with the Master had not given him "personal knowledge of disputed evidentiary facts" and that his impartiality could not reasonably be questioned. Id. at 1043.

The instant matter is, at most, analogous to In re Brooks. At the March 7, 2017 hearing, I informed the parties that I had a duty to protect against unreasonable expense or delay and, therefore, anticipated having ex parte communications with the Master. See Mar. 7, 2017 Tr. at 68. However, I expressed my intention to limit those communications to "administrative

matters." Id. The March 8, 2017 Order reiterated this. See Docket No. 173, ¶6 ("The Master may communicate with the court ex parte on administrative matters.").

My communications with the Master were limited to administrative matters. I was initially told about the payment of the $4,100,000 to Chargois, and the Master's request for authorization to retain Gillers to advise on issues relating to Chargois, in connection with the Master's request for an extension of time in which to file his Report. I was told about the existence of a dispute between Gillers and experts Labaton had retained in connection with the Master's requests for further extensions. Labaton has not asked that the references to the payment to Chargois concerning this case, or that he is entitled to up to 20% of Labaton's fee in each case for which ATRS is class representative and Labaton is Lead Counsel, be redacted from the public version of the Master's Report. I do not expect that Labaton will object to the accuracy of the claim the payment to Chargois concerning this case occurred. Labaton has stated, however, that it objects to Gillers' opinions concerning the ethical propriety of the payment. I did not discuss with the Master the substance or merits of Gillers' opinions or the law firms' experts' competing views.

In not moving for my recusal under §455(b)(1), Labaton implicitly acknowledges that the information I received ex parte

from the Master does not actually give me "personal knowledge of disputed evidentiary facts concerning the [current] proceeding." §455(b)(1). In any event, ex parte communications implicate §455(b)(1) only "when a judge receives information that does not enter the record [and] the reliability of that information may not be tested through the adversary process." Craven, 239 F.3d at 103 (citing Edgar v. K.L., 93 F.3d 256, 262 (7th Cir. 1996)). This is not such a case. The limited information I received about Chargois is included and amplified in the Master's Report. Labaton's view of the propriety of that payment will be presented fully with its objections, which I can and will decide with an open mind, de novo. In these circumstances, a knowledgeable, reasonable person could not believe that I received ex parte relevant information that is not, or will not be, in the record and, therefore, doubt my impartiality because of my communications with the Master.

Contrary to Labaton's contention, this case is not analogous to Edgar, 93 F.3d at 259-60. In Edgar, the Seventh Circuit found that recusal was required under §455(b)(1), and §455(a) as well, because the judge had, and reasonably appeared to have, "personal knowledge of disputed evidentiary facts," §455(b)(1), when he had ex parte discussions with court-appointed experts about the merits of their opinions and prohibited any attempt to reconstruct those conversations for the record. Id. In contrast, I had no communications with Gillers or, as explained earlier, any

discussion with the Master concerning the substance or merits of Gillers' opinions.[18] Compare In re Faulkner, 856 F.2d 716, 720-21 (5th Cir. 1988) (recusal required under §§455(b)(1) and (a) where judge's relative was a major participant in transaction at issue and "communicated to the judge . . . material facts and her opinions and attitudes concerning those facts").

As explained earlier, it has been held that reasonable people presume that "a judge . . . will rule according to the laws, as enacted, as required by his or her oath." In re Aquinda, 241 F.3d at 204; see also First Interstate Bank of Arizona, 210 F.3d at 988. In In re Brooks, 383 F.3d at 1043, the D.C. Circuit found that for the purposes of §455(b)(1), and §455(a) as well, there is "no reason for not accepting the judge's unequivocal" representation that he did not receive substantive information in his ex parte discussions with a Master. Similarly, in this case a reasonable person would not doubt my explanation that there were proper administrative reasons for my ex parte communications with the Master and that I did not receive from him any extra-judicial information concerning disputed evidentiary facts.

Nor would my communications with the Master concerning the federal prosecutors' request for information cause a reasonable

---

[18] Although not comparable to the facts in the instant case, the First Circuit has noted that even "[e]ngaging in ex parte communications with court-appointed experts need not inevitably require a judge's disqualification." Craven, 239 F.3d at 103.

person to question my impartiality. The fact that the United States Attorneys' office was investigating whether Thornton had made illegal campaign contributions had been previously reported by the Boston Globe. The Master consulted me in order to get instructions on how to respond to the prosecutors' request. He told me that the prosecutors said they were investigating Thornton, including whether a possible illegal payment had been made to an official of a pension fund. This information was comparable to the information that had been published by the Boston Globe. I instructed the Master not to provide information to the prosecutors voluntarily.

The information I received from the Master about the prosecutors' request for information did not give me personal knowledge of any evidentiary fact that is disputed in this proceeding. No reasonable person could believe that it did. Nor could a reasonable person believe that my knowledge that federal prosecutors were investigating Thornton would cause me to violate my oath to be impartial.

Labaton also suggests that a reasonable person could question my impartiality in deciding challenges it is making concerning the cost of the Master and the manner in which he performed because I appointed the Master and monitored his activities. Again, Labaton cites no analogous case in support of this contention.

In any event, this argument is unmeritorious. I did appoint the Master, monitor his fees and expenses, and received limited information about his activities in the process of deciding whether to authorize him to retain Gillers, among others, and to extend deadlines. A reasonable person would understand that I did this to discharge my duty to protect against unreasonable expense and delay. See Fed. R. Civ. P. 53(a)(3).

In the Order appointing the Master I stated that "[t]he court intends to disclose the cost of the Master at the conclusion of these proceedings." See Docket No. 173, ¶14. On June 19, 2018, Labaton, Lieff, and Thornton filed under seal a Motion for an Accounting and for Clarification that the Master's Role Has Concluded. See Docket No. 302. After this Motion is briefed, I will decide with an open mind whether the Master's involvement in these proceedings should be terminated and, in any event, whether the request for an immediate accounting should be granted.

Federal Rule of Civil Procedure 53 is premised on the principle that the judge who appointed the Master can and will decide objections to his performance or his recommendations de novo. A knowledgeable reasonable person would not doubt my ability to do that in this case.

In view of the foregoing, my recusal under §455(a) is not justified. Rather, recusal in the circumstances of this case would injure an important interest to be served by §455(a). As the First

Circuit has explained: "[t]his statute seeks to balance two competing policy considerations: first, that courts not only be, but seem to be, free of bias or prejudice, and second, the fear that recusal on demand would provide litigants with a veto against unwanted judges." In re Boston's Children First, 244 F.3d at 164 (internal citations and quotations omitted). Therefore, as the First Circuit has also stated, the recusal decision must, among other things, reflect "the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking." In re Allied-Signal, 851 F.2d at 967.

In this case, a reasonable person would know that I am evidently the first judge to have appointed a Master to investigate the reliability of representations made by lawyers in seeking an award of attorneys' fees in a class action. The Master has recommended that Labaton and some of the other firms that represented the class be ordered to disgorge more than $10,000,000. The Master recommends that I sanction Garrett Bradley personally, refer him for possible discipline by the Massachusetts Board of Bar Overseers, and require additional disgorgement of up to $1,000,000 received by Thornton. The Master also recommended that I find that Sucharow, acting for Labaton, violated its legal and ethical obligations. In seeking my recusal, Labaton wrote that my

decisions on the Master's recommendations could result in "serious and far reaching adverse ramifications for at least some of the law firms, and even beyond this investigation for the practice of the Plaintiffs' class action bar . . . ." Docket No. 216-1 at 2. My disqualification would require the reassignment of this case to a judge who is not familiar with its long and complex history.

In these circumstances, my unjustified recusal under §455(a) could encourage the perception that litigants can manipulate the system to veto an unwanted judge. As the First Circuit has repeatedly reiterated, this would be damaging to public confidence in the administration of justice. See In re Allied-Signal, 891 F.2d at 967; In re Bulger, 710 F.3d at 47; In re Boston's Children First, 244 F.3d at 164; In re United States, 441 F.3d at 67; Cigna Fire Underwriters Co., 86 F.3d at 1270.

I am also mindful of the First Circuit's admonition that §455(a) "should not be used by judges to avoid sitting on difficult cases." Snyder, 235 F.3d at 45. It is evident that this will continue to be a demanding case. As careful consideration has persuaded me that my disqualification is not justified, recusal would be an abdication of professional responsibility, which judges have been urged to avoid.

V. ORDER

Therefore, in view of the foregoing, on June 21, 2018, I denied Labaton's motion for my recusal pursuant to §455(a). See Docket No. 315.

UNITED STATES DISTRICT JUDGE

REDACTED

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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PRELIMINARY STATEMENT

Labaton Sucharow LLP ("Labaton") objects to the Master's findings of fact and conclusions of law set forth in his Report and Recommendations (the "Report"), as detailed below.

After nearly four million dollars spent and an investigation spanning more than a year, the Master has produced a 377-page Report that is unmoored from the law governing the conduct in question. His investigation – launched as a result of a self-reported and inadvertent double-counting error in the lodestar reports of the three Customer Class law firms – has morphed into a challenge of the practice of paying referral fees, despite it being perfectly permissible in Massachusetts. The Master has asserted several accusations of misconduct against Labaton. Each of them flows from an unprecedented misapplication of the law. Instead of applying the actual rules, the Master has – quite unfairly – sought to impose his own personal feelings and aspirations. As a matter of law, he is incorrect. The Court, reviewing the Master's findings of fact and conclusions of law *de novo*, must reject them.

Despite the millions expended by the Master, this case is simple. Labaton, along with several other firms, litigated a hard-fought battle for five years, which resulted in a terrific result for the class. Everybody involved in this case, including the Master, agrees. The attorneys requested 25% of the settlement as a fee award, which the Court determined was fair, in large part based on the difficulty of litigating the case, the risks of investing five years into the effort, and the outstanding result achieved for the class.

But two issues have surfaced regarding the attorneys' fees that were paid. First, Labaton, along with the other Customer Class Firms (Lieff Cabraser Heimann & Bernstein LLP and The Thornton Law Firm), mistakenly double-counted hours on their lodestar reports. This was an unfortunate error, which Labaton regrets. But because the Court used these lodestars as a cross-

check to determine whether the 25% fee award was fair, and because the inadvertent double-counting error did not materially affect the result of that cross-check (with the multiplier being adjusted from 1.8 to 2), this mistake should not affect the Court's conclusion that the 25% fee was fair.

Second, Customer Class Counsel paid a portion of their own fee award as a referral fee. Because it was taken from the fees already earned by Customer Class Counsel, this payment did not reduce the amount received by the class whatsoever (instead, it only affected the bottom line of the three firms paying the referral). Crucially, in Massachusetts, referral fees such as this are perfectly permissible.

Labaton obtained the consent of its client, Arkansas Teacher Retirement System ("ATRS"), to pay this fee. Five different experts have concluded that Labaton complied with the governing rules regarding referral fees. Three – Professors Peter Joy, W. Bradley Wendel, and Bruce Green – are law professors specializing in legal ethics. One, Hal Lieberman, is a practitioner who has worked in attorney discipline for over 35 years, including for the Massachusetts Office of Bar Counsel, as Chief Counsel to the Disciplinary Committee for New York's First Judicial Department, and as a private practitioner (in addition to teaching ethics for over a decade and serving on numerous committees involving professional discipline). The final expert is Camille Sarrouf, who has been practicing in the Commonwealth since 1960, including a term as president of the Massachusetts Bar Association in 1998. The combined expertise of this group on this particular issue is unmatched. Each one of these experts has opined, unequivocally, that Labaton complied with its obligations. And, in any event, ATRS has reaffirmed its consent to the payment of this referral fee, which is adequate under clear and controlling precedent from the Massachusetts Supreme Judicial Court.

Related to Labaton's permissible payment of this referral fee from its own share of the fee award, the Master has accused Labaton of misconduct because the referral payment was not disclosed to the Court or the class. The law on this issue is crystal-clear: Labaton was not required to disclose the referral fee absent an order from the Court. There was no such order. Although the Federal Rules of Civil Procedure are already definite and dispositive, Professor William Rubenstein – who literally wrote the book on class action law – has decisively confirmed that Labaton complied with its disclosure obligations as a matter of law. Labaton's conduct comported with the controlling Federal Rules of Civil Procedure, applicable precedent, local practice, and the Massachusetts Rules of Professional Conduct.

For his part, the Master's findings of fact are, in many instances, incorrect. He ignores or fails to address record evidence that squarely contradicts his findings. Far from acting as a neutral – as he purports to be – the Master has rendered factual findings that are skewed toward his desired result.

While some of the Master's findings of fact are one-sided, his conclusions of law are almost entirely incorrect. His legal conclusions regarding the referral fee are not only erroneous – in large part, they are unprecedented. For example, he claims that Labaton violated Massachusetts Rule of Professional Conduct 7.2, which marks the first time in the Commonwealth's history that this Rule has been applied in such a way. He also concludes that Labaton was required to disclose the referral fee to the Court, based largely on a strained reading of the Federal Rules of Civil Procedure that has never been applied by any court. Moreover, in many places, the Master does not rely on any law at all, instead choosing to render edicts in wholly conclusory fashion. The Master's conclusions are incorrect as a matter of law. And his

efforts to impugn and punish Labaton with accusations of misconduct while relying on novel and unprecedented legal interpretations are offensive to due process.

Labaton helped deliver a result for the class that was lauded by all. Its own client, ATRS, has repeatedly reaffirmed its satisfaction with Labaton's representation. The Master's findings are the outgrowth of his animosity toward referral fees and his refusal to apply the plain language of the Federal Rules of Civil Procedure. Labaton, at long last, welcomes this opportunity for the Court to scrutinize the Master's flawed conclusions and decide these questions *de novo.*

OBJECTIONS TO THE MASTER'S FINDINGS OF FACT

1. Labaton Did Not Take "Pains At Every Turn" to Hide the Chargois Agreement from ATRS.

Labaton disputes the Master's finding that Labaton "took pains at every turn not to reveal" the Chargois Agreement to George Hopkins or ATRS. Special Master's Report and Recommendations ("R&R") at 102-04. This finding is unsupported by the record.

a. ATRS' Institutional Knowledge of Chargois & Herron.

The Master improperly frames the knowledge of ATRS (the client) only in terms of what Hopkins knew. *Id*. This conveniently ignores the institutional knowledge of ATRS. It is undisputed that ATRS was aware of Damon Chargois and the Chargois & Herron firm. That firm facilitated the introduction between ATRS and Labaton, and Damon Chargois was present at the initial meeting. Ex. 125 (Chargois Dep.) at 36:12-37:10.[1] Further, Chargois & Herron and Labaton jointly responded to ATRS' Request for Qualifications for a monitoring counsel role and expressly stated that they intended to work together. Ex. 128 (LBS017738-55). ATRS answered through its Chief Counsel (Christa Clark) that, while the state system could not accommodate two unaffiliated firms as a single monitoring panel member, Labaton would be

[1] Exhibits attached to the Declaration of Justin J. Wolosz are indicated with a letter (e.g., "Ex. A"). Exhibits to the Master's Report and Recommendations are referred to by number (e.g., "Ex. 1").

free to "affiliate that firm [Chargois & Herron] or utilize them." Ex. 129 (LBS017455-56). Thereafter, Belfi spoke with Chief Counsel Clark and told her that Labaton would be working with Chargois & Herron and that the firm would be involved in the relationship. Ex. 122 (Belfi 9/5/17 Dep.) at 117:20-24, 118:5:7. The foregoing facts are undisputed, but not meaningfully acknowledged or accepted by the Master.

b. Labaton Followed Client Instructions.

Apart from the fact that ATRS, as an institutional party, was unquestionably aware of a relationship between Chargois & Herron and Labaton, the finding of concealment disregards the testimony of the only two people with knowledge of whether there was any attempt to hide information from ATRS (Hopkins and Labaton relationship partner Eric Belfi). After Hopkins joined ATRS, Belfi raised the subject of "how fees worked." *Id.* at 23:17-23. Hopkins responded that "he only wanted to deal with [Labaton] and wasn't concerned about how [Labaton] would cut fees up if [they were] working with other firms." *Id.* In short, Hopkins was interested in the aggregate attorney fee amount – not the allocations of that aggregate fee among various firms. *Id.* Hopkins' testimony confirmed Belfi's understanding: "I told Eric if I ever want to know about your attorney fees and who you all hired, I'll ask you . . . I don't feel misled because I made it real clear to them I didn't want to be the gatekeeper on all this attorney relationship. And I think if they thought I wanted to know, they would have told me because Eric always said if you ever want to see how we do all these fees, just let me know." Ex. 12 (Hopkins 9/5/17 Dep.) at 68:24-69:1, 73:11-18. The explanation provided by the two individuals with personal knowledge of the truth should be credited, and the Master's finding should be rejected.

c. ATRS' Engagement Letter With Labaton For the *State Street* Matter Permitted the Payment of Referral Fees.

Labaton objects to the suggestion by the Master that ATRS did not know or had no reason to know that Labaton may pay referral fees to another law firm in connection with the *State Street* matter. *See* R&R at 103-104. In their engagement letter, ATRS consented to Labaton dividing its fees, *inter alia*, with "local or liaison counsel" or as "referral fees." Ex. 138 (LBS011060-62). This express language in the letter sets forth (1) notice to ATRS of the potential payment of referral fees and (2) ATRS' consent for the payment of such fees.

Labaton also objects to the Master's finding that it was required to tell ATRS the name of the firm it paid a referral fee or the percentage of such fee. *See* R&R at 103. Under governing Massachusetts law at the time (and currently), there was no requirement to identify the name of the attorney being paid a referral fee or the percentage fee paid to such attorney. *See* § III.B, *infra*.

2. George Hopkins Ratified the Chargois Agreement on Behalf of ATRS.

Labaton objects to the Master's statement that the Hopkins Declaration (Ex. 130) (March 15, 2018) was anything other than a ratification of the Chargois Agreement on behalf of Labaton's client, ATRS, following full disclosure. *See* R&R at 101 n.83 (stating that Mr. Hopkins "purports" to ratify the Chargois Agreement). In his Declaration, Mr. Hopkins, the Executive Director of ATRS, acknowledged the fee division with Chargois, recited its details, and consented to and ratified the fee division on behalf of ATRS with respect to the *State Street* matter. Ex. 130. There is nothing "purported" about Mr. Hopkins' Declaration. *See* R&R at 101 n.83. It is unequivocal. And, as the SJC held in *Saggese v. Kelley*, 445 Mass. 434 (2005) in the context of MRPC 1.5(e) on fee sharing, "[r]atification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate." 445 Mass. at 442.

3. The Payment to Chargois & Herron Was Not Required To Be Disclosed In the Fee Petition Or Any Settlement Documents.

Labaton objects to the Master's finding that "the failure to include the payment to Chargois in the Fee Petition, or anywhere else in the settlement documents, was a material omission." R&R at 88. This is a legal conclusion, not a finding of fact, and for the reasons set forth herein (§§ IV and V, *infra*), there was no duty to disclose the payment to Chargois to the Court, in the notice to the class, or in any of the settlement documents filed in the case.

4. The Payment to Chargois & Herron Did Not Come From "Class Funds."

Labaton objects to the Master's finding that the payment to Chargois & Herron came from "class funds." *See, e.g.*, R&R at 7, 87 n.67, 114 n.93, 263, 287, 299, 306, 311, 324-25, 358-59. The payment came from the share of reasonable attorneys' fees that the Court had already awarded to Customer Class Counsel. *See* Order Awarding Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs dated November 2, 2016, ECF No. 111. It did not come from "class funds."

After the Court entered the aggregate fee award, the attorneys apportioned the aggregate fees pursuant to their previously agreed upon fee allocation agreements. As part of that process, Labaton transferred the aggregate attorneys' fee award from the settlement fund into a separate escrow account. The referral or origination fee payment to Chargois was funded by the three Customer Class Counsel. Accordingly, Labaton reduced the payment to Lieff and Thornton by the amount they had agreed to contribute to the Chargois payment, and included these amounts in the transfer to the Labaton IOLA account. From Labaton's IOLA account, Labaton paid service awards and made the payment to Chargois. *See* Ex. 238 (Response by Labaton Sucharow LLP to Special Master's September 7, 2017 Request for Supplemental Submission) at 37.

The suggestion that Labaton was shifting a pre-existing obligation to the class is flat-out wrong. Labaton's agreement was to pay a portion of its share to Chargois & Herron (although, in this case, it was also funded by Lieff and Thornton). If Labaton itself was entitled to no share of attorneys' fees, then Chargois & Herron likewise would be entitled to no payment.

Throughout these proceedings, Customer Class Counsel and several of their experts, including Prof. Rubenstein, have vigorously disputed the notion that the payment to Chargois & Herron came from "class funds." As Professor Rubenstein testified at his deposition:

> I think it's an important distinction in a big case like that that there are these two phases; that the fee is set in the aggregate in the first phase. That's the important phase 'cause that's when the class' money is being taken from the class. And that's the key to the whole thing in my opinion. And then once the Court has decided that's a fair fee to take from the client, then the question of how the lawyers divide that fee up among themselves is what I refer to as the allocation phase which I think has less pertinence for the class in most cases. Ex. 235 (Rubenstein Dep.) at 23:16-24:4.

The repeated finding in the R&R that the payment to Chargois & Herron came from "class funds" and that Labaton used "class funds" to satisfy a preexisting obligation are baseless and incorrect, and therefore should be rejected.

5. Labaton Did Not Improperly Hide the Chargois Agreement From Other Counsel.

Labaton objects to the Master's suggestion (R&R at 116, 132-133 & n. 115) that it improperly hid the Chargois Agreement from the other lawyers in the case. The Labaton witnesses testified to their belief that their business arrangements, which would include the payment of permissible referral fees to other lawyers, were not required to be disclosed to other counsel. Ex. 42 (Goldsmith 9/20/17 Dep.) at 167:12-168:21; Ex. 38 (Sucharow 9/1/17 Dep.) at 94:8-95:6. This information about the identity of local counsel who helped Labaton develop certain business relationships is proprietary to the Firm and Labaton did not expect other counsel to share any such relationships with it. Moreover, the other firms were not surprised by this. *See*

Ex. 162 (4/13/2018 Hearing) at 266 (Lieff attorney stating "how competitive the field is in the plaintiffs' securities bar for clients like Arkansas . . . the identity of your local counsel in the minds of some plaintiffs' firm is proprietary); *id.* at 269-70 (Lieff attorney stating "Labaton did not want to disclose to the world who their local contact was for their Arkansas Fund client . . . it's just not a surprise. It is not – it was not a surprise to me").

6. The ERISA Firms Had No Intention of Sharing Any Attorneys' Fee Allocation Information with the Department of Labor.

Labaton objects to the Master's finding that its failure to tell ERISA counsel (McTigue Law LLP, Keller Rohrback L.L.P. and Zuckerman Spaeder LLP) about the Chargois Agreement kept it from being disclosed to the Department of Labor. *See* R&R at 117-18, 349. [redacted] *See* Transmittal Declaration of Justin J. Wolosz, submitted herewith ("Wolosz Decl."), [redacted]

Second, on August 28, 2015, Mr. Sarko wrote to plaintiffs' counsel: "We need to be careful about this as the DOL has asked if there were any agreements on fees between counsel. ***I would never answer their question***. And then they seem to forget about it." Ex. 35 (TLF-SST-052975) (emphasis added).

Therefore, it is simply incorrect for the Master to credit Mr. Sarko's *post hoc* and self-serving testimony that, had he known of the Chargois Agreement, he would have disclosed it to the Department of Labor. *See* R&R at 117-18, & n.96. The fact that the Master does not even address these statements by Mr. Sarko speaks volumes about the unbalanced nature of his Report.

7. The Special Master Is Incorrect Regarding Amounts Supposedly Owed to ERISA Counsel.

Throughout the course of the investigation, the Special Master (as was apparent through his questioning) misunderstood or misconstrued a term in the Stipulation and Agreement of Settlement. The relevant provision states that: "no more than Ten Million Nine Hundred Thousand Dollars ($10,900,000.00) in attorneys' fees shall be paid out of the ERISA Settlement Allocation." ECF 89, ¶24. In questioning, the Special Master appeared to mistakenly believe that this term means that ERISA Counsel was entitled to receive up to $10.9 million in attorneys' fees. *See, e.g.,* Ex. 42 (Goldsmith 9/20/17 Dep.) at 101:13-16 (asking what would occur "if the differential between the 10.9-million-dollar cap and what ERISA counsel received didn't go to ERISA counsel for fees"); Ex. 41 (Chiplock 9/8/17 Dep.) at 85:13-20 (The Master: "Where maybe the lack of understanding is . . . It looks in the agreement like there's a 10.9 percent cap because it's captioned ERISA settlement allocation. It looks like that is an allocation for ERISA counsel."). In the R&R, the Master confirms that this was his erroneous understanding, making demonstrably incorrect statements describing the $10.9 million cap, such as: "attorneys' fees *for ERISA counsel* would not exceed $10.9 million" (p. 277, emphasis added) and "fees *for ERISA counsel* will not exceed $10.9 million" (p. 343-344, emphasis added). He also makes a "recommendation" that the award of fees to ERISA Counsel should be increased by $3.4 million, so that they would receive a total of $10.9 million. *Id.* at 368-69.

The Special Master conflates the amount of total attorneys' fees that could permissibly be paid from the ERISA Settlement Allocation with the amount of fees payable *to ERISA Counsel*. There is no basis to say that "those two numbers have anything to do with each other." Ex. 42 (Goldsmith 9/20/17 Dep.) at 100:12-13; *see also id. at* 101:6-11 ("There was never, to my knowledge, any sort of cross-over or discussion of how this cap, which was requested by the DOL and negotiated between the DOL and Lynn Sarko to my recollection, informed or had anything to do with" how a fee award would be divided among Customer Class Counsel and ERISA Counsel).

Nor would there be a basis to increase the amount payable to ERISA Counsel to $10.9 million, or anything above what they received. ERISA counsel contributed to the effort in this case – as acknowledged by Customer Class Counsel when they increased the ERISA Counsel's share of attorneys' fees from 9% to 10% – but ERISA Counsel played a much less significant role than Customer Class Counsel. Among other things, ERISA counsel never litigated a motion to dismiss. *Id.* at 16:12-17:1; 43:11-18. Likewise, ERISA Counsel did not invest nearly as much as Customer Class Counsel in expenses and fees to develop the theory of the case, conduct massive document review and analysis, and respond time and again to contentious presentations by State Street's counsel during the mediation sessions, leading ultimately to a settlement for all. *See, e.g.,* Ex. 58 (Goldsmith 7/17/17 Dep.) at 48:18-20 ("And based largely on our efforts they were able to settle their cases without having those allegations tested."); 65:11-67:11 (explaining his recollection that ERISA counsel never requested access to the voluminous documents that Customer Class Counsel had requested and reviewed); [redacted]. Any suggestion by the Special Master that ERISA Counsel were solely

responsible for obtaining the entire portion of the ERISA Settlement Allocation – which seems to be the premise behind the Special Master's suggestion that ERISA Counsel were supposed to receive $10.9 million (and the "recommendation" that their share should be increased now) – fails to reflect the reality of how this case proceeded.

The amount of the losses suffered by the putative ERISA class members likewise provides no basis to increase the share of attorneys' fees paid to ERISA counsel. The Special Master's Report and Recommendation states affirmatively that after reaching the agreement that ERISA Counsel would take 9% of any fee award, "it was later learned" that losses to the putative ERISA class were "actually about 12-15% of the total trading volume." R&R at 46. Although the Special Master includes a footnote saying that Labaton's counsel indicated *at oral argument* that the trading volume was between 9 and 10% (R&R at 46 n.28), this statement is misleading:

[redacted]

As explained in the Court-approved Plan of Allocation for the proceeds of the Settlement, the Class's ERISA trading volume is derived from the volume of ERISA Class Members and also from certain Class Members that are "Group Trusts." *See generally* Class Notice, ECF No. 104-13 at 17-20. "The amount of the ERISA Settlement Allocation has been set based on the Indirect FX Trading Volume information provided, including information concerning the total amount of Indirect FX Trading Volume executed during the Class Period by ERISA Plans and Group Trusts." *Id*. at 17.

However, both the amount of the Class's ERISA trading volume, *i.e.,* the Indirect FX Trading Volume of ERISA Class Members and eligible Group Trusts, and the proportion of the

Class's ERISA trading volume to total Indirect FX Trading Volume of the Class *is not known at this time*.[2] This is because the scope of Group Trust ERISA trading volume and assets is only known to the Group Trusts and, as part of the Settlement administration and Plan of Allocation, they were asked to provide certifications concerning their ERISA assets and/or the Indirect FX Trading Volume made by their ERISA Plans so that the Claims Administrator could determine their ERISA Volume. *See id.* at 18-19. As explained by the Claims Administrator in connection with Plaintiffs' Assented-To Motion For Authorization To Distribute To Eligible Registered Investment Company Class Members (ECF Nos. 209-211), this Group Trust certification process is ongoing. *See* Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Support of Motion for Authorization to Distribute to Eligible Registered Investment Company Class Members, ECF 211 at ¶¶ 13-14.

Moreover, the deposition testimony cited by the Special Master in support of his finding does not even support his proposition regarding Indirect FX Trading Volume. Lynn Sarko's July 6, 2017 testimony states:

> THE WITNESS: I guess in my view was, you know, in the perfect world, we would have received –
>
> SPECIAL MASTER: Something commensurate with what the ERISA trading volume turned out to be?

[2] "The ERISA Settlement Allocation (which shall be the source of distributions *to ERISA Plans and certain Group Trusts,* as set forth below) shall be at least Sixty Million Dollars ($60,000,000.00) …. The ERISA Settlement Allocation, even without the $10,900,000 cap on attorneys' fees described above, provides a premium per dollar of Indirect FX Trading Volume for ERISA Plans and eligible Group Trusts in comparison to the allocations to other Settlement Class Members. The precise size of the premium is not known at this time because *the amount of ERISA assets within Group Trusts is currently undetermined*…." *See* Class Notice, ECF No. 104-13 at 17 (emphasis added). Moreover, "*[i]n light of the fact that the amount of ERISA assets within Group Trusts is currently undetermined*, the Parties, with input from the DOL, have agreed that the Plan of Allocation will be modified in the event that the total amount of Group Trusts' ERISA Volume is in excess of 2/3 of the total amount of Group Trusts' Indirect FX Trading Volume, as reported by State Street on July 25, 2016." *Id*. at 18 (emphasis added).

> THE WITNESS: Correct. Or you can say, put it differently, should we receive a lower multiplier than certain other folks?

Ex. 28 (Sarko 7/6/17 Dep.) at 64:3-11.

Moreover, Carl Kravitz's full testimony actually supports the opposite finding:

[redacted]

Accordingly, the Master's finding that ERISA trading volume "was actually about 12-15% of the total trading volume. . . ." is unsupported by the record.

Finally, the division of fees between Customer Class Counsel and ERISA Counsel was not entirely predicated on an estimate of the ERISA trading volume. In fact, the 9% share of fees initially allocated to ERISA counsel was also based on the fact that the ERISA claims were largely duplicative of the claims asserted in the "customer" case (i.e., *ATRS v. State Street*). In other words, when the fee allocation was negotiated, the ERISA claims were not expected to be solely responsible for any recovery to ERISA-eligible claimants. Thus, even leaving aside the

exact trading volume, the fee agreement between Customer Class Counsel and ERISA Counsel was still fair.

8. ERISA Plaintiffs Were Not Labaton Clients Until, at the Earliest, a Class Was Certified.

The Report makes a blanket statement – twice – that Customer Class Counsel considered ERISA plaintiffs to be Customer Class Counsel's clients. R&R at 28, n.16 and 281, n.232. This conclusion is inaccurate, at least as to Labaton. With respect to Labaton, both statements cite to the testimony of David Goldsmith. *Id.* The first is a citation to a September 20, 2017 deposition that apparently was intended to refer to a July 17, 2017 deposition. The actual quotation (when the citation is corrected) merely says that Customer Class Counsel "did allege a class which was broad enough to encompass ERISA governed assets." Ex. 58 (Goldsmith 7/17/2017 Dep.) at 42:11-14. The second citation, which also points to the wrong deposition date, does include a quotation with a passing comment saying that putative ERISA class members "were our clients." *Id.* at 61:7-14. But the reference to that comment fails to acknowledge that, when questioned more directly about the issue, Mr. Goldsmith testified unequivocally that, "I would not view the ERISA plaintiffs as clients of Labaton Sucharow." Ex. 42 (Goldsmith 9/20/2017 Dep.) at 31:10-12; *see also id.* at 32:9-11; 33:21-24. As the deposition continued, Mr. Goldsmith further explained that in his mind, the ERISA plaintiffs and putative class members "actually weren't Labaton clients, to the extent they ever were, until the class [was] certified . . . until the settlement was finally approved by the Court which was I think on or about November 2, 2016." *Id.* at 65:19-66:2.

9. Labaton's Purported "Compartmentalization" Is Not Inappropriate.

Labaton disputes the Special Master's repeated conclusion that Labaton has a structure of "compartmentalization" that is somehow inappropriate. *See, e.g.,* R&R at 56, 97-98. Labaton

does have settlement counsel who focuses on the preparation of settlement documentation and fee submissions, and relationship partners who serve as the primary conduit with clients. But the Special Master's suggestion that these individuals do not communicate with each other goes much too far. *See, e.g.,* Ex. 58 (Goldsmith 7/17/07 Dep.) at 14:3-7 (one of the lead litigators on the State Street matter, who explained that: "I did have a lot of involvement in the documentation of the settlement and the submission of papers relating to the settlement."). Labaton recognizes that, in this case, more communication might have caught the double counting issue. But that does not mean that Labaton's staffing structure is somehow flawed, and Labaton objects to any suggestion that it is. To the contrary, there are many benefits to having (for example) a Settlement Group, which can devote resources to develop more in-depth knowledge of this important area of the law and important part of Labaton's practice, and offer their services in all of Labaton's cases.

10. Labaton Was Not Required to Disclose the Referral Relationship in Response to RFPs or Interrogatories.

The Special Master's initial round of discovery, as modified, did not ask Customer Class Counsel to produce information regarding the fee-sharing arrangement with Chargois & Herron. On Thursday, May 18, 2017, counsel for the Special Master sent via email the Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Labaton Sucharow LLP ("First RFP") and the Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP ("First Interrogatories"). *See* Wolosz Decl. a [redacted]

[redacted]

The scope of the request made the timing demanded completely unrealistic. Accordingly, Labaton's counsel and the Master's counsel agreed to meet on Monday, May 22, 2017, at the offices of counsel for the Master, to confer regarding the requests. At the beginning of the meeting, one of the Special Master's attorneys handed counsel for Labaton a list of document requests and interrogatories that the Special Master had decided to strike in their entirety. [redacted]

- Request No. 18 asked for documents regarding certain communications "relating to sharing costs and/or expenses" of the litigation. Ex. 164 at 8. The Special Master has pointed to no such documents that discuss the referral fee arrangement.
- Request No. 40 sought "[a]ll documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records." Ex. 164 at 12. The

Special Master has pointed to no such documents that discuss the referral fee arrangement.

- Interrogatory No. 60 asked Labaton to "[i]dentify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor." Ex. 174 at 16. Labaton gave a detailed response that provided a significant amount of information (*see id.*, p. 16-24), but did not identify anything regarding Chargois & Herron because it was not called for by the question.
- Interrogatory No. 72 asked Labaton to "[i]dentify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge." *Id.* at 37. This interrogatory is impossible to answer as drafted, because there could be thousands of people, inside and outside of Labaton, who have some degree of "knowledge of the . . . SST Litigation." Labaton objected and stated that it will "construe this Interrogatory as a request that the Firm identify (to the extent not otherwise identified in its response to the Interrogatories) the principal Labaton Sucharow attorneys or staff who worked on, or have unique knowledge regarding, the topics being reviewed by the Special Master." *Id.* at 37-38. As reasonably construed in this manner, the request did not call for identification of Chargois & Herron.

Simply put, once the Master voluntarily eliminated a number of the requests contained in the First RFP, there was nothing left that even arguably called for identification of the Chargois & Herron relationship. The fact that Thornton – for whatever reason – chose to include some of

the documents does not make them responsive. The Master did not ask for these documents, and Labaton objects to any "finding" to the contrary.

11. There Has Been No Failure to Accept Responsibility.

Although not expressly included as a "finding," the Special Master makes unnecessary, inflammatory commentary saying that Labaton has somehow failed to "own up" to wrongdoing. The Special Master describes this as "[o]ne of the most troubling elements of the Chargois" relationship, claiming that Labaton has failed to "accept[] responsibility for the calculating and secretive nature of the conduct," failed to "express[] contrition" or "remorse." R&R at 362. The Special Master goes on to criticize Labaton for retaining what he terms a "phalanx of experts" and "erect[ing] a wall of legalistic and formalist excuses and blame-shifting." *Id.*

The Special Master's musing is wrong and highly inappropriate. The suggestion that Labaton should express remorse or contrition fails to recognize the threshold fact that Labaton (together with highly-credentialed experts who have testified in this case) disputes the Special Master's findings and conclusions. The Special Master also ignores that he arrived at an early view that the Chargois relationship was somehow improper, leaving Labaton with no choice but to defend itself. For example, during the deposition of Mr. Sucharow – which occurred *on the very first day of depositions relating to the Chargois issue* – the topic of whether the referral fee should have been disclosed to ERISA Counsel came up. Abandoning any sense of impartiality or suggestion that he was engaged in fact-finding (or a deposition, for that matter), the Special Master argued with the witness, stating his predisposition:

> THE SPECIAL MASTER: There is a difference, Larry. Let me tell you what it is.
>
> Your fees, Lieff's fees and Thornton's fees were going to be before the Court, disclosed to the Court, and the allocation was going to be disclosed to the Court.

> The fees of the ERISA counsel were going to be before the Court, and the allocation disclosed to the Court.
>
> By not bringing it to the ERISA counsel's attention that a lawyer who is not before the Court is going to get 5.5 percent of the total award is depriving the ERISA counsel of having the opportunity to weigh in not only as to their own distribution but as to whether or not it's appropriate in the larger context of the class distribution and the larger context of the allocation to the other lawyers. You don't see that?

Ex. 38 (Sucharow 09/01/2017 Dep.) at 27:5-27:23.

This exchange occurred near the beginning of the referral fee portion of the Special Master's investigation. In the months that followed, the Special Master doubled down on his view that the referral relationship (and/or disclosures about it) must somehow be improper, and he took great pains to find *some* legal basis upon which he could call the fee or disclosure issues into question. *See, e.g.,* Ex. 232 (Gillers Report, which was prepared over the course of almost three months); Ex. 253 (Gillers 3/20/18 Dep.) at 53:9-62:17 (conceding that he found no opinions of the Massachusetts Board of Bar Overseers, the Massachusetts Bar Association, or the Boston Bar Association, or any Massachusetts judicial opinions, which explain or hold that his interpretation of Rule 1.5(e) is correct.). Labaton's retention of a so-called "phalanx of experts" was merely an attempt to ensure that the one-sided, novel opinions being leveled at Labaton were not left unrebutted in the record.

It does not lie in the Special Master's mouth to now accuse Labaton of being legalistic or formalistic. In the face of new legal interpretations being used to suggest serious wrongdoing, the Firm had no choice but to push back, pointing to the actual, controlling legal principles. Although the Special Master largely ignored Labaton's arguments, the process is now past that stage and Labaton has the opportunity for a *de novo* review before the Court. Surely Labaton is not required to forego that review and express some kind of "remorse" or "contrition" before there is a fair adjudication of whether the Firm did anything wrong.

To the extent that the Special Master's inappropriate commentary can be considered a "finding" of any sort, Labaton objects.

12. ATRS Continues to Be an Adequate Class Representative.

The Special Master takes the position that ATRS is not appropriate to serve as class representative moving forward. R&R at 78 n.58 and 257-58, n. 207. The "finding," if it rises to that level, is outside the scope of what the Special Master was asked to do in this case. The Appointment Order commissions the Special Master to "prepare a Report and Recommendation concerning all issues relating to the attorneys' fees, expenses, and service awards *previously made in this case.*" Appointment Order (ECF 173) at 2 (emphasis added). It says nothing about opining on the fitness of ATRS or its executive director to serve in a class representative position in the future. For this reason alone, the Special Master's unsolicited opinions about ATRS serving as class representative going forward should be disregarded.

Moreover, even if the Master had been asked to look into this issue, there is no reason for him to conclude that ATRS should step down. As the Special Master himself stated, "[y]ou're not going to get any disagreement from me on whether [ATRS' Executive Director] was more involved, more engaged, and contributed more value than not just the average class representative but almost any class representative." Ex. 162 (4/13/2018 Hearing) at 50:20-24. In addition, the remaining issue being litigated involves the allocation of attorneys' fees, which is not something in which a class representative is normally involved. Ex. 235 (Rubenstein Dep.) at 177:1-9 ("And again, my testimony – and I'll repeat it – is that I don't expect much of the class representatives as to fee allocation, nor does class action law. I don't know of a single class action case that says the class representatives oversee fee allocation. In all the cases that your expert cited no one ever mentions a class representative as being a key factor in the fee allocations or the fee agreements. It's the Court."). In a situation where the class representative

has performed better service than "almost any class representative" in the past, and there is no real role left for it on the key contested issue remaining in the case, there is certainly no basis to find that the representative should step down.

Nor is there any suitable alternate class representative who would be available if ATRS were to step down. There are no other named plaintiffs in the case brought by Customer Class Counsel. No possible class representative other than ATRS would satisfy the requirements of Rule 23(a)(4). *See* Fed. R. Civ. P. 23(a)(4). For reasons that he does not fully articulate, after praising ATRS for the work it performed as class representative, the Special Master makes these passing, disparaging remarks in two footnotes that purport to raise a question about ATRS' fitness to serve as class representative going forward. The footnote comments are outside the scope of the Master's mandate, insufficiently explained or supported, and inappropriate. They should be disregarded.

OBJECTIONS TO THE MASTER'S CONCLUSIONS OF LAW

Labaton objects to the following of the Master's Conclusions of Law, and all subsidiary conclusions reached by the Master, including but not limited to the following:

1. Labaton objects to the conclusion that it violated any duties to ATRS concerning the Chargois Agreement. *See* R&R at 248-73; 331-34. In particular, but not exclusively:

    - Labaton objects to the conclusion that it violated MRPC 1.5(e). *See* R&R at 248-63.

    - Labaton objects to the conclusion that it violated MRPC 7.2(b). *See* R&R at 263-73.

    - Although the Master reached no such conclusion, Labaton objects to any suggestion that it violated MRPC 1.5(a). *See* R&R at 261 n.209.

2. Labaton objects to the conclusion that it "failed to meet its fiduciary duties to the class members as clients." *See* R&R at 346; 273-286; 338-46. In particular, but not exclusively:

- Labaton objects to the conclusion that it was required to disclose the Chargois Agreement to the named plaintiffs/class representatives. *See id.*

- Labaton objects to the conclusion that it violated MRPC 1.2 or MRPC 1.4. *See id.*

3. Labaton objects to the conclusion that it was required to disclose the Chargois Agreement to the Court. *See* R&R at 139-141; 303-26; 343; 353-362. In particular, but not exclusively:

    - Labaton objects to the conclusion that Rule 23(e)(3) required disclosure of the Chargois Agreement. *See* R&R at 278, 306-309; 354-57.

    - Labaton objects to the Master's suggestion (not conclusion) that Labaton's non-disclosure of the Chargois Agreement was "supportable" of a Rule 11 violation of Labaton or any of its attorneys. *See* R&R at 309-318; 357-59.

    - Labaton objects to the conclusion that at the fee petition stage attorneys must present "all relevant facts" and there exists "an enhanced duty of full disclosure." *See* R&R at 139-141; 303-305, 313-314; 353-54.

    - Labaton objects to the conclusion that it "deprived the Court information it needed to discharge its fiduciary obligations to protect the class's interests" or otherwise withheld from the Court information that Labaton had a duty to disclose. *See* R&R at 303-326.

    - Labaton objects to the conclusion that its non-disclosure of the Chargois Agreement violated MRPC 3.3(a) or MRPC 8.4(c). *See* R&R at 318-22; 359-62.

    - Labaton objects to the conclusion that it violated a duty of candor to the Court. R&R at 322-326.

4. Labaton objects to the conclusion that it was obligated to disclose the Chargois Agreement to Customer Class Counsel and ERISA counsel. *See* R&R at 287-303; 346-53.

5. Labaton objects to the remedies recommended by the Master regarding Labaton. *See* R&R at 362-77.

    - Labaton objects to the recommendation that the Customer Class Counsel firms should disgorge in equal amounts the $4 million of double-counted time. *See* R&R at 363-64.

    - Labaton objects to the recommendation that it should disgorge $4.1 million representing the payment to Chargois. *See* R&R at 368-69

- Labaton objects to the recommendation that it work with the Court regarding on-going ethics supervision. *See* R&R at 372-73.

ARGUMENT SUPPORTING LABATON'S
OBJECTIONS TO THE MASTER'S CONCLUSIONS OF LAW

I. STANDARD OF REVIEW.

"The court must decide *de novo* all objections to conclusions of law made or recommended" by the Master. Fed. R. Civ. P. 53(f)(4). "[T]he court also may decide conclusions of law *de novo* when no objection is made." *Id.*, 2003 Advisory Note. Moreover, "[t]he court must decide *de novo* all objections to findings of fact made or recommended by a master," except in two situations that do not apply here. Fed. R. Civ. P. 53(f)(3).

II. THE MASTER MISSTATES THE APPLICABLE LEGAL STANDARDS.

The Master's findings and legal conclusions concerning counsels' duties in connection with a class action fee petition suffer from a fundamental flaw – the Master misstates the applicable law. At the outset of his legal conclusions, the Master describes the "general standards" that "guided" his decisions in this case. R&R at 139-41. He sets forth sweeping obligations: "[a]ttorneys seeking fees from a common fund have a duty to present all relevant facts to the court reviewing the petition;" "[t]he fee petition process clearly places an enhanced duty of full disclosure and transparency upon counsel filing their petition for attorney fees so that the court can perform its gatekeeping function fully and completely advised of all factors and agreements that impact the allocation of attorneys' fees vis-à-vis the actual recovery of the class;" and "[a]bsent full disclosure, the court cannot, with full knowledge, discharge its gatekeeping function and ensure fairness to the class." *Id*. In addition, the Master describes Labaton's duty as requiring it to "provide the Court with all the information it needed to make an informed decision as to the award of attorneys' fees out of the State Street settlement fund. This included disclosure of the identity of all attorneys – including Damon Chargois – who would be

sharing in the award and what the share of each attorney would be." R&R at 354 (citing no case law).

These unbounded standards may be the Master's aspirations, but ***they are not the law***. The Master fails to mention that Federal Rules 23(h) and 54(d) expressly govern the required disclosures in connection with a class action fee petition. These rules directly contradict the Master's unsupported view of attorneys' disclosure obligations. As further explained herein, they do not require the disclosure of the identity of all attorneys sharing in the fee award or the share that each attorney will receive.[3] And, in this case, the governing Federal Rules did not require disclosure of the Chargois Agreement. *See generally* Ex. 234 (Rubenstein Rep.); Ex. 241 (Joy Rep.) at 31-55.[4]

In sum, the Master presents a woefully incomplete and incorrect view of the law. *See* § IV, *infra.* His misguided first principles therefore taint his legal conclusions. *See* R&R at 141 ("The Special Master is guided by the foregoing general standards in deciding the issues presented in this case.").

III. THE CHARGOIS FEE-SHARING AGREEMENT COMPLIED WITH THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT.

Labaton's fee division with Chargois was a permissible referral fee and complied with MRPC 1.5(e). Moreover, even if the fee division did not initially comply with MRPC 1.5(e),

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[3] The Master also relies heavily on *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216, 222 (2d Cir. 1987) – calling it the "leading case" – without acknowledging that the Second Circuit issued an opinion in 2016 explaining that Rule 23 does not require the automatic disclosure of fee sharing agreements. *See Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 137-38 n.2 (2d Cir. 2016).

[4] Professor Gillers, relied upon by the Master, is not an expert in class action practice and disclaims reliance on the governing Federal Rules of Civil Procedure in reaching his opinions. *See* Ex. 253 (Gillers 3/20/18 Dep.) at 114:23-115:7 ("I'm not relying on Rule 54 as the source of authority or obligation to disclose participation of a lawyer whom the Court does not know about."). On the other hand, Prof. Rubenstein – who testified that Customer Class Counsel were not required to disclose the Chargois Agreement to the Court or class – is one of the nation's preeminent scholars on class action law.

ATRS subsequently ratified it, which constitutes adequate consent under controlling Massachusetts precedent. Finally, leaving aside whether Labaton perfectly complied with MRPC 1.5(e), neither MRPC 1.5(a) nor MRPC 7.2(b) apply to the Chargois Agreement.

A. The Master's Animosity Toward Referral Fees is Squarely at Odds With Massachusetts Law and Practice.

Under longstanding Massachusetts practice, the Chargois Agreement was permissible. "Bare" referral payments – i.e., payments for the referral itself without the requirement of any work being performed by the referring lawyer – are "quintessentially a Massachusetts practice." Board of Bar Overseers, *Massachusetts Legal Ethics: Substance and Practice* at 185 (2017) (Ex. E). But one would never know this from reading the Master's Report, as it fails to acknowledge that Massachusetts permits bare referrals until page 251.

Throughout the course of his investigation, the Master has made his opposition to referral fees crystal-clear.[5] His findings reflect his animosity: in his Report, he refers to the fact that Chargois performed "no work" on the *State Street* case at least 25 times. *See generally* R&R;

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[5] As one example among many, the Master impressed his views regarding referral fees onto George Hopkins during his deposition:

> THE WITNESS: Because -- well, first of all, where does it end? If the secretaries in the firm got a bonus do I need to know that? You know, if –
>
> THE SPECIAL MASTER: Not quite the same as paying a lawyer for doing nothing 20 percent of a fee.
>
> . . . .
>
> THE SPECIAL MASTER: Had this relationship been disclosed to Judge Wolf, might he not have said, well, wait a minute, that's an awful lot of money to be going to a lawyer who hasn't done anything on the case, did no work, didn't refer this specific case at all, and maybe the class should get some of that money, or maybe the ERISA counsel should get some of that money rather than this lawyer in Texas who was not involved at all in this case? Isn't that why disclosure to the Court in a non-adversary proceeding, which this was, is a better practice?
>
> THE WITNESS: Let me say this: I've spent enough time with you now that I can feel your -- your passion's not the right word -- your --
>
> THE SPECIAL MASTER: Skepticism.

Ex. 12 (Hopkins 9/5/17 Dep.) at 74:2-76:6.

see id. at 271 (attributing "great significance" to the fact that Chargois did no work on the *State Street* case). And at several points, he openly criticizes referral fees. *See, e.g.*, R&R 261 n.209 ("[A] $4.1 million fee paid to someone who does no work on a case is excessive by any definition of that word . . ."); *id.* at 375 ("However, the practice of 'bare referrals' – permitting a lawyer to receive a referral fee for doing no work and having no attachment to the case or the client – seems to invite abuses . . ."). But regardless of the Master's personal animus toward bare referral fees, the Massachusetts Bar has reaffirmed its support for the practice time and again, as explained by the Supreme Judicial Court ("SJC"), the Board of Bar Overseers, and lifelong Massachusetts practitioners, among others. *See Saggese v. Kelley*, 445 Mass. 434, 442 (2005) (describing referral fees as a "time-honored practice in this State"); *Mass. Legal Ethics* at 185 (Ex. E); Ex. 239 (Sarrouf Decl. 10/31/17) at ¶¶ 19-21; H.P. Wilkins, *The New Massachusetts Rules of Professional Conduct: An Overview*, 82 Mass. L. Rev. 261, 261-262 (1997) (Ex. F). The Master may not approve of bare referral fees, but in Massachusetts, they are a bedrock tradition.[6]

B. Labaton Complied With MRPC 1.5(e).

Labaton complied with MRPC 1.5(e) (the rule governing the division of fees among lawyers, including referral fees) because it notified ATRS that it would be sharing its fee and obtained ATRS' consent to do so. In February 2011, when ATRS engaged Labaton for the *State Street* litigation, MRPC 1.5(e) provided that a "division of a fee between lawyers who are not in the same firm may be made only if, after informing the client that a division of fees will be made, the client consents to the joint participation and the total fee is reasonable." Ex. 225

[6] The type of referral at issue here, which involved referring a client, rather than a specific matter, is "common." Ex. 228 (Lieberman Dep.) at 44:12-14.

(former Mass. R. Prof. C. 1.5(e)).[7] In the parties' engagement letter, ATRS consented to Labaton dividing its fees, *inter alia*, with "local or liaison counsel" or as "referral fees." Ex. 138 (LBS01160-62).[8] This satisfied MRPC 1.5(e) at the time. *See* Ex. 240 (Green Rep.) at 19-20 ("Particularly in the context of a retention letter setting forth the parties' respective rights and responsibilities, it seems reasonably plain to me that the sentence in question in fact memorializes ATRS's permission.").[9]

Moreover, to the extent that it was required at the time – which is an open question in the view of the experts[10] – Labaton also complied with the written consent requirement described in the Supreme Judicial Court's *Saggese* opinion, decided in 2005 (but not codified in the Massachusetts Rules of Professional Conduct until March 15, 2011, after ATRS engaged Labaton for the *State Street* case). *See Saggese*, 445 Mass. at 434. The SJC explained that MRPC 1.5(e) would be construed prospectively to require consent to be obtained in writing,

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[7] Mass. R. Prof. C. 1.5(e) was amended on March 15, 2011 to provide that: "A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable." The requirements of the applicable MRPC 1.5(e) were considerably more lenient than the current version of MRPC 1.5(e) in terms of proving compliance, *e.g.*, consent did not have to be in writing at all.

[8] The Master contends that the "more plausible" way to read the engagement letter is to view the clause "as referral fees" as modifying "local or liaison counsel." R&R at 260. This is a tortured reading of the sentence. *See* Ex. 229 (Wendel Dep.) at 26:7-12 ("I read those as alternatives."); Ex. 228 (Lieberman Dep.) at 38:1-23 ("I read it that they have the right to, under this agreement, allocate fees to people who serve as local or liaison counsel or allocate fees as referral fees or allocate fees for other services performed in connection with the litigation . . . That's the way I read it. It's plain language to me, sir."); Ex. 230 (Green Dep.) at 119:11-1. Moreover, it does not make sense, as not every local or liaison counsel deserving of compensation would have referred the case. But, under the Master's reading, local or liaison counsel could *only* share fees with Labaton if they referred ATRS. This leads to absurd possibilities, such as both local and liaison counsel working with Labaton, but neither getting paid because neither referred ATRS to Labaton.

[9] The Special Master claims that a referral fee must be "matter-specific." R&R at 262. This does not appear to comport with everyday practice. As Mr. Lieberman testified, "I think this is a referral fee, and it happens all the time, common." Ex. 228 (Lieberman Dep.) at 44:12-14.

[10] *See* Ex. 227 (Joy Dep.) at 69:4-70:3; Ex. 228 (Lieberman Dep.) at 125:5-16; Ex. 243 (Wendel Rep.) at 14.

which Labaton did. *Id*. at 443; Ex. 138 (LBS011060-62).[11] Importantly, the *Saggese* Court, in its two-sentence description of its prospective interpretation of MRPC 1.5(e), does not require the disclosure of the identity of other attorney(s) receiving fees or the details of the fee agreements. 445 Mass at 443. Nor is there such a requirement in either the old or the new version of MRPC 1.5(e). *See* Ex. 228 (Lieberman Dep.) at 34:17-20 ("The rule doesn't require anything more than that. And that's been the common understanding of the rule."); *see also* Ex. 241 (Joy Rep.) at 29. Thus, despite the Master's misguided efforts to import an "informed consent" requirement into MRPC 1.5(e), Labaton provided the sufficient level of disclosure. *See* R&R at 249 n.191; *see* also Ex. 230 (Green Dep.) at 117:14-17 ("[T]he rule itself does not require more").[12] Accordingly, the ATRS/Labaton engagement letter met the requirements of both MRPC 1.5(e) and *Saggese*. *See, e.g.*, Ex. 240 (Green Rep.) at 19-20.

The Master describes the MRPC 1.5(e) inquiry as a "close call" and concedes that "reasonable experts and lawyers may differ" on whether Labaton complied with the Rule. R&R at 250, 337. In fact, five different experts – three academics, one veteran of the Massachusetts

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[11] The SJC also explained that the written consent must be obtained before the referral is made (*Saggese*, 445 Mass at 443), which, as Hal Lieberman noted, makes no sense. Ex. 228 (Lieberman Dep.) at 131:1-7. Once the rule was actually amended, the requirement was for written consent to be obtained "before or at the time the client enters into a fee agreement for the matter;" thus, the *Saggese* statement and the new rule as ultimately promulgated are not identical, suggesting that *Saggese* did not create an enforceable rule.

[12] The Master appears to read MRPC 1.5(e) to require "informed consent," or its equivalent. R&R at 249. The Master glosses over the fact that MRPC 1.5(e) *does not* require "informed consent," which is a defined term in the Massachusetts Rules of Professional Conduct (and, at any rate, appears inapplicable to a fee division). MRPC 1(f) ("Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."). Rather than accepting the rules as written, the Master claims they reflect an "incongruence" that represent a "distinction without a difference." *Id.* The Master's willingness to assume incompetence or sloppiness by the drafters of the Massachusetts Rules of Professional Conduct (and the Federal Rules of Civil Procedure), and instead impose his own preferences onto these rules, undermines his conclusions. This is one of many examples where the Master reaches to make the law allow for his desired outcome. *See also*, § IV-VI, *infra*.

Board of Bar Overseers, and one lifelong Massachusetts practitioner – examined the circumstances of the fee division with Chargois and ATRS' engagement of Labaton. Each concluded that Labaton complied with the applicable requirements of the Massachusetts Rules of Professional Conduct. Ex. 240 (Green Rep.) at 19 ("Labaton therefore complied with the relevant version of Rule 1.5(e)."); Ex. 241 (Joy Rep.) at 27 ("Labaton's engagement letter with ARTRS for the State Street Litigation met the requirements of Mass. R. Prof. C. 1.5(e) as it existed at the time of the engagement letter."); Ex. 242 (Lieberman Rep.) at 16 ("Labaton obtained ARTRS' consent to divide its fees with Chargois, and therefore complied with MRPC 1.5(e), as it then existed."); Ex. 243 (Wendel Rep.) at 14 ("In my opinion, the negotiations between Labaton and the ATRS and the written consent provided by Clark [ATRS' Chief Counsel] and Hopkins satisfy the requirements of Mass. RPC 1.5(e) and the interpretation placed on the rule by the *Saggese* court."); Ex. 252 (Sarrouf 3/21/18 Dep.) at 106:6-107:5.

The Court should credit these experts and reject the Master's finding. Indeed, in resolving this "close call," the Master failed to apply the clear terms of MRPC 1.5. Instead, he grafts onto MRPC 1.5(e) the additional requirement that Labaton disclose to ATRS the percentage of Labaton's fee that would be paid to Chargois. *See, e.g.*, R&R at 250 ("While it is admittedly a close call, by not disclosing to ATRS that it had a preexisting obligation to pay Chargois 20% of its fee for performing no work, we conclude that Labaton simply failed to comply with MRPC 1.5(e) and its requirement of disclosure to its direct client, ATRS."). The Master's attempt to rewrite the Rule is directly contrary to Comment 7A of MRPC 1.5, which provides that Labaton was *not* required to inform ATRS that Chargois' share would be 20%. MRPC 1.5 cmt. 7A ("The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the

lawyer is required to disclose the share of each lawyer."). [13] The Master nevertheless elevates his own predilections above the Rule's actual text, arguing that any "other interpretation of this Rule would invite a lack of candor and half-measure disclosures to a client and deprive the client of the ability to make a meaningful decision in its own best interests." *See id.* at 250.

The Master's refusal to apply the plain terms of MRPC 1.5(e) undermines his conclusion.[14] The Court should reject his misapplication and instead find that Labaton complied with MRPC 1.5(e) in the first instance, as five experts have determined.

C. In Any Event, ATRS Ratified The Fee-Sharing Agreement With Chargois.

To the extent that Labaton did not fully comply with the *Saggese* decision, any non-compliance has now been cured because George Hopkins, acting on behalf of ATRS, ratified the Chargois Agreement with respect to the *State Street* matter. *See* Ex. 130 (Hopkins Decl.) at 3-4. In *Saggese*, the SJC explained that "the beneficiary in a fiduciary relationship may ratify conduct that otherwise would constitute a breach of fiduciary duties, provided the requisite disclosure has been made." 445 Mass. at 442. In that case, a client ratified her attorneys' agreement to pay a 33% referral fee two years after the referral was made (and after the referring attorney received several payments). *Id.* at 436-40. The SJC was unequivocal: "[r]atification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate." *Id.* As such,

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[13] The Master references Comment 7A in a footnote but then precedes to ignore its application in his analysis. *See* R&R at 255 n.203. Throughout his legal conclusions, he frames Labaton as being obligated to disclose to ATRS the fact that Chargois' portion would be 20%. *See, e.g.*, R&R at 249 (arguing that "Labaton had a duty to inform ATRS as its client, but more so as a representative of the class, *that Chargois would receive 20% of Labaton's share of the total fee award*," and noting that MRPC 1.5(e) "speaks directly to this issue.") (emphasis added); s*ee also id.* at 250 ("By failing to inform Hopkins – or anyone at ATRS – of the Chargois Arrangement [defined by the Master to mean the agreement to pay Chargois 20%] . . . Labaton breached its duty under MRPC 1.5(e)."); *id.* at 255 ("But neither Labaton nor Chargois & Herron revealed" that Chargois "would receive 20% of Labaton's fees . . ."); *id.* at 256 ("[N]othing in that response alerted ATRS that Chargois would receive 20% of Labaton's gross attorneys' fees . . .").

[14] This is especially true because he views the question as a "close call" despite applying an invented, heightened standard.

Hopkins' ratification on behalf of ATRS is "adequate" here. *See id.*[15] MRPC 1.5(e) exists for the benefit of clients; and, here, the client was protected and is content.[16]

When discussing Labaton's obligations to its "direct client, ATRS," the Master does not address, let alone mention, the substantive effect of Mr. Hopkins' ratification. This is remarkable, especially because the Master otherwise relies upon *Saggese*. *See* R&R at 252 n.200. The Master's failure to address a key fact and controlling precedent in his report of legal conclusions to the Court is troubling and further demonstrates his lack of neutrality. Although the Master avoids discussing the issue, *Saggese* makes clear that Hopkins' ratification "is adequate" on behalf of ATRS. *See* 445 Mass. at 442. Even the Master's expert Prof. Gillers agrees. Ex. 253 (Gillers 3/20/18 Dep.) at 106:18-22 ("Q: Sir, does the ratification declaration that you have seen now from Mr. Hopkins constitute consent on behalf of Arkansas Teacher Retirement System to the fee referral to Chargois & Herron? A: On behalf of Arkansas alone."). Based on the SJC's controlling holding in *Saggese*, regardless of whether Labaton initially complied with MRPC 1.5(e), it subsequently obtained its client's effective consent.

D. Despite the Master's Suggestions, the Chargois Agreement Falls Within MRPC 1.5 and Fulfilled the Purpose of That Rule.

The Master also claims that the Chargois Agreement falls "outside the fee-sharing context altogether, and, thus, outside MRPC 1.5(e)." R&R at 272. This is objectively incorrect. MRPC 1.5(e) applies to a "division of fees . . . between lawyers." There is no dispute that

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[15] *See also* Ex. 242 (Lieberman Rep.) at 16 ("In my opinion the foregoing facts fully support the conclusion that ATRS was adequately informed, in writing, at the inception of the retention, and *de facto*, and retroactively, assented to Labaton's sharing of its fees with Chargois.").

[16] *See* Ex. 240 (Green Rep.) at 20 ("Further, the purposes of the procedural requirements were adequately served."); [redacted]

Labaton agreed to (and did) divide its fee with Chargois & Herron, a law firm, with regard to the *State Street* matter. As such, the Chargois Agreement falls within the plain terms of MRPC 1.5(e).[17]

Moreover, the Chargois Agreement comports with the Massachusetts policy behind referral fees because it benefited the client, ATRS. "As a matter of good policy and the public interest, it is well recognized that the bar should encourage fee sharing relationships that serve the client by helping to ensure that cases, especially litigation matters, are handled by the best, most experienced lawyer in the particular area of the law." Ex. 242 (Lieberman Rep.) at 18. As Mr. Lieberman notes, "[t]hat is exactly what happened here." *Id.* Labaton spearheaded a case that achieved what the Master describes as "an excellent result for the class." R&R at 6.

That "excellent result" depended on Labaton's unique capabilities. Among ATRS' several law firms, Labaton initially helped ATRS push forward with a potential suit against State Street. Ex. 4 (Hopkins 6/14/17 Dep.) at 39:20-40:8. And, after a successful half-decade litigation, Mr. Hopkins explained that he does not "think another law firm could have gotten the outcome they did." *Id.* at 100:8-10. Mr. Hopkins speaks from experience: he is a seasoned attorney and, as Executive Director at ATRS, he has been a class representative in approximately 30 cases. *Id.* at 32:9-13, 34:19-37:6. In his view, Labaton was crucial in securing the $300 million settlement. *Id.* at 100:8-10. Simply put, Chargois, a practicing attorney, referred ATRS (an organization that routinely considers whether to hire firms as monitoring counsel and as

[17] The Master states that the Chargois Agreement "seems more in the nature" of a "finder's fee." R&R at 273. Regardless of the label the Master applies, this was a referral fee under Massachusetts law and within the ambit of MRPC 1.5(e). For example, in *Vita v. Berman, DeValerio & Pease, LLP*, 81 Mass. App. Ct. 748 (2012), the Massachusetts Court of Appeals repeatedly described as a "referral fee" an arrangement in which a criminal defense lawyer used his "many contacts in the financial services field" to refer "potential class action plaintiffs" to a law firm. *Id.* at 749-50 and n.4 (citing *Saggese*). The criminal defense attorney referred at least one potential plaintiff "at the request" of a partner at the law firm, and eventually referred so many plaintiffs so as to require a spreadsheet to track them. The Massachusetts Court of Appeals expressed no disapproval of this relationship. *See generally id.*

plaintiff's class action counsel) to Labaton, a preeminent plaintiffs' class action law firm. *See, e.g.*, Ex. 122 (Belfi 9/5/17 Dep.) at 37:15-39:14. This referral allowed ATRS and the class to obtain excellent representation and achieve an extraordinary result. *See* Ex. 130 (Hopkins 3/15/18 Dec.) at ¶4 ("Personally, I am not aware of another law firm that could have worked as tenaciously or produced as good a result on behalf of the class as Labaton did.").

In short, the Chargois Agreement was a referral fee within the terms of MRPC 1.5(e), and delivered the exact type of benefit that the Rule is meant to foster. By the client's own (sophisticated) estimation, ATRS' retention of Labaton provided significant value. *See id.*

E. Even if Labaton Failed to Comply With MRPC 1.5(e), Which It Did Not, No Sanctions or Discipline Are Warranted.

The Master is incorrect in finding that Labaton did not comply with MRPC 1.5(e), as interpreted by *Saggese*. However, leaving aside his misapplication of MRPC 1.5(e), he rightly notes that, under these circumstances, the "obligations to the client, and the timing of them, were simply too unclear at the time to merit the imposition of professional discipline or any kind of disciplinary sanction." R&R at 334.

First, any alleged violation of MRPC 1.5(e) was a technical procedural lapse. At worst, ATRS did not consent in writing that Labaton would split its fee with Chargois specifically, although (1) *Saggese* does not require that the attorney sharing a fee be named; (2) ATRS was informed that Chargois & Herron would be involved with Labaton on ATRS cases; and (3) the engagement letter permitted Labaton to pay "referral fees." *See Saggese*, 445 Mass. at 443; Ex. 138 (LBS011060-62); Ex. 129 (LBS017455-56); Ex. 122 (Belfi 9/5/17 Dep.) at 117:20-24, 118:5:7. "Technical non-compliance with a state rule of professional conduct – particularly one regulating, rather than prohibiting, a practice – is not the kind of fraud or abuse of the judicial process that justifies sanctions under the federal court's inherent power." Ex. 243 (Wendel Rep.)

at 19.[18] Any procedural violation by Labaton is especially benign because ATRS has now expressly ratified the Chargois Agreement with respect to the *State Street* matter.

Second, no discipline is warranted because any non-compliance is a result of the *Saggese* decision's gloss, rather than the text of the rule in place at the time the *State Street* engagement began. It is fundamental that the codified rules of professional conduct are the touchstone for any disciplinary adjudication. For example, SJC Rule 4:01 – "Bar Discipline" – states that: "Each act or omission by a lawyer, individually or in concert with any other person or persons, which violates any of the Massachusetts Rules of Professional Conduct (see Rule 3:07), shall constitute misconduct and shall be grounds for appropriate discipline . . . ." SJC Rule 4:01, § 3(1); *see also* James S. Bolan, *Ethical Lawyering in Massachusetts* § 1.1, MCLE (4th Ed. 2015) (Ex. H) ("[The rules] set forth the standards of professional conduct for members of the Massachusetts bar and serve as the basis for professional discipline."). Likewise, in the District of Massachusetts, Local Rule 83.6.1 provides that "[t]he rules of professional conduct for attorneys appearing and practicing before this court shall be the Massachusetts Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court, *as set forth as Rule 3:07 of that court* . . ." D. Mass. L. R. 83.6.1(1) (emphasis added).

Therefore, while *Saggese* may have changed how the courts would construe MRPC 1.5(e), it did not change the codified rules that provide a basis for discipline.[19] During the

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[18] *See also* Ex. 240 (Green Rep.) at 22-23 ("Imperfect compliance with a prophylactic procedural requirement of a professional conduct rule (as construed by a court opinion) is unlikely to signify that the lawyer in question poses a threat to future clients or to the public generally.").

[19] In that vein, research has not uncovered a single case between November 30, 2005 and March 15, 2011 disciplining a lawyer for an improper fee division under the terms of *Saggese* (or otherwise). Indeed, when searching a comprehensive Massachusetts Board of Bar Overseers database, not a single decision citing to *Saggese* has been found. Tellingly, the BBO appears not to have used *Saggese* as a basis for discipline. Mr. Lieberman's experience is consistent: "I have never seen a disciplinary case for a lawyer where the court has disciplined a lawyer based on a ruling of a court as opposed to a violation of a Rule of Professional Conduct . . ." Ex. 228 (Lieberman Dep.) at 120:2-7.

intervening time period between *Saggese* and the amendment to MRPC 1.5(e), attorneys' obligations regarding fee divisions were unclear. For example, the chairman of the Standing Advisory Committee that initiated the 2011 amendments explained that "[b]efore these rules were adopted, *there were not such clear guidelines as to what had to be done*." Christina Pazzanese, *Attorney Fee Rules Undergo Revisions in Massachusetts*, Mass. Law. Wkly., Jan. 12, 2011 (Ex. I) (emphasis added). And, even when the SJC finally amended MRPC 1.5(e), it allowed for a three-month period between the amendment and the new Rule taking effect, reflecting that some time was necessary for lawyers to adjust to the changes. *See* December 22, 2010 Order of the Supreme Judicial Court regarding SJC Rule 3:07 (Ex. J); *see also* Pazzanese, *Attorney Fee Rules Undergo Revisions in Massachusetts* (Ex. I) (local attorney and former BBA subcommittee member explaining that "the rule changes will require the bar to do some broad educational outreach").[20]

The lack of a rule implementing *Saggese* raises due process concerns regarding attorney discipline, particularly with attorneys admitted *pro hac vice*, like Labaton here, who rely on the Rules of Professional Conduct to understand their obligations. As the SJC has acknowledged, "[o]rdinarily, an individual case is an inappropriate mechanism for promulgating rules." *In re Saab*, 406 Mass. 315, 324 n.13 (1989). Even if Labaton's conduct did not comply with the *Saggese* opinion – which, to be clear, it did – it would be inappropriate to impose discipline because Labaton complied with the Rule then in effect. *See* Ex. 242 (Lieberman Rep.) at 19 ("In my opinion, which is informed by decades of practice in the disciplinary realm, an attorney

[20] The import of *Saggese* is not clear, as Labaton's experts have testified. As Professor Joy noted, the text of the amended MRPC 1.5(e) did not even match the language in *Saggese*. *See, e.g.*, Ex. 227 (Joy Dep.) at 69:4-19 ("So the fact that neither disciplinary body or the courts were following *Saggese* after *Saggese*, the fact that the bar didn't immediately change the rule, and then when they did change the rule, they didn't use the same wording as *Saggese* had, and then when they changed the rule, they had a period of time between the new rule and when it came into effect led me to conclude that *Saggese* [was] probably dicta.").

would not be expected to research case law in order to ascertain the relevant standards of conduct, and should not be sanctioned for failing to do so.").[21]

F. MRPC 7.2 Does Not Apply.

The Master argues that, if Labaton did not comply with MRPC 1.5(e), then Labaton also violated MRPC 7.2. *See* R&R at 263-73; *see also* MRPC 7.2(b) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services"). The Master's argument relies on a strained and novel reading of the Rules and should be rejected.[22]

As the First Circuit has explained, "courts are bound to afford statutes a practical, commonsense reading. Instead of culling selected words from a statute's text and inspecting them in an antiseptic laboratory setting, a court engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure, and purpose as well as to aggregate language." *O'Connell v. Shalala*, 79 F.3d 170, 176 (1st Cir. 1996) (internal citations omitted). The Master's construction brushes aside this admonition by focusing on narrow semantics but ignoring the logical structure of the Rules. By its plain terms, MRPC 1.5(e) governs a fee division between lawyers. Thus, simply stated, non-compliance with MRPC 1.5(e) is a violation of MRPC 1.5(e). *See Saggese*, 445 Mass. at 441-42 (in the context of an

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[21] Mr. Lieberman expanded on this point at his deposition: "[A]s a regulatory lawyer in disciplining or recommending discipline for a lawyer who, theoretically or arguably, didn't comply with the admonition or prospective ruling, but was in compliance with the rule as it existed in the Code of Professional Responsibility, I would be very reluctant to charge that lawyer with misconduct if the lawyer were relying on, and as he would have a right or she would have a right to do, [] the rule as it existed in the code, because the SJC, Supreme Judicial Court, is ultimately the authority for implementing and changing the rule." Ex. 228 (Lieberman Dep.) at 113:7-114:4; *see also id.* at 88:1-9 ("And if there is no notice that a rule requires, for example, disclosure of the name of the . . . lawyers who referred, it would be very, very difficult for a prosecuting lawyer, as I was for many years, to bring charges against that lawyer . . . because of the notice and due process concerns.") [redacted]

[22] The argument regarding MRPC 7.2 is entirely academic, because Labaton complied with MRPC 1.5(e). *See* §III.B, *supra*.

undisclosed referral fee, explaining that either MRPC 1.5(e) or its prior iteration, DR 2-107, "governed the conduct of the lawyers," and mentioning no other rules of professional conduct). Yet the Master argues that a violation of MRPC 1.5(e) automatically constitutes a violation of a second rule, MRPC 7.2(b) ("Advertising"). This illogical result ignores the clear structure and purpose of the Rules: MRPC 1.5(e) governs fee divisions, and it is the relevant disciplinary standard when assessing an improper fee division. *See* Ex. 227 (Joy Dep.) at 21:1-4 ("[T]hey are separate rules meant to address separate issues.").[23]

Nothing contained in the text of either MRPC 1.5(e) or MRPC 7.2(b) suggests otherwise. MRPC 7.2(b) does not provide that noncompliance with MRPC 1.5(e) will violate 7.2(b). The Master focuses on MRPC 7.2(b)(5), viewing it as an exception that indicates non-compliant fee-sharing agreements fall within MRPC 7.2. However, as Prof. Green explains, the reference to MRPC 1.5(e) in MRPC 7.2(b)(5) actually demonstrates that "fee sharing, generally, is excluded from the rule." Ex. 230 (Green Dep.) at 58:6-59:16 ("I think what it means is to emphasize that fee-sharing arrangements are okay in Massachusetts.").[24] And, importantly, MRPC 1.5(e) does not even mention MRPC 7.2(b) – an odd omission, if non-compliance with MRPC 1.5(e) is an automatic violation of MRPC 7.2(b). Under a natural reading of the Rules, MRPC 1.5(e) governs the division of fees between lawyers, whether perfect or imperfect.[25]

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[23] As Hal Lieberman explained, he is "not aware of any such bootstrapped interpretation or application of MRPC 7.2 in *any* jurisdiction." Ex. 242 (Lieberman Rep.) at 17. Mr. Lieberman has an extensive background in attorney discipline: he was former Assistant Bar Counsel in Massachusetts and Chief Counsel to the First Judicial Department Disciplinary Committee in New York.

[24] The Master rejects this sensible construction, incorrectly framing Labaton's position as a contention that MRPC 7.2(b)(5) amounts to "surplusage." *See* R&R at 268. But, as Prof. Green testified (despite his use of the term "surplusage," which the Master introduced during cross-examination), MRPC 7.2(b)(5) serves a purpose: "I think it's fair in the context of the history [of referral fees in Massachusetts] and in the context of 1.5(e) to read this as, indeed, surplusage, but making it crystal clear . . . that fee sharing is not prohibited by 7.2(b)."). Ex. 230 (Green Dep.) at 60:17-22.

[25] If there were any doubt regarding this natural reading of the Rules – which, frankly, there should not be – MRPC 1.5(e) is titled "Fees," while MRPC 7.2 is titled "Advertising." *See Almendarez-Torres v.*

The history of both Rules confirms this construction. It appears self-evident that, if a violation of MRPC 1.5(e) also constituted a violation of MRPC 7.2(b), attorneys found to have violated MRPC 1.5(e) would also be found to have violated MRPC 7.2(b).[26] Yet, "Massachusetts state courts, Massachusetts disciplinary authorities, and the United States District Court for Massachusetts have never considered a fee division between law firms based on a flawed or imperfect division of fee arrangement between law firms and a client under Mass. R. Prof. C. 1.5(e) to be a violation of Mass. R. Prof. C. 7.2[b]." Ex. 241 (Joy Rep.) at 16. Neither the Master, Prof. Gillers, nor Labaton have located a single instance of this happening in Massachusetts. *See* Ex. 241 (Joy Rep.) at 16-27 (exhaustive survey of ethics law did not find any authority supporting Prof. Gillers' position)[27]; Ex. 242 (Lieberman Rep.) at 17; R&R at 273; Ex. 253 (Gillers 3/20/18 Dep.) at 53:9-62:17.[28] Historically, MRPC 7.2 was never intended to apply,

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United States, 523 U.S. 224, 234 (1998) (explaining that "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute") (internal quotations omitted). While the Master asserts that the title of a statute cannot alter its unambiguous text, R&R at 265 n.216, here the Master has proffered completely novel readings of MRPC 1.5(e) and 7.2(b). Thus, if anything, he has injected doubt into how those Rules should be applied. Accordingly, using the titles of the Rules for guidance is appropriate here. *See Almendarez-Torres*, 523 U.S. at 234. In this case, the respective titles demonstrate a focus on "fees" (MRPC 1.5), on the one hand, and "advertising" (MRPC 7.2), on the other. The Chargois Agreement involves the division of a *fee*, rather than advertising. *See also Mass. Legal Ethics* (Ex. E) at 298 ("MRPC 7.2 provides guidance to lawyers about advertising . . .").

[26] *See, e.g.*, Ex. 241 (Joy Rep.) at 18-19 ("If in 2016, or any time before 2016, ethics authorities in Massachusetts viewed sharing fees in violation of Mass. R. Prof. C. 1.5(e) as a violation of Mass. R. Prof. C. 7.2(b) (previously Mass. R. Prof. C. 7.2(c)), then, in my opinion, I would have expected the Admonition to discuss a violation of Mass. R. Prof. 7.2(b).").

[27] "Massachusetts state courts, Massachusetts disciplinary authorities, and the United States District Court for Massachusetts have never considered a fee division between law firms based on a flawed or imperfect division of fee arrangement between law firms and a client under Mass. R. Prof. C. 1.5(e) to be a violation of Mass. R. Prof. C. 7.2(c)." Ex. 241 (Joy Rep.) at 16.

[28] Prof. Gillers claims that *Daynard v. Ness, Motely, Loadholt, Richardson & Poole, P.A.*, 188 F. Supp. 2d 115, 130 (D. Mass. 2002) stands for the proposition that an imperfect fee division would result in the application of MRPC 7.2(b). Ex. 253 (Gillers 3/20/18 Dep.) at 84:22-86:18. The case does not state, or even suggest, that concept. *See Daynard*, 188 F. Supp. 2d at 130. In fact, despite an analysis of both MRPC 1.5(e) and its New York equivalent, MRPC 7.2(b) is never mentioned. *Id.* at 124 n.5. Prof. Gillers' reliance on *Holstein v. Grossman*, 246 Ill. App. 3d 719 (1993) is similarly inapposite. That case extensively discusses imperfect fee-splitting agreements under Ill. Sup. Ct. R. 2-107. Despite its lengthy

and has never applied, to a division of a fee between attorneys. *See, e.g.*, Ex. 243 (Wendel Rep.) at 16; Ex. 240 (Green Rep.) at 16 n.13; Ex. 241 (Joy Rep.) at 18-27. The Master and Professor Gillers are both outsiders to Massachusetts practice, yet they seek to break new ground with their novel application of MRPC 7.2. *See* R&R at 375; Ex. 253 (Gillers 3/20/18 Dep.) at 53:23-54:12.[29]

In short, the Master's interpretation of the relationship between MRPC 1.5(e) and MRPC 7.2(b) is unprecedented and unsupported by the language of the Rules and the history of their application in Massachusetts. The Court should reject it and instead adopt the conclusion that MRPC 1.5(e) governs a fee division between lawyers and that Labaton complied with 1.5(e).

Nevertheless, the Master correctly does not recommend any discipline or sanctions relating to Rule 7.2(b). *See* R&R at 337-38. In making this determination, the Master notes that "apparently no disciplinary body or court in Massachusetts or, indeed, in the rest of the country has ever imposed discipline or sanctions upon a lawyer for paying another lawyer under Rule 7.2(b)." R&R at 337. In addition, the Master states that because this issue is one of "first impression and not one of which the profession might have been well-advised in advance, it would not be appropriate to impose professional discipline in these circumstances." R&R at 337-38; *see also id.* at 273 ("What does give us some pause before recommending redress for a

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discussion – and the fact that the referral fees at issue were not consented to in writing – the court never mentions MRPC 7.2(b) or its Illinois analogue. *Id.*

[29] The Master's discussion (R&R 270-72) of *In re Disciplinary Action Against McCray*, 755 N.W.2d 835 (N.D. 2008), badly misses the mark. First, the rule at issue stated that "[a] lawyer or law firm shall not share legal fees with a nonlawyer." *See id.* at 845; *see also* N.D. R. Pro. C. 5.4(a). Stating the obvious, Chargois was a lawyer, and Labaton's payment to him was a referral fee. Second, the Master's claim that Chargois' introduction "parallels" that in *McCray* is absurd. *See* R&R at 271. In *McCray*, the conduct at issue was a nonlawyer's funneling of hundreds of clients to a lawyer, who spent an average of 12 minutes on each client's case sending nonfactual dispute letters to credit agencies. *McCray*, 755 N.W.2d at 841-42. The lawyer then turned over 95% of his fees to the nonlawyer. *Id.* at 845. Here, Chargois referred ATRS to Labaton, who then spent five years working on the *State Street* case and earned ATRS a recovery lauded by all involved. This case does not resemble *McCray* whatsoever, let alone being a "parallel" to it.

violation of MRPC 7.2(b) is the fact that, apparently, no bar disciplinary authority or Court has ever imposed discipline upon an attorney for a violation of this Rule by paying another attorney."). Finally, as the Master acknowledges, his (incorrect) finding of a MRPC 7.2(b) violation depends on his (incorrect) finding of a MRPC 1.5(e) violation. Thus, because the law surrounding MRPC 1.5(e) was too unclear to impose discipline, there should be no discipline under MRPC 7.2(b), either. *See* R&R at 337 ("Because the violation of Rule 1.5(e) found here does not merit professional discipline, it would be hard to say that the connected violation of Rule 7.2(b) merited discipline.").

G. MRPC 1.5(a) Does Not Apply to the Chargois Agreement.

Prof. Gillers and the Master do not make a finding regarding MRPC 1.5(a). *See* Ex. 233 at 94 ("In answering Judge Rosen's questions at my deposition, I did not say, nor do I now say, whether the Chargois fee is clearly excessive."); R&R at 261 n.209 (Master "make[s] no finding" regarding MRPC 1.5(a)).[30] Nevertheless, they have introduced the topic into their analyses, and Labaton will thus respond. Although neither Prof. Gillers nor the Master offer a definitive position on MRPC 1.5(a), any suggestion that the Rule applies to the Chargois fee must be rejected.

The payment at issue is a division of Labaton's fee with Chargois & Herron. MRPC 1.5(e) governs fee divisions; MRPC 1.5(a) does not. Instead, MRPC 1.5(a) assesses whether a singular "fee" is "clearly excessive." Once that threshold inquiry is made, MRPC 1.5(e) addresses the requirements for dividing the singular "fee," and notes that the "total fee" must be reasonable. In other words, the whole fee is evaluated for excessiveness – as the Court did here

[30] Prof. Gillers first introduced his opinion on 1.5(a) during deposition testimony, largely in response to a line of leading questions from the Special Master. Ex. 253 (Gillers 3/20/18 Dep.) at 364:8-370:17. His original report contained no discussion of Rule 1.5(a). Ex. 232. Labaton reserves the right to supplement its Objections should the Court allow Customer Class Counsel to depose Prof. Gillers regarding his Supplemental Report (Ex. 233).

– and then it may be divided according to the requirements of MRPC 1.5(e). There is no requirement that each portion of the fee not be "clearly excessive." *Compare* Mass. R. Prof. C. 1.5(a) *and* Mass. R. Prof. C. 1.5(e).

As with his argument regarding MRPC 1.5(e), Prof. Gillers' construction of MRPC 1.5(a) appears to be unprecedented in Massachusetts.[31] The absence of any supporting authority is unsurprising. Applying MRPC 1.5(a) to fee divisions would run counter to the "time-honored" Massachusetts tradition of allowing referral fees, even where the referring attorney does no work. *See Saggese*, 445 Mass. at 442 (enforcing a 33% referral fee where no work was performed by referring lawyer, without questioning whether the 33% division was clearly excessive); *Mass. Legal Ethics* at 185 (Ex. E).[32] The encouragement of referral fees in Massachusetts is the result of deliberate consideration by the state's Bar, and undermines any argument that MRPC 1.5(a) is intended to restrain referral fees. *See Mass. Legal Ethics* at 185 (Ex. E); Wilkins, 82 Mass. L. Rev. at 261-262 (Ex. F).

As a practical matter, it does not make sense to apply MRPC 1.5(a) to a referral fee because the factors that Rule enumerates contemplate work being done. In particular, subsection

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[31] *See, e.g.*, Ex. 241 (Joy Rep.) at 55 ("I could not locate a single case, advisory ethics opinion, or any authority for the proposition that a lawyer's *share* of a fee in a division of fee under Mass. R. Prof. C. 1.5(e) must not be clearly excessive."); Ex. 242 (Lieberman Rep.) at 19 ("[I]n my experience I cannot recall a single instance in which a referral fee was scrutinized for reasonability under the Mass. Rules…."); Ex. 240 (Green Rep.) at 25 ("Prof. Gillers cites no judicial or bar opinions supporting his theory of independent analysis of each lawyer's share of a fee under MRPC 1.5(a). I am unaware of any."); Ex. 243 (Wendel Rep.) at 19-20. [redacted]

[32] *See also* Ex. 227 (Joy Dep.) at 167:18-22 ("I don't think the court would even . . . address the issue, because in *Saggese*, he gets $90,000 from what sounds to be like ten minutes worth of work, and the court didn't even blink an eye at it."); Ex. 230 (Green Dep.) at 98:17-22 ("Obviously, it's capped by the total fee and the total fee has to be reasonable, but it does not limit the amount that's paid out of the total share to the lawyer who made the introduction."); Ex. 228 (Lieberman Dep.) at 103:12-104:10 ("First of all, there's no authority for that notion, that I'm aware of. And, secondly, it doesn't make any sense . . . It wouldn't matter. You can say 99.9 percent, Judge. I wouldn't change my opinion.").

1 states that a factor "to be considered" is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." These considerations cannot be applied to a bare referral fee. *See In re Fordham*, 423 Mass. 481, 490-91 (1996) (focusing extensively on the hours an attorney spent working on a case and the types of work he did in determining whether a fee was clearly excessive). Prof. Gillers' construction would render MRPC 1.5(a)(1) a nullity in some cases and must be rejected. *See United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751-52 (1st Cir. 1985) ("All words and provisions of statutes are intended to have meaning and are to be given effect, and no construction should be adopted which would render statutory words or phrases meaningless, redundant or superfluous.").

Simply put, the text of MRPC 1.5(a) and MRPC 1.5(e), the history of their application in Massachusetts, and common sense all require rejecting any suggestion that MRPC 1.5(a) applies here.

IV. LABATON WAS NOT REQUIRED TO DISCLOSURE TO CHARGOIS AGREEMENT TO THE COURT.

A. The Master Ignores Controlling Federal Rules.

Rule 23 and Rule 54 specifically govern the information regarding fees that must be disclosed to the court. Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 54(d). Their plain language makes clear that fee allocation agreements need not be disclosed unless ordered by the court. *See id.* Contrary to the Master's position, Rule 23(e)(3) does not say otherwise. Despite these clear Rules, the Master attempts to create his own disclosure standard from whole cloth, purporting to rely on general background principles to argue that attorneys must disclose "all available information when seeking a fee award." *See* R&R at 304 n.248. This vague position has no

basis in – and is directly contrary to – the Federal Rules of Civil Procedure, applicable precedent, and custom and practice in the District of Massachusetts.

Given that the Master creates unprecedented disclosure obligations that are contradicted by the Federal Rules of Civil Procedure and other authority, his findings that a Rule 11 violation is "supportable" and that Labaton violated MRPC 3.3 and MRPC 8.4 are incorrect as a matter of law. The Court must reject them.

B. As the Master Appears to Concede, The Federal Rules of Civil Procedure Do Not Require Disclosure of Fee Allocation Agreements.

The Federal Rules of Civil Procedure specifically address a party's obligation to disclose fee agreements in connection with an award of attorneys' fees. Federal Rule of Civil Procedure 23(h) provides that a "claim for an award must be made by motion under Rule 54(d)(2)." In turn, Federal Rule of Civil Procedure 54(d)(2)(B) provides that a motion or petition for attorneys' fees must "disclose, ***if the court so orders***, the terms of any agreement about fees for the services for which the claim is made" (emphasis added).[33] The Rule's Advisory Notes make clear that this provision includes fee-division agreements: "*[i]f directed by the court*, the moving party is also required to disclose any fee agreement, including those between . . . attorneys sharing a fee to be awarded . . . ." Fed. R. Civ. P. 54, 1993 Notes of Advisory Committee, ¶ 8 (emphasis added). This language is unequivocal: disclosure of fee agreements is not required unless the court orders it. Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 54(d)(2); *see also* 5 William B. Rubenstein, *Newberg on Class Actions* § 15:11 (5th ed. 2016) (Ex. L) ("The third prong of Rule 54(d)(2)'s motion requirement – concerning disclosure of fee agreements – is discretionary with the court."); Ex. 234 (Rubenstein Rep.) at 5 ("Rule 23(h) and Rule 54 are therefore clear in

[33] Fed. R. Civ. P. 23(h)(1) requires that motions for attorneys' fees in a class action be brought pursuant to Rule 54(d)(2), such that the general disclosure requirement – i.e., disclosure if the court asks – is expressly incorporated into class actions.

mandating the submission of fee agreements – including those concerning the allocation of fees among counsel – only upon court order."); 10-54 *Moore's Federal Practice - Civil* § 54.154 (2018) (Ex. M) ("If the court so directs, the fee motion must also disclose the terms of any fee agreement with respect to the services implicated by the motion."); *see also* Ex. 241 (Joy Rep.) at 31-35.[34]

Accordingly, courts applying Rules 54 and 23 have adhered to their plain terms. For example, in *Pierce v. Barnhart*, the Fifth Circuit Court of Appeals applied Rule 54 and held that the district court abused its discretion in denying attorney's fees where the plaintiffs' attorney did not submit information regarding "whether attorney's fees had been paid or were due to other counsel for representation," because she had "complied with the local rules and the district court never directed her" to disclose additional information. 440 F.3d 657, 660-61, 664-65 (5th Cir. 2006). Likewise, in the class action context, the Second Circuit's decision in *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP* is directly on point. 814 F.3d 132, 137-38 (2d Cir. 2016). There, a fee petition filed in a class action did not disclose a fee-sharing agreement with (or the presence of) an attorney in Mississippi, who allegedly was paid for unnecessary and irrelevant work, nor did the petition disclose four other law firms who shared in the fee award. *Id*. The Second Circuit explained that Fed. R. Civ. P. 23(h) "does not mandate automatic disclosure of all fee-sharing arrangements in class actions" in the absence of a local rule. *Id.* at 137 n.2. It is well-settled – and the Master appears to agree – that Rule 54(d) and Rule 23(h),

[34] Prof. Rubenstein expanded on this point during his deposition, in no uncertain terms: "From my point of view . . . it's not complicated. The judge should have ordered that the fee agreements be released. He didn't do that. And absent him doing that, I just don't think there was an obligation to make public any of the fee agreements." Ex. 235 (Rubenstein Dep.) at 66:13-19. Prof. Rubenstein explains the Rule embodies deliberate choices made by class action experts. Ex. 234 (Rubenstein Rep.) at 9-12 (noting that "the class action experts who drafted Rule 23(h) were well aware that a class action case encompasses cast and crew – and they nonetheless chose the default embodied in Rule 54: that fee allocation agreements need not be disclosed absent judicial request, that the judge must ask for the playbill.").

which govern fee petitions, do not require the automatic disclosure of fee allocation agreements. *See id.*

C. Rule 23(e) Did Not Require the Disclosure of the Chargois Agreement.

The Master asserts that Rule 23(e)(3) mandated the disclosure of the Chargois Agreement, a requirement "separate and apart" from Rule 23(h). R&R at 306-07. The Master's position appears unprecedented and is incorrect as a matter of law.

1. The Master's Reading of Rule 23(e)(3) is Unsupported by Case Law.

The Master concedes that "he is cognizant that courts generally do not read Rule 23(e)(3)'s disclosure requirement as requiring disclosure of fee agreements among counsel," and that he has "found no First Circuit cases squarely holding that disclosure is required under that Rule." R&R at 317.[35] He does not cite such a case from any other circuit, either. *Id.* It appears that none exist. [redacted]

Indeed, the only directly applicable case the Master cites is *Hartless v. Clorox*, 273 F.R.D. 630 (S.D. Cal. 2011). *See* R&R at 308 n.251. In *Hartless*, the court rejected an objector's argument that Rule 23(e)(3) requires disclosure of fee allocation agreements. *Hartless*, 273 F.R.D. at 646. The court explained that the "agreement as to the amount of

[35] The Master includes this crucial piece of information about the interpretation of Rule 23 in his discussion of "Sucharow's and Labaton's Obligations Under Fed. R. Civ. P. 11," rather than noting it in in his discussion of "Rule 23 Requirements." *See* R&R at 317.

[36] [redacted]

attorneys' fees could affect the class members. The allocation of those fees amongst class counsel does not affect the monetary benefit to class members." *Id.*[37] Likewise, in this case, the fact that class counsel split a portion of their fee award with Chargois did not affect the monetary benefit to the class members, because the payment was taken from the 25% total fee awarded to counsel (and, more specifically, the payment to Chargois was made from Customer Class Counsels' discrete share of the 25% fee award). *See id.*; *see also In re Heartland Payment Sys.*, 851 F. Supp. 2d 1040, 1062 (S.D. Tex. 2012) *and* 4:09-md-02046, ECF 57 (S.D. Tex. Dec. 18, 2009) (Ex. N) at 23-24 (settlement agreement that described total fee award, but allowed Co-Lead Settlement Class Counsel to allocate fees from that award "in their sole discretion," complied with Rule 23(e)(3)); *Bernstein*, 814 F.3d at 137-38 (although an unknown attorney received portion of class counsel's fee award, the court did not mention Rule 23(e)(3) – only Rule 23(h)).[38]

2. The Master's Novel Interpretation of Rule 23(e)(3) is Contradicted by the Rule's Text and its Advisory Notes.

The text of Rule 23 does not support the Master's construction. On its face, Rule 23(e) addresses settlement approval, rather than fee awards. *Compare* Fed. R. Civ. P. 23(e)

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[37] In *Hartless*, the parties filed their stipulated settlement agreement with the Court, which stated that: "Co-Lead Counsel shall make, and Clorox agrees not to oppose, an application for an award of attorneys' fees and expenses not to exceed a total of $2,250,000 . . . Class Counsel, in their sole discretion, shall allocate and distribute the award of attorneys' fees and expenses among Class Counsel." *Hartless v. Clorox*, 3:06-cv-02705, ECF 77 (May 21, 2010) (Ex. O) at ¶¶ 11-12, 16-17. An objector challenged the settlement on the basis that Rule 23(e)(3) requires "production of all fee agreements regarding sharing fees with clients, incentive promises to clients, splitting fees with co-counsel, and any other financial arrangement touching the class action." *Id.* at ECF 98. The court rejected this interpretation. *See Hartless*, 273 F.R.D. at 646.

[38] This Court appears to have interpreted Rule 23(e)(3) the same way, although it never expressly made such a finding. The Stipulated Settlement Agreement in this case contained similar language regarding fees as that at issue in *Heartland*. *Compare* Ex. N (*Heartland*) at 23-24 *and* Ex. 114 (Settlement Agr.) at 26-28. Although the Court was aware that the class attorneys would be allocating their fees in some fashion, the agreement to do so was never disclosed, and the Court did not raise an issue of compliance with Rule 23(e)(3).

("Settlement, Voluntary Dismissal, or Compromise") *with* Fed. R. Civ. P. 23(h) ("Attorney's Fees and Nontaxable Costs"). Rule 23(e)(3) – referring to "any agreement made in connection with the [settlement] proposal" – applies to agreements between the parties that are tied to and bear upon the actual settlement agreement. *See, e.g.*, *Office & Prof'l Emps. Int'l Union, Local 494 v. Int'l Union*, 311 F.R.D. 447, 459 (E.D. Mich. 2015) (in the context of Rule 23(e)(3), the Court addressed an agreement to restructure health plans made concurrently with a settlement agreement, and then discussed class counsel fees in a separate part of its opinion.); [redacted] Fed. R. Civ. P. 23, 2003 Advisory Notes (Rule 23(e)(3) "aims at" agreements related to the settlement "that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others").[39] For instance, in this case, the parties disclosed a "Supplemental Agreement Regarding Requests for Exclusion," made in connection with the settlement, and discussed that supplemental agreement with the Court at the August 8, 2016 preliminary settlement hearing. Ex. 111 (8/8/16 Hr'g Tr.) at 30; Ex. 114 (Settlement Agr.) at ¶ 49(a).[40]

The upcoming 2018 amendment to Rule 23 makes clear that Rule 23(e)(3) agreements and attorney's fee agreements are treated as distinct subjects. In pertinent part, the amended

[39] By material contrast to this straightforward reading of Rule 23(e)(3), the Master's construction makes little sense. The Master's interpretation suggests that agreements regarding the division of the total fee award must be disclosed in connection with settlement approval, but need not be disclosed when the Court actually scrutinizes the proposed fees, whether or not there is a settlement. *See* R&R at 306-307.

[40] As another example, in this case, the total attorney's fee award was referenced in the settlement agreement between the plaintiffs and defendant and was disclosed. Ex. 114 at 26. It also bears noting that the initial agreement between Customer Class Counsel to pay a portion of their fee to Chargois originated in 2013, long before the settlement. *See* Ex. 140 (LBS025771); Ex. 41 (Chiplock 9/8/17 Dep.) at 105:19-106:4. Although the specific 5.5% term was finalized during the fee allocation process, the agreement amongst the three firms to pay Chargois predated the settlement and differs from agreements that are made between the parties ancillary to the settlement negotiation process which affect settlement terms – i.e., the agreements that Rule 23(e)(3) contemplates. [redacted]

Rule will direct courts to consider several express factors in evaluating a settlement, including whether "the relief provided for the class is adequate, taking into account: . . . (iii) the terms of any proposed award of attorney's fees, including the timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3)." 2018 US Order 0020.[41] The separate enumeration of the "terms of any proposed award of attorney's fees," on one hand, and Rule 23(e)(3) agreements, on the other, makes clear that these two categories of information are distinct. *See id.*

The 2018 Advisory Notes confirm this distinction because they treat attorney's fee agreements and Rule 23(e)(3) agreements separately. *See* Fed. R. Civ. P. 23, 2018 Advisory Notes (Ex. P) ("The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court . . . *Another topic* that normally should be considered is any agreement that must be identified under Rule 23(e)(3).") (emphasis added); *see also id.* ("The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class . . . Examination of the attorney-fee provisions *may also* be valuable in assessing the fairness of the proposed settlement.") (emphasis added). These Notes confirm that "attorney-fee provisions" are not "any agreement identified under Rule 23(e)(3)." *See id.* Otherwise, the repeated, separate references to each would be redundant. The Court should adopt the clear intent of the current and amended Rule 23, as further explained by the Advisory Committee: agreements to allocate the fee award are separate and distinct from Rule 23(e)(3) agreements.

[41] In the Master's view, this express enumeration of Rule 23(e)(3) agreements as a factor to consider "reaffirms that the Chargois Arrangement should have been disclosed to the court." R&R at p. 309 FN 252.

3. The Master Misstates Professor Rubenstein's Opinions.

The Master attempts to support his novel reading of Rule 23 by cherry-picking statements made by Prof. William Rubenstein, who authored *Newberg on Class Actions* and has offered opinions as an expert in this case. R&R at 307-08. Specifically, the Master clings to *Newberg's* observation that, while courts "generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel," some fee agreements that "impact settlement terms" possibly "should be disclosed to the class." *See* R&R at 307-308; 355-56; *see also* 5 *Newberg on Class Actions*, § 15.12 at 36 (5th ed. 2015) (Ex. L).[42] While eager to rely on Prof. Rubenstein's statement that there *potentially* could be exceptions to how courts apply Rule 23(e)(3), the Master ignores the fact that Prof. Rubenstein reached the opposite conclusion based on the specific facts of *this case*: "Rule 23 does not require disclosure of fee allocation agreements absent judicial order, courts rarely so order, and Judge Wolf did not do so in this case." Ex. 234 (Rubenstein Rep.) at 31; *see also id.* at 29 n.94 ("Courts have not read [Rule 23(e)(3)] to encompass fee allocation agreements . . ."). In other words, the Master relies on a high-level paragraph in Prof. Rubenstein's treatise, but brushes aside his concrete opinion. The Court should reject the Master's selective citation of Prof. Rubenstein.

In an attempt to justify his slanted reliance on Prof. Rubenstein, the Master attacks the professor's credibility. R&R at p. 307 n.250 ("Professor Rubenstein's deposition testimony and Report are curious in light of the positions he has taken in his treatise, particularly as emphasized

[42] *Newberg* provides no case citation, but offers the following hypothetical example: "For example, if one set of counsel's fee allocation was capped at a certain amount, that counsel would have less interest in pushing further on behalf of the class once her cap was met." In that situation, the fee agreement could affect the timing (and thus the terms) of the settlement, because counsel would have no incentive to continue litigating once the fee was capped. Here, regardless of the division of fee with Chargois, every Customer Class and ERISA attorney were incentivized to litigate toward the largest possible settlement, from which they would request a 25% fee.

in this quote [regarding the possible 23(e)(3) exception regarding fee agreements].").[43] The Master's insinuations are unfair. Despite nearly a full day of deposition – during which Prof. Rubenstein testified repeatedly and emphatically that Rule 23 does not require disclosure of fee allocation agreements – the Master did not ask him a *single* question about whether Rule 23(e)(3) required disclosure of the Chargois Agreement to the Court.[44] The Master also claims that Prof. Rubenstein's statements regarding his preference for transparency "ring hollow given the positions he has taken in this case." R&R at p. 307 n.250. This, too, is unfair. Prof. Rubenstein has been consistent, prior to and during this case, that he views transparency regarding fees as beneficial – but not required without a court order. *E.g.*, Rep. at 30. As such, he will not retroactively "make up a rule" for the purposes of this case. *Newberg*, § 15.12 at 34 ("While Rule 54(d)(2)(B)(v) makes disclosure of such [fee] agreements dependent on a judicial order, there are at least two reasons that courts should regularly order disclosure.");

[redacted]

[43] The Master may feel such an insinuation is appropriate because Prof. Rubenstein is a retained expert witness who is being paid for his work. Whatever Prof. Rubenstein's bill is, it is dwarfed by the $3.8 million that the Master has collected to act as an adversary.

[44] Prof. Rubenstein's initial report regarding Customer Class Counsels' duty to disclose the Chargois Agreement to the Court and/or class was submitted as a rebuttal to Prof. Gillers' initial expert report. *See* Ex. 234 (Rubenstein Rep.); Ex. 232 (Gillers Rep.). Prof. Gillers' did not mention Rule 23(e)(3) in his report or during his deposition. *See* Ex. 232 (Gillers Rep.); Ex. 253 (Gillers 3/20/18 Dep.). Nor did the Special Master ask Prof. Rubenstein during his deposition whether Rule 23(e)(3) required disclosure of the Chargois Agreement to the Court. *See* Ex. 235. The Master's silence on this issue is difficult to explain, especially when considering that he is (purportedly) "curious" about Prof. Rubenstein's position. R&R at 307 n.250. Perhaps the Master did not want Prof. Rubenstein to explain why Rule 23(e)(3) does not apply here, or perhaps he only decided that Rule 23(e)(3) requires disclosure very late in the investigation, after realizing that the law does not otherwise support his aspirational views.

[redacted] Unlike the Master, Prof. Rubenstein has demonstrated an ability to separate aspirational best practices from the actual rules and what they require. Ex. 235 (Rubenstein Dep.) at 63:7-24 ("[Y]ou want to make up a rule after the fact . . . I'm not making up a rule for one case.").

4. The Master's Position on Fee Allocation Disclosure is Incorrect and Inconsistent.

The Master repeatedly claims that Rule 23(e)(3) required disclosure of the Chargois Agreement because it "allocated money that the class may have received elsewhere." *See, e.g.*, R&R at 278, 307, 308, 355.[46] [redacted]

However, even using the Master's formulation of Rule 23(e)(3), his argument is (1) incorrect and (2) inconsistent with the positions he has taken in this case.

First, the payment to Chargois did not allocate money away from the class. It was taken from a portion of Customer Class Counsels' fee award, which was part of the total award the Court had already determined was fair and reasonable and had already allocated away from the class. *See* Ex. 235 (Rubenstein Dep.) at 23:16-24:4. It did not affect the amount received by the class. *Hartless*, 273 F.R.D. at 646 ("The agreement as to the amount of attorneys' fees could

[45] [redacted]

[46] Although the Master suggests that this phrase is quoted from the Manual for Complex Litigation, *see* R&R at 308, it does not appear in that resource. Instead, the Manual explains that Rule 23(e)(3) (previously 23(e)(2)) is intended "to reach agreements that might have affected the interests of class members by altering what they may be receiving or foregoing." *Manual for Complex Litigation* at § 21.631; *see also* Fed. R. Civ. P. 23, 2003 Advisory Note (explaining that 23(e)(3) requires disclosure of agreements that "may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others.").

affect the class members. The allocation of those fees amongst class counsel does not affect the monetary benefit to class members.").

Second, the Master's position is inconsistent because he focuses solely on the Chargois payment while ignoring the fact that no information regarding any fee allocations was provided to the Court, except for the fact that fees from the ERISA Settlement Allocation were capped at $10.9 million. *See* Ex. 3 (Sucharow Decl.) at 32; Ex. 111 at 39 (8/8/16 Hr'g Tr.).[47] The allocations among the Customer Class firms or the ERISA firms do not qualitatively differ from the allocation between the Customer Class firms and Chargois – in any of those situations, lawyers are splitting up and sharing the total fee. By the Master's circular logic, an allocation of part of the total award to any of these firms "allocates money that the class could have received elsewhere." *See* R&R at 308. There is no basis for the Master's arbitrary decision that Rule 23(e)(3) only applies to the Chargois Agreement.

D. The Court's Fiduciary Duty to the Class Does Not Create an Independent Disclosure Obligation.

Lacking on-point procedural rules or case law, the Master resorts to an ill-defined and overarching argument premised on the Court's role as a fiduciary at the class action settlement stage. *See* R&R at 138-141, 303-305. According to the Master, the Court's role as a fiduciary means that "Labaton had a legal and ethical duty to provide the Court with all information it needed to make an informed decision as to the award of attorneys' fees out of the *State Street* settlement fund," including "what the share of each attorney would be." *Id.*[48]

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[47] The Master incorrectly discusses this figure in relation to allocation. *See* pp. 10-12, *supra.*

[48] *See also see also id.* at 140 ("The fee petition process clearly places an enhanced duty of full disclosure and transparency upon counsel filing their petition for attorney fees so that the court can perform its gatekeeping function full and completely advised of all factors and agreements that impact the allocation of attorney's fees . . ."); *id.* at 304 n.248 ("We agree with Professor Gillers that, in total, federal case law makes clear that counsel must be transparent in providing the court *all available information* when seeking a fee award in class actions.") (emphasis added).

The sweeping duty imposed by the Master to provide "all information" finds no basis in the law and does not supersede the specific procedural rules that provide otherwise. *See* Fed. R. Civ. P. 23; Fed. R. Civ. P. 54; Ex. 234 (Rubenstein Rep.) at 13 ("Background Principles Do Not Reverse the Language of Rules 23/54"). The precedent relied upon by the Master may have influenced, but has nevertheless been subsumed by, the specific Rules that govern fee disclosures. *See* Ex. 234 (Rubenstein Rep.) at 14 (explaining that Prof. Gillers' argument, parroted by the Master, "ignores the facts that the framers of Rule 23(h) were well aware of the principles set forth in his random set of snippets [of case law], yet chose to have Rule 23(h) cross-reference Rule 54(d). In other words, the class action law experts who wrote the rule after study and public input balanced the principles at stake by authorizing class counsel to keep fee-sharing arrangements confidential absent an explicit judicial order to the contrary.").

The Master also claims, again with no support, that as part of Labaton's boundless disclosure obligation, it had a legal duty to provide "the identity of all attorneys – including Damon Chargois – who would be sharing in the award and what the share of each attorney would be." R&R at 303; *see also id.* at 313 (same).[49] This is simply incorrect, as a matter of law and practice:

> [I]n nearly 40% of class action cases, courts are not provided the names of lawyers who worked on the case and who might, on that ground be in line to receive a portion of the award. Moreover, class action fee awards are sometimes allocated to other lawyers . . . There are, therefore, a variety of situations in which the identities of counsel sharing in a fee award are routinely unknown to the class action court . . . [T]he class action experts who drafted Rule 23(h) were well aware that a class action case encompasses cast and crew – and they nonetheless

[49] None of the firms provided any information about the size of their individual shares. The Court, obviously aware that the attorneys would share the fee award, never asked. Yet, the Master seems to suggest that the failure of Labaton to disclose the size of its own share, or of Lieff's share, or of any other firm's share, violated a "legal and ethical duty." *See* R&R at 303. The Master has created this requirement out of thin air, without any controlling legal support.

> chose the default embodied in Rule 54: that fee allocation agreements need not be disclosed absent judicial request, that the judge must ask for the playbill.

Ex. 234 (Rubenstein Rep.) at 10-11. The Master's purported disclosure obligations simply are not the law. They reflect his own aspirational views on how attorneys *should act*, not how they *do act* or – more importantly – how they *must act*.

Moreover, the Court's role as a fiduciary to the class does not change the lawyers' disclosure obligations. Although a *court* acts as a fiduciary during the settlement stage and may be interested in reviewing fee agreements, it does not follow that it is the *attorneys'* obligation to disclose information regarding fees in the absence of a court request. *See id.* Rather, as a fiduciary, it rests with the Court to decide whether a disclosure of fee allocation agreements would be helpful to its evaluation of the fee award, and, if so, to order the disclosure of those agreements. *See* Fed. R. Civ. P. 54(D)(2)(b) (petition for attorneys' fees must "disclose, *if the court so orders*, the terms of any agreement about fees for the services for which the claim is made") (emphasis added); Ex. 235 (Rubenstein Dep.) at 135:8-12 ("Number one, when I see that the Court is a fiduciary for the class members, I immediately think that means the Court has a responsibility to do something. I don't immediately think that means the parties have a responsibility to do something."); *see also* Fed. R. Civ. P. 23, 2003 Advisory Committee Notes ("Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. . . the court bears this responsibility.").

The cases cited by the Master do not support the limitless disclosure duty that he proposes. Most offer nothing beyond the general principle that the court acts as a fiduciary and may be interested in fee allocations. *See* R&R at 303-304, and cases cited therein.[50] Meanwhile, the Master (and Professor Gillers) afford far too much weight to *Agent Orange* and *Lewis*

[50] The Master also incorporates Prof. Gillers' legal citations by reference. R&R at 303-304.

Teleprompter. R&R at 304, citing *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) *and Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980); Ex. 233 (Gillers Supp. Rep.) at 82-83 (same).

First, those decisions predate Rule 23(h), which makes unequivocally clear that automatic disclosure of fee agreements is *not* required. *See* Fed. R. Civ. P. 23(h). Second, in the more recent *Bernstein* case, the Second Circuit explained without qualification that information regarding attorneys' fees was not required to be disclosed even where attorneys collecting fees were unknown to the Court. *Compare In re "Agent Orange"*, 818 F.2d at 223, *with Bernstein*, 814 F.3d at 137 n.2. Third, as Prof. Rubenstein thoroughly explains, when *Agent Orange* was decided, a local rule required disclosure of fee agreements; the Second Circuit's commentary regarding the disclosure of fee agreements related to that local rule, rather than an overarching common law duty (which, to the extent it ever did exist, was superseded by the amended Rule 23(h)). *See* Ex. 234 (Rubenstein Rep.) at 16 n.42; Ex. 227 (Joy Dep.) at 128:20-129:1; *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 869 (E.D.N.Y. 1984) (deciding not to apply "Rule 5 of the U.S. District Court for the Southern and Eastern Districts of New York"). Fourth, as Prof. Gillers concedes, the Chargois Agreement did not conflict with the interests of the class in litigating the case to its most favorable resolution, unlike the agreements in *Agent Orange*. *See* Ex. 233 (Gillers Supp. Rep.) at 82 n.87; Ex. 235 (Rubenstein Dep.) at 55:23-56. [51] Finally, even if *Agent Orange* and *Lewis Teleprompter* fashioned some mandate that survived

[51] "Second, when I look at Chargois' involvement, I don't see anything like in the *Agent Orange* case where anyone's worried that the payment to Chargois conflicted with the class' interest in litigating the case." Ex. 235 (Rubenstein Dep.) at 55:23-56:3

both the amendments to the Federal Rules and the dispositive *Bernstein* decision, they do not impose an obligation in this Circuit.[52]

In sum, neither the Master nor Prof. Gillers have cited any legal authority that required disclosure of fee sharing agreements in District of Massachusetts in 2016. Their sweeping generalizations, contradicted by specific Rules, are not enough.[53]

E. The Master's Fundamental Dislike of Referral Fees Does Not Nullify the Federal Rules of Civil Procedure in This Case.

Starting with the premise that referral fees are wrong, the Master views the fact that the Chargois Agreement was not disclosed as objectively harmful and thus deserving of "blame." R&R at 306 ("Professor William Rubenstein places the entire blame for the nondisclosure of the Chargois payment in this case upon the Court."); *id.* at 355 (same). In fact, there is no "blame" here. Referral fees are permissible. *See Mass. Legal Ethics* at 185 (Ex. E). Labaton was not required to disclose the fee agreement with Chargois, just as the Court was not required to ask about fee agreements. *See* Fed. R. Civ. P. 23; Fed. R. Civ. P. 54; *see also, e.g.*, Ex. 227 (Joy Dep.) at 92:2-15 ("Is the absence of having all those rules [requiring disclosure of fee agreements] an indication that the judge is not fulfilling his or her fiduciary obligation? Absolutely no.").

Because the Master believes that the Chargois Agreement was wrong and should have been disclosed, he treats the contrary Federal Rules of Civil Procedure as inconvenient obstacles standing in the way of his desired result. *See*, *e.g.*, R&R at 342-43 (in the context of discussing

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[52] There is no District of Massachusetts local rule that requires the automatic disclosure of fee allocation agreements.

[53] If the attorneys truly were required to disclose "all the facts," then they would have been obligated to disclose all of the fee-sharing agreements in this case. *See* R&R at 303-304. Yet the Master is singularly focused on the Chargois agreement. *See* R&R at 303-309. A finding that the Chargois Agreement required disclosure, but the other fee sharing agreements did not, is too arbitrary and subjective to withstand scrutiny.

disclosure obligations to the Court and the class, claiming that the Rules "ignore the realities of class action litigation"); *id.* and *id.* at 280 n.231 (referring to the Rules as "unsatisfactory" and expressing his "frustration" with how they operate); *id.* at 280 n.231 (arguing that the plain language of Rule 23 "seems to stand common sense and the realities of class action litigation upon its head," and noting his belief that the Rule reflects "a misapprehension of the responsibilities of the respective players in the class action process.").[54] For example, he is palpably skeptical of the notion that the Rules do not require disclosure of fee agreements without a court order. *E.g.*, R&R at 279 n.230 ("Rubenstein conceded this is a lot to ask of the judge."); *id.* at 306 (noting Prof. Rubenstein's contention that Rule 23 "places the burden on the Court to order disclosure of a fee agreement or payment"). But, despite the Master's admitted frustration, the Rules plainly make disclosure of fee agreements discretionary with the Court – and the Court is more than capable of asking for them, if it believes such disclosure necessary.[55]

The Master goes so far as to claim that Labaton has "erected a wall of legalistic and formalistic excuses and blame-shifting (largely to the Court)." R&R at 362. To be clear, the "legalistic and formalistic excuses" he refers to are the Federal Rules of Civil Procedure, which

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[54] Contrary to the Master's gripes, the drafters of the Federal Rules understand what they are doing. The current Advisory Committee includes, among others: Prof. Edward Cooper, coauthor with the late C.A. Wright and A.R. Miller of the original, second, and third editions of *Federal Practice and Procedure: Jurisdiction*; Prof. Richard Marcus, a lead author of *Complex Litigation* (5th ed. 2010) and *Civil Procedure: A Modern Approach* (6th ed. 2013), published by West Academic Publishing, as well as several volumes of *Wright and Miller*; Prof. A. Benjamin Spencer, author of *Civil Procedure: A Contemporary Approach* (2d ed. 2007) and several volumes of *Wright and Miller*. The list goes on, including at least ten judges, several preeminent litigators, and several more academics. Ex. Q (Advisory Committee on Civil Rules).

[55] With all due respect to the Court, Labaton does not subscribe to the Master's paternalistic belief. *See* Ex. 234 (Rubenstein Rep.) at 12 (opining that "it is really not much of an imposition for a court to ask, 'How are the fees being allocated?' as Rule 54(d)(2) proposes."). Indeed, the Court has recently demonstrated its ability to readily inquire about fee sharing agreements, as Rule 54 contemplates: "Is there one or more other attorneys that would benefit, get money from the settlement of this case?" *Arkansas Teacher Retirement System v. Insulet Corp.*, No. 15-cv-12345 (D. Mass. March 9, 2018) (Wolf, J.) (Ex. R).

(of course) govern litigation in federal court, regardless of the Master's derision. *See, e.g.*, *In re Bos. Reg'l Med. Ctr.*, 328 F. Supp. 2d 130, 151 (D. Mass. 2004) (Wolf, J.) ("If a Federal Rule of Civil Procedure governs a question, the court must apply it unless the rule violates the Rules Enabling Act or the Constitution."). Plainly, the Master disagrees with the payment to Chargois, and he appears determined to make the law fit his desired outcome, even if that means stretching or ignoring the Rules. As Prof. Rubenstein observed:

> Rule 23 clearly sets out a process and the structure for the fee process in class action cases. It's the governing rule. In the case we're talking about it has a specific subpart directly on point . . . I feel like you all [The Special Master and his team] are trying very hard to find a way around that specific law . . . from where I sit there's a specific[] rule directly on point. Just doesn't happen to say what you want it to say, but it's there.

Ex. 235 (Rubenstein Dep.) at 149:2-15; *see also id.* at 73:18-19 (explaining his view that Prof. Gillers' position that an attorney must disclose information regarding fee allocations to the Court "was made up after the fact to fit the facts of this case."). This Court should reject the Master's end-run around the law and instead apply the Rules as written.

F. Labaton Did Not Violate Rule 11.

As the foregoing makes clear, the Federal Rules of Civil Procedure do not require the disclosure of fee allocation agreements. Therefore, the Special Master has proffered the untenable argument that complying with the disclosure obligations set forth in Rule 54 and Rule 23 simultaneously constitutes a non-disclosure that violates Rule 11. In other words, by the Special Master's logic, the Federal Rules of Civil Procedure are internally inconsistent and directly contradict each other. Such a conclusion would necessarily be premised on the notion that the drafters of the Rules, wittingly or through extraordinary carelessness, laid a trap for attorneys who followed the requirements of Rules 54 and 23 but failed to divine a particular judge's desire for information that he had not requested. This reading of the Rules cannot be

squared with their essential purpose. *See* Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . They should be construed, administered, and employed by the court and the parties to secure the *just* . . . determination of every action and proceeding") (emphasis added).[56]

Beyond a common-sense reading of the Rules, the First Circuit's interpretation of Rule 11 also precludes a finding that the Labaton violated it. Any alleged "omission" regarding the Chargois Agreement from the Sucharow Declaration does not approach the level of a Rule 11 violation, because the "omission" was perfectly permissible under the Federal Rules of Civil Procedure and class action practice. Without any notice that disclosure of the Chargois bare referral fee was required, Rule 11 simply does not apply.

Finding a violation of Rule 11 requires "culpable" conduct by the attorney. As the First Circuit has repeatedly admonished, a "lawyer who makes an inaccurate factual representation must, at the very least, be *culpably* careless to commit a violation [of Rule 11]." *Young v. City of Providence*, 404 F.3d 33, 39 (1st Cir. 2005) (emphasis added); *see also Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 437 F.3d 140, 142 (1st Cir. 2006) (explaining that "some degree of fault is required" to find a violation of Rule 11); *see also McGee v. Town of Rockland*, 11-cv-10523, 2012 U.S. Dist. LEXIS 180197, at *2 n.2 (D. Mass. Dec. 20, 2012) ("Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps."). Moreover, the First Circuit has recently explained that whether an attorney violates Rule 11 "depends on the objective

[56] The Special Master deflects this common-sense conclusion by relying on Rule 23(e)(3). R&R at 317 n.256 ("Labaton, however, does not mention, let alone discuss in its Memorandum, the separate and independent obligation imposed on Labaton by Rule 23(e)(3) . . ."). This is unavailing. As described in § IV.C, *supra*, Rule 23(e)(3) does not require – and has never been interpreted by a court to require – the disclosure of fee sharing agreements.

reasonableness of the [attorney's] conduct under the totality of the circumstances." *Eldridge v. Gordon Bros. Grp., LLC*, 863 F.3d 66, 87-88 (1st Cir. 2017) (internal citations omitted).

Here, Labaton is not culpable, and its attorneys acted exactly as reasonable lawyers would. Everything known to Labaton indicated that disclosure was *not* required. At the time that Mr. Sucharow submitted the fee petition: (1) the Federal Rules of Civil Procedure did not require disclosure; (2) this Court did not have a standing order requiring disclosure; (3) this District's local rules did not require disclosure; (4) this Court did not order disclosure; and (5) referral fees were a "time-honored practice" in Massachusetts and perfectly permissible. *Saggese*, 445 Mass. at 442. Moreover, the following facts further support the reasonableness of Labaton's conduct: (1) no judge in the District of Massachusetts had ordered disclosure of fee agreements in well over a hundred class action cases since 2011 (*see* Ex. 234 (Rubenstein Rep.) at 6); (2) no case within the First Circuit (or elsewhere, as far as Labaton's research has revealed) had found a violation of Rule 11 for non-disclosure of fee agreements; and (3) no Boston Bar Association and Massachusetts Bar Association ethics opinions, or Massachusetts Board of Bar Overseers ethics decisions, contained analogous guidance relative to the disclosure of fee agreements in connection with the Massachusetts Rules of Professional Conduct.[57]

In short, there was no notice that disclosure was required. In fact, the opposite was true, i.e., the applicable rules stated that disclosure *was not* required in the absence of inquiry or an order. Viewing the circumstances in their totality, a reasonable attorney – trained to rely on the

[57] Even if this Court agreed with the Master's strained interpretation of Rule 23(e), such a reading would be unprecedented in this Circuit. Respectfully, this would still be an insufficient basis for a finding of a Rule 11 violation. [redacted]

Federal Rules of Civil Procedure, precedent, and standard practice – would not believe that disclosure was required. *See Eldridge*, 863 F.3d at 87-88 (courts must assess the objective reasonableness of the attorney's conduct); *see also Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003) (explaining that in the Rule 11 context, "courts determine whether a reasonable attorney in like circumstances could believe his actions were factually and legally justified."). This is far from the "culpable" and "egregious" conduct that courts in the First Circuit require before finding a Rule 11 violation. *See Young*, 404 F.3d at 39; *McGee*, 2012 U.S. Dist. LEXIS 180197, at *2 n.2.[58]

G. Labaton's Non-Disclosure of the Chargois Agreement Did Not Violate the Massachusetts Rules of Professional Conduct.

1. Labaton Did Not Violate MRPC 3.3(a) or 8.4.

The Master contends that Labaton, in complying with Rules 23 and 54, violated MRPC 3.3(a) and MRPC 8.4(c). *See* Mass. R. Pro. C. 3.3(a) ("A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."). The Master offers no meaningful analysis for this finding. R&R at 318-19. Instead, he cites a collection of inapposite cases and decides, in wholly conclusory fashion, that "[c]ompliance with Rules 3.3(a) and 8.4(c) required Sucharow to

[58] And, as the Master concedes, the First Circuit has never found a Rule 11 violation based on a "material omission." Moreover, the group of out-of-Circuit cases that the Master has cobbled together are inapposite. *See* R&R at 314, *citing In re Ronco, Inc.*, 838 F.2d 212, 218 (7th Cir. 1988) (firm requested continuance because it needed time to prepare for a hearing, but did not mention that it had previously represented a creditor in the same case and had previously evaluated and requested discovery on the subject matter of the hearing); *Gurman v. Metro Housing and Redevelopment Auth.*, 842 F. Supp. 2d 1151, 1154 (D. Minn. 2011) (blatantly misrepresenting facts, such as referring to an already-decided appeal as "current," and dramatically mischaracterizing the content of a housing authority order); *Campmor, Inc. v. Brulant*, LLC, 2:09-cv-05465, 2014 U.S. Dist. LEXIS 150299, at *17-18 (D.N.J. Oct. 21, 2014) (declining to find a Rule 11 violation); *Lamon v. Amrheign*, No. 1:12-cv-00296, 2014 U.S. Dist. LEXIS 111787, at *14 (E.D. Cal. Aug. 12, 2014) (factual allegation changed substantially between original complaint and amended complaint; no finding of a Rule 11 violation).

disclose Chargois and his fee arrangement" because it was "highly relevant to the Court's exercise of its fiduciary duty." *Id.*[59]

The Master is incorrect. In light of the lack of an obligation to disclose the Chargois Agreement to the Court, the Master's arguments regarding MRPC 3.3(a) and MRPC 8.4(c) miss the mark. As noted by Profs. Joy and Wendel, those Rules require a "knowing" misrepresentation or omission on the part of the attorney. Mass. R. Prof. C. 3.3(a); *see also* Ex. 241 (Joy Rep.) at 43; Ex. 243 (Wendel Rep.) at 20. Thus, "[f]or there to be an ethical duty for Labaton to disclose to the Court its fee sharing agreement with Chargois & Herron under Mass R. Prof. C. 3.3(a) or 8.4(c), the ethical duty would have to be based on Labaton *knowingly* engaging in impermissible conduct." Ex. 241 (Joy Rep.) at 43. Because there was no legal obligation to disclose the Chargois Agreement, and no inquiry from the Court, it cannot be that Labaton lawyers "knowingly" made some kind of unethical omission. *See* Ex. 227 (Joy Dep.) at 88:3-8 (explaining that Rule 3.3 applies "[o]nly in a situation where you have a duty to speak.").[60]

2. Comment 14A Does Not Change the Analysis.

Late in his investigation, the Master suggested that Comment 14A to MRPC 3.3 applies here and supports finding that Labaton violated MRPC 3.3(a).[61] Comment 14A provides that:

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

[59] The cases relied upon by the Master and Prof. Gillers Prof. do not resemble the facts in this case. R&R at 318-19; Ex. 233 (Gillers Supp. Rep.) at 85; *see also* Ex. 241 (Joy Rep.) at 47-49. In none of those cases did a rule of procedure specifically govern the disclosure. *Id.*

[60] To be clear, there was no omission in the first place, but – assuming solely for the sake of argument that nondisclosure of the Chargois Arrangement could be called an omission – it certainly was not knowingly made in violation of an obligation. *Id.* at 44. ("For an omission to be the equivalent of a misrepresentation, the omission has to occur where there is a duty to speak.").

[61] Professor Gillers initially did not address this comment, but added it in his supplemental report. Compare Ex. 232 (Gillers Rep.) with Ex. 233 (Supp. Gillers Rep.) at 87.

> minor, the proceeding loses its adversarial character and in some respects takes on the form of an ex parte proceeding. The lawyers presenting such a joint petition thus have the same duties of candor to the tribunal as lawyers in ex parte proceedings and should be guided by Rule 3.3(d).

At the outset, this comment is inapposite, because the fee petition submitted by plaintiffs' counsel was not submitted jointly with an adversary. ECF 102 at 5 ("State Street takes no position on the relief sought in the motion [for fees]"). Indeed, during the final settlement hearing, the Court specifically asked whether the plaintiffs and defendant discussed attorney's fees as part of their settlement negotiations, and counsel responded that they did not. Ex. 78 (11/2/16 Hr'g Tr.) at 20. This, clearly, is not a "joint petition to approve a settlement" that two parties present together. *See* Mass. R. Pro. C. 3.3 cmt. 14A.

The Master also ignores Comment 14, which states that "Rule 3.3(d) does not change the rules applicable in situations covered by specific substantive law." Mass. R. Pro. C. 3.3, cmt 14. The disclosure standards for fee petitions in a federal class action are specifically governed by Rule 23 and Rule 54. *See* Fed. R. Civ. P. 23(h); Fed. R. Civ. P. 54(d). Therefore, even if MRPC 3.3(d) were relevant here, it would not override the governing rules addressing the issue (by contrast, the Massachusetts Rules of Civil Procedure do not address fee-related disclosures in class actions, *see* Mass. R. Civ. P. 23).

More importantly, even if Comment 14A applied here, it would not have required disclosure of the Chargois Agreement because it did not appear to be "material" information to the Court's decisionmaking. *See* Mass. R. Pro. C. 3.3(d); *see also* Ex. 227 (Joy Dep.) at 99:2-3 ("I don't believe it's a material fact."). Nearly all the fee-related discussion at the Final Settlement Hearing relating to fees focused on the whether the *total* fee award was fair. Ex. 78 (11/2/16 Hr'g Tr.) at 22-38. In fact, the Court, acting well within its discretion, did not ask a single question regarding how the fee award would be shared among Customer Class Counsel.

Id. Accordingly, information about how Customer Class Counsel planned to divide their portion of the award did not appear material to the Court's decision-making process. *See id.*

The Court's willingness to let the plaintiffs' counsel decide how to divide up the total fee award is not surprising. As demonstrated through an empirical review conducted by Professor Rubenstein, out of 127 recent class actions that reached a settlement in the District of Massachusetts, the Court did not order the disclosure of fee agreements in a single one. Ex. 234 (Rubenstein Rep.) at 6.[62] Therefore, it would be reasonable for an attorney appearing in this district to conclude that information regarding attorney's fee allocations among plaintiffs' counsel is not viewed as material by this Court.[63]

Finally, and perhaps most significantly, the Rules do not require disclosure. Every class action may become non-adversarial at the fee petition stage. *See* R&R at 140-41 and cases cited therein. Nevertheless, the drafters of the Federal Rules – who surely understand this concept – chose to condition the disclosure of fee agreements on the Court's order. *See* Fed. R. Civ. P. 23(h). This reflects a deliberate judgment that fee allocation information is *not* material (and, if a particular court does view it as material, it can order the information disclosed). *See* Ex. 234 (Rubenstein Rep.) at 11.[64]

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[62] This is consistent with the experience of Camille Sarrouf, who has practiced in Boston for over five decades. *See* Ex. 252 (Sarrouf 3/21/18 Dep.) at 35:23-36:7 (testifying that he tried hundreds of cases as the attorney paying a referral fee, and that he "never had a Court ask [him] what is your referral fee. Never. It never comes up.").

[63] The Master makes much of the fact that the payment to Chargois was a referral fee that required "no work." However, it bears repeating that Massachusetts permits bare referral fees. Thus, even knowing that attorneys are permitted to pay and receive referral fees, this Court has, as a matter of course, not ordered the disclosure of any such agreements. *See* Ex. 234 (Rubenstein Rep.) at 6.

[64] Instead, Rule 23, through its reliance on Rule 54, only requires that "the judgment and the statute, rule, or other grounds entitling the movant to the award" and "the amount sought or . . . a fair estimate of it" be disclosed – i.e., material information at the fee petition stage. *See* Fed. R. Civ. P. 54(d)(2)(b).

In short, in his argument regarding Comment 14A and MRPC 3.3(d), the Master has not cited anything indicating the Chargois Agreement was "material" to the Court beyond his own subjective and conclusory opinions. On the other hand, there is abundant objective evidence suggesting otherwise, including this Court's questions at the final settlement hearing, the general practice in this district, and the Rules themselves.

3. No sanction or Discipline is Warranted Based on a Purported Finding That Labaton Violated MRPC 3.3(a).

During his deposition, Professor Gillers conceded that finding a violation of MRPC 3.3 under these circumstances would be novel, if not unprecedented. *See* Ex. 253 (Gillers 3/20/18 Dep.) at 144:24-145:1 ("I know of no authority that applies 3.3 to the duty to disclose a fee agreement."). Both the Master and Prof. Gillers attempt to maneuver around this inconvenient truth by arguing that the Chargois Agreement, *specifically*, was required to be disclosed because it was "highly relevant." R&R at 319; Gillers Supp. Report at 86-87 ("It is not necessary to conclude that class counsel must inform the Court, or the class, of every lawyer who seeks a fee in a matter for the work he or she performed."). In doing so, the Master seeks to find an ethical violation based on a completely subjective and *ad hoc* judgment, and thus to punish Labaton even though it followed a clear rule without notice of purported wrongdoing. *See*, *e.g.*, Ex. 235 (Rubenstein Dep.) at 75:2-3 ("I am adamantly saying the rules were clear."); *id.* at 126:20-22 ("I think that lawyers have the right to rely on the rules, and the rule is the Court can ask for the fee agreements if they want."); *id.* at 198:6-10 ("[Y]ou know, the law is clear here, and the lawyers have reason to rely on the clearness, the clarity of the law. Rule 23 and Rule 54 could not be more clear . . .").

The Master's *ad hoc* finding of a MRPC 3.3(a) violation is impermissible. "Due process requires that attorneys, like anyone else, not be subject to laws and rules of potential

random application or unclear meaning." *In re Discipline of an Atty.*, 442 Mass. 660, 668 (2004); *see also* Ex. 241 (Joy Rep.) at 52 ("Courts and ethics authorities do not impose sanctions on or discipline a lawyer or law firm when a legal or ethical duty is unclear."). The Master appears to acknowledge this – at least with regard to MRPC 1.5(e). *See* R&R at 337 ("[T]his goes to the question of notice to the practicing bar . . . [B]ecause this appears to be an issue of first impression and not one of which the profession might have been well-advised in advance, it would not be appropriate to impose professional discipline in these circumstances.").

Nevertheless, the Master presses forward with a finding of a MRPC 3.3(a) violation, which is contradicted by the governing Federal Rules of Civil Procedure and appears unprecedented. The Master's decision that the Chargois Agreement, unlike other fee allocation agreements, possesses some unique and subjective combination of characteristics requiring disclosure should be rejected. *See* R&R at 319. As Prof. Rubenstein explained, there "is nothing that the lawyers did here that was unusual." Ex. 235 (Rubenstein Dep.) at 104:5-6. Thus, discipline is unwarranted. *See, e.g.*, *In re Discipline of an Atty.*, 442 Mass. at 668, citing with approval *In re Ruffalo*, 390 U.S. 544, 554-556 (1968) (White, J., concurring) (discipline inappropriate "on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct").[65]

65 [redacted]

H. The Master's "General Candor to the Court" Argument Also Fails.

The Master contends that Labaton violated its "broad duty of candor" to the Court. R&R at 322-26; 360-362. The factually extreme cases cited by the Master are inapposite. In *Pearson v. First NH Mortg. Corp.* – the only First Circuit case cited by the Master – an attorney submitted a statement to the Bankruptcy Court, as required by Fed. R. Bankr. P. 2014(a), stating that he had "no connections" with the creditors or "any party in interest, their respect attorneys, and accountants." 200 F.3d 30, 33 (1st Cir. 1999). In fact, the attorney had "serious conflicts of interest": specifically, his firm represented the bank that was being sued by the attorney's current client, who sought to have loan documents (which were likely drafted by members of the attorney's firm) declared void. *See id.* at 36-37. The firm's representation of the bank also presented several other serious conflicts. *Id.* The First Circuit found that the attorney violated his duty of candor to the court, explaining that the attorney "submitted the verified statement required under Fed. R. Bankr. P. 2014, which unequivocally asserted that there were no conflicts of interest." *Id.* at 38.

The Master and Professor Gillers also rely heavily on *United States v. Schaffer Equip.*, 11 F.3d 450, 457 (11th Cir. 1994). Their nearly-identical descriptions of the case are quite understated: "In *Shaffer*, the government failed to disclose false testimony at the deposition of its expert witness in a civil environmental case, and then moved for summary judgment without relying on his opinion." R&R at 323; s*ee also* Gillers Supp. Rep. (Ex. 233) at 89. In fact, the government's deception was much more extensive: the individual in question, the EPA's "on-scene coordinator" for the clean-up site, misrepresented his academic credentials (he had not

[redacted]

graduated from college).[66] *Id.* at 460. After learning of his misrepresentations, and despite concluding that his credibility was relevant to the litigation as matter of law, the government did not update interrogatory responses regarding his credentials. *Id.* at 455. Moreover, far from merely moving "for summary judgment without relying on his opinion" (R&R at 323), the government's summary judgment motion was "dependent on the administrative record" compiled (and tainted) by the coordinator. *Id.* at 461. Litigating the case in reliance on this administrative record, while concurrently obstructing the defendant's discovery regarding the coordinator's credentials, comprised the violation of the government attorneys' duty of candor. *See id.*

This case is nothing like *Pearson* or *Shaffer*. In *Pearson*, the attorney at issue was required by rule to submit a statement and flatly lied about serious conflicts of interest in doing so. *See Pearson*, 200 F.3d at 38. In *Shaffer*, the government litigated a case in reliance on a fraudulent record and discovery misconduct.[67] By material contrast, in this case, the applicable rules did not require any disclosure, Labaton did not make any affirmative misrepresentation, and the underlying referral fee was permissible, rather than an "irreconcilable" conflict of interest.

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[66] The coordinator eventually pled guilty to perjury. *Id.* at 452 n.1.

[67] Prof. Gillers also relies on *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). *See* Ex. 233 at 90. *Rodriguez* is irrelevant. It involved undisclosed incentive awards that uniquely incentivized the class representatives to settle, rather than risking trial. *See id.* Labaton disclosed the class representatives' service awards to the Court in this case, and included information about them in the class notice. *See* Ex. 78 (11/2/16 Hr'g Tr.) at 31; Ex. 81 (Notice of Pendency of Class Actions) at 5. *Rodriguez* did not involve fee sharing agreements, which are specifically addressed by Rules 23 and 54.

V. DISCLOSURE TO THE CLASS WAS NOT REQUIRED.

A. The Payment to Chargois Came From Customer Class Counsels' Share of the Fee Award.

The Master premises his argument regarding Labaton's disclosure obligations to the class on the false notion that the payment to Chargois was made from "the class fund." *See* R&R at 277. The Master's position ignores the mechanics of class action fee awards:

> I think it's an important distinction in a big case like that that there are these two phases; that the fee is set in the aggregate in the first phase. That's the important phase [because] that's when the class' money is being taken from the class. And that's the key to the whole thing in my opinion. And then once the Court has decided that's a fair fee to take from the client, then the question of how the lawyers divide that fee up among themselves is what I refer to as the allocation phase which I think has less pertinence for the class in most cases.

Ex. 235 (Rubenstein Dep.) at 23:16-24:4. The payment to Chargois came during the "allocation phase," after the Court had already determined that the amount of attorneys' fees payable from the total settlement fund was fair. *See id.* That Customer Class Counsel paid a portion of their own fee award and allocated it to Chargois had absolutely no effect on the amount the class received. *Hartless*, 273 F.R.D. at 646.

Moreover, the Master's argument is illogical. In a state where bare referral fees are permissible, there is no basis to distinguish the fee paid to Chargois from the other fee allocations among class counsel (which also were not disclosed to the class). A member of the class could challenge the payment to Chargois, just as a member of the class could challenge the amount received by another of the firms as not being commensurate with its performance. Yet, inconsistently, the Master only believes that the Chargois Agreement required disclosure. *See* R&R at 273-74.

B. The Federal Rules of Civil Procedure Do Not Require Disclosure to the Class of the Fee-Sharing Agreement With Chargois.

The Master admits, as he must, that Rule 23 does not require disclosure to the class in the settlement notice of attorney fee agreements. *See* R&R at 280-81 & n.231.[68] Rule 23(h)(1) governs notice to the class in connection with attorney's fees.[69] The Rule says nothing regarding disclosure of fee agreements in the settlement notice. Rather, it provides that claims for attorneys' fees be made by motion with notice of the motion served on all parties and class members "in a reasonable manner." *Id.* Thus, Rule 23 relies on the fee motion to provide information regarding fees to the class, and as such, is dependent on the Court to order disclosure. *See* Fed. R. Civ. P. 23(h)(1); Fed. R. Civ. P. 54(d)(2); *see also* § IV.B, *supra*; *Bernstein*, 814 F.3d at 137-38 n.2 (explaining that Fed. R. Civ. P. 23(h) "does not mandate automatic disclosure of all fee-sharing arrangements in class actions"). As Prof. Rubenstein explained:

> Class action law generally does not put fee allocation information in the class notice . . . I would say it's not an expected part of the notice process in a class action that the allocations as to what each lawyer's getting is put in the notice . . . If the class members want to know that information, they can come forward and ask the Court to release it. I hope the Court would. But it's not expected in a class action that the allocation as to what each lawyer is getting is ever in the notice to the class.

Ex. 235 (Rubenstein Dep.) at 188:6-20.[70]

In short, as the Master recognizes, there is no requirement that information regarding fee agreements or allocations be described in the class notice.

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[68] The content of a settlement notice under Rule 23(e) "is committed to the discretion of the trial judge." 3 William B. Rubenstein, *Newberg on Class Actions* § 8:17 (5th ed. 2013) (Ex. T).

[69] As Professor Green testified, "[i]n my view the kinds of notice you give to a class is governed by Rule 23 and case law that develops under Rule 23." Ex. 230 (Green Dep.) at 152:12-14.

[70] *See also* Ex. 234 (Rubenstein Rep.) at 27-30 (Prof. Gillers' argument that "class counsel must disclose fee-sharing agreements in the class's notice . . . is not supported by the text of Rule 23, nor the cases interpreting it."); *see also* Ex. 241 (Joy Rep.) at 50-52.

C. The Rules of Professional Conduct Do Not Require Disclosure.

Simply put, because there was no requirement to disclose fee allocation agreements to the class, failure to do so is not an ethical violation. Rule 23 provides the standards relating to class counsel's duties to the class. *See* Fed. R. Civ. P. 23(g)(4) ("*Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class."). Courts view counsels' duties toward the class as "coextensive" with the requirements of Rule 23. *See* Ex. 235 (Rubenstein Dep.) at 154:16-20 ("What the Court found [in other cases] was that there was not a breach of fiduciary duty because Rule 23 had been complied with and hence in some ways what the Court's saying is that whatever fiduciary duty the lawyer had was co-extensive with its Rule 23 duties."); [redacted] And, with regard to fee agreements in particular, Rule 23 provides that they must only be disclosed upon the court's order. As Prof. Joy explained, "[w]ithout a disclosure obligation to the Court and without a clear obligation to disclose how fees would be divided to the class, there was no obligation for Labaton to disclose [] the fee sharing agreement with Chargois & Herron to the class members." Ex. 241 (Joy Rep.) at 50.[71]

Yet the Master argues that class counsel's role as a fiduciary created an obligation to disclose the Chargois Agreement to "at least the[] named plaintiffs/class representatives." *See* R&R at 284-85. As with many of his other legal findings, the Master's conclusion is unsupported by any case law and appears unprecedented. *See* Ex. 241 (Joy Rep.) at 51; Ex. 253

[71] Professor Joy explained further during his deposition: "It was sufficient to notify class members about the fees. It didn't have to describe the division of fees because the court did not use Rule 54(d) to order that the terms of any agreement about fees for which the claim is being made be disclosed." Ex. 227 (Joy Dep.) at 145:14-19.

(Gillers 3/20/18 Dep.) at 150:3–7.[72] Lacking any legal authority and ignoring that Rule 23 provides the applicable standards in the class action context, the Master turns to MRPC 1.2 and 1.4. However, his reliance on MRPC 1.2 and 1.4 is misguided and does not withstand scrutiny.[73] Neither Rule mentions anything about attorney's fees or appears to have any bearing on this situation.[74] Stating the obvious, MRPC 1.5 addresses the requirements for communications with

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[72] "Q: Sir, you list some cases in this section, but none of the cases you cite hold that counsel must disclose fee allocations to class members, do they? A: No." *See also id*. at 150:17–22 ("Q: Can you cite us to a case that says that class counsel has the obligation to notify the unnamed class members; that is, the non-named plaintiffs, of a referral fee that's going to come out of class counsel's fee? A: No."); *id*. at 156:20–157:1 ("You're seeking to impose a duty of disclosure of a fee division that no Court has yet imposed in any written decision, right? A: So far as I know, but it's not -- it's an analysis under the Massachusetts rules. It's not an analysis under Rule 23.").

[73] As the Master explained, "the class is not a client for all purposes." R&R at 284; *see also See* 5-23 *Moore's Federal Practice - Civil* § 23.120 (2018) ("[T]he post-2003 appointment procedures probably sharpen the differences in ethical obligations between class-action attorneys and the 'customary obligations of counsel to individual clients.'"); *see also* Ex. 235 (Rubenstein Dep.) at 151:19-21 (explaining that members of the certified class are "clients for some purposes, and they're not clients for other purposes."). Moreover, as courts have recognized, class actions are legally unique situations that do not always neatly fit within the standard framework of ethical rules. *See Rand v. Monsanto Co.*, 926 F.2d 596, 600 (7th Cir. 1991) ("We conclude that DR 5-103(B) is inconsistent with Rule 23 and therefore may not be applied to class actions."). For example, conflicts rules – which are suited to individual clients – are "much laxer" in the class action context. *See* Ex. 235 (Rubenstein Dep.) at 151:23-153:10.

[74] MRPC 1.2 provides:

> a. A lawyer shall seek the lawful objectives of his or her client through reasonably available means permitted by law and these Rules. A lawyer does not violate this Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his or her client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.
>
> b. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.
>
> c. A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
>
> d. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel

clients regarding fee agreements. *See* Mass. R. Prof. C. 1.5; *see also* § III.B, *supra.* But the Master does not mention MRPC 1.5 when discussing the fee-related information that he suggests Labaton was required to convey to the class (presumably, the Master realizes that applying MRPC 1.5(e) to a class situation is unworkable, so he instead relies on general principles from other rules.); *see* Ex. 227 (Joy Dep.) at 154:9-14 (explaining that Labaton had a fiduciary duty to the class, "but not one that encompassed disclosing the fee-sharing arrangement").[75]

In sum, the "Special Master's finding that Mass. R. Prof. C. 1.2 and 1.4 imposed additional ethical obligations on Labaton where there were no legal obligations, and no ethical guidance in Massachusetts reaching a similar conclusion, is unprecedented and inconsistent with Massachusetts case law and lawyer disciplinary authority." [redacted]

> or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

MRPC 1.4 provides:

> a. A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(f), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[75] The Master's argument is also illogical: he contends that MRPC 1.2 and 1.4 required disclosure of the "Chargois Arrangement," which he defines as the agreement to pay Chargois 20% of fees earned in cases where ATRS was a plaintiff. Thus, because MRPC 1.5 does not require disclosing the size of a referral fee unless the client asks, the Master essentially argues that Labaton was obligated to convey more information to the class than it was required to disclose to ATRS, its direct client. *See* MRPC 1.5 cmt. 7A ("The Massachusetts rule does not require disclosure of the fee division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.").

The Court should reject the Master's attempts to cast ill-fitting rules – which do not govern fee disclosures – as the controlling standards in this situation. Instead, the Court should apply Fed. R. Civ. P. 23, which specifically addresses fee disclosures in class actions and did not require disclosure of the Chargois Agreement. *See* Fed. R. Civ. P. 23(h)(1).

D. The Court Has Endorsed the Notice Provided by Labaton.

The Master's arguments regarding the Notice of Pendency of Class Actions (the "Notice") ring especially hollow when considering recent actions taken by this Court. In *Arkansas Teacher Retirement System v. Insulet Corp.*, in which Bernstein Litowitz represents ATRS, the parties conducted a preliminary settlement hearing on March 9, 2018, at which the Court reviewed the draft settlement notices provided by the parties and provided guidance and instruction as to how they should be revised. 1:15-cv-12345 (D. Mass) (Wolf, J.). Although the Bernstein attorneys explained that two law firms which had not appeared in the case would be receiving fees in the form of expenses, the Court did not direct Bernstein to include this information in their class notice. *See* March 9, 2018 Hearing Tr. at 12 (ECF 120) (Ex. R); *see also* p. 9, *supra*. Instead, the Court explained that the notice regarding the fee petition need only include the aggregate amount of fees being requested: "[i]f it's your intention to ask for 25%, all you have to say is the lawyer is going to ask for 25%." *Id*.

Notably, in *Insulet*, the Court directed the parties to use the notice sent by ATRS in this case as a "template." *See* March 9, 2018 Hearing Tr. at 29-30 (Ex. S). Apparently, at that point, the Court may have been aware of the Chargois Agreement.[76] Nevertheless, although the Notice did not describe or mention the Chargois Agreement or any other fee allocation information among any of the counsel in the case, the Court held it up as a model for other law firms. *See id.*

[76] *See* Ex. U (5/30/18 Hearing Tr.) at 73 (the Court, in response to a statement about *Insulet*, explained that it has been "educated" by the State Street case).

The Court's endorsement of ATRS' Notice demonstrates that it provided sufficient information to the class.

VI. LABATON DID NOT BREACH ANY DUTIES TO CO-COUNSEL.

The Master labors to conclude that Labaton breached a duty that it owed to the other firms. The Master claims that Labaton's supposed "breaches of duty to its co-counsel spring from two separate but related sources": (1) its role as Lead Counsel and (2) "settled principles of contract law." R&R at 347. The Master is incorrect. Labaton had no such duties.

A. Labaton Did Not Breach an Ethical or Legal Duty by Not Disclosing the Chargois Agreement.

The Master contends that Labaton, as class counsel, had a general duty to disclose the Chargois Agreement to the other plaintiffs firms in the *State Street* litigation. He does not explain or define the duty that he references, other than stating that Labaton had "a duty to act fairly, efficiently, and economically," and was required to meet a "demanding standard of trustworthiness." R&R at 287-295, 347. The Master describes these generalities as reflective of "important duties," but offers no meaningful analysis or explanation. *Id.* at 287; 289. Nevertheless, he determines (in entirely conclusory fashion) that "general principles of fairness and professional responsibility toward co-counsel, and toward the Court, strongly suggest that Labaton was required to disclose the Chargois agreement." R&R at 290.

Leaving aside the Master's general statements, Labaton had no legal duty to disclose or further describe the Chargois Agreement to the other firms. There was no requirement imposed by the law governing class actions. Ex. 235 (Rubenstein Dep.) at 47:13-15 ("I don't know of anything in class action law that addresses this directly."). Moreover, it is clear that Labaton did not owe any such duty under the Massachusetts Rules of Professional Conduct. Ex. 229 (Wendel Dep.) at 172:1-12 (agreeing that "there is nothing in the Massachusetts Rules of

Professional Responsibility that would require Labaton to fully disclose the nature of its relationship with Chargois . . . to Lieff and Thornton."); Ex. 240 (Green Rep.) at 24 ("The Professional Conduct Rules are meant to protect clients and the public, not to protect lawyers from over-reaching by their colleagues.").

Accordingly, the fact that Labaton or the other Customer Class Counsel did not disclose the payment to Chargois to the ERISA firms was not a violation of the Massachusetts Rules of Professional Conduct or any duty of candor imposed by class action law. *See* Ex. 229 (Wendel Dep.) at 172:1-12; Ex. 240 (Green Rep.) at 24; Ex. 235 (Rubenstein Dep.) at 47:13-15.[77] Likewise, the fact that Labaton did not disclose the full parameters of the Chargois Agreement (i.e., that it was a bare referral fee) to Lieff did not violate any ethical duty or duty of candor. *See id.*[78]

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[77] Although the Master relies heavily on Labaton's role as Lead Counsel and the purported duties that flow from that position, ERISA counsel was not forthcoming about their own fee arrangements. Not one of the three lead ERISA Firms who received a distribution of fees from the Lead Counsel Escrow Fund disclosed complete information to the ERISA plaintiffs regarding their own fee sharing arrangements. *See* Ex. 27 (Keller Rohrback L.L.P.'s Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Second Supplemental Interrogatories) at 7 (explaining that the named plaintiffs approved ERISA counsel receiving 9% of the aggregate award and approved the 25% award being sought, but that "[t]he specific dollar allocations of fees to individual class law firms from the gross fee award was not detailed in any written disclosure to the ERISA named plaintiffs, other ERISA class members, or the ERISA counsel," nor was the amount paid by Keller Rohrback to Hutchings Barsamian disclosed to the other firms);

[78] The Master found that Garrett Bradley was aware of the Chargois Agreement. R&R at 353.

B. Labaton Did Not Breach a Contractual Duty.

The Master's contract analysis, which he uses to justify reallocating an additional $3.4 million to ERISA counsel, should be rejected. At the outset, Labaton is not interested in litigating a contract dispute among the other counsel involved in the *State Street* litigation based on claims instigated by the Master.[79] Nevertheless, because he has injected this element into the case, Labaton is constrained to respond to the Master's faulty reasoning.

As to ERISA counsel, the Master relies on a non-disclosure theory. *See* R&R at 297-99. This is unavailing. It is well-settled that "[i]n the absence of an affirmative misrepresentation, an action for fraud requires 'both concealment of material information and a duty requiring disclosure.'" *Smith v. Zipcar, Inc.*, 125 F. Supp. 3d 340, 344 (D. Mass. 2015) (*quoting Sahin v. Sahin*, 435 Mass. 396, 758 N.E.2d 132, 138 n.9 (Mass. 2001)). In other words, without a duty to disclose, there is no actionable omission. *Id.*

Labaton did not owe a duty to disclose to the ERISA firms. Such a duty arises only in "discrete situations." *See Wolf v. Prudential-Bache Sec.*, 41 Mass. App. Ct. 474, 476, 672 N.E.2d 10, 12 (1996). One such situation is where "there is a fiduciary or other similar relation of trust and confidence" between the parties. *Stolzoff v. Waste Sys. Int'l*, 58 Mass. App. Ct. 747, 763 (2003).[80] Beyond a strictly legal fiduciary relationship (e.g., trustee-beneficiary or attorney-

[79] The Master acknowledges that he is, in effect, creating this dispute, rather than adjudicating one raised by the parties. R&R at 296 ("Cognizant of the limitations of contract principles in this particular context – outside a typical dispute between bargaining parties – contract principles nevertheless inform the Special Master's assessment of the equitable implications of the nondisclosure to co-counsel, and consideration of a court's fiduciary duty to safeguard class settlement funds and its equitable authority to modify and unfair and unreasonable fee allocation among class counsel.").

[80] The Master relies on *DeMarco v. Granite Sav. Bank* for the proposition that a duty to disclose may arise "where the relationship of the parties creates a particular legal or equitable obligation to communicate all facts." 1993 Mass. App. Div. 122, 124 (Mass. App. Ct. 1993). However, that case involved a bank that owed a fiduciary duty to its client. *See id.* ("[T]he Bank assumed the role of the plaintiffs' agent , and all duties incident to such fiduciary role, including the duty of full disclosure to the plaintiffs.") (internal citations omitted).

client), Massachusetts courts recognize a relationship of "trust and confidence" requiring disclosure in the limited circumstance where one party is "dependent on another's judgment in business affairs or property matters," such that the relationship effectively is a fiduciary one. *See Markell v. Sidney B. Pfeifer Found., Inc.*, 9 Mass. App. Ct. 412, 443-44 (1980) (recognizing relationship of "trust and confidence" and attendant fiduciary responsibilities where elderly aunt "had the utmost trust and confidence" in her nephew, who was an attorney, and relied on his "judgment and integrity in committing to him the management of her securities"); *see also Smith v. Jenkins*, 626 F. Supp. 2d 155, 171 (D. Mass. 2009) ("Whether a relationship of trust and confidence exists is a question of fact. . . . The relationship may be found on evidence indicating that one person is in fact dependent on another's judgment in business affairs or property matters."). Neither of these circumstances applies to Labaton.

As the Master notes, Labaton was not the ERISA firms' fiduciary. *See* R&R at 298 n.245. This Court, in the context of a class action fee dispute, found that counsel did not owe a fiduciary duty to an attorney challenging his share of the fee award. *Sobran v. Millstein*, 148 F. Supp. 3d 71, 72 (D. Mass. 2015) ("This Court agrees that the Defendants do not owe Sobran any sort of fiduciary duty."). As noted in that decision, the Massachusetts Court of Appeals has "suggested that there was no 'direct duty of care between co[-]counsel.'" *Id.* (*quoting Bartle v. Berry*, 80 Mass. App. Ct. 372, 379 (2011)). Although the Massachusetts Court of Appeals did not decide in *Bartle* the issue of whether a fiduciary duty exists between co-counsel, it explained that courts in other jurisdictions have "flatly rejected any imposition of a duty of care owed by

one attorney to another to protect an attorney's prospective interest in contingency fees." *Bartle*, 80 Mass. App. at 379.[81]

Nor did Labaton and the ERISA firms share a relationship of "trust and confidence" creating a fiduciary-like duty on Labaton's part. Although the Master notes that Labaton was expected to act "fairly" and demonstrate "trustworthiness" as lead counsel, the relationship between Labaton and the ERISA firms does not resemble the dependent and one-sided dynamic necessary to create a fiduciary-like duty under Massachusetts law. *See, e.g., Markell*, 9 Mass. App. Ct. at 444. Stating the obvious, the ERISA firms – comprised of attorneys and actively negotiating for their share of the fee – were not dependent on the judgment of Labaton to care for them in the way that Massachusetts law requires. *See id.*; *see also, e.g.*, *Adley v. Burns*, No. 16-12265-WGY, 2018 U.S. Dist. LEXIS 81899, at *13 (D. Mass. May 15, 2018) ("While Adley may have trusted in the Defendants' judgment . . . Adley, a fully independent adult and then-active federal agent, was fully capable of making his own business decisions and thus was not dependent on the Defendants' judgment in the same way as the individuals in *Rood* and *Markell*.").

To the contrary, the fee-sharing agreement between Customer Class Counsel and the ERISA firms was a bargained-for contract that (according to Lynn Sarko) was negotiated during a period of "distrust between certain ERISA lawyers and certain customer class lawyers." *See* Ex. 37 (Sarko 9/8/17 Dep.) at 82:8-14; *see also* Ex. 159 (McTigue 9/8/17 Dep.) at 23:18-23; 29:22-24 (discussing "leverage" and "bargaining power" in fee negotiations with Customer Class

[81] *See also Scheffler v. Adams & Reese, LLP*, 950 So. 2d 641, 653 (La. 2007) ("Accordingly, we hold that, as a matter of public policy, based on our authority to regulate the practice of law pursuant to the constitution, no cause of action will exist between co-counsel based on the theory that co-counsel have a fiduciary duty to protect one another's prospective interests in a fee."); *Beck v. Wecht*, 28 Cal. 4th 289, 298 (Cal. 2002) ("The better approach, we conclude, is a bright-line rule refusing to recognize such a fiduciary duty."); *Mazon v. Krafchick*, 158 Wash. 2d 440, 448 (Wash. 2006) (adopting "a bright-line rule that no duties exist between cocounsel that would allow recovery for lost or reduced prospective fees.").

Counsel). Simply put, there was nothing like a fiduciary duty on Labaton's part (or the other Customer Class Counsel) in the fee negotiations with the ERISA firms. Thus, there was no contractual duty to volunteer information about the Chargois Agreement. *See* Ex. 162 (4/13/18 Hr'g. Tr.) at 275 (Lieff's attorney explaining that the Chargois Agreement should not have been disclosed to the ERISA firms because they "have no business in that"); *Sobran*, 148 F. Supp. 3d at 72 (finding no duty of care between co-counsel in a class action); *see also Frontier Mgmt. Co. v. Balboa Ins. Co.*, 658 F. Supp. 987, 990 (D. Mass. 1986) ("[A]n arms length business relationship generally will not give rise to fiduciary duties").[82]

VII. OBJECTIONS TO MASTER'S PROPOSED REMEDIES.

A. The Master's Double-Counting Remedy Should Be Rejected.

Labaton objects to the Master's recommended remedy for Customer Class Counsels' double-counting error on their lodestar petitions – specifically, that the Customer Class Counsel disgorge in equal amounts the entire double-counted time ($4,058,000). R&R at 363-64. The Master acknowledges that the error was "inadvertent," yet the Master concludes that a remedy is nevertheless necessary. *Id.* at 363. The Master is entirely without legal support for his recommendation. *See id.* at 363-64. In fact, the law in the First Circuit is quite clear and for the reasons explained below no disgorgement is appropriate in these circumstances.

First, the Master lauds the work done by Labaton and its team of attorneys. The billing rates for Labaton partners, associates and staff attorneys were reasonable. R&R at 174, 176, 180.[83] Labaton kept contemporaneous time records and the hours presented on its fee petition

[82] The Master's contractual analysis regarding disclosures to Lieff is also incorrect as a matter of law. However, given Lieff's position that it is not seeking relief from Labaton (*see* R&R at 352), Labaton will not press this point.

[83] Unlike Lieff and Thornton, Labaton did not use contract attorneys and its staff attorneys "performed substantive and valuable work beyond simple document review." R&R at 172.

were reasonable. *Id.* at 202, 210. The time spent by Labaton's team running the litigation "was commensurate with its role as Lead Counsel as well as with the complexity and extremely hard-fought nature of the five-year long litigation." *Id.* at 213.

Second, the lodestar submission provided by Customer Class Counsel was a cross-check, not the basis for payment. *See, e.g.*, [redacted]. Thus, the roughly $4 million double-counting error did not result in a $4 million higher fee for Customer Class Counsel. Instead, it merely altered the cross-check that the Court used in determining whether a 25% fee was reasonable. As such, "the critical question is the effect that the lodestar error had on the cross-check." *Id.*

In this case, the double-counting error did not materially affect the cross-check. Correcting for the double-counting error increases the lodestar multiplier from 1.8 to approximately 2.0. [redacted]. It also is still well within the acceptable range in this Circuit. *See, e.g.*, *Harden Mfg. v. Pfizer, Inc (In re Neurontin Mktg. & Sales Practices Litig.)*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (describing a multiplier of 3.32 as well within the appropriate range), *citing* 4 Newberg on Class Actions § 14:7 (4th ed. 2002) ("Generally, multipliers from 1-3 are the norm."). Thus, while the double-counting error was an unfortunate mistake, its effect on the multiplier "in the context of this case was not significant." [redacted]

The Master does not even attempt to explain the basis for his proposed remedy, which has no grounding in law or fact. *See id.* at 363-64. Moreover, the substantial disgorgement

proposed by the Master is disproportionate to Labaton's conduct, which the Master found was unintentional. The Court should reject his illogical and unsupported recommendation that an inadvertent mistake on Customer Class Counsels' lodestar submissions, which did not materially affect the multiplier, should result in a loss equal to the double-counting amount. Courts routinely reduce lodestars (based on attorney rates or other factors) and still conclude that the percentage fee was reasonable based on the adjusted multiplier. [redacted] Here, the 25 percent fee award to Customer Class Counsel is well within the range of reasonable and customary in the First Circuit even when cross-checked against a multiplier of 2. As a result, the Court should reject any disgorgement remedy based on the double-counting mistake.

B. The Master's Chargois Payment Remedy Should Be Rejected.

Labaton objects to the Master's recommendation that the Firm on its own disgorge $4.1 million reflecting the payment to Chargois. *See* R&R at 368-71. For the reasons set forth above, no remedy is appropriate against Labaton for its payment of a referral fee to Chargois as permitted by long-standing Massachusetts law, as consented to by ATRS, and as in compliance with the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct.

Labaton further objects to the Master's recommendation that the vast majority of such payment ($3.4 million out of $4.1 million) be provided to ERISA counsel. This recommendation is unwarranted and inconsistent with the Master's positions during this investigation and in his Report. *See, e.g.*, R&R at 313 ("The Court had the authority . . . to deny any part of the recovery to Chargois . . . and instead to direct that the money intended for Chargois should instead go to the class.").

C. The Master's Recommendation of Ongoing Ethical Supervision By the Court Or Otherwise Should Be Rejected.

Labaton objects to the Master's recommendation that the firm "work with the Court to establish a consulting process that will ensure consistent ethical compliance." R&R at 373. This is both unnecessary and inappropriate.

First, for the reasons explained herein, Labaton complied with the Federal Rules of Civil Procedure and the Massachusetts Rules of Professional Conduct and the custom and practice in the First Circuit as confirmed by its five expert witnesses and by Lieff's expert Professor Rubenstein. Professor Gillers is a lone outlier, propounding arguments regarding fee-sharing that are unprecedented, incorrect, and not "believable."[84] Moreover, because the Master correctly concluded that the double-counting mistake was inadvertent, there is no reason for any ongoing ethics supervision.

Second, it would be highly inappropriate for the Court to inject itself in an ongoing way into an out-of-state law firm's practices and procedures. This would implicate serious attorney-client privilege concerns, among other things. The Master is unsure whether the Court has such authority beyond the present case. *See* R&R at 373. Perhaps as a result of this uncertainty, and in keeping with the profession's tradition of regulating itself, Labaton has not located an example where a federal district court was appointed to have an ongoing role in the conduct of a law firm in circumstances such as these. Nothing in this case warrants the recommendation made by the Master.

[84] See Ex. 235 (Rubenstein Dep.) at 73:7-19 ("I think it was made up after the fact to fit the facts of this case.").

VIII. CONCLUSION

Labaton requests that the Court, following its *de novo* review, reject the Master's factual findings and legal conclusions as objected to herein and also reject to the Master's proposed remedies relating to Labaton.

Dated: June 28, 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 June 28, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

THORNTON LAW FIRM LLP'S MOTION TO IMPOUND
OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Pursuant to Local Rule 7.2, the Thornton Law Firm LLP respectfully moves to impound Thornton Law Firm LLP's Objections to the Special Master's Report and Recommendations and exhibits 1 to 10, 14, and 18 to 24 thereto.

As grounds, the Thornton Law Firm refers to this Court's May 16, 2018 Order stating that the Special Master's Report and Recommendations, the accompanying Executive Summary, and all attached exhibits were temporarily sealed by the Court so that the parties could seek redactions for an unsealed, redacted public version of such documents. *See* Dkt. 223, May 16, 2018 Order. Although the Court has unsealed a redacted version of the Special Master's Report and Recommendations, the accompanying exhibits remain under seal, although such seal was modified by today's Order. *See* Dkt. 356, June 28, 2018 Order. The Thornton Law Firm's Objections to the Special Master's Report and Recommendations quote, cite to, and/or discuss material in the accompanying exhibits to which redactions have been proposed. As further grounds, Thornton Law Firm states that exhibits 1 to 10, 14, and 18 to 24 to its Objections may contain information to which other parties may wish to propose redactions pursuant to the process set forth in All Parties' Response to May 31, 2018 Order Regarding Additional Documents From The Record. *See* Dkt. 259.

WHEREFORE, for the reasons set forth herein, the Thornton Law Firm respectfully requests that the Court impound Thornton Law Firm LLP's Objections to the Special Master's Report and Recommendation and exhibits 1 to 10, 14, and 18 to 24 thereto.

Respectfully submitted,

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Dated: June 28, 2018

Counsel for the Thornton Law Firm LLP

Rule 7.1 Certification

I informed counsel for all parties of this motion. Counsel for Labaton Sucharow, State Street, Zuckerman Spaeder LLP, the Special Master, Lieff Cabraser, and McTigue Law do not object. I did not hear back from any other party at the time filing.

/s/ Joshua C. Sharp
Joshua C. Sharp

Certificate of Service

I certify that the foregoing document was filed on ECF on June 28, 2019 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing.

/s/ Joshua C. Sharp
Joshua C. Sharp

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW **REDACTED COPY**
ARNOLD HENRIQUEZ, MICHAEL T. COHN, WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, STATE STREET GLOBAL MARKETS, LLC and DOES 1-20, Defendants.	No. 11-cv-12049 MLW
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THORNTON LAW FIRM LLP'S OBJECTIONS TO
THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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INTRODUCTION

Following a sixteen-month, $3.8 million investigation, the Special Master has produced a Report and Recommendations (and Executive Summary) that is riddled with factual and legal errors and mischaracterizations of the record, not to mention internal contradictions. Ironically, and disturbingly, in a case in which the Special Master recommends a draconian sanction based on Garrett Bradley's role in "causing" an inadvertent mistake, the number of clear factual and legal mistakes in this Report is stunning. Indeed, if this Report were subjected to the same extreme, misguided analysis being applied to Garrett Bradley's mistakes, the submission of the Report itself would be sanctionable conduct. The Report repeatedly mischaracterizes the applicable law and actual facts of this matter.

Even though the Report concludes that "the $300 million settlement reflected an excellent result for the class members and was the product of the highly professional and skilled work of the class's law firms," R&R at 125, the Special Master goes on to malign the hard-earned reputations of the lawyers who achieved this result with novel theories of ethical improprieties and sanctionable conduct that are unprecedented, unreasonable, and unsupported by evidence. This Court must conduct a thorough *de novo* review and ensure that the facts are all weighed carefully and accurately, and that the law is applied consistently and dispassionately. The Thornton Law Firm is confident that this *de novo* review will reveal what has been evident all along: that Thornton's efforts were instrumental to the excellent result in this case, and that it should not be penalized any more than it already has been for mistakes that are deeply regrettable but inadvertent and immaterial to the attorneys' fee award.

A. Double Counting

This case began after a media inquiry prompted the self-disclosure of inadvertent double counting of certain staff attorneys on the lodestars of the Thornton Law Firm, Lieff Cabraser,

and Labaton Sucharow (collectively, "Customer Class Counsel"). The Special Master's investigation found, as Customer Class Counsel asserted from the very beginning, that the double counting error was an inadvertent mistake. Moreover—and as the Special Master fails to acknowledge—this error has **no effect** on the objective reasonableness of the flat percentage of fund attorneys' fee award. It is important to remember that neither Thornton Law Firm nor any firm in this case was awarded fees for hours worked. The attorneys' fee in this case was, like other cases in this district, a simple percentage of the class recovery amount, 25%. The firms provided hours worked and rates (in lodestars) to the Court not for the purpose of seeking fees for hours worked, but only as a **cross-check** to ensure that the percentage award was reasonable. Of course, this is not to say that firms receiving percentage of fund awards are excused from ensuring that information they submit to the Court is accurate. But the limited function of the lodestar here cannot be ignored. In undertaking a lodestar cross-check, courts look to the "multiplier" (*i.e.*, total lodestar divided by fee award) as the touchstone of their inquiry. If the multiplier is reasonable, the lodestar cross-check is satisfied. Harvard Law School Professor William B. Rubenstein, the author of the leading treatise on class actions, testified in this investigation that multipliers much higher than the one here—indeed, up to 4—are reasonable in cases like this. Rubenstein Dep., 4/19/18, at 216:1-218:4 (SM Ex. 235). In this case, removing the double-counted attorney time from the firms' lodestars increases the multiplier from 1.8 to 2.01. Rubenstein Decl., 7/31/17, at ¶¶ 18, 39-45 (TLF Ex. 1). In other words, although certainly unfortunate, the double counting had no material effect on the fee award. The Special Master himself concedes that "all other things being equal, the attorneys' fee award was fair, reasonable, and deserved." R&R at 6.

As described in further detail herein, the double counting was the result of a very basic error. Customer Class Counsel were prosecuting an extremely complex case that included the review of millions of pages produced by their opponent. As co-counsel, they came to an agreement to share both the costs of this work and the work itself, which also had the effect of spreading the risk should the case never produce a monetary settlement. The Thornton Law Firm, which is smaller than both Labaton and Lieff, does not have document review attorneys. Accordingly, after all three firms agreed to split the cost of the document review work, it paid for its share of the work by reimbursing Lieff and Labaton for staff attorneys housed at their firms or, in some cases, by directly paying legal staffing agencies that supplied the staff attorneys. When the time came to submit lodestars to the Court for purposes of the cross-check, through administrative errors and miscommunication, some of the Thornton Law Firm's staff attorneys' time was included on the other firms' lodestars.

Despite finding that the double-counting was "inadvertent," R&R at 363, the Special Master recommends that the three firms "disgorge" the amount of the double counted time—$4,058,000—such that it can be "returned" to the class. This is the first of many logical fallacies in the Report. In urging "disgorgement" of monies, the Special Master **confuses the function of the lodestar cross-check with a lodestar-based fee**. When, as here, the lodestar is used as a cross-check of a percentage award (which the Special Master does not dispute is how the Court awarded the fee), the proper course, taken by numerous courts in similar circumstances, is for the Court to recalculate the multiplier and reassess whether the higher multiplier is reasonable. Because the attorneys' fees were not awarded on a one-to-one basis, "disgorgement" of an amount that was, in actuality, a piece of a piece of a cross-check, is nonsensical. The Special Master did not attempt to calculate an adjusted multiplier (for this or any other of his

recommendations), perhaps because he recognized that the multiplier would still be well within the realm of reasonableness, and therefore there would be no basis for "disgorgement" of any money relating to the double counting error.

B. Intent

The Special Master's most outlandish finding in his Report is that Garrett Bradley intentionally included staff attorneys on Thornton's lodestar—staff attorneys for whom it paid, but who were housed at, and in some cases employed by, Lieff and Labaton— to deceive Thornton's own co-counsel and the Court. The alleged purpose was either to convince co-counsel to give the Thornton Law Firm a greater share of the aggregate fee award, or to mislead the Court into approving the fee award. Indeed, the Special Master's allegation of intentionality is particularly unbelievable because, as he himself concludes, a simple side-by-side comparison would have revealed (and did ultimately reveal) that the same attorneys were incorrectly listed on more than one lodestar.

Unfortunately for the Special Master, "Facts are stubborn things."[1] Here, the facts show that: (1) Customer Class Counsel jointly developed the plan to share the cost of staff attorney work and the risk of failure, and neither Lieff nor Labaton has ever stated they were deceived; (2) the final fee agreement among counsel was executed **before** the fee declarations submitted to the Court ever existed, thereby negating any possibility that the submitted lodestars had any bearing whatsoever on the fee split among counsel; and (3) the fee agreement was the result of a negotiation among sophisticated and experienced counsel who had expressly agreed to split the risk of jointly funding the staff attorneys. More to the point, the Special Master's finding that Thornton intentionally included staff attorneys on its lodestar in order to deceive co-counsel is

[1] Summation of John Adams, *Rex v. Wemms* (Suffolk Superior Court, 1770).

flatly contradicted by his finding that there was an understanding among some of the attorneys at all three firms that Thornton would include the staff attorneys on its lodestar. *See* R&R at 45 n.27, 363. As all firms had attorneys who understood that Thornton would include the staff attorneys on its lodestar, it is impossible that Thornton was attempting to deceive—or ever could have deceived—Lieff or Labaton.

In terms of any alleged deception of the Court, there was simply no motivation to increase the lodestar submitted to the Court in order to generate a larger fee or to get a greater share of the aggregate fee. The Special Master chooses to ignore a basic fact: by the time the lodestar was submitted to Court in September 2016, all of the lawyers had already agreed that they would seek no more than an aggregate 25% fee[2] and the Thornton Law Firm had already agreed to a final fee split agreement with Lieff and Labaton. Additional lodestar would not have generated any additional fee award for the Thornton Law Firm. The only possible motivation would have been to decrease the aggregate multiplier, which is highly implausible for at least two reasons: (1) the multiplier was already well within the range of reasonableness; and (2) the Thornton Law Firm accounted for only 18% of the total lodestar submitted to the Court, so it would not have been able to "move the needle" on the aggregate multiplier. These are important facts that the Special Master ignores. Further, the Special Master insinuates that there was something wrong about the fact that staff attorneys accounted for "71.5% of all Thornton hours reported." *See* R&R at 45. In fact, Lieff's and Labaton's percentage of hours worked by staff or contract attorneys (83.4% and 81.5%, respectively) significantly exceed Thornton's percentage.[3]

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[2] In fact, the Court remarked during the pre-filing hearing on June 23, 2016 that it "usually start[s] with 25 percent in mind" as the percentage award. 6/23/16 Hr'g Tr. at 15:18-16:2 (Dkt. 85).

[3] In addition, the Special Master has made a mathematical error. The Thornton staff attorney percentage was 68.9% of all Thornton hours reported, not 71.5%. These calculations were made using the lodestars submitted to the Court in September 2016.

In a transparent attempt to generate a soundbite, the Special Master and his counsel quote repeatedly (and entirely out of context) an email in which Garrett Bradley states that paying for additional staff attorneys is the "best way to jack up the loadstar [sic]." The Special Master knows that there is nothing wrong with the concept expressed in the email, which is from February 2015 (well over a year before the fee declaration or lodestar was filed with the Court) and contains an invoice for staff attorneys *from Labaton*. The concept was that if the Thornton Law Firm bore more risk by investing in additional staff attorneys vis-à-vis the other law firms (and pursuant to their agreement), Thornton would eventually be able to pursue a greater share of the fee vis-à-vis co-counsel. This would in no way increase the total lodestar submitted to the Court or the amount of fees the class paid to its attorneys. There was always only a finite number of documents to be reviewed and reviewers who could review those documents; the only difference was, for purposes of spreading the internal risk among the firms, which firm would be financially responsible for which staff attorneys. In other words, as is clear from the context, Bradley uses "lodestar" as shorthand for the number of hours worked and resources expended *among counsel* for purposes of dividing the fee *among counsel.* It is typical of the Special Master and his counsel's approach that they choose to ignore this context (which is clear from the record) in order to generate a catchy—albeit totally misleading—soundbite.

Ultimately, the Special Master is left with a strained theory by which the Thornton Law Firm deceived co-counsel and the Court not by inflating hours worked—the Special Master found all of the hours worked by Thornton Law Firm attorneys reasonable and sufficiently supported—but by correctly listing on its lodestar staff attorneys that the Thornton Law Firm paid for pursuant to an agreement among co-counsel. As the Special Master acknowledges, names of the staff attorneys were listed on the lodestars such that anyone who placed the

lodestars side by side would immediately realize that certain attorneys' time had been double counted. The idea that this could be intentional deception—an idea which the Special Master advocates —is ludicrous.

C. The Boilerplate Affidavit

Failing to find any true evidence of deception—because there was none— the Special Master rests his case for Rule 11 sanctions and professional misconduct on immaterial misstatements in a boilerplate affidavit that was provided to all counsel by Labaton. Bizarrely, the Special Master recommends sanctions only for Garrett Bradley even though almost every law firm in this matter used an identical boilerplate affidavit and therefore could be held responsible—under the Special Master's dubious theories—for similar misstatements. Even stranger, after characterizing the Chargois matter as "[t]he most troubling issue in this case," R&R at 303, the Special Master declines to recommend any sanctions or disciplinary action related to Chargois, but recommends a massive sanction of Garrett Bradley for his role in an inadvertent error that was obvious to anyone who closely read the submissions to the Court.

Garrett Bradley's statements are described in further detail herein, but as an example, the Special Master faults the Thornton Law Firm for stating the rates in the lodestar "have been accepted in other complex class actions." The Special Master's criticism is that the rates for the *individual* staff attorneys listed in the Thornton Law Firm's declaration had not previously been accepted in class actions for those *individual* staff attorneys. Of course, the sentence is intended to convey that the rates for the staff attorney *role* had been accepted in other class actions—which is true— and not that particular staff attorneys had previously performed document review for those same rates in other class actions. The Special Master alleges "deception" with respect to Garrett Bradley, but his investigation made no attempt to inquire whether each of the 20 staff attorneys listed in Lieff's affidavit and each of the 35 staff attorneys listed on the Labaton

affidavit (as well as all of the attorneys in the ERISA firms' declarations) had ever been listed on a lodestar at the same rate.

The fact of the matter is that the rates for Thornton Law Firm staff attorneys—which ranged from $425 to $500 with a weighted average (overall fees divided by overall hours) of $428— was **lower** than both the range and weighted average of the Lieff staff attorneys, $415 to $515, and $438, respectively. As Prof. Rubenstein testified, rates of up to $550 have been accepted for staff attorneys in class actions. Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1). What is more, the Special Master himself found that the staff attorneys' rates in this matter—which for Lieff ranged up to $515—were reasonable. *See* R&R at 176-81.

In what appears to be the crux of his case against Garrett Bradley, the Special Master presents the Court with an opinion from the Rhode Island Supreme Court, *In re Schiff*, which he claims is "eerily similar" to the case at bar. *See* R&R at 244. Nothing can be further from the truth. In *Schiff*, there were not immaterial misstatements in a boilerplate affidavit, but a "grossly inflated" lodestar in a fee-shifting case. The attorney in *Schiff* sought costs and fees 47 times greater than amount of her client's recovery—4,000 billable hours for a case that was "based on a relatively simple sequence of events occurring over a limited period of time." The Court found that "The billing sheets submitted by respondent sought reimbursement for work unrelated to the case [and] *sought payment for time not worked*." *Matter of Schiff*, 677 A.2d 422, 423 (R.I. 1996) (emphasis added). In this case, however, the Special Master has made no finding whatsoever of false or unreasonable billings—indeed, to the contrary, he has concluded that "the total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable." R&R at 216. The extensive reliance on *Schiff* is indicative of the fact that the Special Master and his

counsel have acted, and are acting, as overly-aggressive litigants who are accusing their perceived adversaries of not being candid with the Court.[4]

D. Michael Bradley

The Special Master finds that "the total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable," R&R 217, and that such time "is supported by reasonably reliable contemporaneous time records." R&R at 366. The Special Master's concern is not with hours, but with Michael Bradley's rate as listed on the lodestar ($500 per hour), because Bradley's work "most closely resembles that of a junior level associate." R&R at 196. Yet the reduced rate that he argues should apply to Michael Bradley's work—$250 per hour—is less than the rate used for *any* associate in this case, by *any* of the nine law firms that submitted fee declarations. It also is less than the lowest end of the range of rates for associate work that the Special Master himself concludes to be reasonable elsewhere in the Report ($325 to $725 per hour). R&R at 164. Moreover, it is substantially less than the $415 per hour rate of another staff attorney who performed exactly the same work and, like Michael Bradley, performed it remotely. There is no basis for reducing Michael Bradley's rate by 50% when the Special Master himself found that staff attorney rates of up to $515 were reasonable in this very case. *See infra* § VII. Even if Michael Bradley's rate is reduced (whether to the rate of the other Thornton Law Firm staff attorneys, or to the $415 per hour rate of the staff attorney who performed exactly the same work, or to the Special Master's arbitrary $250 per hour), the effect on the lodestar and multiplier, as discussed herein, is completely immaterial to the attorneys' fee award.

E. Contract Attorneys

[4] As further detailed herein, the Report and Recommendations is replete with mischaracterizations of the record and propositions that unreasonably stretch the meaning of their purported supporting authorities.

The Special Master recommends that the time agency/contract attorneys expended reviewing State Street's documents—the same work performed by staff attorneys—should be listed as a "cost" rather than as a legal service on Customer Class Counsel's lodestars. The Special Master has **failed to identify a single case** holding that contract attorneys must be charged as expenses. When Customer Class Counsel provided the Special Master with various case law demonstrating that agency/contract attorneys—who are, in terms of work performed and qualifications, entirely indistinguishable from firm-hired staff attorneys—are properly included in fee applications at an hourly rate, the Special Master said that he would simply agree to disagree with those courts. But he has done more here, for he falsely asserts that "legal and ethical rulings have not provided definitive guidance on this interesting issue," R&R at 187, which **is simply not true**. Case law and ethics opinions strongly suggest that it is not only permissible, but common practice, to include contract attorneys in the lodestar. *See infra* § VI. The Special Master cites a particular case, *In re Citigroup*, in support of his statement that courts "that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates." R&R at 183. In fact, *Citigroup* specifically *drew* this distinction, recognizing that "a contract attorney's status as a contract attorney—rather than being a firm associate—affects his **market rate**." 965 F. Supp. 2d at 395 (emphasis added). Whatever the Special Master's personal policy preference may be in terms of how work performed by contract attorneys should be accounted for, it is clear that there is no legal or factual basis for his recommendation to this Court that contract attorney work be charged as a cost.

Accordingly, for the reasons set forth more fully below, this Court should reject the Special Master's recommendations. His Report, which relies in large part on the ever-changing

musings of a self-proclaimed "legal expert" from NYU Law School, is replete with clearly erroneous legal and factual findings and should not be the basis for taking any further action against the attorneys in this case. Besides the substantial expense of the investigation itself (as well as lost opportunity costs), the attorneys have already suffered serious reputational harm, and there is simply no fair or legally sensible reason to continue punishing attorneys who achieved such an excellent result for the class.

ARGUMENT

I. The Double Counting Error Was Inadvertent And The Special Master's Recommendation Of $4 Million Disgorgement Is Unjustified

Although the parties to this investigation dispute many issues, one thing on which everyone agrees is that counsel achieved an outstanding result for the class. *See* Exec. Summ. at 7 ("By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class' law firms, a view with which the Special Master wholly agrees.").

Through their diligent and hard-fought prosecution of this matter, Plaintiffs' counsel ensured the return of hundreds of millions of dollars to pension funds subjected to State Street Bank and Trust's standing instruction foreign exchange ("FX") trading practices. The Thornton Law Firm, which brought the first cases involving standing instruction FX trading, played a critical role in this case from inception to resolution, bringing to bear substantial expertise in the subject matter as well as developing the damages theory for the case.

The Thornton Law Firm and its co-counsel also incurred substantial risk in bringing suit against a large, well-funded bank with no guarantee of any recovery. In approving the 25% fee at a hearing on November 2, 2016, the Court remarked:

> [I]n this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain.
>
> The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that.

11/2/16 Hr'g Tr. at 36:2-14 (SM Ex. 78).

In its ruling on November 2, 2016, the Court identified the factors it considered in approving a 25% fee: (1) the reasonableness of the multiplier produced by the lodestar cross-check (1.8); (2) the Court's tendency to award between 20% and 30% in class action common fund cases; and (3) consideration of awards in comparable cases, and, in particular, the reasonableness of the percentage in the context of other First Circuit cases with comparable settlements (*i.e.*, settlements in the $250 million to $500 million range). *Id.* at 35:3-36:2. The Court's approval of the 25% fee was consistent with its initial remarks during the pre-filing hearing on June 23, 2016, at which the Court stated that it "usually start[s] with 25 percent in mind" as the percentage award. 6/23/16 Hr'g Tr. at 15:18-16:2 (Dkt. 85).

Throughout the investigation and in his Report, the Special Master likewise recognizes the tremendous efforts of counsel that produced this substantial settlement. Noting the "risks, complexities and legal challenges inherent in the litigation," the Special Master concludes in his Report that the skill and dedication of counsel produced "an excellent result for the class," and was an "undeniable accomplishment" by counsel engaged in "fine and highly effective lawyering." R&R at 6-7. Specifically as to Thornton, the Special Master finds that the rates listed for Thornton partners and associates were justified and reasonable in light of the complexity of the case, R&R at 175; that the number of hours listed for Thornton partners and

associates was justified and reasonable, R&R at 216 ("[T]he total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable"); and that the number of hours listed for Michael Bradley also was reasonable. R&R at 217 ("[T]he total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable").

A. The Double Counting of Staff Attorney Hours Was Inadvertent And Not Thornton's Fault

As the Special Master concludes, and as all firms confirmed numerous times during the investigation, the double counting errors made in the fee declarations submitted to the Court were inadvertent. R&R at 7, 352, 363. Without question, the mistakes in the fee declarations should have been caught before filing. But the failure to do so was just that: a mistake. Within two days of realizing the double counting, counsel submitted a letter to the Court alerting it to the errors. Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). As explained below, these inadvertent errors in the lodestar calculation, while unfortunate and regrettable, have no impact on the reasonableness of the attorneys' fees awarded pursuant to the percentage of fund method in this case. The impact of these mistakes on Customer Class Counsel already has proven significant, costly, and lasting. Further redress for these inadvertent errors would be needlessly punitive, and is unwarranted.

B. The Proposed "Disgorgement" of $4,058,000 Is Unjustified And Misapprehends the Function of the Lodestar Cross-Check

Despite expressly finding that the errors in the fee declarations were inadvertent, the Special Master asserts that the three firms must "disgorge[]," in equal shares, the amount at issue ($4,058,000),[5] and that the amount should be "returned" to the class. R&R at 364. The Special

[5] The exact amount at issue as a result of the double counting error is $4,058,654.50. *See* Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). However, the Special Master uses a rounded amount ($4,058,000) throughout his Report. Accordingly, undersigned counsel uses the rounded figure ($4,058,000) herein.

Master's terminology reveals the logical fallacy that underlies his conclusion. The attorneys were not paid $4,058,000 that otherwise would have gone to the class. The Special Master's recommendation that Customer Class Counsel "disgorge[]" this amount is based on a fundamental misunderstanding of how attorneys' fees were awarded in this case, and specifically of the function of the lodestar cross-check.

As the Court knows, and as the Special Master acknowledges, R&R at 143-46, the attorneys' fee award in this case was calculated using the percentage of fund method (also called the "common fund" method), which is typically used in cases in the First Circuit.[6] Under the percentage of fund method employed by the Court in this case, the lodestar numbers submitted by counsel **are not the basis for counsel's fee award**; the percentage granted by the court is. *See* Rubenstein Decl., 7/31/17, at ¶¶ 13, 17, 18 (TLF Ex. 1); Rubenstein Decl., 6/20/18, at ¶¶ 18-19. The lodestar cross-check is used **only** as a means of verifying the reasonableness of the percentage of the recovery being awarded to the attorneys. Rubenstein Decl., 6/20/18, at ¶ 18-19. If there are errors in the lodestar, the only inquiry the court must perform is to analyze the revised lodestar number and its impact on the multiplier. Rubenstein Decl., 6/20/18, at ¶¶ 19-20;[7] *see also* Rubenstein Decl., 7/31/17, at ¶ 15 (TLF Ex. 1) ("[U]sing a lodestar cross-check

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6 *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295 (1st Cir. 1995) (cited in the Report at p. 144); Rubenstein Decl., 7/31/17, at ¶¶ 13, 17 (TLF Ex. 1).

7 Professor Rubenstein explains the relevant authority as follows: *In re Polyurethane Foam Antitrust Litig.*, 168 F. Supp. 3d at 1013 (reducing lodestar in cross-check in part because of contract attorney rate and then re-assessing acceptability of new multiplier); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("[E]ven if the Court were to reduce the Plaintiffs' lodestar to reflect the contract attorneys' lower billing rates, the multiplier that would result would still be well within an acceptable range. . . . A lodestar reduction is unnecessary when the effect on the multiplier is not material."); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 378 (S.D.N.Y. 2013) ("If the Court reduces the blended hourly rate for staff attorneys to $300—a rate that appears to be either appropriate or slightly high—the modified lodestar is approximately $73.5 million. Such a reduction would make the multiplier closer to 1.59. Assuming even a blended hourly rate for staff attorneys of $250—perhaps somewhat on the low end—the result is a modified lodestar of approximately $65 million and a multiplier of nearly 1.8. All of these figures are within the range of reasonableness. The lodestar cross-check has therefore performed its function, satisfying the Court that an award of 16%—which it has already determined represents a reasonable percentage of the settlement fund—adequately compensates plaintiffs' counsel for their time and effort based on

enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall."). Errors in the lodestar—and particularly if they are inadvertent and self-disclosed—do not warrant return of monies to the class as long as they do not have a material effect on the multiplier and the multiplier is still reasonable. Rubenstein Decl., 6/20/18, at ¶¶ 19-20. The Special Master does not seem to understand this concept. The First Circuit is **not** a lodestar-based jurisdiction, where fees are awarded solely on the attorney's hours and rates. Yet the amount the Special Master recommends be "disgorged" is the amount of the **lodestar** that was inadvertently double counted. When the fee is *percentage-based*, as it was here—which the Special Master does not dispute (Exec. Summ. at 7)—it is black-letter law that the attorneys are not paid dollar-for-dollar for time they submit to the Court. Instead they are paid a percentage of the recovery in the case, with lodestar information only supplied to cross-check the reasonableness of that percentage. As long as the percentage remains reasonable, the fee is reasonable. The Special Master repeatedly admitted that the fee in this case was reasonable and therefore he has no basis—nor is there basis in logic or case law—to recommend "disgorgement" of monies based on inaccurate lodestar numbers.

Indeed, the Special Master's recommendation that the firms "disgorge[]" an amount corresponding to errors in their lodestar submissions is incomprehensible given the role of the lodestar in the fee award in this case. To properly measure the effect of the lodestar mistake, it is only necessary to revisit the two-step lodestar cross-check inquiry. This means reducing the raw

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estimations of reasonable market rates and factoring in an appropriate multiplier."); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009) ("[I]f the charges for the contract attorney time were decreased, the multiplier in this case would still be a reasonable multiplier."); *In re Royal Dutch/Shell Transp. Sec. Litig.*, No. CIV.A. 04-374 JAP, 2008 WL 9447623, at *32 (D.N.J. Dec. 9, 2008) ("Even if Lead Counsel reduces plaintiffs' counsel's total lodestar by $7,287,396.25 (the lodestar of the discovery attorneys employed by Lead Counsel)—from $56,891,317.50 to $49,603,921.25—that reduction increases the multiplier only from 1.002 (based upon the total fee of $57 million) to 1.15, an immaterial difference.").

lodestar to account for the errors, recalculating the multiplier, and then reassessing whether that multiplier is still reasonable in the context of the percentage award. Numerous courts in cases in which lodestars have been adjusted post-filing have addressed the issue this way.[8]

This reassessment, as applied to the attorneys' fee award in this case, undeniably shows that, even assuming *arguendo* that *all* of the Special Master's proposed reductions to the overall lodestar should be made, the 25% fee award remains reasonable and entirely justified by the lodestar cross-check:

- Reducing the lodestar by the double counted time ($4,058,000) results in a multiplier increase from 1.8 to **2.01**. Rubenstein Decl., 7/31/17, at ¶¶ 18, 39-45 (TLF Ex. 1).

- Reducing the lodestar by (1) removing the double counted time and (2) adjusting the lodestar to reflect contract attorney time as an expense results in a multiplier increase from 1.8 to **2.07.** Rubenstein Decl., 6/20/18, at ¶ 19.

- Reducing the lodestar by (1) removing the double counted time, (2) adjusting the lodestar to reflect contract attorney time as an expense, and (3) adjusting Michael Bradley's hourly rate to $250 results in a multiplier increase from 1.8 to **2.07.**[9]

Every one of these hypothetical multipliers is well within the range of reasonableness for a class action case of this size, duration, and complexity. Lodestar cross-check multipliers as high as 4 have been accepted in similar cases. *See* Rubenstein Decl., 7/31/17, at ¶¶ 39-45 (TLF Ex. 1) (concluding that a multiplier of 2.01 "falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past" and "fully supports the reasonableness of the fee the Court awarded Counsel in this matter"); *see also* Rubenstein Dep., 4/9/18, at 56:24-57:2, 216:1-218:4 (SM Ex. 235) (concluding that "for what the attorneys accomplished here a two multiplier is a perfectly reasonable—in fact, quite a modest fee for them," describing

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8 *See supra* footnote 7.

9 The value of the double counted time is taken from the Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178). The contract attorney adjustment is taken from the Report and Recommendations at 367.

the factors underscoring the multiplier in this case, and opining that "**I wouldn't have been surprised in a 300-milllion-dollar settlement to see a three or a four multiplier.** I should add multipliers are often higher the higher the settlement. And so I wouldn't have been surprised, and I think it would have been justified to see a three or four.") (emphasis added); Rubenstein Decl., 6/20/18, at ¶ 19 (finding that a 2.07 multiplier, which results if double-counted and contract attorney time are removed, is "fully reasonable, indeed modest").

The Special Master's proposed disgorgement of the lodestar cross-check errors misapplies the applicable law and would result in an unfair and unsupportable result. The inadvertent lodestar errors simply do not materially affect the result of the lodestar cross-check and, therefore, do not affect the reasonableness of the fee.

C. Thornton Is Not Responsible For The Inadvertent Double Counting

The Special Master concludes that Labaton bears "ultimate responsibility" for the double counting because, as lead counsel, it had a duty to cross-check the individual fee petitions of the firms, but failed to do so. Exec. Summ. at 18-19.

Despite concluding that Labaton bears ultimate responsibility for the inadvertent double counting errors, the Special Master recommends that Labaton, Lieff, and Thornton should equally share the remedy he proposes to address the errors, *i.e.*, the "disgorgement" of $4,058,000. As discussed above, disgorgement is unjustified and misapprehends the function of the lodestar cross-check. The double counting errors simply have no material effect on the cross-check, and the multiplier that results when those hours are excluded is well within the range of reasonableness.

The Special Master contends that a remedy is necessary to address the inadvertent double counting, but imposing that remedy on Thornton would be unjustified for reasons additional to the ones stated above. The Special Master attributes the double counting mistakes in the fee

declarations to two core failures: (1) Labaton's failure to inform its partner preparing the omnibus fee declaration, Nicole Zeiss, of the firms' agreement to share the cost of staff attorneys; and (2) the failure of the firms to reduce their agreement regarding the staff attorneys to writing. R&R at 363.

The Special Master also concludes that, as to the firms' agreement to share the cost of staff attorneys, Thornton reasonably understood that it would list the staff attorneys for whose work it paid in its lodestar, and that "at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate[.]" *See also id.* at 220-21, 363 (Special Master concluding "there is sufficient evidence in the record to find that at least some attorneys at both Labaton and Lieff believed that the staff attorneys paid for and allocated to Thornton would be included on Thornton's lodestar petition.").[10]

The Special Master further notes that correspondence contemporaneous with the drafting of the November 10, 2016 letter to the Court, and the November 10, 2016 letter itself, showed Labaton and Lieff acknowledging that the inadvertent double counting was in **their** lodestars, not Thornton's. R&R at 220-21, n.174 (citing contemporaneous email correspondence from Chiplock to Goldsmith, 11/9/16 (SM Ex. 261) and Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)).

Despite these findings, the Special Master concludes that Thornton shares in the "responsibility" for the double counting errors because Garrett Bradley did not adequately describe the firms' staff attorney agreement in his declaration. Exec. Summ. at 15-16. The

[10] [redacted]

statements in Garrett Bradley's declaration are discussed in detail elsewhere in this response. *See infra* § III(B). The Special Master concludes that Thornton shares responsibility for the "administrative confusion" that led to the double counting because it did not modify the boilerplate language in the Labaton-prepared template declaration. Exec. Summ. at 19. This conclusion is wholly speculative, without any basis in the Record, and logically inconsistent.

The Special Master concludes, without **any** supporting evidence, that "[i]t is probable that, had Thornton's petition contained fully truthful and accurate statements describing the actual affiliation and rates of the loaned staff attorneys and agency attorneys, Labaton Settlement Attorney Nicole Zeiss, or the Court, would have been alerted that something was amiss and thereby have detected the double-counted hours." Exec. Summ. at 16. The Special Master drew this conclusion (and went so far as to deem it "probable") despite having never asked Nicole Zeiss—who sat for two depositions in this investigation—what would have happened if Thornton had modified the boilerplate language.

Moreover, this wholly speculative assertion is contradicted by the Special Master's own conclusion that Labaton "fail[ed] to perform a side-by-side comparison" of the declarations. R&R at 56 n.39. It is difficult to imagine, and impossible to conclude based on any fact, that modified boilerplate language would have led to a different result when a basic side-by-side comparison was not done.[11] If a simple comparison of the fee declarations would have revealed the double counting, as the Special Master concludes, it was Labaton that should have, but did not, perform this comparison. *See* Exec. Summ. at 19.

[11] Indeed, Nicole Zeiss testified that, while some firms changed the language in their fee declarations, she did not discuss any changes with any firm, and does not recall whether she noticed the changes before filing, or only after the fact. Zeiss Dep., 6/14/17, at 42:22-43:14 (SM Ex. 79).

The Special Master also concludes that because Labaton did not circulate the individual declarations among the group, the other law firms were not in a position to notice and rectify the double counting.[12] *See* R&R at 224. Though the Special Master mentions only Lieff and ERISA Counsel, the record is clear that Thornton also did not see any other firm's fee declaration before Labaton filed the omnibus fee declaration—and therefore Thornton, like Lieff and ERISA Counsel, did not have an opportunity to identify the double counted time before filing. Evan Hoffman of Thornton confirmed this in response to the Special Master's explicit inquiry during his deposition:

> THE WITNESS: And then it was sent back to Labaton for their review and maybe an edit or two and that was the last we saw of it until it was submitted on ECF for the final, when it was actually given to the judge.
>
> JUDGE ROSEN: You never saw Labaton's fees or Lieff's fees in the declaration?
>
> THE WITNESS: Correct.
>
> JUDGE ROSEN: In the actual fee declaration, did you ever see their fees?
>
> THE WITNESS: No, not until it was already filed.
>
> JUDGE ROSEN: Not until it was filed?
>
> THE WITNESS: Correct.

Hoffman Dep., 6/5/17, at 94:18-95:10 (SM Ex. 63).[13]

The inadvertent double counting of staff attorney time was undoubtedly a regrettable mistake. The evidence in the record, however, does not support holding Thornton accountable

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[12] The Special Master uses the term "double-billing," not "double counting," here. R&R at 224. To be clear, there was no "billing" in this case. This repeated wording is a conscious choice of the Special Master and further demonstrates his fundamental misunderstanding of the purpose of the lodestar cross-check in a percentage of fund scenario. Rather, as described in detail *infra*, the submission of fee declarations showing the time spent on the case was made in conjunction with the lodestar cross-check that was used to support, **not replace**, the percentage of fund method by which attorneys' fees were awarded.

[13] The Special Master does not mention this piece of relevant testimony in the Report, wrongly inferring, and suggesting that the Court infer, that Thornton had an opportunity to review the other firms' fee declarations prior to filing.

for these errors. To the contrary, Thornton acted consistent with the firms' agreement regarding staff attorneys. Even if there was imperfect knowledge of this agreement within the other law firms, due to compartmentalization or other issues, it does not mean that Thornton acted unreasonably. As the November 10, 2016 letter to the Court and contemporaneous correspondence stated, the inadvertent double listing of these staff attorneys' time occurred on the Labaton and Lieff lodestars, not on Thornton's. R&R at 220-21, n.174 (citing contemporaneous email correspondence from Chiplock to Goldsmith, 11/9/16 (SM Ex. 261) and Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)). And as the Special Master also concludes, the duty to review and cross-check the individual petitions belonged to Labaton, which, as lead counsel, was responsible for drafting and submitting the omnibus fee declaration to the Court. It is notable and illogical that, unlike his suggestion for Thornton and Garrett Bradley, the Special Master proposes no Rule 11 sanction for Labaton despite finding that Labaton "was ultimately responsible for preparing an accurate and reliable fee petition that the Court could rely upon" and failed in its responsibility to ensure the accuracy of the papers it filed with the Court. Exec. Summ. at 19.[14]

As a result of the double counting mistake and this ensuing investigation, the law firms, Thornton included, have no doubt identified areas where there is room for improvement. To that end, the firms jointly proposed a number of best practices recommendations in a submission to the Special Master that, for reason unknown, the Special Master does not include as an exhibit to the Report. [redacted]

[14] Such sanction would, of course, be unjustified.

[redacted] That did not happen here, and is deeply unfortunate. But hindsight is 20/20, and in light of the record evidence demonstrating that Thornton is not responsible for the double counting, any disgorgement is unjustified.

D. The $425 Per Hour Rate Used By Thornton For Staff Attorney Work Is Reasonable And Justified

The Special Master's Report endorses, with two exceptions, the hours and rates in the firms' fee declarations. The Special Master concludes that, with two exceptions, "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." Exec. Summ. at 21-22; R&R at 365-67. The two exceptions are the rate of Michael Bradley and the rate of the agency-employed "contract" attorneys, both of which are addressed *infra* at sections VI and VII.

The Recommendations section of the Report does not recommend any adjustment to the $425 per hour rate assigned to the staff attorneys in Thornton's fee declaration, and none should be applied. However, in the narrative section of the Report, the Special Master states: "Although the Special Master finds nothing unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms, an adjustment of the amounts billed in Thornton's lodestar for staff attorneys will be required."[15] R&R at 181. This sentence is accompanied by a footnote that reads: "Fees for these staff attorneys will be calculated at the same rate as they were billed on the Labaton and Lieff petitions." *Id.* at n.150.

[15] The terminology used here—"billed in Thornton's lodestar"—demonstrates the Special Master's continued confusion of lodestar as the basis of a percentage award cross-check with lodestar as the direct basis for a fee.

Although the Special Master does not ultimately recommend any adjustment to the lodestar on this basis, because his earlier remarks in the narrative section of the Report may be read to call for a reduction, Thornton addresses the reasonableness of the $425 per hour rate as follows.

First, the $425 per hour rate assigned to staff attorney hours by Thornton is an empirically reasonable rate, within the range of court-accepted rates for staff attorney work. In his expert declaration submitted to the Special Master with the Law Firms' Consolidated Submission on August 1, 2017, Harvard Law School Professor William Rubenstein cites empirical research showing that courts have accepted staff attorney rates in the range of $250-$550 per hour in a dozen class action cases decided since 2013. *See* Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1); *see generally id.* at ¶¶ 34-38.

Moreover, contrary to the Special Master's assertion that this rate evidenced the "unempirical nature" of the rates used by Thornton, R&R at 70, the Southern District of New York accepted $425 per hour as a rate for staff attorney work in **another FX trading class action case**, *In re Bank of New York Mellon Corp. Forex Transactions Litigation*,[16] a year before the fee declaration filings in this case.

Second, Thornton's use of a $425 per hour rate was reasonable under the circumstances here, and was based on its understanding of previously accepted rates in other litigation and its discussions with co-counsel.[17] Specifically, the Special Master finds that Thornton understood, at the time of the filing of the State Street fee application, that the $425 per hour rate had been

[16] Referred to herein as *BNY Mellon*.

[17] *See also* Hoffman Dep., 6/5/17, at 59:5-12 (SM Ex. 63) ("It was suggested by Dan Chiplock of Lieff and Mike Rogers of Labaton, that we should use for purposes of fee petition rates that had been approved by Judge Kaplan in the Mellon case for the reviewers, which was $425 an hour and that was what was put in on Thornton's end.").

used by Lieff and had been accepted by the Court in the *BNY Mellon* case. R&R at 70. The Special Master further finds that Thornton believed Lieff to be suggesting this rate in the State Street case, R&R at 180 n.146, as Lieff itself surmised in deposition testimony referencing an email exchange between Lieff, Labaton, and Thornton after the staff attorney work was completed:

> And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425.

Chiplock Dep., 6/16/17, at 184:20-25 (SM Ex. 10) (discussing 9/11/15 Email, LCHB-0052627 (SM Ex. 192)).[18]

Without any other basis, the Special Master unreasonably suggests that the passage of time between this email (September 2015) and the filing of fee declaration (September 2016) makes the email less reliable. Such a conclusion ignores the fact that the staff attorneys' work on the case was fully completed as of July 2015, when the parties reached an agreement in principle to settle the case. Although it took more than a year for the parties to finalize the settlement and appear before the Court, the agreement in principle and thus the conclusion of substantive work on the matter, including the document review, was reached in the summer of 2015. Accordingly, it is neither surprising that counsel were discussing their eventual lodestar petitions at this time in 2015, nor is it unreasonable for Thornton to have relied on this information in preparing its fee declaration. Because Labaton did not circulate the fee declarations among the parties before filing, R&R at 224, Thornton did not know that Labaton and Lieff were applying staff attorney rates different from $425 per hour. While perhaps a more perfect practice would have been to

[18] For unknown reasons, the Special Master does not cite this deposition testimony in his discussion of the issue, but it immediately follows the portion of Mr. Chiplock's testimony he does cite. *See* R&R at 180 n.146 (citing to Chiplock Dep., 6/16/17, at 182:5-183:5 (SM Ex. 10)).

exchange this information prior to filing, Thornton reasonably relied on an established, court-accepted hourly rate. It did not simply pluck $425 per hour out of thin air.

Third, applying the Special Master's proposed formula for adjusting the $425 per hour rate (*i.e.*, that the rates on the Labaton and Lieff petitions should be used instead (R&R at 181 n.150)) would not result in any material difference to Thornton's lodestar, much less the overall lodestar or the multiplier resulting from the cross-check. As to staff attorneys overlapping with Labaton, reducing their rates on Thornton's position would result in a cumulative reduction of $412,627 from Thornton's lodestar (5.5% of the Thornton lodestar submitted to the Court, and less than 1% of the overall lodestar submitted to the Court). As to staff attorneys overlapping with Lieff, using Lieff's rates for the staff attorneys on Thornton's lodestar would result in no reduction.[19]

Finally, reducing Thornton's lodestar to adjust the rates as suggested by the Special Master would result in an unjustified double reduction, as overlapping time billed at a higher rate was already accounted for in the double counting reduction. In the November 10, 2016 letter to the Court alerting it to the double counting errors, David Goldsmith of Labaton explained that, "[w]hen a given SA [staff attorney] had different hourly billing rates, we removed the time billed at the higher rate." Goldsmith Ltr. to Ct., 11/10/16, at 3 (SM Ex. 178). This approach was not taken because the firms believed that the time on Thornton's lodestar was less legitimate—to the contrary, at least "some attorneys at Labaton, Lieff and Thornton independently assumed that Thornton would claim the SA time on its lodestar." R&R at 220. Rather, the firms took a lowest-rate approach to reducing the overlapping time as a conservative measure.

[19] This is because, as the Special Master notes, Lieff billed two of the overlapping staff attorneys at a rate of $515 per hour. R&R at 180 n.147.

The Special Master at one point suggests that Thornton's use of a rate of $425 per hour for staff attorneys was so unreasonable as to warrant "adjustment" of Thornton's lodestar. Ultimately, perhaps in recognition of the empirical evidence and record evidence that $425 per hour was a reasonable rate, or perhaps having calculated the *de minimis* effect such adjustment would have—or perhaps both—the Special Master does not recommend any reduction to Thornton's lodestar on this basis. Indeed, the Special Master concludes that the hours and rates in Thornton's lodestar (excepting the rates for Michael Bradley and contract attorneys) are "reasonable and accurate." Exec. Summ. at 21-22; R&R at 365-67.

II. Garrett Bradley Did Not Intentionally File A False Declaration

The Special Master's erroneous conclusion that Garrett Bradley intentionally lied to the Court relies on a blatant mischaracterization of the factual record and a fundamental misunderstanding of the fee allocation among counsel.

A. There Was No Motivation To Deceive Co-Counsel

The Special Master's primary "support" for the proposition that Garrett Bradley intentionally lied to the Court is what he perceives as evidence of motivation. In particular, the Special Master finds:

> [T]he statements were false, and the false statements were not due to simple negligence, but rather Bradley intentionally and willfully identified the SAs in his Declaration as members of his firm and that their hourly rates were the same as the firm's regular rates charged for their services. Bradley's motivation for making the false statements is clear and well supported by the record. The record evidence shows that Bradley intentionally sought to "jack up" Thornton's individual firm lodestar vis-à-vis the other Customer Class firms, and representing the SAs as members of Thornton with billing rates of $425 an hour ($500 an hour, in the case of Michael Bradley) was the way to do it.
>
> R&R at 233.
>
> **

> [T]he Special Master concludes that Bradley deliberately and intentionally misrepresented the make-up of Thornton's professional staff and their hourly rates so that Thornton's lodestar petition would be grossly inflated.
>
> R&R at 234-35.
>
> **
>
> [T]he Special Master has found that Garrett Bradley's statements in his sworn declaration that accompanied the Thornton fee petition were knowingly false, and that they were motivated by a desire to greatly enhance the Thornton lodestar and thereby justify a larger fee award . . . .
>
> R&R at 364.

In short, the Special Master has concocted a story in which the Thornton Law Firm claimed staff attorneys as employees in order to deceive co-counsel into paying more of the aggregate fee to Thornton. This is wrong on many levels: (1) Lieff, Labaton, and Thornton jointly developed a plan to perform the necessary review of the millions of pages of State Street documents— neither Lieff nor Labaton ever stated they were deceived; (2) the boilerplate affidavit signed by Garrett Bradley was provided by Labaton; (3) the Special Master found that attorneys at all three firms understood that staff attorneys for which Thornton paid would be included on Thornton's lodestar; (4) the final fee agreement among the firms was executed *before* the fee declarations submitted to the Court even existed; (5) the fee agreement between the firms was not directly dependent upon each firm's lodestar; and (6) the fee agreement was a negotiation among sophisticated and experienced parties who had agreed to split the risk—and therefore the reward—of jointly funding the staff attorneys.

The idea that Garrett Bradley intentionally lied by signing an inaccurate boilerplate fee declaration (that he did not draft) in order to deceive co-counsel defies logic. The Special Master's conclusion is squarely contradicted by the fact that, in the course of a $3.8 million investigation, the Special Master did not uncover a shred of evidence that co-counsel was or felt

that it was deceived. There is no citation anywhere in the Report and Recommendations for this proposition because there is no such evidence; not a single Lieff or Labaton witness stated that the firms were in any way deceived by the Thornton Law Firm's fee declaration or lodestar.[20] The Special Master's motivation argument further hinges on the dubious claim that Garrett Bradley deceived co-counsel by signing (and not modifying) a boilerplate affidavit that co-counsel itself (Labaton) provided to the Thornton Law Firm. It simply does not make sense that Garrett Bradley would try to fool co-counsel by signing a declaration with language prepared by co-counsel.

The Special Master's conclusion that the Thornton Law Firm included staff attorneys on its lodestar in order to deceive co-counsel also **directly contradicts** the Special Master's finding that there was an understanding among attorneys at all three firms that Thornton would include staff attorneys on its lodestar. *See* R&R at 45 n.27 ("Some of the attorneys from Labaton, Lieff, and Thornton, however, independently made assumptions based on the circumstances that Thornton would claim those staff attorneys' time on its lodestar."); *id.* at 363 ("[C]ontemporary email traffic, the billing practices and deposition testimony all bear out that at least some of the lawyers at each of the three customer class law firms anticipated that Thornton would put the staff attorneys on its lodestar, and lawyers from each firm thought this was appropriate . . . ."). *See also* Lieff's Resp. to Interrog. No. 34, 6/1/17 (SM Ex. 57) ("[I]t was the Firm's understanding that Thornton would include in its lodestar total (to be reported in any Fee Petition submitted by Thornton) any hours worked by Staff Attorneys for which Thornton had borne

[20] Strangely, the Special Master insinuates that there was something nefarious about the fact that staff attorneys accounted for "71.5% of all Thornton hours reported." *See* R&R at 45. Yet Lieff's and Labaton's percentage of hours worked by staff or contract attorneys (83.4% and 81.5%, respectively) significantly exceed Thornton's percentage. In addition, the Special Master has made a mathematical error. The Thornton staff attorney percentage was 68.9% of all Thornton hours reported, not 71.5%.

financial responsibility."); [redacted]

If attorneys at all three firms understood that Thornton would list the staff attorneys on its lodestar, it is unclear what possible motive there could have been to deceive, as all firms were operating under the same assumption. The Special Master also concluded that the double counting error was "largely inadvertent and the result of a combination of Labaton's internal compartmentalization . . . and a lack of any formal agreement." R&R at 363. It therefore makes no sense to suggest that Garrett Bradley could have *intentionally* caused an *inadvertent* error by signing a boilerplate affidavit.

In finding that Garrett Bradley was motivated to lie on the fee declaration to deceive co-counsel, the Special Master glosses over the incontrovertible chronology of the case. By the time the fee declaration was submitted to the Court, Customer Class Counsel had already decided upon a final division of fees. **There was no way in which the fee declaration submitted to the Court could have affected the proportion of the overall fee which Thornton would receive.** Here, some background is necessary. As the Special Master concedes, in 2011, "[a]t the inception of the case, Customer Class Counsel had agreed to a fee sharing arrangement pursuant to which Labaton, Lieff, and Thornton would each be entitled to 20% of any fee award, with the remaining 40% to be distributed at the end of the litigation . . . ." R&R at 51.

The Special Master does not explicitly say so but appears to believe that the remaining 40% was to be divided up among Labaton, Lieff, and Thornton based on the firms' lodestars

submitted to the Court on September 15, 2016. This was not the case. The final fee agreement among the firms was executed in August 2016, **prior to** the existence of the fee declarations or lodestars submitted to the Court in September 2016. *See* Chiplock Dep., 9/8/17, at 135:7-9 (SM Ex. 41) ("[T]he fee allocation agreement was reached in late August of 2016 . . . ."); Chiplock Dep., 6/16/17, at 131:5-9 (SM Ex. 10) ("So that was divvied up formally before we actually submitted the fee petition."); G. Bradley Dep., 6/19/17, at 46:24-47:2 (SM Ex. 43) ("[T]he fact of the matter is we had a fee agreement in place in August of '16 before we filed the fee application."); [redacted]. Not surprisingly, this important piece of the chronology is absent from the Report.

[redacted]. As demonstrated by the below chart, the fee agreement did **not** track the final lodestar agreement. Although Thornton's lodestar was smaller than Lieff's, Thornton received a larger portion of the fee split than Lieff did:

	[redacted]	Percentage of Customer Class Counsel Total Lodestar (September 2016)
Labaton	[redacted]	50%
Thornton	[redacted]	22%
Lieff	[redacted]	28%

This is illustrative of a broader point: which staff attorneys were on which lodestar did not at all control the allocation of the fee among counsel. All of the staff attorneys could have been listed on Lieff's or Labaton's lodestar, or all of the staff attorneys could have been listed on Thornton's lodestar—no matter who was on which lodestar, the fee allocation among counsel had already

been determined by negotiations among the three firms.[21] The purpose of the lodestars submitted to the Court on September 15, 2016 was not to set an allocation among counsel but simply to provide backup so that the Court could engage in a "cross-check" and determine whether the aggregate fee of 25% was reasonable. The Special Master refuses to acknowledge this important point.

In terms of rates, the Special Master ignores that some of Lieff's staff attorneys were actually billed at $515[22] and that **the weighted rate (i.e., total fees divided by total hours) for Thornton staff attorneys ($428) was actually lower than the weighted rate for Lieff staff attorneys ($438)**. If the weighted rate is limited to the "double counted hours," **the Lieff weighted rate is $50 per hour greater than the Thornton weighted rate.**[23] It's difficult to see

[21] The Special Master finds something troubling in the fact that there was "intertwining of the fee negotiations in the two cases [*BNY Mellon* and the State Street litigation]" as between Lieff and Thornton. *See* R&R at 52-53. The Special Master's "view [of Bradley intentionally making false statements in Thornton's fee declaration] is informed by the email exchanges between Bradley and Chiplock in which Bradley conveys his belief that Thornton did not receive a fair share of the *BONY Mellon* fee, in part because its lodestar was too low." R&R at 233 n.179. The fee agreement, which was finalized prior to the submission of the lodestars, was negotiated by sophisticated counsel who had entered into a cost-sharing agreement at the beginning of the litigation and who had finalized the fee division prior to submission of the lodestar. It would have been unremarkable (and certainly not cause for any kind of concern) if the fee allocation in the *BNY Mellon* case informed the negotiations among counsel in the State Street matter. The fee allocation among counsel would have **no effect** on the overall amount of attorneys' fees the class would pay to its attorneys.

[22] There are misrepresentations in the Special Master's report with respect to the staff attorney rates. At footnote 134 on page 169, the Special Master states that "Lieff Cabraser staff attorneys were billed at $415, except for two staff attorneys (Joshua Bloomfield and Marissa Oh) who were charged at $515." At page 169 in the text, he states "With the exception of two Lieff staff attorneys, those [staff attorney] rates landed mainly between $335 and $440." Both of these statements are false. Five Lieff staff attorneys were billed at $515, not two. *See* Lieff Decl., 9/14/16, Ex. A (SM Ex. 89). The Special Master himself acknowledges this in another part of his report on page 176: "Lieff's report listed twenty staff attorneys, five of whom were billed at $515 per hour . . . ." There is another misrepresentation on page 181. There, referring to the double counted staff attorneys, the Special Master states "The attorneys were billed by Labaton at Lieff at hourly rates ranging from $335 to $415." Again, this is false. As the Special Master acknowledges in footnote 147 on page 180, "Lieff billed two [double counted] staff attorneys – Ann Ten Eyck and Rachel Wintterle – at $515 per hour." In any case, there is no material difference between the Thornton billing rate for staff attorneys, $425, and the rate at which Lieff billed most of its staff attorneys, $415.

[23] Calculated according to the double-counted hours set forth in 11/9/16 Email, TLF-SST-032267 (SM Ex. 261). According to that email, no hours were double counted for McClelland and Weiss. To be conservative, double-counted hours for Wintterle and Ten Eyck are the lower of the hours on either the Lieff or the Thornton lodestar since "Rachel Wintterle and Ann Ten Eyck should not have been included in LCHB's lodestar at all,"

how Thornton could deceive Lieff when Lieff's effective staff attorney rate was higher than Thornton's. More broadly, the Special Master's laser focus on the $425 per hour rate[24] blinds him to the fact that by almost every metric, Thornton's rates were lower than one or both of co-counsel:

RATES	Average Partner	Weighted Partner	Average Staff Atty	Weighted Staff Atty
Labaton	$905.00	$861.13	$380.42	$376.59
Lieff	$765.50	$690.73	$440.00	$438.02
Thornton	$721.25	$694.36	$428.13	$427.87

Particularly noticeable is that both the average partner rate and weighted partner rate is more than $150 higher for Labaton than for Thornton. In none of the four categories listed above is Thornton the rate leader. This is hardly demonstrative of a law firm that is trying to inflate rates to deceive co-counsel (or the Court).[25]

Even if the fee agreement was based on the lodestar submitted to the Court (which it was not), the Thornton Law Firm's seeking credit for staff attorneys for which it paid could not possibly have deceived co-counsel—especially when the entire effort related to document review

but Wintterle's hours were slightly lower on the Thornton lodestar and Ten Eyck's hours were slightly lower on the Lieff lodestar.

[24] As discussed *infra* at Section III(B)(iii), the $425 rate was used for Thornton staff attorneys because it was approved by the Court for Lieff staff attorneys in the most analogous case, *BNY Mellon*. Dan Chiplock had expressly suggested that the $425 rate be used in the State Street litigation. *See* note 34.

[25] One statement the Special Master makes with respect to rates is particularly misleading. He notes in the Executive Summary at page 16, "Indeed, the manner in which Thornton implemented this [cost sharing] agreement appears designed from the inception to exaggerate its lodestar. Thornton specifically reimbursed the other two firms for the staff attorneys and agency lawyers 'loaned' to them on a straight cost-only basis yet subsequently claimed them on its own lodestar report at rates much higher than Thornton had actually paid the two firms in cost reimbursement, and even higher hourly rates than Labaton and Lieff claimed for most of these same staff attorneys on their own reports." Here, the Special Master is concerned about the entirely unobjectionable proposition of billing attorneys above cost. Yet elsewhere in the R&R, the Special Master admits, "[T]here 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," R&R at 177. And the Special Master later finds that the billable rate for the staff attorneys was reasonable. R&R at 172, 180.

and subsequent work was jointly planned and executed by the three customer class firms. The Special Master found that "Labaton, Lieff, and Thornton entered into a fee agreement to 'allocate' the costs of certain staff attorneys employed by and working at Labaton and Lieff's offices to Thornton. . . . The purpose of the cost-sharing agreement was to share the cost and risk burdens of the litigation among the three Customer Class firms." R&R at 43. Lieff and Labaton are sophisticated parties. They did not think that Thornton should have borne the risk of paying for staff attorneys during the pendency of the litigation if it was not going to be rewarded for taking on such risk if the litigation was successful. And Lieff and Labaton would not have themselves agreed to the cost-sharing agreement if it was not in their best interest to distribute some of the risk—and therefore some of the reward—to Thornton. *See, e.g.*, Chiplock Dep., 6/16/17, at 129:6-13 (SM Ex. 10); Belfi Dep., 6/14/17 at 51:8-13 (SM Ex. 17); Rogers Dep., 6/16/17, at 91:18-92:16 (SM Ex. 54).

This Court should understand the context of what the Special Master perceives as the "smoking gun"—an email in which Garrett Bradley receives an invoice *from Labaton* for staff attorneys and writes to Michael Thornton and Michael Lesser, "First month bill. . . . This is the best way to jack up the loadstar [sic] . . . ." 3/11/15 Email, TLF-SST-011124 (SM Ex. 64).[26] This email was sent in **February 2015**—more than a year before the fee declaration or lodestar was filed with the Court. What Garrett Bradley is referring to is the fact that if Thornton bore more risk by investing in additional staff attorneys over the course of the litigation in relation to the other firms (and pursuant to the firms' agreement), Thornton would reap a greater reward **in the fee split among counsel** if the litigation was successful. **This would in no way increase the aggregate lodestar submitted to the Court or the amount of fees the class would pay its**

[26] This email is a long thread that continues into March, but the cited email was sent in February.

lawyers. In fact, Bradley is not referring to the aggregate lodestar, but is using shorthand for the number of hours worked and resources expended *among counsel* for purposes of dividing the fee *among counsel.* Although the Special Master or his counsel may think "jacking up" serves as a great soundbite, the concept is entirely proper and unobjectionable.

It is worth noting that the very same document demonstrates the Thornton Law Firm's attentiveness to avoiding any inaccuracies in the lodestar. Michael Lesser later writes, "Just following up on the doc review recordkeeping. The attached invoice is dated 2/6/2015 (and was sent by email on 2/6 as well) but includes billables through 2/28. Can you ask them to confirm whether these hours billed were for 2/6 – 2/28? **I don't want us to double-count anything**." 3/11/15 Email, TLF-SST-011124 (SM Ex. 64) (emphasis added).

Perhaps what the Special Master really finds objectionable, as his so-called expert witness certainly does, is that plaintiffs' lawyers are interested in their fees. *See* Benjamin Weiser, *Tobacco's Trials*, WASHINGTON POST (Dec. 8, 1996) ("'The plaintiffs' bar is peopled by lawyers who are permanently hungry,' says Stephen Gillers, professor of legal ethics at New York University. 'They're like red ants at a picnic. There are an unlimited number of them, and if the food is good, they'll keep coming at you.'"); Stephanie Clifford and Benjamin Weiser, *In Shift, New York City Is Quickly Settling Big Civil Rights Lawsuits*, N.Y. TIMES (July 24, 2014) ("'It's like ants at a picnic,' said Stephen Gillers, an expert in ethics and the legal profession at New York University School of Law. 'All of a sudden the food's on the table and here they come.'").[27]

[27] The Thornton Law Firm objects to Prof. Gillers' participation in these proceeding as a "legal expert." *See* Supplemental Ethical Report for Special Master Gerald E. Rosen at 2 (SM Ex. 233) (stating "I understand that I am the equivalent of a court appointed expert" and noting "the District Court in Massachusetts has recognized legal ethics experts."). The Court should not permit Prof. Gillers to assume the imprimatur of the Court as an expert on the law. *See Reed v. Cleveland Bd. Of Ed.*, 607 F.2d 737, 747 (6th Cir. 1979) ("[W]e do not approve the practice of appointing legal advisors to a master or the court. To the extent that the master was not qualified to make recommendations to the court because of a lack of experience in constitutional law, he

B. There Was No Motivation To Deceive The Court

It is telling that the Special Master appears to find only that, in signing the boilerplate declaration, the Thornton Law Firm was motivated to deceive co-counsel, and not the Court. Again, in a percentage fee jurisdiction, additional lodestar simply does not provide additional funds to attorneys seeking a fee award—the lodestar is only used as a cross-check to ensure that the aggregate fee amount is reasonable. *See* Rubenstein Decl., 6/20/18, at ¶¶ 19-20; Rubenstein Decl., 7/31/17, at ¶¶ 14-18 (TLF Ex. 1). [redacted] The 25% figure was represented to the Court in June 2016, three months before the lodestars were filed, *see* 6/23/16 Hr'g Tr. at 15:5-16:2 (Dkt. 85), and was published in the Notice of Pendency dated August 22, 2016. By the time the lodestars were submitted to the Court in mid-September 2016, the attorneys could not have asked for anything beyond 25%. It is not as if, for instance, the Thornton Law Firm could have showed its co-counsel a particularly large lodestar and convinced them to seek leave to request 27% or 30%. **The aggregate fee request was already set and, no matter how large their lodestar, there was zero possibility that Thornton could receive more than their agreed upon share (29% of Customer Class Counsel allocation) of the 25% fee request.**

should have submitted such legal issues to the court."); *Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("Expert testimony concerning the fact of an ethical violation is not appropriate, any more than expert testimony is appropriate concerning the violation of, for example, a municipal building code."); *In re: Initial Public Offering Securities Litigation*, 174 F. Supp. 2d 61, 69 n. 11 (S.D.N.Y. 2001) ("Each courtroom comes equipped with a 'legal expert,' called a judge.") (quoting *Burkhart v. Washington Metro. Area Trans. Auth.*, 112 F.3d 1207 (D.C. Cir. 1997)). The Thornton Law Firm also objects to Prof. Gillers's report on the basis that the factual background section of the report (which, at 58 pages, is the more than half of the report) is replete with mischaracterizations and omissions of record evidence. This is not surprising, as Prof. Gillers acknowledges that the Special Master and his counsel drafted the factual background section of his report, Gillers Supp. Report, 5/8/18, at 2, and as those mischaracterizations and omissions are repeated in the R&R.

Perhaps the Special Master will next speculate that the Thornton Law Firm might have been motivated to increase its lodestar to provide further support for the Court's cross-check in support of the 25% award. In other words, the higher the lodestar, the lower the multiplier, and the more likely that the Court would find the fee award reasonable. But this is not a realistic motivation for at least two obvious reasons. First, the aggregate fee multiplier in this case was modest and well within the range of what courts find acceptable in awarding fees. *See* Rubenstein Decl., 7/31/17, at ¶¶ 39-45 (TLF Ex. 1); Rubenstein Decl., 6/20/18. There was therefore no need to decrease the multiplier to ensure the Court would approve the award. And second, it would be incredibly difficult for any one firm, especially Thornton, to "move the needle" on the multiplier. Thornton's lodestar represented just 18% of the overall lodestar submitted to the Court. Even if there were an additional $1 million on Thornton's lodestar which was removed, it would have only moved the overall multiplier from 1.804 to 1.849, which is negligible. Indeed, even if Thornton billed all of its staff attorneys at $300 per hour rather than $425 or $500 per hour and the difference was removed, the overall multiplier would have only moved to 1.865, which is also negligible.

It is important to recall the manner in which the Special Master believes the Court was supposedly intentionally deceived. The manner of deception was not falsely increasing hours worked, which would have been very difficult for the Court or anyone else to detect. In fact, the Special Master found that all of the Thornton Law Firm hours were reasonable. R&R at 216-17. The supposed manner of deception was instead signing a boilerplate affidavit (which the Thornton Law Firm did not even draft) and correctly listing on the Thornton's Law Firm's lodestar those staff attorneys which the Thornton Law Firm paid for pursuant to an agreement among co-counsel. The names of the staff attorneys were explicitly listed on the lodestars such

that **anyone** who placed the lodestars side by side would immediately realize that certain attorneys' time had been double counted. It is ludicrous to suggest such an obvious and basic mistake was intentional deception—indeed, it would be perhaps the lamest attempt at deception in the history of the federal courts. *Cf. Awkal v. Mitchell*, 613 F.3d 629, 655 (6th Cir. 2010) (Martin, J., dissenting) ("At some point, Ockham's Razor [sic] must apply—the simplest answer is usually the correct one."); *Thompson v. Bell*, 373 F.3d 688, 690 (6th Cir. 2004) ("Applying the principle of Occam's razor, we conclude that more than likely, a genuine mistake was made . . . .").

C. The Special Master's Assertion That Garrett Bradley Did, In Fact, Closely Review The Declaration Prior To Submission Is Based On A Blatant Misrepresentation Of The Evidence

With no true evidence of motivation, the Special Master next finds intentionality based on "evidence" that Garrett Bradley closely read the boilerplate declaration before singing it and therefore was aware of his misstatements. The Special Master states:

> Emails among Garrett Bradley, Mike Lesser and Evan Hoffman show that drafts of the declaration were circulated among these Thornton attorneys for their review. This is confirmed by the testimony of Evan Hoffman: "[w]e put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and then **mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed**" the declaration before Bradley signed it. Hoffman 6/5/17 Dep., p. 94:9-15.

R&R at 229 (emphasis in Special Master's R&R).[28]

Although the Special Master's description makes it seem that he has found another "smoking gun," the Court's attention should always be piqued when a litigant replaces the material words of a quotation with his own characterization, and this instance is no different. In fact, Mr. Hoffman **does not** say at lines 9 through 15 of page 94 that Messrs. Lesser, Bradley,

[28] The Special Master uses the same quote in his R&R at 59.

and Thornton reviewed the entire boilerplate declaration prior to Mr. Bradley signing it. Mr. Hoffman instead explained:

> [T]here was a section on fill in what your hours are, fill in what your expenses are, fill in what your lodestar is, fill in what your specific contributions were to the case, and the rest of the language was sort of, it was called a model fee declaration. And so that's what we did, he put in all the hours that we had kept track of, I along with our accounting department and Anasthasia put in the expenses and then mostly Mike Lesser and then Garrett Bradley, Mike Thornton and myself all reviewed **the sort of narrative about the firm's contribution, which I believe mostly Mike Lesser drafted**.

Hoffman Dep., 6/5/17, at 94:1-17 (SM Ex. 63) (emphasis added—the emphasized portion was omitted from the Special Master's quotation of this deposition).

This is perhaps the most egregious example of the Report's overreaching to identify non-existent misconduct. The Special Master or his counsel have lifted a partial quote, omitted the most material aspect of the quote, and substituted their own words to create an entirely different meaning. Mr. Hoffman **did not** testify that Mr. Bradley reviewed "the declaration" as a whole, but only that he reviewed the "narrative about the firm's contribution." *Id.* For the Special Master to find otherwise—and to use it as purported evidence to impose severe sanctions—is disingenuous and highly misleading. As the Court is aware, the boilerplate Labaton declaration was a "fill-in-the blank" document. *See* Hoffman Dep., 6/5/17, at 93:14-22 (SM Ex. 63). [redacted]. The rest of the declaration was Labaton's boilerplate and, as the Special Master concluded, the majority of the firms did not modify the boilerplate section at issue in these proceedings. *See* R&R at 57. Like the other firms, the Thornton Law Firm carefully drafted a narrative of its

particular contributions and submitted the narrative to the Court as paragraph 2 of its declaration. This is the "narrative" to which Mr. Hoffman is referring as being reviewed by Mike Lesser, Mike Thornton, and Garrett Bradley. It makes sense that the Thornton Law Firm partners carefully reviewed the customized section of the fee declaration, but in no way does this prove that Garrett Bradley must have also carefully reviewed the entire boilerplate portion of the fee declaration. The Special Master's (or his counsel's) decision to replace the content of sworn deposition testimony with their own words was obviously not done as a matter of summarization or for ease of reading: one can only conclude it was intended to change the meaning of the testimony in order to advance a false narrative.

D. The Special Master's Assertion That Garrett Bradley Had The "Opportunity" To Give The Declaration A "Close Read" Is Unobjectionable, But Does Not Prove Bradley Intentionally Filed A False Declaration

Without proper evidence of motivation or that Garrett Bradley in fact closely reviewed the boilerplate portions of the fee declaration, the Special Master also tries to prove that Garrett Bradley made intentional misrepresentations based on the fact that Bradley had the **opportunity** to scrutinize the boilerplate declaration. *See* R&R at 229 ("Though Bradley testified that he only looked at his declaration before it was filed . . . the record shows that Bradley had ample opportunity to give the declaration the 'close read' that was required."). This is, of course, a classic strawman argument. No party in these proceedings has ever contended that Garrett Bradley did not have the "opportunity" to closely read the declaration prior to signing it. Garrett Bradley himself has certainly never made this argument. *See* G. Bradley Dep., 6/19/17, 84:22-85:1 (SM Ex. 43) ("I saw the final. Evan brought it in. I gave it, obviously, not a close read and then I signed it. I'm sure I was on e-mail traffic for the draft form, as well."). Quite simply, the fact that Garrett Bradley had the opportunity to closely review the boilerplate sections of the declaration does not mean that he actually did so, and therefore that he knowingly and

intentionally made misrepresentations to the Court. Certainly Labaton, whose attorneys had the opportunity (and indeed, whose job it was as lead counsel) to review all fee declarations side by side and scrutinize them for inaccuracies, did not do so. The fact that Labaton had the opportunity to correct the inaccuracies but did not do so does not mean that they made intentional misrepresentations any more so than the fact that Garrett Bradley had the opportunity to review the affidavit means he made intentional misrepresentations.

E. The Special Master's Finding Of Intentional Misrepresentation Is Belied By His Inability To Decide Whether Or Not Garrett Bradley Actually Read The Declaration

It is emblematic of the Special Master's scattershot approach and ever-changing theories that, in one section of the Report (discussed above) he presents what he believes is hard evidence that Garrett Bradley carefully reviewed the declaration before it was filed and in the next section he alleges that "Garrett Bradley did not read the narrative section at all." In particular, the Special Master writes:

> Bradley admits that he did not take the time to "closely read" the Declaration before signing it. **The Special Master believes Bradley did not read the narrative section at all** or if he did, even in a cursory fashion, he turned a blind eye to the falsity of the statements, ignoring the ethical obligations imposed by Rule 11 and the potential impact of the false statements upon the attorney fees approval process.

R&R at 231 (emphasis added).

But the Special Master cannot have it both ways. The argument is ridiculous on its face—the Special Master cannot find both that Garrett Bradley read the declaration, knew it was false, and signed it anyway, and that he signed the declaration without reading it at all. When considering the imposition of sanctions, it is the factfinder's job to "marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11." *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). Here, the Special Master's own factual

determinations flatly contradict themselves; he therefore could not have properly applied the "fact-dependent" legal standard required by Rule 11.

F. The Special Master's Assertion That Garrett Bradley Admitted He Intentionally Lied To The Court Grossly Mischaracterizes The Evidence

Lacking any support for the propositions that Garrett Bradley (1) had motivation to lie to the Court; (2) closely read the boilerplate sections of the affidavit prior to signing and therefore intentionally lied to the court; or (3) had the *opportunity* to closely read the boilerplate sections of the affidavit prior to signing and therefore intentionally lied to the court, the Special Master's final argument is that Garrett Bradley simply admitted that he lied to the Court: "At numerous times during the March 7 hearing, Bradley acknowledged that he knew his Declaration contained inaccurate information but he signed it anyway." This statement appears twice in the Special Master's Report. *See* R&R at 60, 229. The problem of course is that Bradley **did not** acknowledge during the hearing that "he knew his Declaration contained inaccurate information but he signed it anyway." The citations for this "fact" are: "3/7/17 Hearing Tr. P. 87:13-14; 88:2-9; 14-18 [sic]; 91:5-7; 92:3-8." Below is the transcript of the cited portions of the March 7, 2017 hearing:

87:13-14:

The Court:	Well, you signed the affidavit.
Mr. G. Bradley:	I did, your honor and within that . . . .

88:2-9:

The Court:	The Court was told that was their billing rate.
Mr. G. Bradley:	That is what the rate was that the Court approved in that case.
The Court:	Had you ever charged any of those individuals, paying client, at $425 an hour?
Mr. G. Bradley:	We don't have paying clients, your . . . .

88:14-18:

> Mr. G. Bradley: The staff attorneys that were listed on there that under – paragraph 4 in my affidavit where it says that we paid them is a mistake, your Honor. Those individuals were actually housed at Labaton Sucharow or Lieff Cabraser. We had not used those before. That paragraph, quite frankly, should . . . .

91:5-7:

> Mr. G. Bradley: [A]dmittedly, your Honor, the language here, we should have been clearer in this and that fault lies with me in that particular paragraph.

92:3-8:

> Mr. G. Bradley: There was a discussion at the time as to what to use, and then our firm and, I believe, the Lieff firm used the same rates that were used within the *Mellon* case, but everybody understood that those were the rates that were going to be applied to the type of work being done by that group of people.

In no way do these cited statements show that Bradley "knew his Declaration contained inaccurate information but he signed it anyway." Mr. Bradley simply did not say so. What these excerpts instead show is that Garrett Bradley made a basic and very unfortunate mistake. The Special Master has mischaracterized the record here in the manner one would expect of an overly-aggressive litigant, not a supposed neutral court-appointed factfinder.

G. In Fact, Garrett Bradley Made A Mistake And Corrected The Mistake At the Appropriate Time

As demonstrated above, none of the Special Master's evidence even suggests that Garrett Bradley intentionally misled the Court. Although the Special Master may think he is obligated to justify his $3.8 million investigation by finding some form of intentional misconduct, in actuality, the root of the case is a basic and unfortunate inadvertent error—or in more simple terms, a mistake. The fact of the matter is that Labaton sent all firms a boilerplate, fill-in-the blank fee declaration with customizable sections for fees, expenses, and a narrative for each firm's unique contribution to the litigation. *See* Hoffman Dep., 6/5/17, at 93:14-94:8 (SM Ex.

63); [redacted]. Thornton Law Firm attorneys drafted the fees, expenses, and firm contribution section and Messrs. Lesser, Bradley, Hoffman, and Thornton reviewed the firm contribution section. Hoffman Dep., 6/5/17, at 94:9-17 (SM Ex. 63). The Thornton Law Firm did not modify the boilerplate portion of the fee declaration at issue here but neither, as the Special Master found, did six of the nine firms who submitted fee declarations. *See* R&R at 57.

As Garrett Bradley testified in his deposition, when he signed the boilerplate declaration he "gave it, obviously, not a close read." G. Bradley Dep., 6/19/17, at 84:22-23 (SM Ex. 43). In other words, he did not scrutinize the boilerplate portion of the declaration to the extent necessary to have realized that some of its statements were incorrect, or at the very least, unclear. The errors in the affidavit, although unintentional and, as set forth below, immaterial, are "messy and . . . embarrassing." G. Bradley Dep., 6/19/17, at 82:20-21 (SM Ex. 43). Bradley admitted this mistake to the Court during the March 7, 2017 hearing, noting: "That paragraph, quite frankly, should have been clarified by me at that time. It was not," 3/7/17 Hr'g Tr. at 88:18-19 (SM Ex. 96), and "[A]dmittedly, your Honor, the language here, we should have been clearer in this and that fault lies with me in that particular paragraph," *id*. at 91:5-7.

The double counting, which (as discussed above) was not the Thornton Law Firm's error, was immediately disclosed to the Court by Customer Class Counsel after a media inquiry alerted the law firms to the issue. As the Special Master found, on November 8, 2016, Garrett Bradley learned from counsel that the *Boston Globe* identified potential double counting on Customer Class Counsel's lodestar. *See* R&R at 126-27. The same day, Bradley contacted Lieff and Labaton, and all three firms worked diligently to determine the extent of the error and to prepare a revised and corrected lodestar figure. *Id*. A letter informing the Court was filed on November

10, 2016. The letter, which was signed by Labaton attorney David Goldsmith, noted that counsel "sincerely apologize[s] to the Court for the inadvertent errors in our written submissions and presentation during the hearing" and that counsel was "available to respond to any questions or concerns the Court may have." Goldsmith Ltr. to Ct., 11/10/16, at 3 (SM Ex. 178).

III. The Thornton Law Firm Did Not Violate Rule 11

A. Isolated Factual Errors Cannot Serve As The Basis For Rule 11 Sanctions

Sanctioning a lawyer or law firm pursuant to Federal Rule of Civil Procedure 11 is a severe penalty that should not be imposed broadly. "Rule 11 sanctions should be reserved for only the most egregious of lawyerly missteps." *McGee v. Town of Rockland*, No. 11-CV-10523-RGS, 2012 WL 6644781, at *1 n.2 (D. Mass. Dec. 20, 2012). As the First Circuit noted in reversing a district court's imposition of sanctions, "[c]ourts ought not to invoke Rule 11 for slight cause; the wheels of justice would grind to a halt if lawyers everywhere were sanctioned every time they made unfounded objections, weak arguments, and dubious factual claims." *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 33, 39-40 (1st Cir. 2005). This is especially so where sanctions are imposed *sua sponte* and counsel are not able to avail themselves of the Rule's safe-harbor provision when they realize they have erred and may withdraw a pleading without penalty. *Young*, 404 F.3d at 40 (noting that, when imposed *sua sponte*, Rule 11 sanctions are reserved for instances of "serious misconduct"); *Vollmer v. Selden*, 350 F.3d 656, 663 (7th Cir. 2003) ("Absent extraordinary circumstances not shown here, *sua sponte* sanctions are generally limited to several thousand dollars."); Fed. R. Civ. P. 11 advisory committee's note ("[S]how cause orders will ordinarily be issued only in situations that are akin to a contempt of court."). *See generally* Vairo Decl., 3/26/18 (TLF Ex. 10).

In this proceeding, it is vital to heed the First Circuit's warning that "Civil Rule 11 is not a strict liability provision." *Eldridge v. Gordon Bros. Grp., L.L.C.*, 863 F.3d 66, 88 (1st Cir.

2017) (internal quotation marks omitted). Statements that are "literally inaccurate" may not be sanctionable because "Rule 11 neither penalizes overstatement nor authorizes an overly literal reading of each factual statement." *Navarro-Ayala v. Hernandez-Colon*, 3 F.3d 464, 467 (1st Cir. 1993) (Breyer, J.).[29] *See also Young*, 404 F.3d at 41 (reversing sanctions imposed by district court where "memorandum may otherwise have been misleading or inaccurate in certain of its detail"); *Forrest Creek Assocs., Ltd. v. McLean Sav. & Loan Ass'n*, 831 F.2d 1238, 1245 (4th Cir. 1987) ("[Rule 11] does not extend to isolated factual errors, committed in good faith, so long as the pleading as a whole remains 'well grounded in fact.'").

The case at bar is on all fours with *Navarro-Ayala*. There, the First Circuit reversed the district court's finding of sanctions because "the motion, **read fairly and as a whole**, contain[ed] **no significant false statement** that **significantly harmed** the other side." *Navarro-Ayala*, 3 F.3d at 467 (emphasis added). In so holding, the First Circuit noted that "We emphasize the word 'significant' because the district court found one sentence literally false," and further explained that, "the district court, at most, could have found a few isolated instances of noncritical statements that further inquiry might have shown to be inaccurate or overstated. That further inquiry would not have shown the motion's requests to have been baseless." *Id.* at 467-68. *See also Obert v. Republic W. Ins. Co.*, 398 F.3d 138, 143 (1st Cir. 2005) (reversing Rule 11 sanctions where "the affidavit was not knowingly false as to any material fact, although one of the statements may well have been factually inaccurate and another was a dubious and unattractive piece of lawyer characterization" and describing the affidavit as "an unsound piece of lawyer advocacy rather than a lie about a fact").

[29] Although this case construed the pre-1993 version of Rule 11, the 1993 amendments are immaterial to the First Circuit's analysis.

B. The Statements In The Affidavit Do Not Support Rule 11 Sanctions

The Special Master identifies what he believes are six discrete "false statements" in Garrett Bradley's affidavit. Upon closer examination, it is clear that none of the "false statements" can serve as a proper basis for imposing Rule 11 sanctions. *See* Vairo Dep., 4/10/18, at 47:23-48:8 (SM Ex. 202).

i. Staff Attorneys As Employees

The first two alleged "false statements" are variations on the same criticism—that the attorneys listed on Thornton's lodestar were not technically "employed" by the Thornton Law Firm. Specifically, the Special Master identifies as false: (1) the statement that the lodestar summarized "time spent by each attorney and professional support staff-member *of my firm* who was involved in the prosecution of the Class Actions"; and (2) the statement that "[f]or personnel who are no longer *employed* by my firm, the lodestar calculation is based upon the billing rates for such personnel in his or her final year of *employment* by my firm." R&R at 227 (emphasis added). Of course, both statements are true with respect to the four partners, one associate, and one paralegal listed on the affidavit. These attorneys and the paralegal were bona fide employees of the Thornton Law Firm. With respect to the staff attorneys, the statement is literally incorrect in the sense that the staff attorneys were not technically, as a legal matter, employees of the Thornton Law Firm. It is not, however, as if the staff attorneys had no relationship with Thornton. In fact, it is undisputed that Thornton paid for all of the staff attorneys listed on its lodestar, whether directly through a staffing agency, or through co-counsel. And the Special Master has conceded that attorneys at all three law firms understood that the Thornton Law Firm would include the staff attorneys for which it was paying on the Thornton lodestar. *See supra* § II(A).

The error of including the word "employed" with respect to the staff attorneys was introduced only because Thornton used the boilerplate template of Labaton, a larger firm which predominantly and regularly brings class action cases and has the capacity to employ its own staff attorneys. Most crucially, by its nature, the error had absolutely no effect on the lodestar figure. The purpose of the lodestar is to show hours worked—not employment status. There is no question that the attorneys listed actually worked the hours included on the lodestar, as the Special Master concedes the hours were reasonable. R&R at 210.[30] Instead, the Special Master raises only the technical question of whether all attorneys were described properly as "employees."

If the Special Master believes that the reference to staff attorneys (housed at co-counsel but paid for by the Thornton Law Firm) as "employed" is false and sanctionable, it is curious that the Special Master does not recommend Rule 11 sanctions for Lieff and Labaton, both of whom used the **exact same boilerplate** the Special Master finds objectionable as to Thornton. The Lieff and Labaton affidavits, under the Special Master's hyper-technical reading, also appear 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.[31] *Compare* Chiplock Decl., 9/14/16 (SM Ex. 89) (referring to

[30] The Special Master does not question any of the hours expended by any of the attorneys in this matter.

[31] In fact, it seems to be a fairly common practice to list contract attorneys as "employees" or attorneys "of the firm" on lodestars, even though such attorneys are technically not employees. *Compare* Friedman Decl., Dkt. 916-29, *In re Anthem, Inc. Data Breach Litigation*, No. 5:15-md-02617 (N.D. Cal. Dec. 1, 2017) (noting lodestar contains "detailed summaries of the amount of time spent by my firm's partners, attorneys, and professional support staff") (TLF Ex. 11), *with* Ex. 1, Dkt. 916-10, *Anthem* (listing 15 contract attorneys alongside partners, associates and staff in the firm's lodestar) (TLF Ex. 12); Shuman Decl., Dkt. 506-7, *In re: Oppenheimer Rochester Funds Group Securities Litigation*, No. 1:09-md-02063-JLK-KMT (D. Colo. June 6, 2014) (stating that the lodestar calculation is based on "my firm's current billing rates" or on billing rates "in his or her final year of employment by my firm" for "personnel who are no longer employed at my firm" and attaching a lodestar report that includes a "contract attorney") (TLF Ex. 13).

all attorneys in same manner as Bradley Declaration) *with* [redacted]. The Labaton affidavit is similarly "flawed" because it lists as "employees" those attorneys who were paid by Thornton pursuant to the cost-sharing agreement. *Compare* Sucharow Decl., 9/15/16 (SM Ex. 88), *with* [redacted]. By listing staff attorneys as "employees," the Labaton affidavit implies that Labaton paid for all such attorneys when in fact it did not. This is certainly not to say that Lieff and Labaton should be sanctioned for these misstatements, but to emphasize that such misstatements are not sanctionable for any of the three firms. *See Obert*, 398 F.3d at 143 (attorneys should not be sanctioned for erroneously describing a chambers conference as a "hearing").

ii. Time Records

The Special Master next contends that the Thornton Law Firm should be sanctioned because the Bradley affidavit states that the lodestar "was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court." Here it is worth noting that the Special Master finds this statement sanctionable because it is "untrue" on pages 227-28 of his R&R, but on page 59 of his R&R **declines to find that the exact same statement untrue**. R&R at 59 n.46 ("The Special Master, however is unable to conclude that this statement is untrue."). Putting aside the obvious irony of such a clear error in the context of this case, this demonstrates that the "time records" statement is not, as the Special Master contends on pages 227-28, actually false.

If the Court is inclined to accept the Special Master's finding on pages 227-28 rather than the exact opposite finding on page 59, it is important to note the Special Master finds this statement false and sanctionable (on pages 227-28, at least) for two reasons. The first reason is

that "Thornton did not prepare or maintain daily time records of the hours worked by the SAs listed on its lodestar." R&R at 227-28.

The Special Master's quibble is simply that co-counsel, rather than the Thornton Law Firm, and in some cases perhaps staffing agencies, *prepared and maintained* time records for certain staff attorneys listed on the lodestar.[32] Again, there is no allegation that the hours were not actually worked, only that the Thornton Law Firm did not state with adequate precision who *prepared* and *maintained* the records. But the Special Master ignored (at least in this section of the report) evidence that the Thornton Law Firm did, in many cases, *maintain* the time records of staff attorneys for whom it paid, including lawyers at Lieff and Labaton, and Michael Bradley. *See, e.g.*, R&R at 44 (describing how Thornton partner Evan Hoffman kept track of staff attorney time). Even if the Thornton Law Firm did not maintain or prepare any of the time records, it is certainly a stretch to say a technical error in who *prepared* and *maintained* the time records warrants Rule 11 sanctions.

The Special Master's second criticism is that the clause "was prepared from contemporaneous daily time records regularly prepared and maintained by my firm" is false because "Thornton [did not] maintain *sufficiently reliable* contemporaneous time records for all of the attorneys working on the State Street case." R&R at 227-28 (emphasis added). But the Special Master specifically found that Thornton Law Firm partners Michael Lesser and Evan Hoffman *did* maintain sufficiently contemporaneous time records, R&R at 205, and does not appear to take any issue with the timekeeping of the staff attorneys. The Special Master has only criticized the timekeeping of Garrett Bradley and Michael Thornton. R&R at 208-09. In other

[32] Regardless, however, of the Special Master's criticism, for the partners, associate, and paralegal listed on Thornton's lodestar, all time records *were* prepared and maintained by the Thornton Law Firm.

words, the Special Master takes issue with the timekeeping of *two out of the thirty* timekeepers listed on the Thornton Law Firm's lodestar. Crucially, he does not conclude that the time records of these two attorneys were **not** contemporaneous, but that "**it is questionable** whether the handwritten notes and calendars of Garrett Bradley and Michael Thornton are sufficiently reliable to constitute contemporaneous records of their time." R&R at 228 n.178. Despite his questions as to whether the time records of two attorneys are sufficiently contemporaneous, he nonetheless concludes that "the total hours expended by each of the Thornton lawyers were **reasonable** and **sufficiently reliable**." R&R at 216 (emphasis added). The finding that a small number of time records *may not* have been contemporaneous (at least in one section of the R&R, which is flatly contradicted by another), but that nonetheless the time was reasonable, the records were reliable, and the hours were actually worked, clearly does not support a Rule 11 violation.

iii. Rates Accepted In Other Actions

The Special Master finds the statement that lodestar rates "have been accepted in other complex class actions" false because "[w]ith the exception of 4 staff attorneys, the $425 rate charged for the remaining staff attorneys listed on the lodestar, including Michael Bradley, had not been accepted in other complex class actions." R&R at 228. The Special Master appears to read the statement as an attestation that each *individual* staff attorney had previously been listed on an approved lodestar petition at the same rate. If the Special Master is correct in the meaning of this phrase, then he would have been obligated to inquire whether each of the 20 staff attorneys listed on the Lieff affidavit and each of the 35 staff attorneys on the Labaton affidavit (as well as, for that matter, all of the attorneys on Customer Class Counsel and the ERISA firms' declarations) had actually been listed on an approved lodestar petition at the relevant rate, or whether, for instance, some were recent law school graduates who had never previously

appeared on a lodestar.[33] That the Special Master does not appear to have undertaken this exercise undermines his interpretation of this phrase. Clearly the statement that certain "rates" have been accepted refers to rates for attorney **positions** (such as the staff attorney position), not rates for **individual** staff attorneys themselves. This reading is the only one that makes sense because staff attorneys are often temporary employees who move from firm to firm and document review to document review and whose rates are often not determined on an individual basis.

In any event, the rate of $425 per hour, which Thornton charged for its staff attorneys in this case, **was accepted** by the court in the *BNY Mellon* litigation for the staff attorneys listed on Lieff's lodestar. *Compare* Chiplock Decl., Ex. B, Dkt. 622-1, *In re Bank of New York Mellon Corp. Forex Trans. Lit*., No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Aug. 17, 2015) (SM Ex. 186) (listing $425 as the rate for nine contract attorneys on Lieff's lodestar) *with* Order Awarding Attorneys' Fees, Service Awards, and Reimbursement of Litigation Expenses, Dkt. 637, *In re Bank of New York Mellon Corp. Forex Trans. Lit*., No. 12-MD-2335 (LAK) (JLC) (S.D.N.Y. Sept. 24, 2015) (SM Ex. 9) (allocating attorneys' fees "based on the multipliers applied to each firm's lodestar . . . which are adopted by the Court"). Although Michael Bradley's rate ($500) was not the rate for staff attorneys in the *BNY Mellon* litigation, the affidavit was not limited to that litigation, but rather cited "other complex class actions." G. Bradley Decl., 9/14/16, at ¶ 4 (SM Ex. 66). As Professor Rubenstein explained in his expert report, rates of up to **$550** per hour have been accepted in class action litigation for staff attorneys. *See* Rubenstein Decl.,

[33] For instance, is doubtful that Ann Ten Eyck and Rachel Wintterle, two contract attorneys, had ever been billed on an approved lodestar at $515 per hour. Lieff intended all staff attorneys to be billed at $415 per hour. The $515 rate was likely unintentional. Heimann Dep., 7/17/17, at 109:6-12 (SM Ex. 19). That is not to say that the $515 rate was not reasonable or that it had not been approved for staff attorneys in other actions, only that it may not have been previously approved for Attorneys Ten Eyck and Wintterle as individuals.

7/31/17, at ¶ 36 (TLF Ex. 1). Even in this case (the instant State Street litigation), the Court approved Lieff's lodestar, which listed the rates of five staff attorneys as **$515** per hour, and the Special Master accepted these rates as well. *See* R&R at 180-81 (noting "the Special Master finds noting unreasonable *per se* in the staff attorney rates billed by the Customer Class law firms . . . ."). [redacted]. The statement regarding rates "accepted in other complex class actions" is therefore true and cannot be the basis for Rule 11 sanctions.

Here, it is worth noting that the Special Master implies that it was somehow untoward for the Thornton Law Firm to use the $425 rate for staff attorneys because he has concluded that Lieff and Labaton suggested that $425 serve as a cap, not that Thornton actually charge $425 for its Staff Attorneys.[34] *See* R&R at 225. Regardless of the Special Master's insinuations, it is undisputed that the $425 rate was accepted in the *BNY Mellon* litigation. It is unclear why it would be inappropriate for the Thornton Law Firm to use the rate its co-counsel used (and the court approved) in the case most analogous to the one at bar. *See* Chiplock Dep., 6/16/17, at 184:20-25; 227:2-4 (SM Ex. 10) ("And so Thornton I think by and large used 425, perhaps thanks to this e-mail from fall of 2015, where I said, 'in Bank of New York Mellon I think we used 425,' which I think we did, because Thornton was involved in that case, too. So they used 425," and "[t]hey [*BNY Mellon* rates] were generally 425, which is the guidance that Thornton used when they submitted their declarations."). Moreover, there is hardly any difference between the rate Lieff set for most of its staff attorneys in the State Street matter (generally $415,

[34] The Special Master's comment that $425 was a "cap" is also inconsistent with the record testimony, which was ignored by the Special Master. *See* Chiplock Dep., 9/8/17, at 52:2-5 (SM Ex. 41) (with respect to same email Special Master discusses, stating "It was my expectation that the three firms would be billing their document reviewers at comparable rates. And perhaps the same rate as I'm suggesting here.").

but going up to $515) and Thornton's rate. As set forth *supra* at section II(A), the average weighted rate for Lieff staff attorneys was actually higher than the average weighted rate for Thornton staff attorneys.

iv. Current And Regular Rates

The final two errors identified by the Special Master are that the lodestar was "based on my firm's current billing rates" and that the rates "are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." It is understandable that the Court interpreted the phrases "current billing rates" and "charged for their services" to mean that each firm had paying clients who actually compensated the firms at the hourly rates listed in the lodestars. But the message perhaps intended by Labaton's boilerplate template—albeit unclear and with a poor choice of words—was that these are the regular rates of the firms which are charged against the common fund in class actions.[35] This is a plausible meaning if one understands that plaintiffs' firms, as evidenced by this case, usually do not have clients who actually pay by the hour. A simple modifying clause such as "in contingent fee matters" would have made the matter much more clear for the Court. Although the misunderstanding is regrettable, when considered with lack of both intent and materiality, the statement does not support Rule 11 sanctions.

It is of paramount importance that, although the Special Master has decided to single out the Thornton Law Firm with respect to the statements "based on my firm's current billing rates" and "the same as my firm's regular rates charged for their services," **identical phrases** appear in the Lieff and Labaton fee declarations. At the March 7, 2017 hearing, all three firms

[35] *See, e.g.*, Labaton Resp. to Interrog. 61, 6/9/17 (SM Ex. 174) ("The intent of the statement used by Labaton, as set forth above, was to convey to the Court that the rates in Exhibit A are the firm's regular standard rates, which are not applied for a specific case or depending on the nature of the work performed, **and that other Courts had found them reasonable when charged to a class in other litigation.**") (emphasis added).

acknowledged that, generally, they do not have clients who pay by the hour. *See, e.g.*, 3/7/17 Hr'g Tr. at 79:9-22; 88:8-9; 93:11-21 (SM Ex. 96). Further, the law firm of Richardson Patrick also submitted a fee declaration containing the **exact same** boilerplate language, SM Ex. 95 at ¶ 4, even though the Special Master found that Richardson Patrick is "a 100% contingent fee firm," R&R at 68. The McTigue Law Firm has "very few" clients who pay hourly rates, McTigue Dep., 7/7/17, at 83:19-84:3 (SM Ex. 11), yet also used nearly the same boilerplate language.[36]

There is no principled basis by which the Special Master can recommend that the Thornton Law Firm should be sanctioned for these misstatements when Lieff, Labaton, Richardson Patrick, and the McTigue Law Firm committed the same non-material error. This is not to say that all five firms should be sanctioned, but that the error itself is not the proper basis for sanctions. In fact, the types of phrases about which the Special Master is concerned, although admittedly confusing, appear to be quite common in fee declarations. For instance, in response to the Special Master's interrogatories, Labaton identified ten cases in which it submitted fee declarations with identical or similar language. *See* Labaton Resp. to Interrog. 61, 6/9/17 (SM Ex. 174). *See also* Labaton Resp. to Interrog. 71, 6/9/17 (SM Ex. 174) (stating that such language "has appeared in Labaton Sucharow's fee petitions for several years."). The leading treatise in this area, *Newberg on Class Actions*, includes in its appendix a sample "Declaration of lead counsel in support of motion for attorney's fees from common fund"

[36] The McTigue Law Firm's declaration used slightly different language. As relevant here, the declaration stated, "The hourly rates for the attorneys and professional support staff in my Firm included in Exhibit A are the same as my Firm's regular rates otherwise charged for their services, which have been accepted in other complex class actions my firm has been involved in." McTigue Decl., 9/13/16, at ¶ 20 (SM Ex. 91). In his deposition, when asked whether the language "might lead a judge to believe that the references to amounts that were actually charged to a paying client," Mr. McTigue responded, "I think it could. And I'm learning." McTigue Dep., 7/7/17, at 87:9-12 (SM Ex. 11).

(Appendix XV-B) and "Declaration of lead counsel in support of motion for attorney's fees" (Appendix XVI-C). 9 NEWBERG ON CLASS ACTIONS (5th ed.). Those two sample declarations contain language, respectively, that the "lodestar is calculated based on the current hourly rates of the firm" and that "[b]ased upon hourly rates historically charged to my firm's clients, the total lodestar value of this billable time is . . . ."[37] This is not to say that the language should not be clarified in the future for all plaintiffs' firms, but to suggest that singling out one firm for Rule 11 sanctions is not the appropriate means of doing so.

With respect to the phrase "regular rates," in particular, to the extent plaintiffs' attorneys (who generally do not charge by the hour) have "regular rates," they can only be the rates that they have charged in past actions. The testimony of Keller Rohrback managing partner Lynn Sarko is particularly illuminating on this point. Mr. Sarko testified:

> I know in this litigation there's been some questioning about what does the term "regular rates" mean. And I guess, to me, that is a common term that's used in class actions by judges. And what it means is your standard listed rate. And if you're a firm that has all contingent fee work, that's your listed rate that you submit your time at, that isn't made up for this case, isn't made up, isn't higher, isn't raised or ballooned or anything, but that's the rate that you offer your services at . . . . [I]n the cases that I regularly appear in and judges that actually have you have fee orders at the beginning, regular rates, at least to me in the industry that I've seen, are the regular rate, posted rates, whether or not – doesn't mean and charged to individual clients because most firms – many of the firms don't have that.

Sarko Dep., 7/6/17, at 90:1-11, 98:23-99:5 (SM Ex. 28).

Here, Thornton's rates were similar or identical to the approved lodestar rates in the most analogous case the Thornton Law Firm handled, the *BNY Mellon* litigation. The rates for Michael Thornton and Garrett Bradley were identical to the rates approved in the *BNY Mellon*

[37] The Thornton Law Firm does not know whether the law firms who drafted these declarations work solely on a contingency basis. The mere fact, however, that these are the sample declarations in the treatise regularly consulted by contingent plaintiffs' attorneys suggests that this type of language is widely used by contingent firms.

litigation. The rates for both Evan Hoffman and Michael Lesser were $50 greater than in the *BNY Mellon* litigation to reflect that Hoffman had become a partner and that Lesser had gained valuable expertise in FX litigation from the *BNY Mellon* case. The rate for associate Jotham Kinder was $30 greater than in the *BNY Mellon* litigation. The paralegal rate, $210, was identical to the *BNY Mellon* rate. As discussed above, Thornton is a small firm that had not previously listed staff attorneys on its lodestars, so Thornton used the exact same "regular rate" that Thornton's co-counsel, Lieff, had used (and the court approved) for the staff attorney position in the *BNY Mellon* litigation.

But regardless of whether they were "regular" or not, the Special Master found the rates of the Thornton attorneys reasonable. "[G]iven that the rates at which Thornton partners and associates were billed were comparable to (and indeed generally less than) Labaton's and Lieff's billing rates, and given the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness. The Special Master is particularly persuaded that Thornton's billing rates here . . . are reasonable because rates in this range were previously approved for Thornton by the Court in the *BONY Mellon* case." R&R at 175.

If one ignores the fact that Michael Bradley was working on a purely contingent basis, perhaps it could be argued that his rate should have been listed as $425 per hour to reflect that he was a staff attorney and to match the "regular rate" that Thornton's co-counsel had listed for the staff attorney position in the *BNY Mellon* litigation.[38] $500 was still well within the range of

[38] There may have been exceptions on the Lieff declaration as well. For instance, the $515 rate at which certain staff attorneys were billed was likely an error since Lieff had made a decision to generally charge staff attorneys at $415. *See* Heimann Dep., 7/17/17, at 109:6-12 (SM Ex. 19). That is not to say that the rates were not reasonable, only that they may not have been regular, and that Thornton should not be sanctioned for a single $500 rate any more than Lieff should be sanctioned for the $515 rates.

rates which have been accepted for the staff attorney position in other class actions, *see* Rubenstein Decl., 7/31/17, at ¶ 36 (TLF Ex. 1), but it may well have been an error to describe it as a "regular rate" for the staff attorney position in this matter. As a mitigating consideration, it is important to note that if Thornton had listed the staff attorney "regular rate" of $425 rather than $500 for Michael Bradley, Thornton's lodestar would have decreased by only $30,480, which represents less than one half of one percent of the Thornton lodestar, and .0007 of the overall lodestar.[39] Moreover, as discussed above, even when Michael Bradley's rate is included, the weighted average rate for the Thornton Law Firm staff attorneys ($428) was actually lower than the weighted average rate for the Lieff staff attorneys ($438).[40]

C. Double Counting

Although the Special Master does not identify the double counting error as a basis for Rule 11 sanctions, it is clear that this error colors his view of the misstatements he identified in the affidavit. The Special Master, however, has found that the double counting "was simply a mistake that grew out of combination of different circumstances," R&R at 221, and that it was "inadvertent," R&R at 363. Moreover, as demonstrated above, Thornton cannot be held responsible for the double counting errors, as it is clear that the staff attorneys were double counted on Lieff's and Labaton's lodestars, not on Thornton's. *See supra* § I(C). If there is any sanction based upon the double counting issue (which the Special Master does not recommend

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[39] Calculated from the overall lodestar figure as submitted to the Court in September 2016. As noted elsewhere, Michael Bradley's rate was higher than the other staff attorneys, in part, because he was compensated on a contingent basis. That is, if the class action against State Street did not succeed, Michael Bradley would have been paid absolutely nothing for the over 400 hours of document review he performed.

[40] It is worth noting that an inadvertent error in Labaton's fee declaration resulted in an overstatement of over $80,000 but that the Special Master did not find this sanctionable or even worthy of mentioning in his Report and Recommendations. Lawrence Sucharow executed the Fee Declaration in this matter stating that the "[t]ime expended in preparing this application for fees and payment of expenses has not been included in this [fee] request." Later, it came to light that over 100 hours of time totaling $80,330 related to fee applications was mistakenly included in Labaton's lodestar submitted to the Court. *See* Labaton Resp. to Interrog. 71, 6/9/17 (SM Ex. 174).

and which would, in any case, be unwarranted), there would be no principled legal basis to simply levy the sanction on Thornton.

D. Materiality And Intent

Given the nature of the statements that the Special Master identifies as "false," it is highly relevant that: (1) the "false" statements were immaterial to the overall motion; and (2) Garrett Bradley did not have any intent to deceive the Court. In terms of materiality, none of the statements in the affidavit affected the overall lodestar amount, which was the purpose of the motion. *See Navarro-Ayala*, 3 F.3d at 467 (reversing district court's finding of sanctions because "the motion, read fairly and as a whole, contain[ed] no significant false statement that significantly harmed the other side."). In terms of intent, section II, *supra*, explains why the Thornton Law Firm's fee declaration was not intentionally deceptive but rather the result of inattention. This fact is crucial. *See Young*, 404 F.3d at 41 ("We are not suggesting that a deliberate lie would be immune to sanction merely because corrective language can be found buried somewhere else in the document. But here the trial judge did not find, and in these circumstances could not have found, that plaintiff's counsel had intended to deceive."). *See also* Vairo Dep., 4/10/18, at 35:17-22, 36:6-7 (SM Ex. 202).

Seen in context, Bradley's affidavit was an isolated instance of inattentiveness due to reliance on a boilerplate affidavit that Bradley knew was prepared by experienced counsel. *See* Vairo Dep., 4/10/18, at 61:7-12; 78:2-3 (SM Ex. 202) ("Garrett Bradley made a mistake by not taking a closer look at the template before he submitted it to the Court. But that does not mean he violated Rule 11," and "[t]his is not the type of misstatement that should give rise to Rule 11 sanctions."). With respect to the double counting, Bradley immediately contacted co-counsel once alerted to the issue and ensured that within two days the Court was informed of the errors. R&R at 126-28. With respect to the additional statements in the affidavit, Bradley took

responsibility for the errors when he acknowledged, during the March 2017 hearing, that certain aspects of his affidavit were factually incorrect. 3/7/17 Hr'g Tr. at 88:8-21 (SM Ex. 96). Clearly sanctions are not warranted in these circumstances. *Cf. United States v. Jones*, 686 F. Supp. 2d 147, 156 (D. Mass. 2010) (Wolf, J.) (in criminal context, imposing no sanctions against prosecutor who, due to "inexcusable and inexplicable" errors, inadvertently neglected to disclose important exculpatory material to defendant). *See also Garbowski v. Tokai Pharm., Inc.*, No. 16-CV-11963, 2018 WL 1370522, at *8 n.5, *11 n.7 (D. Mass. Mar. 16, 2018) (Wolf, J.) (no discussion of sanctions for attorneys who "filed . . . documents in a manner that misrepresented the contents of the Certification" and filed an inaccurate declaration).[41]

IV. The Recommended Sanctions Are Incompatible With Rule 11

If the Court were to find that the Thornton Law Firm did violate Rule 11, a conclusion with which the Thornton Law Firm strenuously objects, the Court should not accept the Special Master's proposed sanction of $400,000 to $1 million for three reasons: (1) Rule 11 requires that

[41] Immaterial (or even material) errors, when not committed with ill intent, should not generate Rule 11 sanctions. In this very case, for example, the Special Master has made misstatements to the Court. In a letter to the Court dated April 23, 2018, the Special Master requested a delay in the submission of his Report and Recommendations. He stated that "[w]e were prepared to file under seal with the Court by today a hard copy of the Report and Recommendations, together with all exhibits" but noted that certain technical delays in creating a searchable disk with hyperlinks to exhibits necessitated a request for an extension. (Dkt. 217-1). It is clear, however, that the Report and Recommendations was not finalized by April 23, 2018, as the Special Master erroneously represented to the Court. Included as an exhibit to the Report and Recommendations is a "Supplemental Ethical Report for Special Master Gerald E. Rosen" dated **May 8, 2018** (totaling, with exhibits, over 700 pages) (SM Ex. 233), which the Special Master cites throughout the Report and Recommendations.

Also worth noting is that on June 7, 2018, the Special Master filed "Special Master's Responses (Under Seal) to Various Motions of Plaintiffs' Counsel On Redaction and Related Issues" but did not serve the filing on all counsel. On June 9, this Court issued an order citing the Special Master's submission. Once alerted to the existence of the Special Master's submission, counsel inquired of the Special Master's counsel why the Special Master filed an *ex parte* motion with the Court. In response, the Special Master's counsel acknowledged the error and provided all parties with the filing. The copy of the filing provided did not include a certificate of service, which means either that the filing did not conform to Federal Rule of Civil Procedure 5 or that there was a certification on the copy submitted to the Court but that such certification was false because the parties were not actually served. This is not to say that the error was anything other than inadvertent or that the inadvertent error should subject any firm to sanctions, but to highlight the absurdity of the Special Master's hyper-technical reading of the Rules.

sanctions must be "limited to deter repetition of the conduct or comparable conduct of others similarly situated"; (2) the dollar amount of the sanction sought is wildly out of proportion with other sanctions imposed in the First Circuit; and (3) monetary sanctions may not be imposed *sua sponte* if there has been a settlement of the underlying litigation.

A. The Recommended Sanction Exceeds What Is Necessary For Deterrence

As an initial matter, it is axiomatic that the central purpose of Rule 11 sanctions is deterrence. *See Lamboy-Ortiz v. Ortiz-Velez*, 630 F.3d 228, 247 (1st Cir. 2010) ("Rule 11 . . . finds its justification exclusively in deterrence."); *Carrieri v. Liberty Life Ins. Co.*, No. 09-12071-RWZ, 2012 WL 664746, at *5 (D. Mass. Feb. 28, 2012) ("It is well established that the purpose of Rule 11 sanctions is to deter rather than to compensate.") (internal quotation marks omitted); *Ultra-Temp Corp. v. Advanced Vacuum Sys., Inc.*, 194 F.R.D. 378, 384 (D. Mass. 2000) ("[U]nder the amended version [of Rule 11], sanctions should be imposed for the purpose of deterrence rather than to compensate the opposing party."). The Rule explicitly states that any sanction imposed "**must be limited** to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4) (emphasis added).[42]

Here, there is no plausible argument that a sanction of between $400,000 and $1 million is needed to deter an inadvertent error in a boilerplate affidavit prepared by another law firm.[43]

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[42] Rule 11 was amended in 1993. The Rule may well have had compensatory purposes prior to the amendment, but it is clear that the current version of Rule 11 finds its purpose in deterrence. *See Silva v. Witschen*, 19 F.3d 725, 729 n.5 (1st Cir. 1994) ("Under amended Rule 11, however, 'the purpose . . . of sanctions is to deter *rather* than to compensate.'") (quoting Fed. R. Civ. P. 11 advisory committee's notes) (emphasis added by *Silva*); 5A FED. PRAC. & PROC. CIV. § 1336.3 (3d ed.) ("[T]he 1993 revision makes it clear that the main purpose of Rule 11 is to deter improper behavior, not to compensate the victims of it or punish the offender."). Unfortunately, some courts erroneously cite pre-amendment cases for the proposition that today's Rule 11 serves a compensatory purpose.

[43] The Special Master has set sanctions at 10% to 25% of the double counting error. As explained above, the disgorgement of the double counting error is unjustified because the lodestar figure served only as a cross-check and not a dollar-for-dollar fee request. **If the correct disgorgement is $0, Rule 11 sanctions, to the extent any should be imposed, should also be $0.**

Both the monetary and reputational impact of this case on the Thornton Law Firm have already been severe. In monetary terms, the Thornton Law Firm (and its co-counsel Lieff and Labaton) have **already** funded the Special Master's $3.8 million investigation. As the exclusive purpose of Rule 11 is deterrence, it is of no moment where the $3.8 million went— the point is that the Thornton Law Firm has already been sufficiently deterred by paying its ratable share of the investigation, as well as paying for counsel to represent it during the investigation, and by the attendant reputational consequences. It goes without saying that in a typical Rule 11 case, counsel would not have been charged millions of dollars for the investigation of its own conduct. The Court therefore must consider the deterrent effect of the funds the law firms have spent on the investigation in the context of any additional deterrent purposes served by Rule 11 sanctions.

In terms of general deterrence, the $3.8 million investigation as well as the Special Master's recommendation that the three law firms be disgorged of an additional $6 million has sufficiently deterred other lawyers who may otherwise sign boilerplate documents without a sufficiently careful review. This proceeding and the Special Master's investigation have been widely covered in the legal press, ensuring that lawyers in this jurisdiction and others are aware that they introduce errors into fee declarations at their own peril. It is not a stretch to imagine that, in light of the extensive coverage of this case, class action attorneys will significantly revise their boilerplate fee declarations to ensure that all possible ambiguity is removed from their representations to the court.

It appears that the Special Master's recommendation of a Rule 11 sanction of $400,000 to $1 million is tainted by his opinion that the sanction should serve a compensatory purpose rather than a deterrent purpose. Rule 11 states that sanctions are limited to "nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion . . . an order directing payment to the

movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11. The Advisory Committee Notes further note that "a monetary sanction imposed after a court-initiated show cause order [is] limited to a penalty payable to the court." The Special Master has ignored the Rule, instead crafting his own remedy "that the monetary sanctions should be awarded to the class." R&R at 365. This is clear legal error. *See Lamboy-Ortiz*, 630 F.3d at 244 n.27 ("[A]ny monetary sanction imposed by the court *sua sponte* must be payable to the court alone."); *Medina v. Gridley Union High Sch. Dist*., 172 F.3d 57 (9th Cir. 1999) (table decision) (vacating order to pay *sua sponte* Rule 11 sanctions to party rather than to the court); *Nw. Bypass Grp. v. U.S. Army Corps of Engineers*, No. 06-CV-00258-JAW, 2008 WL 2679630, at *2 (D.N.H. June 26, 2008) (on reconsideration, vacating award of Rule 11 sanctions to party, and noting, "[t]he only monetary sanction a court may order on its own initiative is a penalty to the court itself."); *Balerna v. Gilberti*, 281 F.R.D. 63, 71 (D. Mass. 2012). The Special Master's proposed remedy suggests that he views Rule 11 as compensatory and has disregarded the deterrent effect of the Thornton Law Firm's funding of his $3.8 million investigation.

B. The Recommended Sanction Is Extraordinary When Compared With First Circuit Precedent

The First Circuit has warned that "the power to impose sanctions is a potent weapon and should, therefore, be used in a balanced manner." *Navarro-Ayala*, 968 F.2d at 1426-27. Courts "take pains [not] to use an elephant gun to slay a mouse." *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990). The sanction recommended by the Special Master here is truly extraordinary. Undersigned counsel has searched for Rule 11 opinions in all courts in the First Circuit in the last twenty years. The sanction proposed by the Special Master is wildly inconsistent with the sanctions generally imposed in the First Circuit. Undersigned counsel has

identified only **three** cases in the last twenty years where courts in the First Circuit have imposed sanctions of over $100,000.[44] These cases are particularly instructive because they show the type of conduct that does—and does not—qualify for severe Rule 11 sanctions. Notably, in one of the cases, the First Circuit reduced a sanction of $250,000 to only $5,000.

i. *In re Nosek*

In 2008, the bankruptcy court issued a $250,000 *sua sponte* sanction against a mortgage company because the company represented to the court on multiple occasions that it held a certain mortgage when, in fact, it did not hold the mortgage.[45] *In re Nosek*, 386 B.R. 374 (Bankr. D. Mass. 2008). As later explained by the district court:

> Despite the fact that it had not held the loan since 1997 or serviced it since early 2005, Ameriquest and its attorneys made contrary representations. It filed a proof of claim and an amended proof of claim in 2002 and 2003 . . . listing itself as creditor without any reference to the assignment of the loan and without attaching a copy of the power of attorney. It filed pleadings signed by [its] attorneys in 2003 stating that it 'is the holder of the first mortgage . . . .' It filed an Answer signed by [its] attorneys in 2005 admitting the allegation that it is the holder of the first mortgage. It conducted an eight-day adversary proceeding in 2006, with representation by [its attorney], without ever notifying the Bankruptcy Court that it was neither the holder nor the servicer of the note and mortgage.

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[44] There are occasionally matters where the district court or the bankruptcy court orders sanctions in the amount of costs or fees and the amount of costs or fees does not appear in the opinion. *See, e.g.*, *Rivera v. Lohnes*, No. 10-2114, 2012 U.S. Dist. LEXIS 29441 (D.P.R. March 5, 2012). Although it is quite difficult to verify, even in these cases undersigned counsel is not aware of any case in which the amount of costs or fees is or exceeds $100,000. *See, e.g.*, Judgment, Dkt. 62, *Ruiz-Rivera v. Lohnes*, No. 12-1520 (1st Cir. Jan 8, 2014) (noting that "the district court never set the amount of attorneys' fees that appellant would be required to pay" and that "even if the sanction order were before this court, we could not affirm it.") (TLF Ex. 15). In a recent opinion, Judge Young discussed Rule 11 and ordered a party to submit a claim for attorneys' fees and costs. *Shire LLC v. Abhai LLC*, No. 15-13909, 2018 U.S. Dist. LEXIS 46946 (D. Mass. Mar. 22, 2018). The party's revised motion for fees seeks over $2 million but makes clear that the fees sought are pursuant to Fed. R. Civ. P. 37, the court's inherent power, and 35 U.S.C. § 285 (not, in other words, pursuant to Rule 11). *See* Plaintiff's Application for Reasonable Attorneys Fees and Expenses, Dkt. 342, *Shire LLC v. Abhai LLC*, No. 1:15-cv-13909 (D. Mass. Apr. 19, 2018) (TLF Ex. 16).

[45] Sanctions were imposed under the bankruptcy analogue to Rule 11. In addition to Ameriquest, additional sanctions were imposed on two law firms, an attorney, and another financial services company. The individual attorney's sanction was vacated on reconsideration by the bankruptcy court. The other sanctions were vacated by the district court, with the exception of a $25,000 sanction on one of the law firms. *See In re Nosek*, 406 B.R. 434, 436 (D. Mass. 2009).

In re Nosek, 406 B.R. 434, 437 (D. Mass. 2009).

On appeal, the mortgage company admitted that it had misrepresented the status of the mortgage, but argued that the sanction imposed was unreasonable. In reducing sanctions from $250,000 to $5,000, the First Circuit held that, "accuracy of representations is an objective matter, as is the reasonableness of any inquiry actually made. But subjective intent can bear on whether to impose a sanction and what amount to fix. Even a dog, said Holmes, distinguishes between being kicked and being stumbled over." *In re Nosek*, 609 F.3d 6, 9-10 (1st Cir. 2010) (citing O.W. HOLMES, JR., THE COMMON LAW 3 (1881)) (additional citations omitted).

ii. *In re 1095 Commonwealth Corp.*

The bankruptcy court imposed an approximately $143,000 sanction on Citizens Bank under the bankruptcy analogue to Rule 11 for substantial misrepresentations regarding the amount of attorneys' fees sought. *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. 284 (Bankr. D. Mass. 1997).[46] Specifically, in support of a motion for attorneys' fees, Citizens Bank filed an affidavit in which it stated that it had "incurred" legal fees in the amount of $262,419.40 and had paid such fees to its law firm. In fact, the law firm had an arrangement whereby it charged Citizens a special negotiated rate for fees actually paid by Citizens, but "in the event that [the bankrupt party] should ultimately be responsible to Citizens for fees, Brown Rudnick would charge Citizens the standard, generally higher hourly attorney rates. In effect, the higher fees would only be charged if Citizens was not going to pay the fees." *In re 1095 Commonwealth Corp.*, 236 B.R. 530, 533 (D. Mass. 1999). After the dual-fee arrangement was uncovered, one of the lawyers for Citizens "continued his attempt to conceal from the Court and the Debtors the nature of the agreement." *In re 1095 Commonwealth Ave. Corp.*, 204 B.R. at 299. In affirming

[46] The sanction was imposed over twenty years ago, in 1997, but undersigned counsel includes this case because the affirmance by the district court occurred in 1999.

the imposition of $143,000 in sanctions, the district court noted that the bankruptcy court "found that the intentional nondisclosure of the fee agreement was the equivalent of fraud." *In re 1095 Commonwealth Corp.*, 236 B.R. at 533. The amount of the sanction (imposed on motion, not *sua sponte*) was equivalent to the attorneys' fees and expenses the bankrupt party incurred in opposing Citizen's fee petition.[47]

iii. *Sanchez v. Esso Standard Oil de Puerto Rico*

The District of Puerto Rico sanctioned plaintiffs approximately $513,000, which represented certain costs incurred by defendant defending environmental litigation which was "frivolous, unreasonable, and lacking a factual foundation" and in which plaintiffs "wrongfully procured injunctive relief based upon false testimony." *Sanchez v. Esso Standard Oil de Puerto Rico, Inc.*, No. CIV 08-2151, 2010 WL 3809990, at *10, *14 (D.P.R. Sept. 29, 2010). The court noted that the plaintiffs' attorneys "acted in bad faith by . . . attempting to deceive this court . . . and dragging out the expensive litigation for over a year without factual support and without any reasonable hope of prevailing on the merits." *Id.* at *18 (internal quotations omitted). The court also ordered that plaintiffs and their attorney pay the defendants' attorney's fees for part of the litigation. Although undersigned counsel is including this case among the three First Circuit cases in the last twenty years where Rule 11 sanctions exceeded $100,000, it should be noted that the sanction was imposed in the first instance under 28 USC § 1927 and in the alternative under Rule 11, the court's inherent sanction power, or the fee-shifting section of the statute pursuant to which the underlying action was brought. The sanction was unusual in that the court appears to

[47] For sanctions imposed on motion, "under unusual circumstances . . . deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party." Fed. R. Civ. P. 11 advisory committee's note.

have approved a settlement between the parties in which plaintiffs paid defendant $315,000 to settle all claims, including any costs and fees pursuant to the court-ordered sanction.[48] *See* Agreed Final Judgement, Dkt. 513, *Sanchez v. Esso Std. Oil Co.*, No 3:08-cv-02151 (D.P.R. Apr. 13, 2011) (TLF Ex. 17).

C. The Special Master Has Ignored Rule 11's Prohibition On Imposition Of Monetary Sanctions Post-Settlement

In recommending a significant monetary sanction, the Special Master has wholly ignored section 5 of Rule 11, titled "Limitations on Monetary Sanctions," and thereby committed another serious legal error. That section states that "The court must not impose a monetary sanction . . . on its own, unless it used the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned." Here, the Court entered its Order and Final Judgment approving the settlement between State Street and the Class (i.e., the "settlement of the claims made by or against the party") on November 2, 2016. *See* Order and Final Judgment, 11/2/16 (SM Ex 113). The Court has not issued a show-cause order contemplated by Rule 11(c)(3). Even if one were to interpret the Court's February 6, 2017 Order as a Rule 11(c)(3) show-cause order, it was still issued after the settlement. The Special Master's failure to even consider this strict requirement is another example of his and his counsel's inattention to the law and to the facts. *See, e.g.*, *Wohllaib v. U.S. Dist. Court for the W. Dist. of Washington, Seattle*, 401 F. App'x 173 (9th Cir. 2010) (reversing *sua sponte* monetary sanction and noting "Rule 11 clearly prohibits a district court from *sua sponte* issuing an order to show cause why the court should not impose a monetary sanction if the parties have already settled a case."); *Steeger v. JMS Cleaning Servs.*, No.

[48] The court also agreed that plaintiffs' attorney could pay defendant $10,000 in lieu of court-ordered sanctions.

17CV8013, 2018 WL 1363497 (S.D.N.Y. Mar. 15, 2018) (on reconsideration, vacating monetary sanctions imposed *sua sponte*). *See also* 5A FED. PRAC. & PROC. CIV. § 1336.3 (3d ed.); MOORE'S FEDERAL PRACTICE, § 11.22(2)(b) (3d ed.).

V. Garrett Bradley Should Not Be Referred To The Board of Bar Overseers

A. The Conduct At Issue Affects All Firms Yet The Special Master Unfairly Recommends Only Garrett Bradley For Discipline

As an initial matter, the Special Master's recommendation that Garrett Bradley be referred to the Board of Bar Overseers for inadvertent misstatements in a boilerplate affidavit contradicts "the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp*., 546 U.S. 132, 139 (2005). As demonstrated above, nearly identical misstatements were made by lawyers from the other law firms involved in this litigation—the majority of whom used the same boilerplate affidavit— yet the Special Master recommends discipline only for Garrett Bradley. Further, with respect to the Chargois arrangement (supposedly "the most disturbing aspect of what was learned during the entire investigation," R&R at 330), the Special Master found violations of multiple ethical rules, *see* R&R at 250, 255, 286, 322, 326, yet recommends "no professional disciplinary action be taken," *id.* at 371. This is not to say all firms should be referred for professional discipline, but to note that Garrett Bradley's conduct does not warrant professional discipline for him or his firm, particularly with respect to the technical and immaterial misstatements in the fee declaration. *Cf.* Lieberman Dep., 4/4/18, at 91:21-92:6 (SM Ex. 228).

B. The Special Master's Reliance On *Matter of Schiff* Is Clearly Wrong

As further evidence of the serious flaws in the Special Master's Report and Recommendations, the Court need look no further than the Special Master's primary authority for the proposition that Garrett Bradley should be referred to the BBO—*Matter of Schiff*. The

Special Master writes of this case, "The Rhode Island Court's handling of *Schiff* informs the Special Master with regard to Bradley's false Declaration in this matter." R&R at 241. But the *Schiff* case has absolutely no bearing on any potential discipline for Garrett Bradley or the other lawyers who signed boilerplate fee declarations. The Special Master's extensive discussion of this case—which takes up nearly three pages of his Report and Recommendations— suggests that the Special Master or his counsel are either: (1) disingenuous because they know the *Schiff* case has no relevance here but rely on it anyway; or (2) simply unable to understand the difference between two readily distinguishable cases. Both possibilities are cause for concern.

The procedural history underlying the *Schiff* case is "bizarre, not to say byzantine." *Pontarelli v. Stone*, 978 F.2d 773, 774 (1st Cir. 1992). Attorney Schiff represented a police fraternal organization and five police officers in an eight-count civil rights lawsuit against Rhode Island and four Rhode Island officials filed in June 1986. *Pontarelli v. Stone*, 930 F.2d 104, 107 (1st Cir. 1991). At the conclusion of the district court proceedings, all defendants prevailed against all plaintiffs except for three judgments on a single count of sex discrimination obtained by one plaintiff against Rhode Island ($2.00), and two officials ($10,002 and $5,002.). *See id; Pontarelli v. Stone*, 781 F. Supp. 114, 118 (D.R.I. 1992). Despite the relatively modest judgment, plaintiff moved for attorneys' fees of $511,951.00 and costs of $203,268.28 (in other words, over forty times greater than the recovery) pursuant to 42 U.S.C. § 1988. *Pontarelli*, 781 F. Supp. at 118. In connection with the fee petition, Attorney Schiff signed an affidavit stating that "the summaries of time and charges for my services attached hereto present an accurate statement of services performed in connection with this litigation and was prepared from contemporaneous time records, and with respect to sums for costs and expenses, from accounting records." *Matter of Schiff*, 684 A.2d 1126, 1140 (R.I. 1996). The district court found the

affidavit to be false and referred Schiff to the Rhode Island Supreme Court, which ultimately imposed an 18-month suspension. *Id.* at 1127, 1138; *Matter of Schiff*, 677 A.2d 422, 425 (R.I. 1996).

There are two similarities between *Schiff* and the case at bar: both are about attorneys' fees and both concern boilerplate statements in an affidavit. The similarities end there. The nature of the falsity in the *Schiff*—where the court found "**the fee claimed has been grossly inflated**" and the fee declaration was "**riddled with misrepresentations**"—is worlds apart from the nature of the alleged falsity in this case.[49] *Schiff*, 684 A.2d at 1134, 1136 (emphasis added). In *Schiff*, the "**[t]he billing sheets submitted by respondent sought reimbursement for work unrelated to the case [and] sought payment for time not worked.**" *Schiff*, 677 A.2d at 423 (emphasis added). The records demonstrated a "lack of good faith effort to eliminate time expended on separate unsuccessful claims or on behalf of unsuccessful litigants or to exclude hours which [were] 'excessive, redundant, or otherwise unnecessary.'"[50] *Pontarelli*, 781 F. Supp. at 121. The Rhode Island Supreme Court found that the "misrepresentations to the court bear a close resemblance to an attempt to obtain money under false pretenses." *Schiff*, 677 A.2d at 425. The nature of the "grossly inflated" billing is astounding:

> For example, according to the records submitted, Ms. Schiff worked on this case for 25.7 hours on October 9, 1988, and 26.6 hours on October 10, 1988. While it may be possible to work around the clock for two consecutive days without respite, it clearly is impossible to do so for more than 24 hours in any one day. The summary also indicates that on April 14, 1988, Ms. Schiff spent 8.9 hours travelling

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[49] As explained above, the lodestar was submitted in this case so that the Court could determine whether the 25% fee was reasonable (*i.e.*, the "cross-check"). Additional hours or fees on the lodestar would not have increased the fees paid to the plaintiffs' attorneys, but simply reduced the multiplier, making it more likely that the court would find the 25% fee reasonable. This is wholly different from the fee petition Attorney Schiff filed pursuant to 42 U.S.C. § 1988, where the hours and fees listed on the declaration represented the actual funds sought from the defendants.

[50] In addition to this malfeasance, the Court found Plaintiff engaged in "an effort to accomplish a goal completely unrelated to the stated purpose of litigation by making unsupportable claims against third persons." *Pontarelli*, 781 F. Supp. at 127.

> to New York for a meeting. That was only two days after she wrote to the Court advising that she was unable to meet a filing deadline because of a totally incapacitating illness that would prevent her from engaging in normal activities for 7–10 days. Her incapacity was confirmed by another letter she sent to the Court on April 20 indicating that she had been hospitalized until April 19.
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> [C]ompensation is sought for more than 4,000 billable hours which represent more than two full years of a lawyer's billable time. However, despite the sweeping allegations contained in the complaint, the "plaintiffs'" claims were based on a relatively simple sequence of events occurring over a limited period of time. It is inconceivable that even the most vigorous advocacy of those claims required anywhere near the number of hours for which the "plaintiffs" seek recovery.

Schiff, 684 A.2d at 1133-35.

There were also serious allegations that Schiff inflated costs:

> [T]hey assert that they have paid $22,510.17 for the services of three private investigators and approximately $40,000.00 in expert witness fees and expenses. However, they are unable to produce any bills or other documentation showing what services were performed, when they were rendered, how much time was involved, what rates were charged or what expenses are included in those sums.
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> A total of nearly $15,000.00 is claimed for "lodging" expenses. Of that amount, $4,800.00 is identified as "apartment rental" for the two out-of-state attorneys who participated in the trial. That sum, itself, seems excessive inasmuch as the trial lasted for only 17 days. The remaining $10,200.00 consists of hotel bills for unidentified "expert witnesses" who never testified and other individuals who were identified but whose roles in the case, if any, are unknown.
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> Superimposed on this complete absence of documentation is the same kind of misrepresentation that permeates the "plaintiffs'" requests for attorneys' fees. Thus, the plaintiffs seek reimbursement for very precise amounts allegedly expended for items such as office supplies ($479.50 and $877.75), postage ($548.40), and photocopying ($10,320.00, $550.00, $3,689.23). Those figures clearly convey, and presumably were intended to convey, the impression that they were derived from detailed records or exact measurement of the quantities of each item involved. However, on cross-examination, Ms. Schiff admitted that they were only "estimates" and that there is no documentation to support them.

Id. at 1135-36.

Contrast the findings in *Schiff* with the case at bar. **Here, there is no evidence whatsoever of false, inflated, or unreasonable billings.** Instead, the Special Master himself found that: (1) the total fees awarded to class counsel were justified and reasonable, *see* R&R at 6 ("By itself, this attorneys' fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved."); (2) the rates listed for Thornton partners and associates were justified and reasonable, s*ee* R&R at 175 ("[G]iven the intricacies and difficulties of this case, on the whole the Special Master finds the hourly rates at which Thornton billed its partners and associates on its lodestar report were within the realm of reasonableness."); (3) with the exception of Michael Bradley and the contract attorneys, the rates listed for the staff attorneys were reasonable and justified, *see* R&R at 172, 180 ("[W]e find that the higher rates billed were justified in this instance" and "[t]he Special Master concludes that the staff attorney billing rates in the lodestar fee petition are generally reasonable . . . ."); and most importantly, (4) the Thornton attorneys actually worked the hours listed on the lodestar, and the number of hours worked was reasonable, *see* R&R at 216 ("[T]he total hours expended by each of the Thornton lawyers were reasonable and sufficiently reliable"); *id.* at 217 ("[T]he total time Michael Bradley spent working on the *State Street* document review, 406.4 hours, was reasonable.").

In short, the nature of the falsity in the *Schiff* case goes to the very essence of the fee request—the number of hours actually worked and the reasonableness of those hours—whereas the nature of the falsity alleged here relates to erroneous (or at the very least, ambiguous) and immaterial statements that did not affect the overall lodestar. In *Schiff*, the declaration was false because—boilerplate or not— the attached statement of fees was not true and correct. Here, the

declaration *language* itself contained errors regarding, for instance, the nature of the employee-employer relationship between the Thornton Law Firm and the staff attorneys for whom it paid; the Special Master found the accompanying hours and time to be reasonable and reliable. There simply is no comparison between the two and it is bizarre that the Special Master concludes that "[t]he facts in *Matter of Schiff* are **eerily similar** to those here."[51] *See* R&R at 244 (emphasis added). Justice Holmes' axiom, cited above by the First Circuit, again seems particularly apt: "Even a dog knows the difference between being kicked and being stumbled over." O.W. HOLMES, JR., THE COMMON LAW 3 (1881).

C. Garrett Bradley Did Not Violate MRPC 3.3 or 8.4

If the Court were to consider referring Garrett Bradley to the BBO—a step which should be reserved for only serious misconduct—it would have no basis for doing so.[52] In signing a boilerplate affidavit that contained inadvertent and immaterial errors, Bradley violated neither Massachusetts Rule of Professional Conduct 3.3(a)(1) nor 8.4 because he did not have actual knowledge of any false statement.

Rule 3.3(a)(1) states in relevant part that "[a] lawyer shall not **knowingly** make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law

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[51] *Compare* R&R at 244 ("Just like Schiff's affidavit, Garrett Bradley's Declaration here was a sworn statement designed to convince Judge Wolf that Thornton's fee petition was fair, reasonable, and accurate") *with* R&R at 6 ("[T]he attorneys' fee award was fair, reasonable, and deserved.").

[52] The Court's Local Rules regarding disciplinary procedures and referrals were amended effective January 1, 2015. Pursuant to the new rules, there is now a question of whether the judicial officer presiding over the case should be the judicial officer who determines whether or not to refer attorneys to the Board of Bar Overseers. *Compare* L.R. 83.6.5 (effective Jan. 1, 2015) *with* L.R. 83.6.5(A) (version which appears to have been in effect prior to Jan. 1, 2015) ("When misconduct or allegations of misconduct that, if substantiated, would warrant discipline as to an attorney admitted to practice before this court, is brought to the attention of a judicial officer, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the judicial officer may refer the matter to counsel for investigation, the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate."). *See Gonsalves v. City of New Bedford*, 168 F.R.D. 102, 107 n.100 (D. Mass. 1996) (Wolf, J.); *Blake v. NSTAR Elec. Corp.*, No. 09-10955, 2013 WL 5348561, at *1 n.1 (D. Mass. Sept. 20, 2013).

previously made to the tribunal by the lawyer." Mass. R. Prof. C. 3.3(a)(1) (emphasis added). The Rules define "knowingly" as "**actual knowledge** of the fact in question." Mass. R. Prof. C. 1.0(g) (emphasis added). This intent standard does not reach negligent or inadvertent misrepresentations. The drafters of the Rule knew how to employ a negligence standard but affirmatively did not do so in the candor to the tribunal provision. *See* Mass. R. Prof. C. 4.3 (using the "[w]hen the lawyer knows or reasonably should know" standard for communications with unrepresented parties); Mass. R. Prof. C. 8.2 (using the "knows to be false or with reckless disregard as to its truth or falsity" standard for statements regarding integrity of judges).[53]

Indeed, as the Special Master's own so-called expert acknowledged, the test for whether an attorney violated Rule 3.3(a)(1) is **subjective**. Gillers Dep., 3/20/18, at 272:4-21 (SM Ex. 253). That is, in determining whether there has been a violation, the tribunal must ask not what the reasonable attorney *would have known*, but what the attorney *actually knew* when he presented facts to the Court. *See* W. Bradley Wendel, *Monroe Freedman: The Ethicist of the Non-Ideal*, 44 HOFSTRA L. REV. 671, 680 n.8 (2016) ("Knowledge is defined in the *Model Rules* as actual (that is, subjective) knowledge.") (citations omitted); Rutherford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act As Gatekeepers*, 56 RUTGERS L. REV. 9, 51 (2003) ("[T]he Model Rules eschew an objective standard . . . opting instead to judge the propriety of the lawyer's conduct under a subjective, actual knowledge standard.").

As with violations of Rule 3.3, Rule 8.4(c) does not apply to mistakes. *See In re Murray*, 455 Mass. 872, 881 (2010) (upholding hearing committee's finding that attorney did not violate

[53] In *In re Hilson*, 448 Mass. 603 (2007), the Supreme Judicial Court suggested, but did not hold, that Rule 3.3 could be violated by "reckless disregard for . . . truth or falsity."

Rule 8.4(c) where "no intent to mislead"); *Matter of McCabe*, 13 Mass. Att'y Disc. R. 501 (Appeal Panel Report, September 1997) ("[T]he conduct must be intentional, not merely negligent."); *Matter of Thurston*, 13 Mass. Att'y Disc. R. 776 (Board Memorandum, May 12, 1997) (striking hearing committee's finding that attorney violated DR 1-102(A)(4) [predecessor to 8.4(c)] and noting, "As Bar Counsel concedes, a negligent misrepresentation does not violate DR 1-102(A)(4) because the rule prohibits only intentional conduct."). Professor Gillers agrees and stated in his deposition that the mental state required for a Rule 8.4 violation should not be lower than the mental state required for a Rule 3.3 violation. Gillers Dep., 3/20/18, at 275:9-21 (SM Ex. 253).[54]

The Supreme Judicial Court's *In re Diviacchi* opinion, which the Special Master cites, is not to the contrary. There, the attorney committed multiple ethical violations, including charging excessive fees, and sued his client in both federal and state courts. In one of the lawsuits, the attorney alleged the client had a "standard habit" where she "hires an attorney, works him or her until she stops paying the bills, fires that attorney and disputes the bill and files a [BBO] complaint, and then gets another attorney and starts the process again." *In re Diviacchi*, 475 Mass. 1013, 1017 (2016). In fact, there was no evidence of such a pattern, and in particular, there was no evidence of any BBO complaints. In upholding the sanction, the Court cited a comment to Rule 3.3 and rejected the attorney's argument that his statements "should be

[54] The BBO has not always spoken with one voice. In a few instances, particular fact summaries compiled by the BBO have suggested that a negligent misrepresentation may be sufficient for a violation of Rule 8.4. For instance, in *In re Ged* (Public Reprimand 2004-17), the attorney received a public reprimand for erroneously including hours that he did not actually work on a fee petition. The matter, however, was resolved by a stipulation which waived a hearing. Similarly, in *In re Tiberii* (Public Reprimand 1996-4), the BBO imposed a public reprimand for negligent misrepresentations under both the predecessor to 8.4 and the predecessor to 3.3. *See also In re Paul J. Pezza* (No. BD-2013-116) (although the paucity of facts prevents the reader from understanding which intent standard was actually used). The precedents cited above, and that of the Supreme Judicial Court, however, suggest that intentionality is required. *See In re Discipline of an Attorney*, 448 Mass. 819, 831 n.17 (2007); *Matter of Zak*, 476 Mass. 1034, 1038 (2017).

evaluated under a subjective, good faith basis standard" even though he could not provide any factual basis for them. *Id.* at 1020. *Diviacchi* did not alter the "actual knowledge" standard in Rule 3.3; the *Diviacchi* attorney was not merely inattentive in reviewing an affidavit, but intentionally concocted, and swore to the truth of, defamatory allegations about his client.

Nor could the "actual knowledge" standard be changed by a comment to a Rule.[55] As the First Circuit has noted regarding the Rhode Island Rules of Professional Conduct, "[a] Comment cannot substantively change the text of [a] Rule." *Whitehouse v. U.S. Dist. Court for the Dist. of Rhode Island*, 53 F.3d 1349, 1358 n.12 (1st Cir. 1995). And the Rules themselves state, "Comments do not add obligations to the Rules. . . . The Comments are intended as guides to interpretation, but the text of each Rule is authoritative."[56] Mass. R. Prof. C. Scope §§ 1,9. *See also Clark v. Beverly Health and Rehab. Servs., Inc.*, 440 Mass. 270, 275 n.8 (2003) ("[A Comment] is an illustrative tool, not a bootstrap. While it provides guidance to the practitioner in certain circumstances, it cannot enlarge, diminish, or in any way affect the scope of the . . . rule itself."); *Matter of Larsen*, 379 P.3d 1209, 1214 (Utah 2016) ("[Ou]r rules require proof of *actual knowledge*. That concept is distinct from constructive knowledge or recklessness. . . . [Rule 3.3], as written, does not lend itself to the interpretation that a false statement made

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[55] The Special Master believes Comment 3 to Rule 3.3 is applicable, which states "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." *See* R&R at 240; Mass. R. Prof. C. 3.3.

[56] In any event, a federal court is not bound by a state's interpretation of disciplinary rules. *See Grievance Comm. For S. Dist. of New York v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995) ("[W]ell-established principles of federalism require that federal courts not be bound by either the interpretations of state courts or opinions of various bar association committees."); *Figueroa-Olmo v. Westinghouse Elec. Corp.*, 616 F. Supp. 1445, 1450 (D.P.R. 1985) ("The manner in which the Supreme Court of Puerto Rico applied its disciplinary code was, of course, useful precedent in our own interpretation of that code's application to a particular situation before us, but it is essential to understand that the primary responsibility for supervising the conduct of the attorneys who practice before this court lies precisely with this forum.").

without a 'reasonably diligent inquiry' is a *knowing* misstatement in violation of the rule. . . . We accordingly repudiate Comment 3 in the Advisory Committee Notes to rule 3.3.").

Here, as set forth above, there is no evidence that Garrett Bradley had "actual knowledge" that the affidavit submitted in September 2016 contained "false" information.[57] Bradley's admission of an inadvertent mistake does not lead to the conclusion that Bradley knowingly made false statements to the court. As even Professor Gillers acknowledged in his deposition, a careless mistake is not equivalent to a knowing misrepresentation. Gillers Dep., 3/20/18, at 269:5-7 (SM Ex. 253). And here, there is a question about the ambiguity, materiality, and import of the statements in the affidavit. *See Sheppard v. River Valley Fitness One, L.P.*, 428 F.3d 1, 8 (1st Cir. 2005) ("Anyway, it seems to us that a finding of ethical misconduct, so fraught with consequences for a lawyer's professional reputation, should not rest on such fine distinctions. If the court has trouble coming to an unqualified conclusion about the parties' settlement status, then [respondent] can hardly be charged with telling a knowing falsehood—the standard set forth by the Rules of Professional Conduct—under such circumstances.").

There is also no evidence to support the proposition that Garrett Bradley violated Rule 3.3(a) by failing to correct a false statement of material fact.[58] The Special Master is only able to conclude Bradley violated 3.3(a) in this manner because he assumes that, when Bradley submitted the Declaration in September 2016, Bradley had actual knowledge that his Declaration was false. *See* R&R at 233. If that assumption were correct, it may well follow that Rule 3.3(a) was violated from the moment Bradley submitted the Declaration until the moment the errors were disclosed to the Court in the March 2017 hearing. But, as noted, the "evidence" cited for

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[57] The nature of this "false" information is discussed *supra* § III(B).

[58] The Thornton Law Firm objects to the characterization of the errors in the fee declaration as material. This is an additional reason why Garrett Bradley did not violate this provision of Rule 3.3.

the predicate proposition that Bradley had actual knowledge he submitted false evidence in September 2016 is spurious, and there is no other support offered for the violation. *See supra* § II. Nor could there be. All of the evidence, including Bradley's contrition and acceptance of responsibility for the mistakes, as well as the lack of any motive whatsoever to falsify any passages of his Declaration, suggest that Bradley first realized the inaccuracies when Judge Wolf issued the February 2017 order and further inquired during the March 2017 hearing.[59]

The case at bar is similar to those in which courts and other tribunals have found an attorney's mistakenly incorrect statement is not a violation of Rule 3.3 or analogous provisions. For instance, in *Obert v. Republic W. Ins. Co*, 398 F.3d 138, 143 (1st Cir. 2005), the First Circuit found there was no knowing violation of Rule 3.3(a)(1) even where "one of the statements may well have been factually inaccurate and another was a dubious and unattractive piece of lawyer characterization." Even in the much more egregious case of *In re Auerhahn*, No. 09-10206, 2011 WL 4352350, at *16 (D. Mass. Sept. 15, 2011),[60] a three judge panel of the District of Massachusetts found that an attorney who failed to turn over potentially exculpatory documents in a habeas proceeding did not "knowingly disobey an obligation under the rules of the tribunal" (a rule analogous to Rule 3.3 and requiring the same mental state). In that case, the court found

[59] Contrary to the Special Master's insinuations, *see* R&R at 235-36, there is no evidence that Bradley became aware of the errors in the boilerplate affidavit prior to the Court's February 2017 order. The media inquiries which prompted the November 2016 letter to the Court focused on the double counting error, and counsel's efforts were directed at disclosing the error and submitting a revised and corrected lodestar as soon as possible. The February 2017 order, which raised the issue of "regular hourly billing rates" listed in the affidavit, set a date for a hearing on the matter. Memo. and Order, 2/6/17, at 6, 13 (SM Ex. 180). At that hearing Bradley addressed the inaccuracies in the declaration. The Special Master seems to suggest Bradley should have somehow addressed the inaccuracies after the February order but before the hearing. This would be contrary to common practice—when the Court sets a hearing date, attorneys address the issues raised by the Court at the hearing. Moreover, none of the other law firms notified the Court of any inaccuracies prior to the March 2017 hearing—even though, as discussed above, the fee declarations of all three law firms were inaccurate in certain respects.

[60] Since the *Auerhahn* case, the District of Massachusetts has amended its Local Rules regarding the standard of proof in attorney discipline proceedings. *See* L.R. 83.6.5(i)(6).

the attorney was "lackadaisical at best" and conceded negligence. *Id.* But as the *Auerhahn* court noted, "[n]egligence, however, is not enough here." *Id.* Surely if a prosecutor's "lackadaisical" and negligent failure to turn over potentially exculpatory evidence did not violate the Rules of Professional Conduct because it was not done "knowingly," Garrett Bradley cannot be sanctioned for mistakenly submitting a boilerplate fee application containing inaccuracies.

VI. The Customer Class Law Firms Properly Listed Contract Attorneys On The Lodestars

In pages 181-89 of his Report, the Special Master expresses a strong personal policy preference for listing contract attorneys' time as expenses rather than legal fees. But his personal preference is merely that: a personal preference. The Special Master has **failed to identify a single case which holds contract attorneys must be listed as expenses**.[61] In fact, the Special Master's Report cites a number of cases that actually support counsel's decision to include contract attorneys in the lodestar. *See Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009), *aff'd*, 355 F. App'x 523 (2d Cir. 2009) (finding that contract attorneys were properly included in the lodestar where contract attorneys' work was supervised by plaintiffs' counsel); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394-95 (S.D.N.Y. 2013) ("[C]ourts have . . . regularly applied a lodestar multiplier to contract attorneys' hours.");[62] *City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp.*, 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013) ("[I]t is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm[.]"); *In re Enron Corp. Sec., Derivative &*

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61 The Special Master asserts that "legal and ethical rulings have not provided definitive guidance on this interesting issue[.]" R&R at 187. However, case law and ethics opinions strongly suggest that it is not only permissible, but common practice, to include contract attorneys in the lodestar.

62 The Special Master cites *Citigroup* in support of his statement that courts "that have previously weighed in on this issue have not drawn a clear distinction between temporary attorneys and partnership-track associates." R&R at 183. In fact, *Citigroup* specifically drew this distinction, recognizing that "a contract attorney's status as a contract attorney—rather than being a firm associate—affects his market rate." 965 F. Supp. 2d at 395.

ERISA Litig., 586 F. Supp. 2d 732, 784-85 (S.D. Tex. 2008) (allowing counsel to recover fees for contract attorney services at market rates rather than their cost to the firm); *In re Tyco Int'l, Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 272 (D.N.H. 2007) ("It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); s*ee also In re AOL Time Warner S'holder Derivative Litig.*, No. 02 CIV. 6302 (CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) ("The Court should no more attempt to determine a correct spread between the contract attorney's cost and his or her hourly rate than it should pass judgment on the differential between a regular associate's hourly rate and his or her salary.").

The only cited authorities that even come close to supporting the Special Master's preference that contract attorneys should be listed as expenses are cases in which counsel, on their own initiative, included contract attorneys as expenses and the court did not consider whether including them in the lodestar would have been appropriate. *See Dial Corp. v. News Corp.*, 317 F.R.D. 426, 438 (S.D.N.Y. 2016) (noting counsel's decision to include contract attorneys as an expense despite the fact that it is permissible to "mark[]-up contract attorney fees"); *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2016) (approving request for expenses including expenses for document review by contract attorneys).

Further, the ABA Standing Committee on Ethics and Responsibility has advised that "a lawyer may, under the Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 00-420 (2000). Surprisingly, the Special Master cited ABA Formal Opinion 00-420, yet instead of acknowledging that it affirmatively answers the exact question he is posing, stated that it "leave[s] attorneys a wide degree of latitude to decide"

whether to bill contract attorney services as fees for legal services or as costs incurred by the firm.[63] *See* R&R at 186.

The Special Master contends that decisions allowing contract attorneys to be included in lodestars at market rates are "not acceptable for purposes of this Report" because they are based on the "faulty premise" that "contract attorneys [are] indistinguishable from off-track associates[.]" R&R at 184. This assertion is based on a clear mischaracterization of the cases. In *Tyco*, the only decision from a court within the First Circuit cited by the Special Master, the court explicitly found that "[a]n 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." 535 F. Supp. 2d at 272. The other decisions referenced by the Special Master also demonstrate a clear understanding that a contract attorney's work is temporary and often project-specific. *See, e.g.*, *Carlson*, 596 F. Supp. 2d at 409 ("A contract attorney is one hired 'to work on a single matter or a number of different matters, depending upon the firm's staffing needs and whether the temporary attorney has special expertise not otherwise available to the firm.'") (quoting *Enron*, 586 F. Supp. 2d at 782).[64] At no point do the decisions cited by the Special Master conflate a "contract attorney" with an "off-track associate" permanently employed by a firm. The Special Master also claims that those courts including contract attorneys in lodestars "accepted, without discussion, the billing of contract attorney expenditures as legal fees rather than as a cost or expense." R&R at 186. This is simply

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63 It is curious that the Special Master cites ABA Formal Opinion 00-420, which is directly on point, but did not include the full opinion as one of the 266 exhibits attached to his Report.

64 The Special Master cites *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400 (D. Conn. 2009) after acknowledging that "[s]everal courts, *including two within this Circuit*, have applied market rates without regard to the actual wages paid to a contract attorney." R&R at 184 (emphasis added). While *Carlson* does support the fact that firms may bill for contract attorneys at market rates, it is worth noting that *Carlson* is a decision out of the District of Connecticut, a court within the Second—not the First—Circuit.

incorrect. *See Citigroup*, 965 F. Supp. 2d at 394 ("[C]ourts routinely reject claims that contract attorney labor should be treated as a reimbursable litigation expense.").

The Special Master's policy-based arguments fare no better. He claims that "the decision to bill a contract attorney as an expense or as a legal service fee" is a matter of "professional judgment" that should be "informed by the role of the contract attorney vis-à-vis the other attorneys in the case." R&R at 186. According to the Special Master, the contract attorney's role is determined not by the work performed, but by the financial obligations incurred by the law firm. He attempts to compare the cost of hiring contract attorneys with that of hiring a stenographer, or with paying for transportation, meals, and lodging, since the firm does not face "long-term financial obligations" with contract attorneys.[65] Yet, the Special Master does not explain, nor provide any authority for, the proposition that a firm's financial obligations should have any bearing on whether to treat contract attorneys' work as legal fees. Courts considering the issue focus instead on the type of work performed by the contract attorneys. *See AOL Time Warner*, 2010 WL 363113, at *25 (allowing a multiplier on contract attorney fees where those attorneys "were not mere clerks" but "exercised judgments typically reserved for lawyers, under the supervision of the firms' regular attorneys"). The Special Master has offered no explanation as to why the contract attorneys here—who were making legal judgments under the supervision of the firms' regular attorneys—were more akin to stenographers than associates. As the Special Master recognized, "contract attorneys . . . perform work readily assigned to a first- or second-

[65] The Special Master claims that the cost of contract attorneys is "most akin to a disbursement of funds passed along to the client at face value." R&R at 187 (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (SM Ex. 193)). According to ABA Formal Opinion 00-420, Formal Opinion 93-379 was "made in the context of goods or services of non-lawyers," and "does not speak directly to the subject of . . . contract lawyers, in the context of disbursements or expenses." The principles laid out in Opinion 93-379 are "applicable to surcharges for legal services provided by contract lawyers *when billed to the client as a cost or expense*." ABA Formal Opinion 00-420 (emphasis added).

year associate in a traditional law firm model." R&R at 183-84. The contract attorneys in this case provided valuable legal services. They were doing the same work as the "staff attorneys" who, as the Special Master himself admits, were appropriately included in the lodestar.[66] *See* R&R at 176-181. And as the Special Master acknowledges, "similar work justifies similar rates." *Id.* at 182.

Even if the Court were to adopt the Special Master's personal policy preference for listing contract attorneys as reimbursable expenses, it would be inappropriate to apply that preference retroactively. *See In re Beacon Assocs. Litig.*, No. 09 CIV 3907 (CM), 2013 WL 2450960, at *18-19 (S.D.N.Y. May 9, 2013) (the court expressed that if it had thought ahead it "would have included in [its] order appointing Lead Counsel specific directives about how much [it] was prepared to authorize in terms of an hourly rate for document reviewers," but having failed to do so it was "unfair to impose such a rule *ex post facto*"). The attorneys agreed to take this case on a contingency basis, believing that they would be paid appropriately. Their belief that they would be compensated at market rates for contract attorneys' time was not only reasonable, but in line with common practice and supported by legal authority. It would be unfair to impose a retroactive rule reducing counsel's recovery for no reason other than to satisfy the Special Master's personal preference, which has no basis in prevailing case law.

In any event, the Special Master's proposed remedy is improper. Even if the firms were required to list contract attorneys as expenses rather than legal fees—and according to every

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[66] *See* Heimann Dep., 7/17/17, at 51:18-52:15 (SM Ex. 19) ("There is no distinction that I am aware of between the work that's assigned to attorneys who are employed by the firm directly and those that are employed through an agency. There is no difference between the expectations for the work to be performed by those lawyers. There is no distinction with respect to the quality of the work that is expected to be performed by those lawyers. There is no distinction between how those lawyers are trained to to [sic] their work. There is no distinction between how they are supervised in connection with the work that they do. They are one and the same.").

court to have considered the issue, they were not—the proper remedy would not be to disgorge that amount from the lodestar to the class, but to remove that value from the lodestar and then determine whether or not the multiplier was still reasonable. *See* Rubenstein Decl., 6/20/18. When the total contract attorney value is removed, the total lodestar comes to $35,940,307.75.[67] Comparing this against the total fee award, $74,541,250, results in a multiplier of 2.07. This is well within the reasonable range approved by courts in complex class-action litigation. *See, e.g.*, *In re Neurontin Mktg. & Sales Practices Litig.*, 58 F. Supp. 3d 167, 172 (D. Mass. 2014) (finding that a 28% fee award yielding a multiplier of 3.32 was "well within the range").

VII. The Special Master's Proposed 50% Reduction In Rate For Michael Bradley's Work Is Unjustified

The Special Master finds that Michael Bradley performed document review work on this case, on a contingency basis, between 2013 and 2015, R&R at 189-90, and that his work was supported by contemporaneous time records, R&R at 366. The Thornton Law Firm agrees with these findings. However, the Special Master's concern is not with the hours in the Thornton fee declaration attributed to Michael Bradley—indeed, he finds those hours to be supported by time records produced by Thornton, R&R at 217 n.171, 366—but, rather, he takes issue with the hourly rate applied to Mr. Bradley's work for purposes of the lodestar cross-check. The Special Master recommends that Michael Bradley's rate be reduced by 50%, and that the difference between the amount listed in the Thornton lodestar, multiplied by 1.8, and the amount calculated at the new rate, multiplied by 1.8, be "returned to the class." R&R at 366.

[67] This number is calculated by reducing the original lodestar ($41,323,895.75) by the amount of double counted time ($4,058,000) and the Special Master's "original petition" "lodestar value" of "contract attorneys time" ($1,325,588.00).

In assessing the value of the work performed by Michael Bradley in this case, the Special Master finds that Mr. Bradley's work "most closely resembles that of a junior level associate."[68] R&R at 196. For this and for other reasons, he recommends a reduction in the $500 hourly rate associated with Mr. Bradley's work.[69] Yet the reduced rate that he argues should apply to Michael Bradley's work—$250 per hour—is less than the rate used for *any* associate in this case, by *any* of the nine law firms that submitted fee declarations. It also is less than the lowest end of the range of rates for associate work that the Special Master himself concludes to be reasonable elsewhere in his report ($325 to $725 per hour). R&R at 164. Moreover, it is less than the $415 per hour rate used for at least one other staff attorney who performed exactly the same work (*i.e.*, document review, no drafting), and who also worked remotely. *See* p. 86, *infra*.

The Special Master finds that Michael Bradley "had no experience relevant to the case and the work he performed was simple, straightforward, and unmonitored document review."

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[68] The Special Master makes this recommendation despite finding elsewhere in his report that Mr. Bradley had more than eight years of legal experience when he signed on to assist with the State Street matter—years that included serving as an Assistant District Attorney in Norfolk County, as the Executive Director of a Commonwealth Task Force dedicated to detecting fraud in the underground economy, and as a solo practitioner. R&R at 190-91.

Regarding the work performed, the Special Master claims that Michael Bradley had no contact with the Thornton firm regarding this case beyond sending in his hours and raising "technical concerns about the software." R&R at 193. This finding clearly ignores record evidence that Michael Bradley contemporaneously raised substantive questions to Evan Hoffman regarding documents he was reviewing in the Catalyst database. [redacted].

[69] One of these reasons, apparently, is that Michael Bradley performed work "fully on his free time and when it was convenient for him to do so." R&R at 366. The Thornton Law Firm is aware of no authority stating that the time at which worked is performed has a bearing on the rate at which that work can be charged. Setting aside the fact that "free time" and "convenient" are surely subjective concepts, Mr. Bradley did not testify that he did work in his "free time" (or at "odd hours," as the Special Master asserts elsewhere (R&R at 196)). To the contrary, Mr. Bradley testified that his practice was to work on the matter in the afternoons or evenings, when he had available time after attending to other client matters in the mornings, and that he tried to review for a consistent amount of time each week. M. Bradley Dep., 6/19/17, at 51:14-52:8 (SM Ex. 67). The fact that Mr. Bradley was performing this work in addition to other case matters, over a two-year period, makes him no different from any other associate or partner working on this case who also worked on matters for other clients during the years this case was pending.

R&R at 366. These distinctions apply equally to some of the staff attorneys performing document review for both Lieff and Labaton. Yet, despite this similarity, only Michael Bradley's rate is singled out for a 50% reduction. The Special Master's asserted distinctions based on "experience," the "simple and straightforward" nature of the work, and the "unmonitored" nature of the work are unjustified and, more importantly, cannot be the basis for the radically disparate treatment of cutting Michael Bradley's rate in half.

The nature of contract or temporary case-by-case document review is such that lawyers performing document review will seldom see the same fact patterns or underlying issues in their work as they move from one case to the next. While some staff attorneys in this case had previously worked on a similar case involving another bank, BNY Mellon, not all did. Indeed, *none* of the 35 Labaton staff attorneys worked on the *BNY Mellon* case, as Labaton was not counsel in that case. This is not to suggest that they were unqualified to do the work. But there is no basis, in the record or anywhere else, to suggest that such staff attorneys' rates should change from case to case based on their "relevant experience."[70]

If the Special Master's recommendations on this point were followed, every lodestar review would necessarily devolve into a detailed analysis of each staff attorney's professional biography and educational background. Michael Bradley is a gainfully employed attorney with eight years of professional experience, including extensive litigation and trial work, who was appointed to head a state fraud-detection task force. His experience justified his lodestar rate in this case. Surely, the other staff attorneys' experience was not, collectively, so much more

[70] Indeed, if a particularly knowledgeable staff attorney had a wealth of relevant experience, it might make better sense, if the firm so chose, for such an individual to be hired full-time to take on a more senior role in the case.

"relevant" that it would justify listing them at lodestar rates that are nearly *double* what the Special Master would assign to Michael Bradley's work.

Further, to characterize Michael Bradley's document review work as "simple and straightforward" is to necessarily characterize ***all*** staff attorneys' document review work in this case as simple and straightforward. There is nothing in the record to support the notion that any document review was substantively or materially different from any other. Thus, the "simple and straightforward" nature of the work, even if true, cannot be a basis for cutting only Michael Bradley's lodestar rate.

The Special Master takes particular issue with Michael Bradley's "failure to produce any substantive memoranda or other work product," calling this the "perhaps most telling" basis for distinguishing him from other staff attorneys. R&R at 192. But the Special Master cites no evidence that every other staff attorney wrote memoranda. Indeed, the evidence shows that not all staff attorneys wrote memoranda. For example, Lieff staff attorney Kelly Gralewski testified in her deposition that she did not write any. Gralewski Dep., 6/6/17, at 19:23-20:2 (SM Ex. 104) ("Q. Were you tasked with drafting any memoranda related to any specific topics in the case? A: No."). The Special Master, who does not mention Ms. Gralewski's testimony in the Report, proposes no reduction to Ms. Gralewski's rate of $415 per hour, while urging that Michael Bradley's rate be reduced to $250 per hour for the same work. Moreover, Ms. Gralewski—like Michael Bradley—performed all of her work remotely. Gralewski Dep., 6/6/17, at 13:13-15 (SM Ex. 104); [redacted]. Distinguishing Michael Bradley from other staff attorneys on the basis that he did not write memoranda—the "most telling" basis, according to the Special Master— is entirely unjustified.

[redacted]. The firms did not apply different rates for different tasks; the staff attorneys who both performed document review and drafted memoranda maintained the same lodestar hourly rates for both tasks. Appropriately, the Special Master does not propose different rates for the different tasks performed.

In asserting that Michael Bradley's work was "distinctly limited" as compared to that of other staff attorneys, the Special Master cites Michael Bradley's testimony that he recalls recording comments on a "handful" of documents in the Catalyst system. R&R at 192. Of course, the content of the review folders assigned to Michael Bradley, and how many documents they contained that were worthy of comment, is entirely arbitrary and is no basis for judging the quality of his work. On that point, the Special Master notes that there is "no clear evidence" that Michael Bradley made comments on any documents, despite Michael Bradley's testimony that he did. *Id.* The negative inference here is obvious, but patently unfair. The Catalyst system was taken off-line after the document review ended, and, as a result, there is no ability to verify *anyone's* work in Catalyst. *See* Chiplock Dep., 6/16/17, at 212:6-213:8 (SM Ex. 10) (stating that "[T]he Catalyst platform had been shut down for a year and a half at that point, and we had all of the documents and the coding on a hard drive, but there was no way to audit any individual user's work in retrospect by looking at that information," and noting that it is not possible "to do

an audit of any individual user's work from years prior, because I just don't think the system was built to capture that.").

In addition, while some staff attorneys certainly worked at a firm's brick-and-mortar location while under in-person supervision, not all did. [redacted]; Jordan Dep., 6/6/17, at 16:11-22 (SM Ex. 101); Zaul Dep., 6/6/17, at 15:4-10 (SM Ex. 59). [redacted]. There is simply no basis for cutting only Michael Bradley's lodestar rate for working "unmonitored," when he was far from the only lawyer working remotely. Even if he were—and as the Special Master presumably recognized in not recommending any reduction to Lieff staff attorney rates based on remote work—document review technology allows for this work to be done from any computer, wherever located.

Finally, the sheer magnitude of the reduction proposed by the Special Master highlights its unfairness. The Special Master arbitrarily decides that Michael Bradley's rate should be reduced so that his rate is "more at the level of a paralegal, supplemented by the fact of his law degree and experience as a lawyer." R&R at 366. This proposed reduced rate of $250 per hour, while slightly higher than the rate for Thornton's sole paralegal in this case (Andrea Caruth, $210 per hour), is lower than the rate charged for paralegals by Labaton and Lieff in their fee declarations (Labaton listed its paralegals at rates ranging from $275 per hour to $340 per hour, with an average rate of $316 per hour; Lieff listed its paralegal at $270 per hour). Labaton Fee Decl., Ex. A, 9/15/16 (SM Ex. 88); Lieff Fee Decl., Ex. A, 9/14/16 (SM Ex. 89). Moreover, the

lowest rate for any associate in any fee petition submitted by a law firm in this case (both Customer Class Counsel and ERISA Counsel) is $325 per hour.

In light of Mr. Bradley's experience as an attorney, the rates he has recently charged other clients, and his willingness to perform the work in this case on a contingency basis, the Special Master's proposed reduction to his rate is totally unwarranted.

A. Any Reduction In Michael Bradley's Rate Is Immaterial To The Fee Award

Most importantly, even if one accepts the Special Master's recommendation that Michael Bradley's rate should be reduced by any amount, the result is entirely immaterial to the overall attorneys' fee award, regardless of the amount of reduction. At maximum, and even after the removal of all double-counted staff attorney time, Michael Bradley's work accounts for less than 0.55% of the overall lodestar.[71] Even if one were to remove all value associated with Michael Bradley's work ($203,200)—which would be wildly unfair as even the Special Master acknowledges that he performed work and that his time records support that work—it would have no material effect on Thornton's lodestar or on the overall lodestar. Indeed, the multiplier applied to the overall lodestar without *any* of Michael Bradley's time would still be 2.01, well within the range of reasonableness for a case of this size and complexity. *See supra* § I (citing and quoting portions of July 31, 2017 and June 20, 2018 Expert Declarations of Professor William B. Rubenstein, and 4/9/18 Deposition Testimony of Professor Rubenstein, stating that multiplier is "fully reasonable, indeed modest," and that "it would have been justified to see a three or four [multiplier].").

[71] The revised lodestar as stated in the November 2016 letter is $37,265,241.25. Goldsmith Ltr. to Ct., 11/10/16 (SM Ex. 178)

As explained in the previous section regarding double counting, any discussion of lodestar must recognize its limited purpose in this case. In recommending that the difference between Michael Bradley's work at the $500 per hour rate (times 1.8 multiplier) and his work at the proposed reduced $250 per hour rate (times 1.8 multiplier) must be "returned to the class," R&R at 366, the Special Master appears to confuse the lodestar cross-check with the use of lodestar information to determine a *lodestar-based* award. On the one hand, the Special Master accurately concludes that the Court "reviewed the hours as part of a lodestar cross-check, rather than reimbursing . . . attorneys on a one-to-one basis." R&R at 206 n.106 (discussing Thornton hours specifically, but making a general point applicable to all hours).

But when it comes to Michael Bradley, the Special Master flatly contradicts himself, asserting that Thornton "sought reimbursement of fees" for Michael Bradley's work. R&R at 73, 189. This is plainly false and leads to an illogical result. The inclusion of the hours worked by Michael Bradley in the lodestar served the same purpose as the inclusion of all of the other hours in the lodestar—to demonstrate to the Court, *for purposes of the lodestar cross-check only*, the work put into the case, and the reasonableness of the percentage fee sought by counsel. Thornton neither sought nor was awarded "reimbursement" for any professional's hours (as the Special Master himself correctly states elsewhere in in the report, R&R at 206 n.106).

The Special Master compounds his error in asserting that "because of the 1.8 multiplier effect, Thornton received almost an additional $500 per hour on Michael Bradley's time, resulting in an additional almost $200,000 to the Thornton law firm. . . . Thornton's award must be reduced by the amount earned by applying this inflated hourly rate at an almost two-times multiplier." R&R at 197. The Special Master asserts that these ostensible 'earnings' should be returned to the class. R&R at 366. But Thornton clearly did not receive "an additional almost

$200,000" because of Michael Bradley's time. It did not "earn[]" any amount as a result of Michael Bradley's rate.[72] The lodestar containing Michael Bradley's hours was submitted only to help the Court verify that the percentage of the settlement fund it was awarding to counsel was reasonably supported by the work done on the case.[73] And as demonstrated above, the value of Michael Bradley's hours—regardless of hourly rate—had a *de minimis* effect on Thornton's lodestar, an infinitesimal effect on the overall lodestar, and no effect whatsoever on the multiplier applied to the lodestar to verify the 25% percentage of fund award. *See, e.g.*, *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("A lodestar reduction is unnecessary when the effect on the multiplier is not material.").

The Special Master wrongly asserts (without acknowledging the other part of his report in which he concludes the opposite) that the rate charged for Michael Bradley's services has a one-to-one correspondence to the attorneys' fee awarded to Thornton, and that Thornton received an "additional benefit" based on Michael Bradley's rate. R&R at 366. The Special Master then uses this flawed logic as the basis to demand that Thornton disgorge this supposed "additional benefit" it received to the class. *Id.* Neither reason, nor math, nor precedent support such a demand. As Professor Rubenstein states in his June 20, 2018 declaration:

> In a case where a court employs the percentage method to determine class counsel's fee, and uses the lodestar only for cross-check purposes, **the reduction of an hour**

[72] [redacted]

[73] *See* Rubenstein Decl., 6/20/18, at ¶¶ 18-20 (explaining that the purpose in a lodestar cross-check is to enable courts to ensure that the percentage awarded was reasonable when compared to the time counsel have worked on the case).

> **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**. Numerous legal decisions have understood this distinction and, after adjusting a lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remained reasonable.[78]

Rubenstein Decl., 6/20/18, at ¶ 20 n.80 (emphasis added) (citations omitted).

The Special Master's untenable (and internally inconsistent) position and related recommendation with respect to Michael Bradley's work, like his position and recommendation on the issue of the double counting mistake, contravene the purpose and function of the lodestar cross-check in this case.

VIII. The Recommended Payment Of $3.4 Million To ERISA Counsel Is Unjustified And Based On Erroneous Findings

Yet another blunder is the Special Master's conclusion that ERISA Counsel did not receive a fair amount of attorneys' fees in the case. The Special Master calls for a "reallocation remedy" to ERISA Counsel in the amount of $3.4 million. R&R at 369. This recommended remedy is based on three findings made by the Special Master:

1. That, in December 2013, ERISA Counsel agreed to a 9%[74] fee based on the ERISA trading volume of 5-9% that was known at the time, but that "it was later learned" that the trading volume attributable to ERISA plans "was actually about 12-15% of the total trading volume." R&R at 46;
2. That, per the Plan of Allocation and the Stipulated Settlement Agreement, ERISA Counsel were entitled to up to $10.9 million in fees, but received only $7.5 million pursuant to the fee agreement—thereby creating a delta of $3.4 million that was earmarked for ERISA Counsel, but that ERISA Counsel did not receive, Exec. Summ. at 51; R&R at 368-69;[75] and
3. That, owing to "internal tension" between Customer Class Counsel and ERISA Counsel, Customer Class Counsel restricted ERISA Counsel's access to documents,

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[74] As the Special Master found, this amount was later increased to 10% at the suggestion of Customer Class Counsel, and ERISA Counsel received 10% of the overall fees. R&R at 48, 85.

[75] These findings are repeated verbatim in the Supplemental Ethical Report submitted to the Special Master by Professor Stephen Gillers. Gillers Supp. Report, 5/8/18, at 31, 100 n.91 (SM Ex. 233).

> to wit, "ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class," and that "[n]or were ERISA Counsel allowed access to the Customer Class's database." R&R at 34.

All three of these findings are wrong. None is a factually or legally supportable basis for the "reallocation" of fees to ERISA Counsel that the Special Master recommends.

A. The Special Master's Conclusion That The ERISA Trading Volume Was "Actually 12-15%" Is Wrong

The Special Master finds, accurately, that the fee agreement between ERISA Counsel and Customer Class Counsel, signed in 2013, was based on the known ERISA **trading volume** percentage at that time. R&R at 46 ("Th[e] agreement—to allocate 9% of the total fee awarded (if successful) to ERISA Counsel—was based largely on the premise that the total ERISA case volume **comprised five to nine percent of the total FX trading volume**.") (emphasis added). This "five to nine percent" trading volume figure came from State Street, which supplied the trading data, and which conferred directly with ERISA Counsel about it.[76]

The ERISA trading volume percentage—meaning, the volume of affected ERISA FX transactions, expressed as a percentage of the total affected FX transactions—is fundamentally different from the ERISA *settlement* percentage, which is the amount of the settlement allocated

[76] [redacted]

to ERISA funds, expressed as a percentage of the total settlement amount. The ERISA settlement percentage was never the basis of any agreement among counsel.

As support for the conclusion that the ERISA trading volume was "actually about 12-15% of the total trading volume," the Special Master cites **only** to the deposition testimony of ERISA lawyers, who, naturally, stand to gain from the Special Master's faulty recommendation to reallocate funds to them. R&R at 46 (citing testimony of ERISA attorneys Lynn Sarko and Carl Kravitz). Notably, and as discussed further below, the Special Master does *not* mention other deposition testimony, given by the lawyer actually assisting with the claims administration process, that the volume is, in fact, approximately 9%. Nor does he credit (or even mention in the body of his Report) counsel's statements that verifiable data from the claims administrator shows the volume to be approximately 9%, pending final resolution of the administration process. [redacted]

When, in the course of the investigation, it became clear that the Special Master had adopted the belief that the ERISA portion of the overall trading volume was "actually about 12-15%," lawyers for Customer Class Counsel attempted to set this straight, both during the deposition of Nicole Zeiss (the Labaton partner with responsibility for the claims administration

process) and during oral argument before the Special Master on April 13, 2018. [redacted]; *see also* 4/13/18 Hr'g Tr. at 104:22-105:7 (SM Ex. 162) ([MS. LUKEY, Counsel for Labaton]: "Right now, as we have in the record, it appears it's going to come out at 9 to 9.5 percent. A.B. Data is trying to finish, but it needs to be able to get the last data from the group trust which are a mixture of customer class and ERISA investors. And it's been unable to collect some of that. But there is nothing to indicate, at least at this point, that it's going to exceed the estimated 10 percent. Looks like it'll come in a little under that.")

In the Report, the Special Master acknowledges counsel's statements at oral argument in a single-sentence footnote, but makes no mention of Nicole Zeiss's testimony there, or anywhere else in the Report. R&R at 46 n.28 ("During oral argument, counsel for Labaton indicated that the trading volume for the ERISA funds was in a range of 9% to 10%. However, the record evidence on this point is incomplete."). The omission of Ms. Zeiss's testimony is particularly troubling, given that the Special Master questioned her himself about her knowledge of the ERISA trading volume, [redacted].

Presumably, the Special Master makes no mention of this testimony because it contradicts his conclusion that ERISA Counsel got a raw deal in this case. The Special Master's selective reliance on deposition testimony is unjustifiable and, to use a phrase employed by the Special Master elsewhere in the Report, "perhaps telling." Setting aside the issue of selectively quoting deposition testimony, relying on testimony as the sole support for a conclusion about volume is unnecessary and inappropriate. Determining the portion of the total trading volume attributable to ERISA plans is an objective process that results in a definite number, and therefore data, not personal recollection, is the best and most reliable evidence.

But the Special Master did not seek documents regarding the ERISA trading volume. Although the Special Master's first requests for documents, served in May 2017, [redacted].[77] Even after counsel specifically mentioned the claims administration process resulting in the actual ERISA trading volume at oral argument on April 13, 2018, the Special Master did not pursue it. [redacted]

State Street—not Customer Class Counsel—supplied the FX trading volume data used in this case. *See* Omnibus Decl., 9/15/16, at ¶ 131 (SM Ex. 3) ("A.B. Data will calculate each Settlement Class Member's Recognized Claim using information ***supplied by State Street***") (emphasis added), ¶ 132 ("The Plan is based on transaction data ***maintained by State Street***") (emphasis added), ¶ 133 ("The parties have relied on Indirect FX Trading Volume information ***provided by State Street*** to develop this Plan of Allocation") (emphasis added); [redacted]

[77] [redacted]

[redacted]. Over the course of the mediation process, State Street provided updated versions of their FX trading data to all parties. As State Street refined its process, the data reflected incremental changes.

During the spring of 2015, while the parties were engaged in mediation and closing in on settlement, State Street informed Customer Class Counsel and ERISA Counsel that the estimated ERISA volume was approximately $79.8 billion—or approximately **9.11** % of the total trading volume of $875.7 billion. [redacted][79] Accordingly, when the parties reached an agreement in principle to settle this case at the end of June 2015, ERISA Counsel knew that the ERISA trading volume was estimated to be approximately **9.11**%. With the data supplied by State Street in hand, ERISA Counsel made an informed decision to enter into a settlement in principle.

At that time, the ERISA trading volume was still an estimate—albeit an estimate based on hard data analyzed and supplied by State Street—because, as Labaton stated in the Omnibus

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78 The email thread extends to June but the cited email was sent in March. The term "SSH" used in this email stands for "Securities Settlement and Handling," and refers to Indirect FX transactions relating to purchases and sales of foreign securities. "AIR" stands for "Automated Income Repatriation," and refers to Indirect FX Transactions to repatriate dividend and income payments. Omnibus Decl., 9/15/16, at ¶ 20 (SM Ex. 3).

79 As noted above, the Special Master did not request documents concerning the ERISA trading volume during the investigation. Thornton attaches exhibits here to clarify misinformation in the record. Thornton provides these documents pursuant to all protective orders and confidentiality agreements applicable to the Special Master's investigation and to the underlying litigation.

Declaration filed with the fee petition, the Group Trusts' transaction volume attributable to ERISA funds had yet to be determined. *See* Omnibus Decl., 9/15/16, at ¶ 135 (SM Ex. 3) ("ERISA Plans and eligible Group Trusts represent approximately 9%-15% of the total Indirect FX Trading Volume, **depending on what portion of the Group Trusts' volume actually falls under ERISA**.") (emphasis added).[80] The Omnibus Declaration explained the process by which Labaton and third-party settlement administrator A.B. Data would seek this information about the Group Trusts and make the final calculations. *Id.* at ¶¶ 137-50. This process included: (1) requiring the Group Trusts to submit certifications detailing their ERISA fund percentages; and (2) working with the Department of Labor, which has independent knowledge of certain Group Trusts with ERISA volume, to ensure that Group Trusts that failed to provide certifications would be included. *Id.* at ¶¶147-49.

As of June 2018, this two-step process of determining the absolute final ERISA trading volume is nearly complete. The first step (obtaining certifications) was completed last year.

[redacted].[81]

The remaining work (obtaining confirmatory volume information from the Department of Labor for Group Trusts that failed to submit mandatory certifications) is still ongoing. While this cleanup effort with the Department of Labor could cause an adjustment to the ERISA trading volume, it is unlikely to have a significant effect, and certainly nowhere in the range of 3% to

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80 [redacted]

81 The A.B. Data spreadsheet containing this information is subject to a non-disclosure agreement between A.B. Data and State Street, which the Court may order State Street to disclose.

5%—the increase that would be necessary to bring the trading volume within the "actually 12-15%" figure on which the Special Master relies. Contrary to the Special Master's assertion that the ERISA trading volume is between 12-15% of the overall trading volume, the volume is "actually" between 9% and 10%, which, if one compares percentage of volume to percentage of fees,[82] is ***less than,*** or at least very closely commensurate with, the percentage of attorneys' fees that ERISA Counsel received. Accordingly, a "reallocation remedy" is not needed to bridge any gap between ERISA Counsel's fees and the ERISA trading volume, and such reallocation would be unjustified.

Finally, it is worth noting that the suggestion that ERISA Counsel would have agreed to (and agreed not to revisit) a 9% fee agreement when they believed the ERISA trading volume to be approximately 12-15% is difficult to square with their obligations to their clients. ERISA Counsel's fees were derivative, directly or indirectly, of the result they helped achieve for their clients. The $60 million share of the settlement recovery for ERISA plaintiffs was based on the ERISA trading volume. The fact that the Department of Labor insisted on a premium that caused ERISA's share of the *settlement* to be 20% would not excuse ERISA Counsel's acceptance of a $60 million share if they truly thought the ERISA volume was higher. If ERISA Counsel believed that the ERISA trading volume had increased over time by 33 to 60 percent (*i.e.*, from approximately 9% to 12-15%), surely they would have been obligated to demand additional settlement funds for the ERISA plaintiffs, even setting aside the issue of their own fees.

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[82] This is in and of itself a problematic comparison, as it presumes that ERISA Counsel was solely responsible for the ERISA funds' recovery, and therefore entitled to attorneys' fees on a one-to-one basis. To the contrary, the Customer Class Counsel's work on the case—including, of particular note, its development of the damages theory—contributed significantly to the result for the ERISA plans. This also wrongly presumes that the Customer Class's claims did not cover ERISA funds, a question never resolved because the court never ruled on State Street's motions to dismiss the ERISA complaints.

B. The Special Master's Finding That The $10.9 Million "Fee Cap" Applied To ERISA Counsel's Fees Only Is Wrong

In quantifying the "reallocation remedy" he asserts ERISA Counsel deserves, the Special Master references the $10.9 million "fee cap" imposed by the Department of Labor. R&R at 85. In recommending that ERISA Counsel receive reallocated attorneys' fees, the Special Master concludes that those fees should be in the amount of $3.4 million because that number "reflects the difference between the $10.9 million that was allocated as a cap for ERISA attorneys in the Settlement Agreement and the $7.5 million which the ERISA attorneys actually received." Exec. Summ. at 51; R&R at 368-69. This is a faulty conclusion based on the Special Master's incorrect and unsupportable finding that "$10.9 million [] was allocated as a cap for ERISA attorneys in the Settlement Agreement." *Id.*

Contrary to the Special Master's assertion, the purpose of the cap was to limit the amount that could be deducted from the ERISA portion of the settlement for attorneys' fees of any kind, not only ERISA Counsel's fees (the Department of Labor's intention being to limit deductions from the ERISA class's share of the recovery).[83] As with the trading volume issue, discussed

[83] [redacted]

above, attorneys for the Customer Class Counsel attempted to clear up the Special Master's misunderstanding when it became clear during the investigation that the Special Master thought ERISA Counsel received $7.5 million pursuant to the parties' agreement, but was entitled to up to $10.9 million. The Special Master's findings in the Report show that this misunderstanding persists, and it now underpins the Special Master's conclusion that ERISA Counsel is entitled to an additional $3.4 million in fees.

Documents filed with the Court both pre-and post-settlement confirm that the $10.9 million cap applied to *all plaintiffs' counsel's* fees, not just ERISA Counsel's fees. The issue was how much in attorneys' fees could be paid out of the **ERISA portion of the settlement**—not how much money was going to Customer Class Counsel versus ERISA Counsel.[84] Of note:

- The Stipulation and Agreement of Settlement filed with the Court on July 26, 2016 ("Settlement Stipulation"), which the Special Master includes as exhibit 75 to his Report makes this even more clear. The Settlement Stipulation states: "Except with respect to the amount of **Plaintiffs' counsel's attorneys' fees chargeable to the ERISA Plans**,…." Settlement Stipulation, 7/26/16, at ¶ 24 (SM Ex. 75) (emphasis added).

- The Plan of Allocation, which is set forth in full in the Notice to the Class dated August 10, 2016, states that "[N]o more than $10,900,000 in fees can be paid out from the ERISA Settlement Allocation[.]" Notice to Class, 8/10/16, at 11 (SM Ex. 81). In the Report, the Special Master characterizes this portion of the Notice as follows: "**Recipients were also told that attorneys' fees for ERISA counsel would not exceed $10.9 million**, and they were told how fees for the other counsel would be computed 'if the Court awards the total amount of fees that Lead Counsel intends to request.'" R&R at 277 (emphasis added). This is plainly untrue; nowhere does the Notice inform recipients that attorneys' fees for ERISA Counsel would not exceed $10.9 million.

- The Omnibus Declaration filed by Labaton in support of the attorneys' fees motion on September 15, 2016 states that ERISA Plan and eligible Group Trusts class members will be allocated $60 million "minus," *inter alia,* "attorney's fees, if awarded by the Court, in

[redacted]

84 [redacted]

> an amount not to exceed $10,900,000." *See* Omnibus Decl., 9/15/16, at ¶ 134 (SM Ex. 3).

If the above documents leave any room for confusion about which "attorneys' fees" the cap pertains to, the Term Sheet, executed by all counsel in September 2015, [redacted] Therefore, "Plaintiffs' Counsel" logically means both Customer Class Counsel and ERISA Counsel and, indeed, [redacted]

During his deposition, David Goldsmith, the Labaton attorney who presented the settlement plan and request for attorneys' award to the Court, stated that the cap applied to "all counsel's fees":

> Q [MR. HEIMANN]: The Department of Labor also negotiated a cap of some 10.9 million dollars on the fees to be charged against the 60-million-dollar amount that they had negotiated for the ERISA class members, correct?
>
> A [MR. GOLDSMITH]: Correct.
>
> Q. And did that negotiated fee apply only to the settlement being allocated to the ERISA plan -- excuse me. Let me begin again. **Did that cap on the fee apply only to the ERISA counsel's fees?**
>
> A. **No.**
>
> Q. **Did it apply to all counsel's fees?**

A. **Yes.**

Goldsmith Dep., 9/20/17, at 254:13-255:2 (SM Ex. 42) (emphasis added).

ERISA attorney Carl Kravitz also tried to clear up the Special Master's and his counsel's misunderstanding on this point:

[redacted]

There is no support for the Special Master's conclusion that the $10.9 million cap on "attorneys' fees" meant that ERISA Counsel had been "allocated" $10.9 million in fees, but was constrained by its agreement with Customer Class Counsel and had to accept a lesser amount ($7.5 million). Exec. Summ. at 51; R&R at 368. To the contrary, the key settlement and fee documents—including the Plan of Allocation, Term Sheet, Notice, and Omnibus Declaration—all confirm that the cap applied to fees sought by plaintiffs' counsel generally, not only ERISA Counsel. The Special Master's recommendation that a $3.4 million "reallocation remedy" be given to ERISA Counsel is based on his fundamental misunderstanding of the cap, and is wholly unjustified.

C. The Special Master Wrongly Concludes That Customer Class Counsel Sought To Prevent ERISA Counsel From Reviewing Documents And Omits

Testimony From ERISA Counsel That Directly Contradicts This Erroneous Finding

To buttress his ultimate conclusion that ERISA Counsel was treated unfairly, and to further justify his suggested award of an additional $3.4 million to ERISA Counsel, the Special Master erroneously concludes that Customer Class Counsel somehow prevented ERISA Counsel from accessing documents produced by State Street in the litigation. The Special Master's reason for drawing this conclusion is obvious—it is further "evidence" of his belief that Customer Class Counsel sought to put ERISA Counsel at a disadvantage. It is also summarily contradicted, however, by testimony taken by the Special Master that is conveniently ignored in the Report.

Specifically, the Special Master finds that "ERISA Counsel were not provided with access to documents State Street had provided to the Customer Class" and that "[n]or were ERISA Counsel allowed access to the Customer Class's database." R&R at 34. The Special Master finds that this lack of access was a "manifest[ation]" of "internal tension" between the Customer Class Counsel and ERISA Counsel, for which proposition he cites the testimony of ERISA attorney Carl Kravitz. R&R at 34, 46 n.29. Notably, the discussion makes no reference to testimony from numerous other attorneys, including ERISA attorney Lynn Sarko, [redacted] [redacted][85] Ignoring contradictory

[85] [redacted]

testimony about the relationships of Customer Class Counsel and ERISA Counsel that does not fit his desired narrative, the Special Master concludes that ERISA Counsel did not have access to documents produced by State Street because Customer Class Counsel did not want ERISA Counsel to have access.

As with numerous other conclusions the Special Master makes in the Report, this is flatly contradicted by other deposition testimony taken by the Special Master during the investigation. The testimony of ERISA attorney Lynn Sarko dispels the Special Master's conclusion that Customer Class Counsel prohibited ERISA Counsel from accessing documents. First, as to the Special Master's finding that "[n]or were ERISA Counsel allowed access to the Customer Class's database"—the obvious inference being that Customer Class Counsel *denied* ERISA Counsel access to its database—Mr. Sarko testified that sharing a document database would have been "totally unrealistic" for confidentiality, workflow, and other reasons. Sarko Dep., 7/6/17, at 65:10-19 (SM Ex 28). He further testified that it is common in large cases consisting of groups with differing interests, where one group might settle while another does not, for those groups to have separate databases so they can preserve their ability to access documents regardless of another group's actions. *Id.* at 65:5-66:7. On that point, Mr. Sarko explained that, in this case, ERISA Counsel's having a separate database, and thus having the ability to pursue the case even if the Customer Class settled, was an important consideration weighed by the Department of Labor during settlement negotiations. *Id.* at 66:8-18 ("[T]hat was a selling point to them for them to settle the case, thinking that we were not just, you know, trailing along."). Thus, the Special Master's strange finding that ERISA Counsel was not "allowed" access to the database maintained by Customer Class Counsel is squarely contradicted by Mr. Sarko's testimony, which the Report does not cite.

Lynn Sarko's deposition testimony also squarely negates any finding, conclusion, or inference that Customer Counsel inhibited ERISA Counsel's access to documents produced by State Street. *See* R&R at 34. [redacted][86] ERISA Counsel also received other documents and information from State Street's counsel, including trading volume data and analysis.

[86] Nor did the Special Master request documents from Thornton concerning ERISA Counsel's discovery negotiations with State Street.

[redacted]

In addition to ERISA Counsel's own dealings with State Street and their own analysis of State Street's documents, Customer Class Counsel also shared work product with ERISA Counsel and participated in joint collaborative discussions. *See, e.g.*, Sarko Dep., 7/6/17, at 114:15-25 (SM Ex. 28) (recalling "all counsel" meeting at which counsel came together to share

views of the case, and at which Michael Lesser of Thornton presented a PowerPoint presentation); Kravitz Dep., 9/11/17, at 11:7-8 (SM Ex. 117) ("As the case wore on, we did work closely with the customer class"); Kravitz Dep., 7/6/17, at 78:4-23, 95:13-96:20 (SM Ex. 21) (recalling presentation and substantive discussions among counsel).

The Special Master's findings regarding ERISA Counsel's access to documents, and the accompanying inference against Customer Class Counsel, are plainly contradicted by record evidence. There is no factual basis for the Special Master to conclude that Customer Class Counsel was trying to inhibit ERISA Counsel's ability to obtain or review documents. This is an important correction not only because the Special Master saw fit to make this finding in his Report, but also because it underpins his broader conclusion that ERISA Counsel got a raw deal at the hands of Customer Class Counsel, and therefore should receive $3.4 million in "reallocat[ed]" fees—a figure that, for the reasons explained above, is based on a fundamental misunderstanding of the fee cap imposed by the Department of Labor.

IX. The Recommendation That A Monitor Be Appointed Is Baseless

As a final salvo, the Special Master recommends that an ethical monitor be imposed on the Thornton Law Firm "to consult with them on professional conduct norms and to ensure that they comply with those norms." R&R at 373. This recommendation is absurd. What could a consultant do to ensure "consistent ethical compliance" when there have been only unintentional mistakes? The answer is: nothing.

The recommendation that Thornton engage a monitor—no doubt at its own cost— is primarily premised upon the Special Master's conclusion that "[a]s to its **business development**, Thornton lawyers appear to be largely unsupervised and unconstrained by the professional conduct norms" and that such conduct is "**endemic** to the way [the Thornton Law Firm does] business with their hyper-focus on business development and fee generation." *See* R&R at 372-

73 (emphasis added). There is no significant discussion of the Thornton Law Firm's "business development practices" anywhere in the Report. This is simply another instance where the Special Master or his counsel, for whatever reason, impugn the reputation of an entire law firm with no apparent reason.[87]

Ultimately, the only conduct that the Special Master has "uncovered" with respect to the Thornton Law Firm is: (1) immaterial misstatements in a boilerplate affidavit used as a cross-check for an aggregate fee award; and (2) a potential lack of contemporaneous time records of two attorneys where the Special Master found that the time recorded was nonetheless "reasonable and sufficiently reliable." R&R at 216.[88] This sixteen-month, $3.8 million investigation (with its attendant reputational effect and the additional significant cost to the firm of defending itself) has no doubt reminded all attorneys of their responsibility to scrupulously avoid inadvertent errors in submissions to the Court. While the Special Master's recommendations that the Thornton Law Firm establish more consistent procedures for recording

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[87] Of course, this is not the only place where the Report and Recommendations unfairly impugns the reputation of the Thornton Law Firm and its attorneys. As an additional example, page 54 of the Report quotes a lengthy email from co-counsel which the Special Master characterizes as "warning Bradley not to include unwarranted hours in Thornton's fee petition." The underlying email states, "I heard third-hand that Mike [Thornton] recently said on a call (that I wasn't on) that Thornton Law Firm was showing $14 million . . . . I am hopeful that Mike T simply misspoke or was guessing when he said $14 million and that we are not going to suddenly see an additional 12,000 hours mysteriously appear on Thornton Law Firm's behalf." In the response, which does not appear in the Report, Michael Thornton replies, "I did say something like that on the call, but preceded it by saying **it was a guess** and that I would have to ask Mike Lesser for the actual figure at that point which of course is not complete as with the other firms." 8/30/15 Email, TLF-SST-031166 (SM Ex. 87) (emphasis added). Nor does the Special Master include a subsequent email, [redacted]. This later email was identified for the Special Master, [redacted], as was deposition testimony from co-counsel that "I think Mike Thornton may have simply been mistaken because that's not the number they ultimately reported." *Id.* (citing Chiplock Dep., 9/8/17, at 64:16-18 (SM Ex. 41)). The Special Master was either recklessly inattentive or chose to ignore this evidence, publishing innuendo with a complete disregard for injuring the reputation of a highly respected member of the bar.

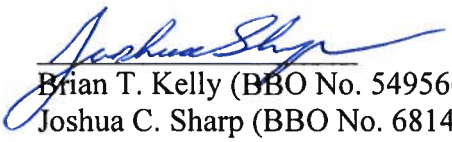
[88] As additional evidence of the Special Master or his counsel's inattention, in one section of the Report, the Special Master finds that he cannot say whether or not the time records were contemporaneous and in another section states that the time records were not contemporaneous. *See supra* § III(B)(ii).

time and setting billing rates are not in and of themselves unreasonable, they certainly do not justify "on-going ethics supervision," R&R at 373, and in fact do not even concern legal ethics. Imposing an ethics monitor on the Thornton Law Firm is a draconian recommendation that should be rejected because it is unfair, unjustified, and needlessly punitive.

CONCLUSION

For the foregoing reasons, the Thornton Law Firm objects to the Special Master's factual and legal findings identified above.

Respectfully submitted,



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Dated: June 28, 2018

Counsel for the Thornton Law Firm LLP

CERTIFICATE OF SERVICE

I certify that the foregoing document and its exhibits will be filed conventionally on June 29, 2018 when the Clerk's office opens, as the Clerk's office will be closed by the time we are able to file the foregoing document and its exhibits tonight. The foregoing document and its exhibits will be served on all counsel by electronic means on June 28, 2018. A redacted version will be filed on ECF on June 28, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing.

Joshua C. Sharp

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

TRANSMITTAL DECLARATION OF JUSTIN J. WOLOSZ IN SUPPORT OF LABATON SUCHAROW LLP'S OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

I, Justin J. Wolosz, on oath, depose and say as follows:

1. I am an attorney at Choate, Hall & Stewart, LLP. I am one of the counsel of record representing Labaton Sucharow LLP in this matter.

2. I submit this declaration for the sole purpose of transmitting true and accurate copies of documents in support of Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations. I have personal knowledge of the facts set forth in this declaration.

3. Attached hereto as Exhibit A is a true and correct copy of an email from Lawrence Sucharow to Lynn Sarko dated August 28, 2015 (TLF-SST-O43022 – 043024).

4. Attached hereto as Exhibit B is a true and correct copy of the Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Labaton Sucharow LLP dated May 18, 2017. Attached hereto as Exhibit C is a true and correct copy of the Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP dated May 18, 2017. Both of these documents were served by email on May 18, 2017.

5. Attached hereto as Exhibit D is a true and correct copy of a list of document requests and interrogatories that the Special Master struck in their entirety. One of the Special Master's attorneys handed this document to counsel for Labaton at a meeting on May 22, 2017.

6. Attached hereto as Exhibit E is a true and correct copy of the Board of Bar Overseers, *Massachusetts Legal Ethic: Substance and Practice* (2017).

7. Attached hereto as Exhibit F is a true and correct copy of *The New Massachusetts Rules of Professional Conduct: An Overview*, 82 Mass. L. Rev. 261 (1997), by Chief Justice Herbert P. Wilkins.

8. Attached hereto as Exhibit G is a true and correct copy of the deposition transcript of Camille R. Sarrouf dated March 24, 2018.

9. Attached hereto as Exhibit H is a true and correct copy of the fourth edition of *Ethical Lawyering in Massachusetts* § 1.1, MCLE, by James S. Bolan.

10. Attached hereto as Exhibit I is a true and correct copy of *Attorney Fee Rules Undergo Revisions in Massachusetts* by Christina Pazzanese, published in Massachusetts Lawyers Weekly on January 12, 2011.

11. Attached hereto as Exhibit J is a true and correct copy of a December 22, 2010 Order of the Supreme Judicial Court regarding SJC Rule 3:07.

12. Attached hereto as Exhibit K is a true and correct copy of excerpts of the deposition of Professor Stephen Gillers, dated March 21, 2018.

13. Attached hereto as Exhibit L is a true and correct copy of excerpts from the fifth edition of *Newberg on Class Actions*, Volume 5, chapters 15-17.

14. Attached hereto as Exhibit M is a true and correct copy of 10-54 *Moore's Federal Practice - Civil* § 54,154 (2018).

15. Attached hereto as Exhibit N is a true and correct copy of the Settlement Agreement in *In re: Heartland Payment Sys. Inc. Customer Data Security Breach Litigation*, No. 4:09-MD-2046, ECF 57 (S. D. Tex.) filed on December, 18, 2009.

16. Attached hereto as Exhibit O is a true and correct copy of the Stipulation of Settlement in *Hartless v. Clorox Company*, No. 06-CV-02705, ECF 77 (S.D. Cal.) filed on May 21, 2010.

17. Attached hereto as Exhibit P is a true and correct copy of the USCS Federal Rules of Civil Procedure Rule 23, including the 2018 Advisory Notes.

18. Attached hereto as Exhibit Q is a true and correct copy of excerpts of the Advisory Committee on Civil Rules dated April 10, 2018.

19. Attached hereto as Exhibit R is a true and correct copy of excerpts of the transcript of a hearing in the case *Arkansas Teacher Retirement System v. Insulet Corp.*, 1:15-cv-12345, ECF 120, before the Honorable Mark L. Wolf dated March 9, 2018.

20. Attached hereto as Exhibit S is a true and correct copy of the Declaration of Peter Joy dated June 28, 2018.

21. Attached hereto as Exhibit T is a true and correct copy of excerpts of the fifth edition of *Newberg on Class Actions*, Volume 5, Chapters 7-10.

22. Attached hereto as Exhibit U is a true and correct copy of excerpts of the transcript of a hearing in the case *Arkansas Teacher Retirement System v. State Street Corp.,* before the Honorable Mark L. Wolf dated May 30, 2018.

23. Attached hereto as Exhibit V is a true and correct copy of McTigue Law LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Second Supplemental Interrogatories dated October 6, 2017.

24. Attached hereto as Exhibit W is a true and correct copy of Zuckerman Spaeder LLP's Answers to Special Master's Second Supplemental Interrogatories dated August 6, 2017.

25. Attached hereto as Exhibit X is a true and correct copy of an email from Christopher Keller to Garrett Bradley dated May 23, 2011 (TLF-SST-033910 – 033913).

26. Attached hereto as Exhibit Y is a true and correct copy of the Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thorton Law Firm LLP to Special Master's July 5, 2017 Request for Supplemental Submission dated July 31, 2017.

Signed under the penalties of perjury this 28th day of June 2018.

/s/ Justin J. Wolosz
Justin J. Wolosz

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on June 28, 2018

/s/ Joan A. Lukey
Joan A. Lukey

Exhibit A
Redacted

Exhibit B
Redacted

Exhibit C
Redacted

Exhibit D
Redacted

Exhibit E

Massachusetts Legal Ethics: Substance and Practice

Draft: December 2017

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DRAFT

The Board's goal in preparing this treatise is to make Massachusetts legal ethics and the disciplinary system readily accessible to members of the bar and to the public. To this end, it has assembled the law on these topics in a single-volume reference work.

This PDF document is a draft of the treatise. The Board is posting it on its web site at this time to make it available as it finalizes the volume. The Board anticipates that a final version of the treatise will be published during 2018 in hard copy and as an e-book. Annual updates will keep this volume current.

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DRAFT

A. The Basics of Rule 1.5

Rule 1.5 expresses a straightforward obligation whose practical application can be remarkably ambiguous. The rule provides that a lawyer's fees must not be clearly excessive or illegal. It lists eight nonexclusive factors that help determine whether a fee is excessive or illegal. Those factors primarily require that a lawyer's fees must not exceed the prevailing market for the kind of work the lawyer provides, but also take into consideration the lawyer's skill level, the nature of the tasks the lawyer must perform (including how long the work will take), the demands and particular needs of the client (including how urgent the matter is), and, significantly, whether the fee is fixed or contingent.[353] Because those factors are not exclusive, other considerations may affect whether any given fee is permitted under the rule. Rule 1.5 also regulates contingent fees with great specificity, as described in a later section. The rule also prohibits a lawyer from "collect[ing] an unreasonable amount for expenses."[354]

Massachusetts requires that all fee arrangements as well as the scope of the representation be communicated to the client in writing, "except when the lawyer will charge a regularly represented client on the same basis or rate,"[355] or in single-meeting consultation, or when the engagement is for a total fee not exceeding $500.[356] The writing requirement, promulgated in 2012, is different from the practice in most jurisdictions,[357] and a signature of the client is not required unless the arrangement is for a contingent fee. Inclusion of the scope of the representation is not only required by the rule, but is essential for both parties' understanding of what the lawyer will address, and what she will not address, during the representation. Recall that Rule 1.2(c) requires the client's informed consent if the objectives of the representation are to be limited. The exception to the writing requirement for regular, repeated representation "on the same basis" most likely refers to arrangements where the lawyer offers services for a flat fee, discussed below.

One further aspect of Rule 1.5 deserves mention, because it is quintessentially a Massachusetts practice and tradition. Unlike almost every other jurisdiction in the nation, Massachusetts permits an attorney's fee to be divided with a lawyer who does not practice in the firm of the primary lawyer (i.e., a referral fee), even if the referring lawyer does nothing more than refer the matter.[358] The rules in most jurisdictions, however, provide that a lawyer may not pay a referring lawyer any fee unless the latter lawyer works on the matter or accepts responsibility for the representation, and even then the fee must be divided proportionately.[359] The Massachusetts rule permits a pure referral fee, as long as the client knows in advance that the fee will be divided with the referring lawyer

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[353] MASSACHUSETTS RULES PROF. CONDUCT 1.5(a)(1)–(8).
[354] Rule 1.5(a).
[355] Rule 1.5(b)(1).
[356] Rule 1.5(b)(2) ("The requirement of a writing shall not apply to a single-session legal consultation or where the lawyer reasonably expects the total fee to be charged to the client to be less than $500.").
[357] The ABA's Model Rule, which most jurisdictions follow, states that the fee basis shall be communicated "preferably in writing." *See* MODEL RULES OF PROF. CONDUCT 1.5(b).
[358] Rule 1.5(e).
[359] *See* MODEL RULES OF PROF. CONDUCT 1.5(e).

and the client consents to the joint participation in writing, and as long as the total fee charged to the client is reasonable.

While a discussion of the provisions of Rule 1.5 as it pertains to the requirements of contingency fee agreements is beyond the scope of this treatise, the Office of the Bar Counsel has written several articles on fee agreements in general and contingency fee agreements in particular, which are available on its website.[360]

Other topics of interest to lawyers arising from Rule 1.5 concern payments in kind, and measures taken by lawyers to secure payments due in the future. These issues will be addressed in Part II.C.(4) below, along with more in-depth discussion of the requirements of a reasonable fee and a proper contingent fee.

B. Discipline for Violation of Rule 1.5

You Should Know

A lawyer who charges a client a clearly excessive fee typically receives a public reprimand. The discipline for a lawyer who charges a clearly excessive fee while misleading the client is a term suspension. On occasion, when a lawyer has refunded the excess fees and the client suffers little harm, the lawyer may receive an admonition. Disbarment has not been imposed for violation of Rule 1.5 alone.

1) Disbarment

If a lawyer intentionally charges or collects fees for work not actually performed it may be viewed as equivalent to misappropriation, or theft, of a client's funds. The presumptive sanction for misappropriation of client money is disbarment or indefinite suspension.[361] Ordinarily, charging a client a clearly excessive fee is not treated in the disciplinary reports in the same fashion as misappropriation of client funds or property.

You Should Know

In *Matter of Schoepfer*, the SJC established the following presumptive sanctions for misappropriation of client funds, which an excessive fee might represent:

> If . . . an attorney intended to deprive the client of funds, permanently

[360] *See, e.g.*, Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf (2015); Constance V. Vecchione, *FAQs: Mass. R. Prof. C. 1.5(b) and Written Fee Arrangements*, https://bbopublic.blob.core.windows.net/web/f/FAQs%201.5(b).pdf (2013); Constance V. Vecchione, *Write It Up, Write It Down: Amendments to Mass. R. Prof. C. 1.5 Require Fee Arrangements to Be in Writing* https://bbopublic.blob.core.windows.net/web/f/WriteItUp.pdf (2012); Constance V. Vecchione, *Fees and Feasibility: Amendments To Mass. R. Prof. C. 1.5 on Fees*, https://bbopublic.blob.core.windows.net/web/f/Fees2011.pdf (2011).

[361] Matter of Schoepfer, 426 Mass. 183, 185-188 & n.2, 13 Mass. Att'y Disc. R. 679 (1997).

> or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension.[362]

In *Matter of Goldstone*,[363] the attorney charged and collected an excessive fee from his client, a national retailer, by intentionally and in bad faith charging fees to which he was not entitled. The corporation sued the lawyer for breach of contract and won a judgment against him.[364] Relying on the facts established conclusively in the civil action, the SJC disbarred the lawyer. The Court wrote, "[The respondent] intentionally overbilled and collected from his client hundreds of thousands of dollars in fees and costs to which he was not entitled, on both closed and active cases. Where an attorney lacks a good faith belief that he has earned and is entitled to the monies, such conduct constitutes conversion and misappropriation of client funds."[365] In *Matter of Smith*,[366] decided soon after *Goldstone*, an attorney filed an affidavit of resignation after Bar Counsel charged him with charging his client excessive fees. The attorney charged a widowed, elderly client a total of $60,000 for services that had a maximum value of $7,500. The single justice accepted his resignation. While many lawyers have been disbarred for intentional misappropriation of client funds held by the lawyers, *Goldstone* and *Smith* represent disciplinary matters where the bad faith charging of an excessive fee led to a disbarment.[367]

On other occasions, lawyers have been disbarred for misconduct involving excessive fees, although always with other serious misconduct as well. In *Matter of Pepyne*,[368] the single justice accepted the respondent's affidavit of resignation after reviewing six separate instances of misconduct, several of which involved the lawyer's imposing liens or accepting fees to which he was not entitled. He also neglected matters, was held in contempt of court, and was convicted of an unrelated crime. In *Matter of O'Connor*,[369] the single justice disbarred a lawyer for misconduct involving his collecting a higher fee in a worker's compensation matter than that provided for in the settlement and misleading his client about the true fee. He also engaged in separate misconduct where he neglected a matter and lied to his client about his carelessness.

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[362] 426 Mass. at 185–188 & n.2 (*citing* Matter of the Discipline of an Attorney, 392 Mass. 827, 836-837 (1984)).

[363] 445 Mass. 551, 21 Mass. Att'y Disc. R. 288 (2005).

[364] *See* Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F. 3d 10 (1st Cir. 1997) (confirming that the attorney bears the burden of proof in a controversy with a client to establish that his fees were reasonable).

[365] 455 Mass. at 566.

[366] 21 Mass. Att'y Disc. R. 609 (2005).

[367] In Matter of Pomeroy, 26 Mass. Att'y Disc. R. 515 (2010), the respondent was retained by an elderly client to liquidate several bank accounts and turn the proceeds over to him. The lawyer converted over $812,000. When her conduct was discovered, she initially claimed this represented a contingent fee she was owed for these services. She later fabricated documents to conceal her activities. Ultimately the respondent submitted an affidavit of resignation and was disbarred. *See* Matter of Pomeroy, and 25 Mass. Att'y Disc. R. 507 (2009) (temporary suspension).

[368] 26 Mass. Att'y Disc. R. 502 (2010).

[369] 26 Mass. Att'y Disc. R. 458 (2010).

You Should Know

There is a difference between a *clearly excessive* fee and an *illegal* fee. An illegal fee is a fee not allowed by the contractual or regulatory terms under which the lawyer is to be paid, even if the actual amounts charged would not be deemed "clearly excessive." Lawyers have been disciplined under Rule 1.5 for charging an illegal fee in a workers' compensation matter[370] and a criminal defense matter,[371] among others.

2) Suspension

The lawyers who have been suspended for violating Rule 1.5 typically have overcharged a client intentionally, with some misrepresentation about the fee. For instance, in *Matter of Beaulieu*,[372] an attorney was suspended for four years and had to make restitution before submitting an application for reinstatement. The attorney billed the Committee for Public Counsel Services for his legal services and violated Rule 1.5(a) by submitting inaccurate and grossly inflated reports of his hours. In a recent disposition that ought to be of considerable interest to many private firm lawyers, *Matter of Murphy*,[373] an attorney was suspended for a year and a day where, in order to increase his billable hours, he knowingly spent more time on client matters than necessary. The attorney, an associate in a law firm, earned an annual salary with a bonus tied to his billings. The attorney billed his clients for extra hours when he should have delegated tasks to lawyers of lesser seniority, and for tasks that were duplicated and billed by others in his firm.[374]

In *Matter of Rafferty*,[375] the single justice imposed a four-month suspension on an attorney, with reinstatement conditioned on his passing the MPRE and making restitution, after he intentionally complied with the questionable instructions of his wealthy and overzealous client, litigating her matter excessively and collecting from her fees of $700,000. The fees were far in excess of any amount she could reasonably hope to win in the lawsuit. Because the lawyer collected an excessive fee through his failure to restrain his client's unreasonable litigation desires, the single justice determined that his

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370 *O'Connor*, *supra*.

371 Matter of Serpa, 30 Mass. Att'y Disc. R. 358 (2014).

372 29 Mass. Att'y Disc. R. 33 (2013).

373 28 Mass. Att'y Disc. R. 643 (2012).

374 The misconduct present in *Matter of Murphy* has been, by many accounts, a very common phenomenon within competitive firm law practice, where associates experience intense pressure to meet billable hour quotas and partners encounter similar incentives to report high hours. For a discussion of this problem, see, e.g., Susan Saab Fortney, *Soul for Sale: An Empirical Study of Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000); Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. 619 (2011); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998).

375 26 Mass. Att'y Disc. R. 538 (2010).

sanction ought to be higher than the presumptive sanction for charging excessive fees, which would have been a public reprimand.

In *Matter of Beatrice*,[376] the respondent was suspended for two years for several instances of misconduct, including entering into and collecting a contingent fee in a criminal case. And in *Matter of Landry*,[377] the respondent was suspended for nine months after charging, and suing to collect, an excessive contingent fee for representation regarding the sale of corporate stock. The respondent also misled his client about the propriety of a contingent fee arrangement in that type of representation.[378]

3) Public Reprimand

"The typical sanction for charging an excessive fee is a public reprimand."[379] Many lawyers have received public reprimands for violating Rule 1.5, either after charging an hourly fee or where the arrangement involved a contingent fee arrangement. The most prominent SJC treatment of the discipline for an excessive fee has been *Matter of Fordham*,[380] discussed in more detail below. In *Fordham*, the SJC imposed a public reprimand for the respondent's having charged his unsophisticated client a clearly excessive fee (despite providing very high quality, and successful, legal services, and despite the fact that the excessive fee was not actually collected).

Other recent matters in which the lawyer received a public reprimand for violating Rule 1.5 include *Matter of Henry*,[381] where an attorney was reprimanded after representing a husband and wife in their petition to partition a two-family duplex. The attorney charged the clients more than $91,000, while the total reasonable amount, according to the Fee Arbitration Board, was $35,000. In *Matter of Tierney*,[382] an attorney received a public reprimand because the fees she charged and collected were disproportionate to the size and value of the estate on which she worked. The net proceeds from the real estate in question amounted to less than $98,000, and the attorney charged $22,500 for her work on the estate, which the Board concluded was clearly excessive under the circumstances.

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376 14 Mass. Att'y Disc. R. 56 (1998).

377 31 Mass. Att'y Disc. R. ___, 2015 WL 10322929 (2015).

378 *See also* Matter of Gibson, 27 Mass. Att'y Disc. R. 396 (2011) (single justice order suspending the respondent indefinitely, without reference to Rule 1.5, after the respondent entered into a grossly unfair contingent fee agreement, and misappropriated the funds held).

379 Matter of Rafferty, 26 Mass. Att'y Disc. R. 538, (2010). The ABA model standards for discipline apply a more flexible approach. Those standards recommend varying sanctions for "unreasonable or improper fees," depending on the mental state of the lawyer and the harm caused to the client. *See* ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS § 7.0 – 7.4 (2012).

380 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996), cert. denied, 519 U.S. 1149 (1997). Fordham charged but did not actually collect a clearly excessive fee. However, since then Bar Counsel has stipulated to public reprimands in cases where lawyers have both charged and actually collected clearly excessive fees, when the lawyer has made restitution. *See, e.g.*, Matter of Chignola, 25 Mass. Att'y Disc. R. 112 (2009) (restitution and other factors in mitigation); Matter of Olchowski, 24 Mass. Att'y Disc. R. 520 (2009) (restitution).

381 28 Mass. Att'y Disc. R. 450 (2012).

382 28 Mass. Att'y Disc. R. 850 (2012).

Lawyers who have failed to document a contingent fee in writing have usually received admonitions, as discussed below. There have been instances when the lawyers have received public reprimands, but in each case the lawyer also committed separate misconduct. (Indeed, in each case Bar Counsel seemingly would not have known of the absence of a written agreement but for the separate misconduct.) For example, in *Matter of Carroll*,[383] the respondent neglected a contingent-fee matter for which there was no written fee agreement, and caused the client's case to be time-barred through his lack of diligence, among other things. He received a public reprimand. In *Matter of Kelleher*,[384] the attorney ignored a previous lawyer's claim to a share of contingent-fee proceeds, and also did not prepare a written contingent fee agreement. In *Matter of Faria*,[385] the lawyer received a public reprimand after he entered into an oral contingent fee agreement, neglected the matter, and was responsible for the dismissal of the client's case. He had previously received an admonition for neglect, including missing a statute of limitations.[386]

4) Admonition

On occasion, lawyers who charged excessive fees or otherwise violated Rule 1.5 have received only an admonition. The admonitions tend to appear where the misconduct was not intentional and the client suffered little or no harm. For example, in AD 00-78,[387] the respondent charged his client, an elderly woman for whom he served as trustee, legal services rates for assistance that did not require legal skills. Because the lawyer "ha[d] also taken very good care of the client over the years that he has been her trustee" and made restitution to the trust, he received only an admonition. In AD 09-02,[388] an attorney failed to execute a written contingent-fee agreement with the client, leading to disagreement about its terms. The lawyer also offered less-than-competent services to the client, but made full amends to remedy any potential harm.[389] In AD 06-02,[390] the attorney charged his client for services that were unnecessary and redundant. He made

[383] 28 Mass. Att'y Disc. R. 130 (2012). *See also* Matter of Kelleher, 26 Mass. Att'y Disc. R. 281 (2010) (attorney also faced public reprimand*ed* for *conduct including* not having a written contingent fee agreement); Matter of Foley, 25 Mass. Att'y Disc. R. 207 (2009) (attorney faced three-month suspension, stayed for one year under probationary conditions, for, among other violations, entering into a contingent fee agreement without a written fee agreement).

[384] 26 Mass. Att'y Disc. R. 281 (2010).

[385] 25 Mass. Att'y Disc. R. 201 (2009).

[386] *See also* Matter of Neal, 19 Mass. Att'y Disc. R. 330 (2003) (public reprimand for misconduct including failing to maintain a copy of the contingent fee agreement).

[387] 17 Mass. Att'y Disc. R. 563 (2000).

[388] 25 Mass. Att'y Disc. R. 655 (2009).

[389] For a similar, if perhaps more surprising, example, see AD 08-18, 24 Mass. Att'y Disc. R. 895 (2008) (no written contingent fee agreement, plus neglect leading to dismissal of client's case; successor counsel obtained reversal of the dismissal, so ultimately no substantial harm to the client). *Compare* AD 00-12, 16 Mass. Att'y Disc. R. 467 (2000) (admonition solely for failure to have contingent fee agreement in writing).

[390] 22 Mass. Att'y Disc. R. 848 (2006).

restitution of the fees to which he was not entitled. In AD 04-05,[391] the attorney received an admonition after calculating his contingent fee on amounts (personal injury protection (PIP) benefits) that were not contingent at all. The attorney refunded that portion of his fee after his client filed a complaint with the Office of the Bar Counsel. Other examples of a similar nature exist in the disciplinary reports.[392]

In AD 99-58,[393] a lawyer received an admonition for failing to disclose to a client his receipt of a referral fee, in violation of DR 2-107(A)(1), the predecessor to Rule 1.5(e). The lawyer had referred a matter, received a contingent fee, but neither he nor the lawyer to whom he referred the matter disclosed the arrangement to the client.

In *Matter of the Discipline of an Attorney*,[394] the Supreme Judicial Court declined to admonish a lawyer for including in his contingent-fee agreement a provision stating that if the attorney were discharged prior to the conclusion of the representation, the attorney would be compensated for the fair value of his services or one third of any settlement offer that had been made at the time of discharge, whichever was greater. Because this specific provision could result in fee that exceeded the fair value of the work and could discourage the client from discharging the lawyer, the Court doubted whether a contingent-fee agreement should contain any such provision. But because the respondent had neither charged nor collected an unreasonable fee based upon that contract, the Court concluded that discipline was not warranted. (Because the respondent's conduct was not expressly prohibited by Rule 1.5, after that opinion the Court amended Rule 1.5 and included clause (6) of both versions of the Model Fee Agreement to limit such fees.) However, the SJC did admonish the lawyer for knowingly misrepresenting to insurers on several occasions the existence of a statutory lien in his favor, and for failing to notify his client promptly about his receipt of funds payable to the client.

C. Other Fee Issues

1) Determining Whether a Fee Is Clearly Excessive

Whether a lawyer's fee is "clearly excessive" cannot be determined formulaically. That determination calls for careful and nuanced judgment based on the many factors set forth in Rule 1.5(a). Most discussions use *Matter of Fordham*,[395] described earlier in Section B.3, as a benchmark for that assessment. In *Fordham*, an experienced and well-respected member of the Massachusetts bar with no history of any previous discipline received a public reprimand for charging a client an excessive fee for representation of a young man in a driving under the influence (DUI) criminal matter. The lawyer succeeded in the goal of the representation, achieving an acquittal for the client. The

[391] 20 Mass. Att'y Disc. R. 668 (2004).
[392] *See* AD 06-06, 22 Mass. Att'y Disc. R. 855 (2006); AD 05-17, 21 Mass. Att'y Disc. R. 706 (2005); AD 03-32, 19 Mass. Att'y Disc. R. 577 (2003); AD 02-55, 18 Mass. Att'y Disc. R. 745 (2002); AD 02-50, 18 Mass. Att'y Disc. R. 732 (2002); AD 00-34, 16 Mass. Att'y Disc. R. 501 (2000).
[393] AD 99-58, 15 Mass. Att'y Disc. R. 759 (1999).
[394] 451 Mass. 131, 24 Mass. Att'y Disc. R. 824 (2008).
[395] 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996) (public reprimand), cert. denied, 519 U.S. 1149 (1997).

parties stipulated that the lawyer had worked diligently every hour he billed, and had billed the client at an acceptable hourly rate. However, the fee the lawyer charged (close to $50,000) was so far beyond what a typical DUI defense lawyer charged similar clients (almost never more than $10,000, according to even respondent's own experts) that it qualified as "clearly excessive." The Court was also critical of the fact that the lawyer had charged his client for the time he spent learning an area of the law he did not previously know. The Court wrote, "A client 'should not be expected to pay for the education of a lawyer when he spends excessive amounts of time on tasks which, with reasonable experience, become matters of routine.'"[396]

Fordham emphasizes the importance of the prevailing practices among lawyers in similar settings offering comparable services. *Fordham* also makes clear that a lawyer may not charge a client for the lawyer's own education in the law if that extra effort results in an excessive fee. In fact, however, in most of the discipline for violation of Rule 1.5, aside from contingent-fee matters, the lawyer charged fees for work that the lawyer never performed or performed poorly.

2) Contingent Fees

Rule 1.5(c) addresses the topic of contingent fees with great specificity. It is beyond the scope of this treatise to review in detail the logistics of charging and collecting a reasonable contingent fee. Useful resources exist for Massachusetts lawyers who charge contingent fees.[397] The requirements for continent fee agreements in Massachusetts are set forth in Rules 1.5(c) and (f), and Comments [3] and [3A]-[3D]. With few exceptions, a lawyer who charges a contingent fee in Massachusetts must enter into a written agreement signed by the lawyer and the client. The agreement must contain several mandated provisions. It must identify the contingency on which the fee award will be based, the rate used, whether the rate is based on the gross proceeds or the net proceeds after litigation expenses have been deducted, and whether the lawyer or the client will be responsible for those expenses. In addition, in a relatively new provision, the agreement must address the question of how the lawyer will be paid, if at all, should the representation end before the matter resolves. If the lawyer is a successor lawyer to a previous lawyer with a contingent-fee agreement who performed some work on the matter, the agreement must address who will pay the previous lawyer.[398] If the agreement is silent, the successor lawyer will be responsible for the previous lawyer's fees.

The revised Massachusetts rule offers lawyers two template versions of a contingent-fee agreement, Form A, which has standard, default provisions, and Form B,

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[396] 423 Mass. at 490 (quoting Matter of the Estate of Larson, 103 Wash.2d 517, 531, 694 P.2d 1051 (1985)).

[397] *See, e.g.*, Timothy Dacey III, *Fee Agreements*, in ETHICAL LAWYERING IN MASSACHUSETTS, Chapter 5 (James Boland ed. 2009 and 2013 Supp.); Nancy E. Kaufman & Constance V. Vecchione, *The Ethics of Charging and Collecting Fees*, *at* h https://bbopublic.blob.core.windows.net/web/f/ethicsfees.pdf (2012).

[398] The Supreme Judicial Court in 2009 sought comments on the question of how to allocate the responsibility for paying the discharged lawyer in a successful contingent fee matter, responding to an issue decided by the SJC a few years before. *See* Malonis v. Harrington, 442 Mass. 692 (2004).

which offers elections for the lawyer to choose among certain provisions. Lawyers are not required to use those template forms, but if they choose to proceed with a different agreement, the lawyers "shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing."[399] In *Matter of Diviacchi*,[400] the lawyer was suspended for twenty-seven months for using a non-conforming contingent fee agreement and not explaining its terms to the client, among much other misconduct.

Several SJC decisions articulated the principles to be applied when a client discharges a contingent-fee lawyer before the final resolution of the matter. In *Salem Realty v. Matera*,[401] the SJC affirmed the Appeals Court determination that a discharged lawyer may not rely on the contingent fee agreement for his fees, but should be compensated on a *quantum meruit* basis for the value his work produced. In *Malonis v. Harrington*,[402] the SJC decided on the facts before it that the successor lawyer was responsible to pay for the discharged lawyer's fees. That decision triggered the ultimate revision to Rule 1.5 addressing the question of who will pay the discharged lawyer. In *Liss v. Studeny*,[403] the Court rejected a lawyer's effort to collect a *quantum meruit* fee in a contingent fee matter after he withdrew from the case before it was concluded, and after the former client had lost at trial. In so doing, the Court announced the general rule that there will be no *quantum meruit* recovery under contingent fee agreements when the contingency has not occurred, i.e., when the client has not obtained a recovery.[404]

3) Changing the Fee Agreement with a Client

A lawyer may alter an existing fee agreement with a client by giving the client notice of such changes in writing.[405] Most authorities agree that a lawyer may increase an hourly fee prospectively, or make comparable adjustments to the fee agreement, as time passes, as long as the client has received adequate notice of the change and the changes are reasonable and the fee agreement provides that the rates may be increased.[406]

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[399] Rule 1.5(f)(3).

[400] 475 Mass. 1013 (2016).

[401] 10 Mass.App.Ct. 571 (1980), *aff'd* 384 Mass. 803 (1981).

[402] 442 Mass. 692 (2004).

[403] 450 Mass. 473 (2008).

[404] 450 Mass. at 480–481. The Court noted, however that it was not categorically prohibiting *quantum meruit* recovery where the contingency does not occur; particularly compelling circumstances might permit recovery. The Court provided some indication of what such circumstances might be: "[T]here is no evidence that Studeny used Liss's services without intending that the contingency occur. That is, Studeny did not defeat Liss's reasonable expectation that he was using Liss's services to bring about the contingency on which Liss might be compensated." *Id.* at 481.

[405] Rule 1.5(b)(1) ("Any changes in the basis or rate of the fee or expenses shall also be communicated in writing to the client.").

[406] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18(1)(a) (2000) (if a fee agreement or modification "is made beyond a reasonable time after the lawyer has begun to represent the client in the matter . . . the client may avoid it unless the lawyer shows that the contract and the circumstances of its formation were fair and reasonable to the client"). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981) (modification of an existing contract is enforceable without additional consideration only upon an unanticipated change of circumstances making a contractual task more onerous or more valuable, and the modification is fair and equitable).

In some circumstances, a material change to an existing contract might qualify as a business transaction between a lawyer and a client, triggering the requirements of Rule 1.8(a).[407] For example, in *Matter of Weisman*,[408] an attorney renegotiated his fee agreement with his organizational client in the middle of the representation in a manner that the hearing committee found was neither fair nor was preceded by sufficient informed consent of the client. That modification represented a business transaction with the client, and the respondent did not comply with Rule 1.8. For that misconduct, and his mishandling of the fees he received, he was suspended for one year.

4) Payment in Kind and Liens for Fees

Lawyers typically receive their compensation in the form of money, by cash, check, or credit card payment. However a lawyer may receive payment in kind, subject to some restrictions. As the Office of Bar Counsel has advised, "A lawyer may accept property instead of money as a fee, so long as the lawyer is not acquiring a proprietary interest in the subject matter of the litigation in violation of Mass. R. Prof. C. 1.8(j). A fee paid in property may constitute a business transaction with a client and be subject to Mass. R. Prof. C. 1.8(a)."[409] The ban on acquiring a "proprietary interest" in litigation means that a lawyer cannot accept ownership, aside from a contingent fee interest, in the property or matter that is the subject matter of the litigation for which the lawyer represents the client. In the words of one authority, "the lawyer's interest in the case cannot be that of a co-plaintiff."[410]

In some settings, accepting property as a fee will qualify as a business transaction between the lawyer and her client, triggering the strict requirements of Rule 1.8(a).[411] One common example of an attorney's fee being subject to the Rule 1.8(a) requirements

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[407] Note that while Rule 1.8(a), concerning business transactions between attorney and client, generally does not apply to the original fee agreement, *see* Matter of an Attorney, 451 Mass. 131, 139–140, 24 Mass. Att'y Disc. R. 824, 832-835 (2008), amendments to the fee agreement might fall within that rule. *See* Kaufman & Vecchione, *supra* note 397, at 7 ("If an attorney . . . changes the fee agreement, this is a business transaction with a client and the lawyer must comply with the requirements of Mass. R. Prof. Conduct 1.8(a), including that the transaction must be fair and reasonable and understood by the client, the client must be given an opportunity to consult independent counsel, and the client must consent in writing."). While this advice from the Office of Bar Counsel seems to indicate that *all* changes in a fee agreement require the protections of Rule 1.8(a), it seems very unlikely that a regular adjustment of an hourly fee rate made after a significant period of time would quality as a business transaction between a lawyer and her client, or that Bar Counsel would consider it as such. *See also* Matter of Murray, 24 Mass. Att'y Disc. R. 483 (2008) (respondent charged with violation of Rule 1.8(a) after demanding changes to a contingent fee agreement; that count rejected by the hearing committee and the board).

[408] 30 Mass. Att'y Disc. R. 440 (2014).

[409] Kaufman & Vecchione, *supra* note 397, at 7.

[410] RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.8-10 (2012-2013 ed.) ("In other words, the client may not assign to the attorney part of his cause of action in a way that would allow the lawyer to prevent settlement. The client cannot waive his right to decide when to settle litigation.").

[411] According to Rule 1.8(a), a business transaction between an attorney and a client must be objectively fair, with all terms disclosed in writing, and the client must have the opportunity to consult with separate counsel, and must consent in writing to the transaction.

is when a lawyer accepts, as his fee, an award of stock in a corporate client.[412] Lawyers may accept such an equity interest in the client as the fee,[413] but, in addition to complying with Rule 1.8(a), the lawyer must ensure that the resulting fee is reasonable. In making that determination, the focus must be on the value of the stock at the time the transfer is made, not at a later time when the stock's value may be very different from what the parties had earlier predicted.[414] The sanctions for violations of Rule 1.8 are discussed in Part IV Section II.D.

If a client does not pay a lawyer the fees owed for the work the lawyer performed in a matter that goes to litigation, the lawyer is entitled to a lien on the claim or the proceeds of the claim, pursuant to a Massachusetts statute,[415] a device sometimes known as an "attorney's lien"[416] or a "charging lien"[417] If the relationship ends by the lawyer's withdrawing as counsel before final judgment, "[w]hether withdrawal works a waiver of the attorney's lien depends on whether the attorney had good cause to withdraw."[418] A lawyer may not withhold a client's papers and other materials in order to collect a fee,[419] but in a matter that is not a contingency-fee case, may properly withhold work product for which the client has not yet paid the lawyer,[420] except when doing so "would prejudice the client unfairly."[421]

Practice Tip

The Office of Bar Counsel hears often from clients whose former lawyers refuse to return or transfer the client's file. Most often, these matters resolve without formal proceedings through the intervention of Bar Counsel's Attorney and Consumer Assistance Program (ACAP). The resolution inevitably includes the attorney's return of the file to the former client.

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412 *See, e.g.*, Rubin v. Murray, 79 Mass. App. Ct. 64 (2011). For commentary about that practice, see John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002); Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Attorneys*, 1999 COLUM. BUS. L. REV. 330; Donald C. Langevoort, *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569 (2010); Therese Maynard, *Ethics for Business Lawyers Representing Start-Up Companies*, 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 401 (2011).

413 Rubin v. Murray, 79 Mass. App. Ct. 64 (2011).

414 *Id*., 79 Mass. App. Ct. at 75.

415 G.L. c. 221 § 50.

416 *See, e.g.*, Matter of King, 23 Mass. Att'y Disc. R. 352 (2007).

417 *See, e.g.*, Boswell v. Zephyr Lines, Inc., 414 Mass. 241, 244 (1993).

418 Phelps Steel, Inc. v. Von Deak, 24 Mass. App. Ct. 592, 594 (1987). "A withdrawal occasioned by a breakdown in the lawyer-client relationship is sufficient reason for an attorney to remove himself from the case, and will leave the attorney's lien intact." Bartermax, Inc. v. Discover Boston Multi-Lingual Trolley Tours, Inc., 71 Mass. App. Ct. 1107 (2008) (unpublished opinion).

419 Rule 1.16(e).

420 Kaufman & Vecchione, *supra* note 397, at 7; *see* Rule 1.16(e)(4) and (6).

421 Rule 1.16(e)(7).

Exhibit F

The New Massachusetts Rules of Professional Conduct: An Overview

BY CHIEF JUSTICE HERBERT P. WILKINS

Herbert P. Wilkins is Chief Justice of the Massachusetts Supreme Judicial Court.

On Jan. 1, 1998, the new Massachusetts Rules of Professional Conduct (Mass. R. Prof. C.) will become effective, replacing SJC Rule 3:07, the Code of Professional Responsibility (Code), that has been in effect since Oct. 2, 1972. The new rules, slow in coming, are the product of extensive discussion and comment by bar associations, lawyers' groups with interests in specific areas of practice, individual lawyers, the justices' Committee on the Rules of Professional Conduct (committee), and the justices themselves. Although the new rules have been adopted within the framework of the American Bar Association's Model Rules of Professional Conduct (rules), the new rules depart in significant respects from the model rules. In some instances, the new rules preserve language that appeared in the ABA Code of Professional Responsibility but the ABA eliminated in the model rules. In others, special Massachusetts provisions are included, some from the code as Massachusetts adopted it and others newly drafted.

Background

It is an historical accident that Massachusetts came so late, compared to other states, to adopting its variation of the ABA model rules. It need not have been so, but an attempt more than ten years ago to have the justices proceed with the development of a Massachusetts version of the model rules foundered on a dispute over a seemingly innocuous provision in the model rules, a dispute that dominated the analysis. On Dec. 18, 1986, the Boston Bar Association petitioned the justices to amend SJC Rule 3:07 (Code) by substituting the ABA model rules. Among the model rules, in seeming innocence, was Rule 1.5 (e) which allows lawyers, not in the same firm to divide a reasonable fee only if (a) the client is advised and does not object or (b) the division of the fee is in proportion to the services to be performed by each lawyer or, with the client's written agreement, each lawyer assumes joint responsibility for the representation. This provision differs considerably from the special Massachusetts code provision on the division of fees then in effect. That provision, DR 2-107 (A), permits the division of fees between or among lawyers not in the same law office, if the total fee is reasonable and if the client "consents to the employment of the other lawyer after a full disclosure that a division of fees will be made." The new Massachusetts rule does not explicitly require disclosure of the proportionate share of the fee to be taken by each lawyer.

The Massachusetts Bar Association and various other groups of lawyers expressed strong disagreement with the change that ABA Model Rule 1.5(e) would make. The major portion of many written comments submitted to the justices on the BBA proposal dealt solely with the division of fees issue. If the BBA had proposed continuation of DR 2-107 (A) in substitution for ABA Rule 1.5(e), the focus of discussion would have been different, and perhaps the justices would have appointed a committee in 1987 to recommend Massachusetts rules based in large measure on the ABA model rules.

On Feb. 29, 1988, after the justices had received numerous written submissions, a majority of the justices (Liacos, Abrams, Nolan, Lynch and O'Connor) denied both the BBA's request for an evidentiary hearing and the BBA petition itself. They concluded that it does not "seem likely the expenditure of time and effort involved in evidentiary and other proceedings to consider the model rules would result in any significant gain in the standards regulating the conduct of the Bar." At that time only 16 states had adopted rules based on the ABA model rules.

In disagreement, Chief Justice Hennessey and the author of this article saw "no reasonable basis for foreclosing further, intensive analysis of the model rules at this time." He and I noted that ABA Model Rule 1.5(e) had moved toward the Massachusetts position (DR 2-107 [A]) from the position stated in the ABA code. We suggested that the justices could simply stand by their present rule. We also noted that the format of the model rules was superior to that of the code and that there were "numerous areas covered by the model rules, not touched by the Code, that would

provide guidance to the bar, bar counsel and the Board of Bar Overseers." We predicted that a majority of the justices will remain opposed even to a detailed study of the rules, unless bar associations were to express an interest in moving toward adoption of the model rules.

There the subject stood for many years, in spite of the efforts to reopen the issue by the late Robert W. Meserve, former president of the ABA and the BBA, who had succeeded Robert J. Kutak as chairman of the Kutak Commission. The Kutak Commission had proposed the original draft of the model rules to the ABA. Meserve thought it ironic that his own state was unwilling even to consider the model rules that had been adopted, with modifications, in over forty jurisdictions.

Finally, in 1994, the justices changed their position. The Board of Bar Overseers requested that the justices adopt the model rules with Massachusetts amendments. The Board of Bar Examiners advised the justices that soon the multistate professional responsibility examination, taken by bar applicants, would be based solely on the model rules, ignoring the Code. The justices inquired of the MBA as to its position, indicating that the justices would agree in advance that they would make no substantive change in the rule governing the division of fees. The MBA agreed. By 1994 more than forty jurisdictions had adopted rules based on the ABA model rules.

After considerable delay and discussion, the study project, rejected in 1986, began in 1994 with the appointment of the Supreme Judicial Court's Committee on the Rules of Professional Conduct. The glacial reluctance of a majority of the justices to recognize the merits of the adoption of new professional conduct rules was, I thought, embarrassing. One benefit from the delay in the adoption of the ABA model rules, however, is that the committee was able to take advantage of accumulated comments on and criticisms of the ABA model rules.

The Committee's Work

The committee was hardworking and meticulous. I had never served on a committee of such intellectual strength and sound judgment (except, of course, one made up exclusively of justices of my court). The committee had the practical experience of practicing lawyers, experience of persons dealing every day with disciplinary matters and an overview and independence of judgment from three nationally recognized legal scholars in the field of legal ethics. The MBA designated Elaine M. Epstein and Jeffrey L. McCormick as members. Until she was appointed to the United States Court of Appeals for the First Circuit, Sandra L. Lynch served as a BBA designated member. Thereafter, the Boston Bar Association was represented by Henry C. Dinger and John L. Whitlock, each of whom has an article in this edition of the *Massachusetts Law Review*. The justices also appointed Robert J. Muldoon Jr., who had had a major role on behalf of the BBA in the abortive proposal to adopt the model rules ten years earlier. Michael Fredrickson, general counsel to the Board of Bar Overseers and Arnold R. Rosenfeld, bar counsel, added to the committee the experience of disciplinary enforcement. From law schools were Daniel R. Coquillette of Boston College Law School, Andrew L. Kaufman of Harvard Law School and Susan Koniak of Boston University School of Law. Justice Abrams was an ex officio member of the committee. In the last phase of the committee's work, Justice Lynch and Justice Abrams who, with me, then constituted the rules committee of the court attended all meetings of the committee.

Notably, and unavoidably, absent from the committee was a representative of the consumer. My sense, self-serving as it may be, is that the committee was particularly alert to the public interest when an issue involved tension between the interests of lawyers and the interests of clients or the public in general. Many controversial issues fell squarely in this area of tension.

The committee commenced its task with the careful consideration of each ABA model rule with the view toward the publication of disciplinary rules adapted to Massachusetts needs and preferences. The committee occasionally concluded that the language of an ABA model rule was not as good as it might be, but the merits of uniformity among jurisdictions was a major factor in the committee's decision making. The tendency to favor uniformity, known as the Coquillette rule (after the committee member who first articulated it), placed the burden of persuasion on any exponent of a departure from the rules, except as to provisions that were already in considerable disagreement among other jurisdictions.

The committee completed its task in the latter part of 1994 and submitted its report to the justices. In Feb., 1995, the rules were published for comment. The time for comment was criticized by some as being too short. However, the justices allowed more than four months for comments.

I could not be more proud of the response of the bar of the commonwealth. The quality of the comments that the justices received was outstanding. Committees of the MBA and BBA prepared comprehensive comment on the rules, made concrete proposals for changes and advanced reasoning on various rules that was new and helpful. Not surprisingly, uniformity within and among bar groups was not attained. Many issues were controversial.

Once the comments were received from the public (which was in fact comment from lawyers and lawyers' groups), the justices referred the comments to the committee. From Sept., 1995, through April, 1996, the committee met more often than monthly, reviewing each controversial or questioned point. At one stage, Professor Kaufman persuaded the committee that the introductory material to and comments on the ABA model rules could not be ignored. Much credit is due to a hardworking drafting subcommittee

on comments, consisting of Professor Kaufman, John Whitlock and Michael Fredrickson, that reworked the ABA comments and drafted special Massachusetts comments. In May, 1996, the committee delivered its second report to the justices containing the rules as further revised and the new comment sections. The committee pointed to (a) areas that required the particular attention of the justices, (b) subjects for a recommended public hearing, and (c) topics that required further attention. Because of the revisions, the justices once again put the committee's recommendations out for public comment and announced that there would be a public hearing on certain of the rules.

The committee had not been of one mind on several issues. The committee by a wide majority preferred ABA Model Rule 1.5(e), concerning the division of fees among counsel, over the rule in effect and continued in substance in new Rule 1.5(e). Professor Kaufman wrote forcefully to that effect in dissent to the adoption of new Rule 1.5(e). In varying degrees, the committee's practicing lawyer members were unhappy with limitations of Rule 1.10 screening procedures when a lawyer, personally disqualified, joins a law firm. The committee, by a majority, excluded screening as a permissible device when the personally disqualified (moving) lawyer had substantial involvement or substantial material information relating to the matter in which the new firm seeks to become an adversary of the former client. The sense was that a former client would not feel assured that its confidences would be protected in such a situation.

The Hearing

The justices selected rules in four areas for comment at a hearir g on April 2, 1997. Because they were acting in an administrative capacity as justices, and not in an adjudicative one as a court, they did not wear robes at the hearing. For the same reason, I refer to rules action as taken by the justices and not by the court. The oral presentations were of a high quality, focused on intellectual concerns and not on emotional ones.

Rules were selected for the hearing if they concerned subjects as to which there was considerable controversy and as to which the justices were in doubt. A number of controversial provisions were not included on the agenda. For example, Rule 3.3(e) deals with the rare but difficult problem of what a criminal defense lawyer is to do when the lawyer knows that the client intends to testify falsely. There is no perfect answer to this problem. The committee was unanimous, however, in concluding that Rule 3.3(e), as ultimately drafted, was the best choice available. The justices agreed and decided that oral argument on the issue would not be beneficial.

I turn now to those rules that were the subject of the public hearing.

Rules 1.6, 3.3 and 4.1.

Probably the most challenging and controversial subject the committee, and then the justices, faced was the treatment of the confidentiality of information received from a client. The debate centered on which client confidences a lawyer may disclose, must disclose and may not disclose. The relevant ABA model rules governing the disclosure of client confidences are stated in the three separate Rules — 1.6, 3.3 and 4.1. The committee resisted the temptation to consolidate all relevant confidentiality provisions in one rule and followed the format of the model rules.

Rules 3.3 and 4.1 contain mandates to disclose confidential client information. Rule 3.3 concerns a lawyer's duty to take remedial measures when material evidence that the lawyer knows to be false has been presented to a tribunal by a client, a witness on behalf of a client or the lawyer. This obligation is universal without regard to the content of the confidential information, except in the case of a criminal defense lawyer who is guided by Rule 3.3(e) when the lawyer knows that the client intends to lie or has lied.

The debate concerning Rule 1.6, the rule permitting disclosure in certain circumstances, centered on the expansion of a lawyer's right to disclose confidential information relating to the representation of a client without the client's informed consent. DR 4-101 (C) (3) allows a lawyer to reveal a client's intention "to commit a crime and the information necessary to prevent the crime," any crime. It is this provision on which the lawyer relied to disclose a client's intention to commit a crime that led to *Purcell* v. *District Attorney for the Suffolk Dist.*, 424 Mass. 109, 111 (1997). Rule 1.6(b) of the ABA model rules, however, limits the scope of the permissible disclosure to reasonably expected criminal conduct that is likely to result in death or substantial injury. This is the respect in which ABA Model Rule 1.6 is clearly more limited than DR 4-101 (C).

Under the new Massachusetts Rule 1.6(b), a lawyer's discretionary right to disclose confidential information is otherwise expanded beyond DR 4-101 (C). Rule 1.6(b)(1) allows the disclosure of confidential information to prevent reasonably anticipated fraudulent (as well as criminal) conduct that is likely to cause substantial injury to the property of another or to prevent the wrongful execution or incarceration of another. Rule 1.6(b)(3) allows a lawyer to reveal confidential information that the lawyer reasonably believes necessary "to rectify client fraud in which the lawyer's services have been used."

It was argued that these expansions of a lawyer's discretionary right to disclose confidential information would chill the relationship between lawyer and client. Clients, it was claimed, would be unwilling to reveal information for fear of its disclosure and lawyers would consequently not have all the information nec-

essary to give proper legal advice. A client who has used a lawyer to commit fraud (Rule 1.6[b][3]) hardly should be heard to complain if the lawyer undertakes to protect himself or herself from a charge of his or her culpatory involvement, or at least undertakes to limit any harm caused by the fraud. The addition to the list of wrongs threatened by a client that a lawyer may reveal serves the public interest and seems to be a modest addition to the right under DR 4-101 (C) (3) to reveal the reasonable likelihood that the client will commit a crime. In practical terms, the apparent expansion of the right to disclose that Rule 1.6(b) sets forth adds few circumstances to the previously authorized right to disclose reasonably expected future criminal conduct. The lawyer's right to disclose expected noncriminal fraud is a modest intrusion on lawyer-client relations that most clients would not perceive as significant. It would be difficult to defend to the public a professional rule that barred, or at least inhibited, the disclosure of the kind of expected or past conduct that Rule 1.6 permits.

Rule 3.4.

The Code provided in DR 7-105 is that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The ABA rules did not retain this provision, and the committee, after discussion and in disagreement, decided not to carry that prohibition over into the new rules. Proof that someone acted "solely" to obtain an advantage seemed problematic. The principle stated, however, is sound, except as it might apply to a government lawyer who has both criminal and civil weapons in his or her arsenal.

The justices received strong requests for the preservation of the substance of DR 7-105. The attorney general opposed retention. After hearing both sides, the justices largely, but perhaps not entirely, allayed the concerns of the attorney general and other government lawyers when they re-established the substance of DR 7-105 but provided in Rule 3.4(h) that the advantage that may not be improperly sought is one in a *private* civil matter.

Rule 3.4(h) expands on DR 7-105 by prohibiting filing or threatening to file disciplinary charges, as well as criminal charges, solely to obtain an advantage in a private civil matter.

Rule 3.5(d).

Rule 3.5(d) is uniquely Massachusetts. It is carried over from DR 7-108 (D). The rule restricts lawyer access to a discharged juror, in a case with which the lawyer was connected, "without leave of court granted for good cause shown." It is ironic that the justices' decision in 1991 to adopt DR 7-108 (D) was made shortly after a case in which a lawyer's posttrial communication with a juror led to evidence that resulted in a new trial for a convicted defendant. *See Commonwealth* v. *Solis*, 407 Mass. 398 (1990). The lawyer's communication with the juror would have violated our special DR 7-108 (D), if that disciplinary rule had then been in effect.

Chief Justice Liacos and I opposed the adoption of special Rule 3.5(d). The ABA Code provision (*See Commonwealth* v. *Solis*, *supra* at 403) barring communications merely to harass or embarrass a juror or to influence the juror's actions in future jury service, was in effect in Massachusetts at the time of the *Solis* opinion. That seemed to us adequate protection against a problem that had not been shown to exist. There are, however, arguments for such a rule. *Id.* at 403-404. Some Federal District Courts have (but, as far as I know, no state court has) adopted a rule similar to our Rule 3.5(d).

The committee was unanimously opposed to rule 3.5(d). No member of the practicing bar or a bar organization advised the justices of support for Rule 3.5(d). District attorneys and some judges favored it. All my colleagues favored it, and, with no dissenting vote recorded on any other rule, I decided not to repeat my objections. I remain concerned, however, that, in particular circumstances, Rule 3.5(d) may contravene the rights, perhaps even the constitutional rights, of people like Daniel Solis.

Rule 4.2.

This rule, concerning communications with a person represented by another lawyer, is indefinite and has been an understandably controversial topic, in both criminal and civil matters. The justices tentatively included the ABA Model Rule 4.2 with modest additions to the ABA comment to that rule. The idea that a lawyer may not communicate with one known to be represented by another lawyer in the matter, except with the consent of the other lawyer and on occasions in which the law authorizes the communication, seems to reach too far.

Criminal prosecutors are concerned about limitations on their investigative activities, including undercover investigations, and in various postcharge communications, such as voluntary and knowing communications after Miranda rights have been given. Federal prosecutors also assert that a regulation of the attorney general allowing communications preempts any contrary state court disciplinary rule. That issue is on appeal to the United States Court of Appeals for the Eighth Circuit from a decision adverse to the attorney general's position in United States ex rel. O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1294 (E.D Mo. 1997).

The tension between the United States Department of Justice and the Massachusetts Rules of Professional Conduct is more than simply a disagreement over Rule 4.2. The justices have included language in Rule 3.8(f)(2) that requires judicial approval, after an opportunity for an adversarial pro-

ceedi g, before a prosecutor may subpoena a lawyer to a grand jury or criminal proceeding to present evidence about a client. The ABA once had but repealed such a rule. That principle was expressed in SJC Rule 3:08, Prosecution Function (PF) 15, which is repealed on the effective date of the new rules. PF 15 was the subject of United States v. Klubock, 832 F.2d 649 (1st Cir. 1986), aff'd en banc by an equally divided court, 832 F.2d 664 (1st Cir. 1987).

The Conference of Chief Justices and the attorney general have had discussions concerning the resolution of their disagreement on Rule 4.2, and a tentative working draft has been prepared but not approved. Even if the matter of prosecutors' rights and obligations is resolved, the propriety of Rule 4.2 will remain as to civil litigants, particularly lawyers with claims or potential claims against an entity such as a corporation. I understand that the modification of Rule 4.2, tentatively agreed on in the working draft, has not been considered in its application to private civil actions (or by the ABA). A careful description is needed of just which employees of an entity are or are not out of bounds. A reasonable rule might provide that a lawyer may have contact with nonmanagerial corporate employees other than those who may be personally liable and those whose conduct is chargeable to the entity (and with former employees), but a lawyer may not inquire into attorney-client confidential communication with a corporation's lawyer.

Rule 8.3 – Reporting Disciplinary Violations

Under the code, adopted by the justices in 1972, no obligation, or even a statement of appropriateness, appeared concerning the disclosure to disciplinary authorities of a violation of a rule of professional conduct by another lawyer. ABA Rule 8.3(a) requires disclosure, that is, it is a disciplinary violation for a lawyer not to disclose knowledge that another lawyer has committed a rules violation that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The committee was sorely divided as to whether the rule should state that a lawyer "should" or "shall" make such a disclosure, and put the point to the justices. They favored "shall," although the committee submitted the rule and it was published with the word "should." The justices were inclined to reject arguments for "should" but did not include Rule 8.3(a) for discussion at the April, 1997, hearing. Because there was strong protest from bar associations against a mandatory rule, the Justices heard oral argument on Rule 8.3(a) on Sept. 9, 1997. As I write, the justices have not made a decision on the question.

Professional Rules and Professional Liability

One concern in disciplinary rule making is the extent to which a disciplinary rule may, in effect, amount to a rule of substantive law and thereby affect the rights and obligations of clients, lawyers and perhaps others. Paragraph [6] of the preliminary scope section of the new rules rejected the statement in paragraph [18] of the scope section of the ABA model rules that a rule violation does not give rise to liability or to a presumption that a legal duty had been violated. In Fishman v. Brooks, 396 Mass. 643 (1986), the court agreed that a violation of a disciplinary rule was not itself an actionable breach of duty to a client. If, however, a disciplinary rule was intended to protect a person in a client's position, scope paragraph 6 and *Fishman* v. *Brooks*, *supra* at 649, state that "a violation of that rule may be some evidence of the attorney's negligence."

How far then will conformity to a disciplinary rule protect a lawyer from liability? A lawyer who conforms to a disciplinary rule might, of course, be subject to adverse consequences other than professional discipline. But a disciplinary rule must on occasion have a significant effect on substantive law. For example, by their rule allowing contingent fee agreements the justices have obviously intended to bar a client from successfully asserting that a rule-conforming contingent fee agreement is unenforceable as champertous. There is, however, a clear distinction between the disciplinary standard concerning the level of legal fees and the substantive rule of law concerning proper legal fees. Rule 1.5 states, as DR 2-106 (A) did, that it is improper for a lawyer to enter into an agreement for, charge, or collect a clearly excessive fee. As comment [1A] to Rule 1.5 states, the stricter substantive law is "that fees must be reasonable to be enforceable against the client." In my view, that means that a lawyer may not collect an agreed-on contingent fee if that fee, although not clearly excessive, is unreasonable in the circumstances.

If a rule requires a lawyer to act, such as compelling disclosure of a client's confidential information (client perjury, for example), it would seem appropriate to conclude that the lawyer is not liable for harm caused to the client by the lawyer's rule-mandated conduct. Where, however, a disciplinary rule permits, but does not compel, the attorney to act in a particular way, it is less clear that the discretionary rule will protect the lawyer against liability. If a course of conduct is permissible under the rules, taking that permitted action should be at least evidence of the reasonableness of the lawyer's conduct (cf. *Fishman* v. *Brooks*, *supra*) and perhaps should be an absolute defense. If public policy considerations justify authorizing the disclosure that a client intends to commit a serious crime, it is not likely that liability would be placed on a lawyer who reveals the client's proposed conduct. To do so would chill the very disclosure that the disciplinary rule was designed to permit, if not encourage. On the other side of the coin, might a lawyer permitted, but not required, to reveal a client's confidential information be liable for failing to do so? It was not the function of the committee or of the justices in their rule making capacity to resolve these substantive law issues.

The committee declined to recommend detailed commentary that would have spelled out specifically permitted practices in the joint representation of clients by lawyers engaged in estate and trust practice. A respected group of lawyers engaged in estate and trust practice recommended language that, for example, would have defined acceptable conduct of a lawyer representing a husband and wife in preparing their wills or in dealing collectively with people having interests under a decedent's will. The committee and the justices deleted ABA Rule 2.2 concerning a lawyer acting as an intermediary between clients, concluding that a lawyer representing more than one client should be governed by the conflict of interest principles stated in Rule 1.7 and guided by [12F] to Rule 1.7. *See* Rule 2.2 cmt. [1]. Comment [12F] should be of assistance to lawyers engaged in estate and trust practice, although neither Rule 1.7 nor the special comment creates a safe harbor against liability for a lawyer engaging in a joint representation, absent client consent. The propriety of the joint representation of clients is a highly fact-oriented issue that requires case-by-case analysis.

Unfinished Business

Adoption of the rules in their present form is not the end of the matter. There is unfinished business, in addition to the already mentioned further attention that Rule 4.2 will require.

The treatment of lawyer advertising was deferred until the rules in other respects were largely in place. Restraints on lawyer advertising are controversial, and the permissible range of restraints is significantly limited by free speech considerations. The justices have appointed a committee to recommend what changes, if any, should be made in the current rules. The justices included ABA Model Rule 7.2 on advertising in the new rules without substantial change; former DR 2-103 on solicitation of professional employment as Rule 7.3; and former DR 2-105 on communication of fields of practice as Rule 7.4. The rule on the solicitation of clients (DR 2-103) was the product of the efforts of an able special committee. It is unlikely that the committee on advertising will make a unanimous recommendation to the justices, but rather, I suspect, it will offer arguments for various alternatives from among which the justices will have to make choices. In the areas of advertising and solicitation, the interests of the public, the prospective clients, are extremely important. Information on access to legal assistance that is informative, fair, and not overreaching should be encouraged. The difficulty lies in the effective implementation of this broad standard. I am inclined to agree that a sophisticated prospective client does not need the same protection as other prospective clients. The problem is whether there is a sound way of identifying sophistication in rule language.

Other unfinished business includes the upcoming appointment of a committee to consider the special circumstances of government lawyers. There may be good reason to state specific exceptions and provisions for government lawyers. The District of Columbia, which has a plethora of government lawyers, has adopted special rules which may or may not be appropriate for our disciplinary rules. The scope section of the introductory material to the rules, in paragraph [4], recognizes the substantive statutory and constitutional authority of the attorney general to control litigation and to make decisions that are contrary to the authority of a private lawyer. Comment [8A] to Rule 1.7 acknowledges that public policy considerations may permit a government lawyer to represent conflicting interests. More may be needed, or at least desirable, concerning government lawyers.

Also open for further consideration is the question whether the justices should adopt a rule concerning pro bono services. The new rules omit ABA Model Rule 6.1 that states an aspirational goal of voluntary pro bono services for every lawyer. The justices have appointed a committee to study the subject of voluntary pro bono services. There appears to be little sentiment for mandating the furnishing of free services to indigent individuals. Whether any benefit would flow from the adoption of a precatory rule remains an open question.

Rule 3.8 states special responsibilities of a prosecutor. There is no parallel new rule stating special responsibilities of criminal defense counsel. Perhaps there should be. There is also a question whether the justices should preserve their separate rules concerning the prosecution and defense functions. Those rules could be incorporated into the disciplinary rules. The justices have referred these issues for comment to their Standing Advisory Committee on the Rules of Criminal Procedure.

Finally, on the subject of unfinished business, there is the matter of the operation and soundness of the new rules themselves. It is likely that adjustments and clarifications will be needed. New problems will arise. The ABA itself is revisiting its rules. Requests for changes and additions are likely. For these reasons, the justices will establish a Standing Advisory Committee on the Rules of Professional Conduct.

Conclusion

The new rules were long in coming. They will serve the bar and the public better than the old Code of Professional Responsibility. They are a credit to the hardworking committee, to Robert Bloom, Esquire, of the staff of the court, to Justices Abrams and Lynch of the Rules Committee, and to all participants in the process.

Exhibit G
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Exhibit H

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Ethical Lawyering in Massachusetts

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CHAPTER 1

Sources of Ethical Authority in Massachusetts

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Scope Note

This chapter provides a historical perspective on the sources for ethical authority in the Commonwealth of Massachusetts. Beginning with the nature and origin of self-regulation within the legal community, the chapter goes on to acquaint the reader with the organization and scope of the Massachusetts Rules of Professional Conduct.

§ 1.1 SELF-REGULATION AND THE ROLE OF THE SUPREME JUDICIAL COURT

The legal profession in the United States is largely self-regulated. *See* C. Wolfram, *Modern Legal Ethics* 20–21 (West 1986). In Massachusetts, the ultimate authority in this self-regulated process is the Supreme Judicial Court. In this role, the court has promulgated rules regulating lawyer admission and conduct and is also the final adjudicator in cases of lawyer misconduct and discipline.

The exercise of the Supreme Judicial Court's regulatory power over the bar is said to be "inherent" and "exclusive." The court itself has described this power:

> It is inherent in the judicial department of government under the Constitution to control the practice of law, the admission to the bar of persons found qualified to act as attorneys at law and the removal from that position of those once admitted and found to be unfaithful to their trust.

Opinion of the Justices, 289 Mass. 607, 612 (1935). Further, the court has stated: "Permission to practise law is within the exclusive cognizance of the judicial department." *Opinion of the Justices*, 289 Mass. at 613.

The history of Supreme Judicial Court power in this area is substantial. More than seventy years ago, the court held that "[t]he determination by the judicial department of the appropriate procedure to be followed in review in proceedings for disbarment or in proceedings for admission to the bar necessarily must be made by the Supreme Judicial Court." *In re Keenan*, 313 Mass. 186, 207 (1943). The court has opined that such determinations "naturally must be made by the court that, under the Constitution, is the 'supreme' court, and that, by a statute of long standing, has general supervisory powers over other courts—so far as that court sees fit to make such determination. G.L. (Ter. Ed.), c. 211, § 3." *In re Keenan*, 313 Mass. at 208 (quoting *In re Keenan*, 310 Mass. 166, 182 (1941)).

Unlike the Supreme Judicial Court's superintendency power, the role of the Massachusetts legislature—the general court—in matters regarding the bar is limited. The court has pronounced as follows:

> Control of membership in the bar of the courts of the Commonwealth, both of admission thereto and removal therefrom, is exclusively in the judicial department of the government of the Commonwealth. Interference therewith by the legislative department would conflict with the provision of art. 30 of the Declaration of Rights that "the legislative department shall never exercise the executive and judicial powers, of either of them."

In re Keenan, 310 Mass. at 171. However, the legislature is empowered to enact statutes that "aid in the performance of" judicial department duties. One such statute was G.L. c. 221, § 37, which conferred jurisdiction for admission to the bar in the Superior Court as well as the Supreme Judicial Court. In *In re Keenan*, the court held that such enactment was not legislative interference with its constitutional power. *In re Keenan*, 310 Mass. at 173. Rather, the court interpreted the statute as "making provision in aid of the judicial department in reaching a proper selection of those qualified for admission as attorneys to practice in the courts." *In re Keenan*, 310 Mass. at 173 (quoting *Opinion of the Justices*, 279 Mass. 607, 610 (1932)). The court held further that it had not, through its rules, specifically excluded the Superior Court from jurisdiction in these matters. *In re Keenan*, 310 Mass. at 182–85.

However, it should be noted that, while G.L. c. 221, §§ 37 and 40 gave the Superior Court concurrent jurisdiction in bar admission and disciplinary matters and have not, as of this date, been explicitly repealed, it appears that the Supreme Judicial Court has now, by its own rules, given itself exclusive jurisdiction in these matters. *See Strigler v. Bd. of Bar Exam'rs*, 448 Mass. 1027 (2007) (finding that the Supreme Judicial Court retains the ultimate authority of an individual to

practice law); 1976 amendment of SJC Rule 3:01, *Opinion of the Justices*, 370 Mass. 895 (1976) (bar admission); 1974 adoption of SJC Rule 4:01, *Opinion of the Justices*, 365 Mass. 681 (1974) (bar discipline). Similarly, while other legislative enactments concern bar admission, discipline, and related matters, *see* G.L. c. 221, §§ 36, 38, 41–52, under the decisional authority discussed above, the Supreme Judicial Court rules that specifically cover the same areas would appear to be controlling.

The Supreme Judicial Court has adopted many such rules that govern attorneys in the Commonwealth. They can be characterized as "substantive" rules, which regulate conduct, and "procedural" rules, which regulate process. The substantive rules are contained within Chapter 3 of the Supreme Judicial Court Rules, entitled "Ethical Requirements and Rules Concerning the Practice of Law." They are as follows:

- Rule 3:01 concerns, among other things, petitions for bar admissions, petitions for admission by motion, qualifications for taking the bar examination, and qualifications for admission.

- Rule 3:02, entitled "Administration of Justice," concerns prohibitions against a disbarred attorney representing a corporation or association and against clerks of court, registers of probate, and the Land Court recorder, assistants, and employees practicing law.

- Rule 3:03 allows supervised senior law student practice on behalf of indigents and/or for the Commonwealth and its subdivisions in certain situations.

- Rule 3:04 allows attorneys from other jurisdictions who are engaged in certain graduate law studies or programs of legal assistance to practice within the context of such law studies or programs.

- Rule 3:05 addresses licensing of foreign legal consultants.

- Rule 3:06 concerns provisions regarding lawyers practicing in professional corporations, limited liability companies, or limited liability partnerships and requirements applicable to such entities.

- Rule 3:07 contains the Massachusetts Rules of Professional Conduct and comments.

- Rule 3:08 (which previously covered the special "Disciplinary Rule Applicable to Practice as a Prosecutor or as a Defense Lawyer") was stricken, effective January 1, 1999.

- Rule 3:09 contains the Code of Judicial Conduct.
- Rule 3:10 concerns the assignment of counsel.
- Rule 3:11 concerns the Committee of Judicial Ethics.
- Rule 3:12 contains the Code of Professional Responsibility for clerks of court.
- Rule 3:13 concerns the Committee on Professional Responsibility for clerks of court.
- Rule 3:14 concerns the Advisory Committee on Ethical Opinions for clerks of court.
- Rule 3:15 concerns the pro hac vice registration fee.
- Rule 3:16 establishes a mandatory one-day course on professionalism for attorneys newly admitted to the bar.

The procedural rules promulgated by the court are found in Chapter 4 of the Supreme Judicial Court Rules, entitled "Bar Discipline and Clients' Security Protection." They are as follows:

- Rule 4:01 concerns bar discipline.
- Rule 4:02 concerns periodic registration of attorneys.
- Rule 4:03 concerns periodic assessment of attorney registration fees.
- Rule 4:04 concerns the Clients' Security Board and Fund.
- Rule 4:05 concerns claims by clients to the Clients' Security Board for reimbursement of losses.
- Rule 4:06 concerns the miscellaneous powers and duties of the Clients' Security Board.
- Rule 4:07 concerns the Lawyers Concerned for Lawyers Fund and Oversight Committee.
- Rule 4:08 concerns the allowance of the Board of Bar Overseers and the Clients' Security Board to request interpretation, advice, and instruction from the Supreme Judicial Court—as well as to make suggestions or proposals to the court—concerning the rules included in Chapter 4.

- Rule 4:09 concerns the court's ability to amend, modify, or repeal Chapter 4 and provide for the dissolution and winding up of the Clients' Security Fund.

The primary focus of this chapter of *Ethical Lawyering in Massachusetts* is Rule 3:07 of the Supreme Judicial Court Rules—the Massachusetts Rules of Professional Conduct and comments ("Rules of Professional Conduct"). The Rules of Professional Conduct were adopted by the Supreme Judicial Court in June 1997, became effective January 1, 1998, and have been amended in part thereafter. They set forth the standards of professional conduct for members of the Massachusetts bar and serve as the basis for professional discipline. In order for readers to more effectively understand the Massachusetts Rules of Professional Conduct, the organizational framework and scope of the rules—as well as a brief history of the predecessor rules that were operative in the Commonwealth for many years and the reasons for the change from them—are discussed below.

§ 1.2 THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT—ORGANIZATION AND SCOPE

The Massachusetts Rules of Professional Conduct finally came into operation in the Commonwealth on January 1, 1998, replacing the Massachusetts Canons of Ethics and Disciplinary Rules, which had been in effect for a quarter of a century. The term "finally" is used because Massachusetts, the forty-fourth state to adopt the Rules of Professional Conduct, did so some fifteen years after the rules' promulgation by the American Bar Association. See § 1.3, below, for a discussion of the history of the Supreme Judicial Court's adoption of the rules.

Recently, the Supreme Judicial Court amended the Rules of Professional Conduct, effective July 1, 2015. As amended, the rules begin with a preamble and scope section designed to provide general orientation to the rules. The preamble outlines the various responsibilities that a lawyer may take on and the functions that a lawyer may perform. Such responsibilities include being a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. A lawyer's functions may include that of advisor, advocate, negotiator, and evaluator. The preamble articulates the lawyer's role in upholding the legal process and conforming the lawyer's behavior to the requirements of the law. The lawyer's duties as a public citizen to seek improvement of the law, the administration of justice, and the quality of legal services are also set forth. The preamble further attempts to acknowledge lawyers' conflicting responsibilities and the prescription by the Rules of Professional Conduct of terms for resolving such conflicts. The preamble also notes the

Exhibit I

Attorney fee rules undergo revisions in Massachusetts

Massachusetts Lawyers Weekly

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Body

The Supreme Judicial Court has approved sweeping and expansive changes to the way attorneys disclose and collect client fees and expenses, a move that has garnered strong support from bar leaders.

Under the revisions to Rule 1.5 of the Rules of Professional Conduct, which take effect March 15, lawyers will need to be far more specific than before about the fees and expenses they charge clients and how those charges are calculated.

The amended rule requires lawyers to get a client's consent about all fee-related issues before or at the very outset of the attorney-client relationship, not as a case unfolds or after a client terminates the engagement.

Lawyers in contingent-fee cases, whom many of the changes will most directly affect, must also now secure their clients' written consent about who will pay for accrued legal fees and expenses in the event they are discharged and succeeding counsel is hired before a case concludes.

Additionally, the SJC has established two new model fee-agreement forms for lawyers to use with clients, though the court will still allow attorneys to draft their own agreements provided they adhere to the rule and explain any material differences to clients.

Bar leaders say the new amendments represent a reasonable compromise in several areas that had sparked heated debate in the five years since the SJC called for a formal revision.

Ellen J. Messing, a Boston employment attorney who served on the Boston Bar Association subcommittee that reviewed previous draft changes to the rule, said she is pleased the court took many of the BBA's concerns into account.

"They were going to do a bunch of changes that would have been a disaster for solo practitioners and small firms," Messing said of a draft issued last spring, which included only one model form agreement that did not permit lawyers to require that clients pay the fees and expenses of prior counsel involved in a case.

"It does not make a lawyer unethical for making a reasonable choice that arises every day. That is really exciting," she said.

Jeffrey N. Catalano, vice president of the Massachusetts Bar Association, worked on the MBA subcommittee that evaluated the draft changes. He said the revisions are fair for both clients and lawyers and represent "a big step in the right direction. "

Catalano, a personal injury attorney at Todd & Weld in Boston, said the SJC's decision to give lawyers two model agreement options, as well as the freedom to use their own form provided it complies with the rule, makes for better transparency, helps reduce potential friction should things sour, and goes a long way to ensure the attorney-client relationship "begins on fair footing. "

"We don't want attorneys to have an unfair advantage, nor do we want the client to have an unfair advantage," he said.

Requiring clients and lawyers to sit down at the outset of a case and clarify how fees and costs will be paid during and after the relationship ends does put new burdens on lawyers, Catalano said, but it is "nothing insurmountable or unachievable. "

Boston trial attorney Elizabeth N. Mulvey, a member of the SJC's Standing Advisory Committee on Rules for Professional Conduct who pushed for greater clarity for clients on the model agreement, said though the panel "struggled" to find common ground on the issue, she is satisfied with the final result.

"It protects clients and lawyers," she said. "Lawyers are still free to propose fees, and clients are still entitled to know what they're agreeing to. "

Catching up to caselaw

Bar Counsel Constance V. Vecchione said the standing advisory committee initiated the rule changes in 2005 at the court's request following its ruling in Malonis v. Harrington in 2004. That case was followed by three others: Saggese v. Kelley in 2005, and Liss v. Studeny and In the Matter of the Discipline of an Attorney in 2008.

The amendments, which are now consistent with the American Bar Association rules, are simply "catching up" Rule 1.5 to the existing caselaw, said Vecchione, who serves on the committee.

In Malonis, the SJC had ruled that a contingency-fee attorney who had been discharged was entitled to be paid under a quantum meruit theory and that his fee ought to come from the successor counsel's contingent fee, not the plaintiff's recovery.

Recognizing the importance to lawyers of the broader question about who should be held responsible for legal fees under similar circumstances, the court asked the committee to study the matter and recommend whether rule changes ought to be instituted.

John L. Whitlock, the committee's chairman, said key issues surrounding fees and fee disclosures that were raised and decided in the four cases were not, until now, reflected in Massachusetts' professional conduct rules.

"Before these rules were adopted, there were not such clear guidelines as to what had to be done," said Whitlock, a lawyer at Edwards, Angell, Palmer & Dodge in Boston.

Messing said the rule changes will require the bar to do some broad educational outreach, particularly to ensure lawyers are not using improperly worded fee agreements.

'Very major undertaking'

The five-year effort to produce the rule changes was the committee's longest-running project and reflected a "very major undertaking that was complex and took much discussion," Whitlock said. "And as with many compromises, no one was entirely happy. "

At times during the drafting process, he said, various bar association members as well as the committee itself were sharply divided over the language to include in the model form fee agreement. Some, like Mulvey, argued that the agreement did not do enough to protect clients, while others railed that it went too far in restricting how lawyers conduct business, Whitlock said.

The bar associations voiced opposition to earlier proposed changes

to Rule 1.5 (c) concerning the payment of fees to prior counsel, calling them draconian and arbitrarily unfair to successor counsel.

In formal comments made by the BBA to the advisory committee in January 2009, then-President Kathy B. Weinman expressed concern over a default provision that, in the absence of an allocation clause in fee agreements, successor counsel's entire fee and costs could be at risk in the event of a fee dispute with predecessor counsel.

Weinman called the rule "far too harsh and arbitrarily unfair," especially given that no similar penalty for nondisclosure is imposed on predecessor counsel. The BBA recommended making nondisclosure a "significant factor" rather than a default measure in determining how such fees get paid.

Even the mere possibility that successor counsel could be responsible for predecessor counsel's fees, Weinman wrote, would unfairly require the second lawyer to "bear the entire burden of ensuring that a client is fully informed" and would "inevitably hinder" the ability of the client to engage successor counsel.

Writing on behalf of the MBA, general counsel Martin W. Healy commented in January 2009 that there are many legitimate reasons why successor counsel might omit informing a client of his obligation to pay predecessor counsel. Those reasons include being unaware of prior counsel, being told that there would be no claim by prior counsel, or simply leaving it out of the written document because the client and attorney had reached a verbal agreement.

Both the BBA and MBA had criticized the draft model fee agreement as insufficient to address the rich variety and complexity of today's contingency-fee work.

New changes to fee disclosure and collection rule

Under new revisions to Rule 1.5 of the Rules of Professional Conduct, which go into effect March 15, lawyers must now delineate at the onset of the attorney-client relationship how fees and expenses will be charged, how such fees and expenses will be calculated, and whether the client or successor counsel must pay should the lawyer be terminated before a case ends.

While the rule applies to all attorneys in every engagement, it is likely to affect lawyers in contingency-fee cases most acutely. Among the key changes:

* Rule 1.5(a), which prohibits all lawyers from charging an "illegal or clearly excessive fee," has now been expanded to prohibit "collecting an unreasonable amount for expenses. "

* Rule 1.5(b) now provides that in addition to the rate or basis of fees, a lawyer must communicate the scope of representation and the basis or rate of expenses to the client before or within a reasonable time after engagement. For a lawyer who has "regularly represented" a client, the lawyer must now disclose to the client any change in the basis or rate of fee or expenses.

* Rule 1.5(c) requires that at any time prior to the occurrence of contingency, if a lawyer is terminated or if the client requests, a lawyer must provide a written itemization of services and expenses within 20 days unless the lawyer informs the client in writing that he does not intend to make a claim for fees or expenses if terminated.

* Rule 1.5(c)(4) requires that a contingent-fee agreement contain language informing a client at the onset of representation if there is a possibility that a legal fee may be owed under other circumstances or on another basis.

* Rule 1.5(c)(6) requires such agreements to inform a client of the method by which expenses will be calculated and paid or reimbursed.

Section (c) includes the following two new subparagraphs:

* In Rule 1.5(c)(7), the contingent-fee agreement must state the basis on which fees and expenses will be claimed and the method by which they will be calculated if the lawyer intends to pursue a claim against the client for expenses or fees if the relationship is terminated before the conclusion of a contingent-fee case.

* In Rule 1.5(c)(8), if a lawyer is successor to counsel whose representation was terminated before the case concludes, the fee agreement must state whether the client or successor counsel is liable for any fees or expenses owed to predecessor counsel.

* Rule 1.5(e), regarding the division of fees between lawyers in different firms, now explicitly includes referral fees and requires the client to be notified and to consent in writing to the fee division at or before the client enters into a fee agreement.

* Rule 1.5(f) now contains two form fee agreements. Form A may be used without any special instructions or explanation to the client. Form B contains various options regarding out-of-pocket costs and expenses and former counsel's fees and expenses that require a lawyer to show and explain alternatives to the client and to get consent in writing as to the option selected. Both forms demand that a lawyer who intends to seek fees and expenses if the relationship is terminated before the case concludes to include a provision noting that possibility and to explain how that amount depends on the services performed, along with the timing and circumstances of the termination.

* Rule 1.5(f)(3) allows a lawyer to use an alternative form agreement provided it is consistent with Rule 1.5. Forms that differ dramatically from the approved Forms A and B must be explained to the client, and a lawyer must obtain the client's consent in writing.

Load-Date: January 19, 2011

End of Document

Exhibit J

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth on the twenty-second day of December, in the year two thousand and ten:

present,

HON. RODERICK L. IRELAND	)	
	)	
HON. FRANCIS X. SPINA	)	Justices
	)	
HON. JUDITH A. COWIN	)	
	)	
HON. ROBERT J. CORDY	)	
	)	
HON. MARGOT BOTSFORD	)	
	)	
HON. RALPH D. GANTS	)	

ORDERED: That Chapter Three of the Rules of the Supreme Judicial Court is hereby amended as follows:

Rule 3:07:	By striking out Mass. R. Prof. C. 1.5 and inserting in lieu thereof the new Rule 1.5 attached hereto.

The amendment accomplished by this order shall take effect on March 15 , 2011.

RODERICK L. IRELAND) Chief Justice
)
)
FRANCIS X. SPINA)
). Justices
)
JUDITH A. COWIN)
)
)
ROBERT J. CORDY)
)
)
MARGOT BOTSFORD)
)
)
RALPH D. GANTS)

MASS.R. PROF. C. 1.5

RULE 1.5 FEES

(a) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee or collect an unreasonable amount for expenses. The factors to be considered in determining whether a fee is clearly excessive include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Except for contingent fee arrangements concerning the collection of commercial accounts and of insurance company subrogation claims, a contingent fee agreement shall be in writing and signed in duplicate by both the lawyer and the client within a reasonable time after the making of the agreement. One such copy (and proof that the duplicate copy has been delivered or mailed to the client) shall be retained by the lawyer for a period of seven years after the conclusion of the contingent fee matter. The writing shall state the following:

(1) the name and address of each client;

(2) the name and address of the lawyer or lawyers to be retained;

(3) the nature of the claim, controversy, and other matters with reference to which the services are to be performed;

(4) the contingency upon which compensation will be paid, whether and to what extent the client is to be liable to pay compensation otherwise than from amounts collected for him or her by the lawyer, and if the lawyer is to be paid any fee for the representation that will not be determined on a contingency, the method by which this fee will be determined;

(5) the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer out of amounts collected, and unless the parties otherwise agree in writing, that the lawyer shall be entitled to the greater of (i) the amount of any attorney's fees awarded by the court or included in the settlement or (ii) the amount determined by application of the percentage or other formula to the recovery amount not including such attorney's fees;

(6) the method by which litigation and other expenses are to be calculated and paid or reimbursed, whether expenses are to be paid or reimbursed only from the recovery, and whether such expenses are to be deducted from the recovery before or after the contingent fee is calculated;

(7) if the lawyer intends to pursue such a claim, the client's potential liability for expenses and reasonable attorney's fees if the attorney-client relationship is terminated before the conclusion of the case for any reason, including a statement of the basis on which such expenses and fees will be claimed, and, if applicable, the method by which such expenses and fees will be calculated; and

(8) if the lawyer is the successor to a lawyer whose representation has terminated before the conclusion of the case, whether the client or the successor lawyer is to be responsible for payment of former counsel's attorney's fees and expenses, if any such payment is due.

Upon conclusion of a contingent fee matter for which a writing is required under this paragraph, the lawyer shall provide the client with a written statement explaining the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination. At any time prior to the occurrence of the contingency, the lawyer shall, within twenty days after either 1) the termination of the attorney-client relationship or 2) receipt of a written request from the client when the relationship has not terminated, provide the client with a written itemized statement of services rendered and expenses incurred; except, however, that the lawyer shall not be required to provide the statement if the lawyer informs the client in writing that he or she does not intend to claim entitlement to a fee or expenses in the event the relationship is terminated before the conclusion of the contingent fee matter.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee (including a referral fee) between lawyers who are not in the same firm may be made only if the client is notified before or at the time the client enters into a fee agreement for the matter that a division of fees will be made and consents to the joint participation in writing and the total fee is reasonable. This limitation does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

(f) (1) The following forms of contingent fee agreement may be used to satisfy the requirements of paragraphs (c) and (e) if they accurately and fully reflect the terms of the engagement.

(2) A lawyer who uses Form A does not need to provide any additional explanation to a client beyond that otherwise required by this rule. The form contingent fee agreement identified as Form B includes two alternative provisions in paragraphs (3) and (7). A lawyer who uses Form B shall show and explain these options to the client, and obtain the client's informed consent confirmed in writing to each selected option. A client's initialing next to the selected option meets the "confirmed in writing" requirement.

(3) The authorization of Forms A and B shall not prevent the use of other forms consistent with this rule. A lawyer who uses a form of contingent fee agreement that contains provisions that materially differ from or add to those contained in Forms A or B shall explain those different or added provisions or options to the client and obtain the client's informed consent confirmed in writing. For purposes of this rule, a fee agreement that omits option (i) in paragraph (3), and, where applicable, option (i) in paragraph (7) of Form B is an agreement that materially differs from the model forms. A fee agreement containing a statement in which the client specifically confirms with his or her signature that the lawyer has explained that there are provisions of the fee agreement, clearly identified by the lawyer, that materially differ from, or add to, those contained in Forms A or B meets the "confirmed in writing" requirement.

(4) The requirements of paragraphs (f)(1) – (3) shall not apply when the client is an organization, including a non-profit or governmental entity.

CONTINGENT FEE AGREEMENT, FORM A

To be Executed in Duplicate

Date:_____, 20__

The Client _____
(Name) (Street & Number) (City or Town)
retains the Lawyer_____
(Name) (Street & Number) (City or Town)
to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is recovery of damages, whether by settlement, judgment or otherwise.

(3) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer.

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater.

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

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This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures	Signatures of client and lawyer
(To client) _____	_____ (Signature of client)
(To lawyer) _____	_____ (Signature of lawyer)

CONTINGENT FEE AGREEMENT, FORM B

To be Executed in Duplicate

Date:_____, 20__

The Client _____
(Name) (Street & Number) (City or Town)
retains the Lawyer_____
(Name) (Street & Number) (City or Town)
to perform the legal services mentioned in paragraph (1) below. The lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are:

(2) The contingency upon which compensation is to be paid is:

(3) Costs and Expenses. The client should initial next to the option selected.

(i) The lawyer agrees to advance, on behalf of the client, all out-of-pocket costs and expenses. The client is not to be liable to pay court costs and expenses of litigation, other than from amounts collected for the client by the lawyer; or

(ii) The client is not to be liable to pay compensation or court costs and expenses of litigation otherwise than from amounts collected for the client by the lawyer, except as follows:

(4) Compensation (including that of any associated counsel) to be paid to the lawyer by the client on the foregoing contingency shall be the following percentage of the (gross) (net) [indicate which] amount collected. [Here insert the percentages to be charged in the event of collection. These may be on a flat rate basis or in a

descending or ascending scale in relation to the amount collected.] The percentage shall be applied to the amount of the recovery not including any attorney's fees awarded by a court or included in a settlement. The lawyer's compensation shall be such attorney's fees or the amount determined by the percentage calculation described above, whichever is greater. [Modify the last two sentences as appropriate if the parties agree on some other basis for calculation.]

(5) [IF APPLICABLE] The client understands that a portion of the compensation payable to the lawyer pursuant to paragraph 4 above shall be paid to [Name of Attorney entitled to a share of compensation] and consents to this division of fees.

(6) [IF APPLICABLE] If the attorney-client relationship is terminated before the conclusion of the case for any reason, the attorney may seek payment for the work done and expenses advanced before the termination. Whether the lawyer will be entitled to receive any payment for the work done before the termination, and the amount of any payment, will depend on the benefit to the client of the services performed by the lawyer as well as the timing and circumstances of the termination. Such payment shall not exceed the lesser of (i) the fair value of the legal services rendered by the lawyer, or (ii) the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. This paragraph does not give the lawyer any rights to payment beyond those conferred by existing law.

(7) [USE IF LAWYER IS SUCCESSOR COUNSEL] Payment of any fees owed to former counsel. The client should initial next to the option selected.

(i) The lawyer is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses; or

(ii) The client is responsible for payment of former counsel's reasonable attorney's fees and expenses and the cost of resolving any dispute between the client and prior counsel over fees or expenses.

This agreement and its performance are subject to Rule 1.5 of the Rules of Professional Conduct adopted by the Massachusetts Supreme Judicial Court.

WE EACH HAVE READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

Witnesses to signatures	Signatures of client and lawyer
(To client) _____	_____ (Signature of client)
(To lawyer) _____	_____ (Signature of lawyer)

Comment

Basis or Rate of Fee

[1] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

[1A] Rule 1.5(a) departs from Model Rule 1.5(a) by retaining the standard of former DR 2-106(A) that a fee must be illegal or clearly excessive to constitute a violation of paragraph (a) of the rule. However, it does not affect the substantive law that fees must be reasonable to be enforceable against the client.

[1B] Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. As such, the standard differs from that for fees, as described in Comment 1A. A lawyer may seek reimbursement for the cost of services performed in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] Rule 1.5(b) states, as the ABA Model Rule does, that the basis or rate of a fee shall be communicated "preferably in writing." Appropriate caution and ease of proof of compliance with Rule 1.5(b) indicate that the presentation of a fee agreement to the client in writing is desirable.

[3] Contingent fees, like any other fees, are subject to the not-clearly-excessive standard of paragraph (a) of this rule. In determining whether a particular contingent fee is clearly excessive, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain matters. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should inform the client of alternative bases for the fee and explain their implications.

[3A] A lawyer must inform the client at the time representation is undertaken if there is a possibility that a legal fee or other payments will be owed under other circumstances. A lawyer may pursue a quantum meruit recovery or payment for expenses advanced only if the contingent fee agreement so provides.

[3B] The "fair value" of the legal services rendered by the attorney before the occurrence of a contingency in a contingent fee case is an equitable determination designed to prevent a client from being unjustly enriched if no fee is paid to the attorney. Because a contingent fee case does not require any certain amount of labor or hours worked to achieve its desired goal, a lodestar method of fee calculation is of limited use in assessing a quantum meruit fee. A quantum meruit award should take into account the benefit actually conferred on the client. Other factors relevant to determining "fair value" in any particular situation may include those set forth in Rule 1.5(a), as well as the circumstances of the discharge or withdrawal, the amount of legal work required to bring the case to conclusion after the discharge or withdrawal, and the contingent fee to which the lawyer would have been entitled upon the occurrence of the contingency. Unless otherwise agreed in writing, the lawyer will ordinarily not be entitled to receive a fee unless the contingency has occurred. Nothing in this Rule is intended to create a presumption that a lawyer is entitled to a quantum meruit award when the representation is terminated before the contingency occurs.

[3C] When the attorney-client relationship in a contingent fee case terminates before completion, and the lawyer makes a claim for fees or expenses, the lawyer is required to state in writing the fee claimed and to enumerate the expenses incurred, providing supporting justification if requested. In circumstances where the lawyer is unable to identify the precise amount of the fee claimed because the matter has not been resolved, the lawyer is required to identify the amount of work performed and the basis employed for calculating the fee due. This statement of claim will help the client and any successor attorney to assess the financial consequences of a change in representation.

[3D] A lawyer who does not intend to make a claim for fees in the event the representation is terminated before the occurrence of the contingency entitling the lawyer to a fee under the terms of a contingent fee agreement would not be required to use paragraph (6) of the model forms of contingent fee agreement specified in Rule 1.5(f)(1) and (2). However, if a lawyer expects to make a claim for fees if the representation is terminated before the occurrence of the contingency, the lawyer must advise the client of his or her intention to retain the option to make a claim by including the substance of paragraph (6) of the model form of contingent fee agreement in the engagement agreement and would be expected to be able to provide records of work performed sufficient to support such a claim.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee if the client has been informed that a division of fees will be made and consents in writing. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[7A] Paragraph (e), unlike ABA Model Rule 1.5(e), does not require that the division of fees be in proportion to the services performed by each lawyer unless, with a client's written consent, each lawyer assumes joint responsibility for the representation. The Massachusetts rule does not require disclosure of the fee

division that the lawyers have agreed to, but if the client requests information on the division of fees, the lawyer is required to disclose the share of each lawyer.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] In the event of a fee dispute not otherwise subject to arbitration, the lawyer should conscientiously consider submitting to mediation or an established fee arbitration service. If such procedure is required by law or agreement, the lawyer shall comply with such requirement. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. For purposes of paragraph 1.5(f)(3), a provision requiring that fee disputes be resolved by arbitration is a provision that differs materially from the forms of contingent fee agreement set forth in this rule and is subject to the prerequisite that the lawyer explain the provision and obtain the client's consent, confirmed in writing.

Form of Fee Agreement

[10] Paragraph (f) provides model forms of contingent fee agreements and identifies explanations that a lawyer must provide to a client, except where the client is an organization, including a non-profit or governmental entity.

[11] Paragraphs (f)(1) and (f)(2) provide two forms of contingent fee agreement that may be used. Because paragraphs (3) and (7) of Form A do not contain alternative provisions, a lawyer who uses Form A does not need to provide any special explanation to the client. Paragraphs (2), (3), and (7) of Form B differ from Form A. While in most contingency cases, the contingency upon which compensation will be paid is recovery of damages, paragraph (2) of Form B permits lawyers and clients to agree to other lawful contingencies. A lawyer is not required to provide any special explanation when using paragraph (2). Paragraphs (3) and (7) of Form B allow options for the payment of costs and expenses and the payment of reasonable attorney's fees and expenses to former counsel. To ensure that a client gives informed consent to the agreed-upon option, a lawyer who uses Form B must retain in the form both options contained in paragraphs (3) and, where applicable, paragraph (7); show and explain these options to the client; and obtain the client's informed consent confirmed in writing to the selected option.

[12] Paragraph (f)(3) permits the lawyer and client to agree to modifications to Forms A and B, including modifications which are more favorable to the lawyer, to the extent permitted by this rule. However, a lawyer using a modified form of

fee agreement must explain to the client any provisions that materially differ from or add to those contained in Forms A and B, and obtain the client's informed written consent. For purposes of this rule, an agreement that does not contain option (i) in paragraph (3) and, where applicable, option (i) in paragraph (7) of Form B is materially different, and a lawyer must explain those different or added provisions to the client, and obtain the client's informed written consent.

[13] When attorney's fees are awarded by a court or included in a settlement, a question arises as to the proper method of calculating a contingent fee. Rule 1.5(c)(5) and paragraph (4) of the form agreements contained in Rule 1.5(f) state the default rule, but the parties may agree on a different basis for such calculation, such as applying the percentage to the total recovery, including attorney's fees.

Exhibit K
Redacted

Exhibit L

NEWBERG
ON CLASS ACTIONS

FIFTH EDITION

Volume 5
Chapters 15 to 17

William B. Rubenstein
Sidley Austin Professor of Law
Harvard Law School

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damages."[3]

The normal practice is that class counsel files a motion for the award of attorney's fees in conjunction with moving for final approval of a proposed class action settlement.[4] That motion will often also encompass requests for costs and for incentive awards for the class representatives. If multiple counsel expect to file fee motions in the same case, they are encouraged to resolve disputes and coordinate the contents of their filings before submission.[5]

The succeeding sections discuss the required contents of a fee motion,[6] as well as the disclosure of fee-related agreements in the fee filings,[7] the timing of the filing,[8] and the notice that must accompany it.[9]

§ 15:11 Fee procedures at a class action's conclusion—Content requirement

Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule 54(d)(2), as applicable.[1] Both Rule 23[2] and Rule 54[3] require a fee claim to be made by motion.[4]

Rule 54(d)(2)(B) sets forth the required content of a fee

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[3]Fed. R. Civ. P. 54(d)(2)(A).

[4]On the settlement approval process, *see* Rubenstein, 4 **Newberg on Class Actions** §§ 13:10 to 13:61 (5th ed.).

[5]Manual for Complex Litigation, Fourth, § 14.221 ("Where multiple counsel in the case expect to submit separate fee motions, consider requiring them to coordinate their submissions, avoid duplication, and perhaps attempt to resolve disputes among themselves before submission.").

[6]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:11 (5th ed.).

[7]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:12 (5th ed.).

[8]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:13 (5th ed.).

[9]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:14 (5th ed.).

[Section 15:11]

[1]Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets.").

[2]Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion under Rule 54(d)(2) . . .").

[3]Fed. R. Civ. P. 54(d)(2)(A) ("A claim for attorney's fees . . . must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.").

[4]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:10 (5th ed.).

motion, stating that it must:

- specify the judgment and the statute, rule, or other grounds entitling the movant to the award;[5]
- state the amount sought or provide a fair estimate of it;[6] and
- disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.[7]

The Rule's requirements are already fairly limited[8] and courts have used their discretion to excuse failures to meet even those limited requirements in certain circumstances.[9]

The first requirement—that the motion identify the legal basis for a fee[10]—is straightforward and non-controversial.

The second requirement—that the motion identify the amount sought[11]—raises a question of what level of detail is required in the fee motion. The best practice is for counsel to submit their time records and hourly rates—that is, their lodestar information[12]—via an affidavit accompanying the fee motion. Such documentation is required to be submitted at some point for any lodestar-based fee award and is generally helpful to a court in assessing a percentage-based fee award as it enables the court to undertake a lodestar cross-

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[5]Fed. R. Civ. P. 54(d)(2)(B)(ii).

[6]Fed. R. Civ. P. 54(d)(2)(B)(iii).

[7]Fed. R. Civ. P. 54(d)(2)(B)(iv).

[8]Wright and Miller's Federal Practice and Procedure, Civil § 2680 ("Because of the early filing deadline for fees, the rule does not require that the motion be fully supported at the time of filing by all of the evidentiary material bearing on fees.").

[9]Morris v. Arizona Beverage Co., L.L.C., 2005 WL 5544961, *9 (S.D. Fla. 2005) (excusing noncompliance with a local rule analogous to Rule 54 because, *inter alia*, the plaintiff did not allege that the defendant's noncompliance prejudiced him in any way).

DeShiro v. Branch, 183 F.R.D. 281, 285, 76 Empl. Prac. Dec. (CCH) P 46028 (M.D. Fla. 1998) (excusing failure to state or estimate the amount of fee being sought in the motion because the moving party alerted its opponents to a rough estimate in another piece of correspondence).

[10]Fed. R. Civ. P. 54(d)(2)(B)(ii).

[11]Fed. R. Civ. P. 54(d)(2)(B)(iii).

[12]For a discussion of the lodestar concept, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:38 (5th ed.).

check.[13] The *Manual for Complex Litigation* states that if counsel's time and expense records are not submitted with the motion, they should be submitted "[i]n advance of any fee-award hearing"[14] and "in manageable and comprehensible form."[15] As class members have a right to review and object to a fee petition, this information is critical in that analysis and ought therefore to be disclosed in conjunction with the filing of the motion and dissemination of fee notice to the class.

The third prong of Rule 54(d)(2)'s motion requirement—concerning disclosure of fee agreements[16]—is discretionary with the court. It raises a host of particular issues in the class action context, which are the subject of the succeeding section.[17]

§ 15:12 Fee procedures at a class action's conclusion—Disclosure of fee-related agreements requirement

Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule 54(d)(2), as applicable.[1] Both Rule 23[2] and Rule 54[3] require a fee claim to be made by motion. Rule 54(d)(2)(B) sets forth the required content of a fee motion,[4] including the requirement that the motion must "disclose, if the court so orders, the terms of any agreement about fees for the services for

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[13]For a discussion of the lodestar cross-check concept, *see* Rubenstein, 5 **Newberg on Class Actions** § 15:84 (5th ed.).

[14]Manual for Complex Litigation, Fourth, § 14.223.

[15]Manual for Complex Litigation, Fourth, § 14.223.

[16]Fed. R. Civ. P. 54(d)(2)(B)(iv).

[17]*See* Rubenstein, 5 **Newberg on Class Actions** § 15:12 (5th ed.).

[Section 15:12]

[1]Fed. R. Civ. P. 23(h)(1) ("A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets.").

[2]Fed. R. Civ. P. 23(h)(1) ("[A] claim for an award must be made by motion under Rule 54(d)(2) . . .").

[3]Fed. R. Civ. P. 54(d)(2)(A) ("A claim for attorney's fees . . . must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.").

[4]For an overview of the Rule's requirements, *see* Rubenstein 5 **Newberg on Class Actions** § 15:11 (5th ed.).

which the claim is made."[5] Relatedly, Rule 23(e), governing class action settlement approval, states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal."[6]

The parties to the suit and their counsel may have a range of private agreements concerning fees. Such agreements might include:

- a retainer agreement between the class representatives and class counsel;
- a retainer agreement between individual class members and their counsel, including objectors and objectors' counsel;
- an agreement between class counsel and the defendant—often embedded in the settlement agreement—whereby the defendant agrees to pay, or not to contest, a certain fee request by class counsel;[7]
- agreements among class counsel about the allocation of fees; and
- agreements between class counsel and non-class counsel about the allocation of fees, such as payment to counsel who helped fund the case but may not have played a material role in litigating it.

While Rule 54(d)(2)(B)(iv) makes disclosure of such agreements dependent on a judicial order, there are at least two reasons that courts should regularly order disclosure. *First*, given that the court is acting as a fiduciary for absent class members in overseeing the settlement approval and fee process,[8] there is a strong argument that requiring transparency as to the fees is in the class's interest and hence a court

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[5]Fed. R. Civ. P. 54(d)(2)(B)(iv).

[6]Fed. R. Civ. P. 23(e)(3).

[7]This is referred to as a "clear sailing agreement." For a discussion, *see* Rubenstein, 4 **Newberg on Class Actions** § 13:9 (5th ed.).

[8]In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 228, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008) ("The district court's close scrutiny of fee awards serves to 'protect the nonparty members of the class from unjust or unfair settlements affecting their rights as well as to minimize conflicts that may arise between the attorney and the class, between the named plaintiffs and the absentees, and between various subclasses.' The court's review also 'guards against the public perception that attorneys exploit the class action device to obtain large fees at the expense of the class.' " (quoting Strong v. BellSouth

should so order their disclosure.[9] The Fifth Circuit has put the argument in these terms, writing in a case concerning the allocation of fees among counsel:

> On a broad public level, fee disputes, like other litigation with millions at stake, ought to be litigated openly. Attorneys' fees, after all, are not state secrets that will jeopardize national security if they are released to the public . . . From the perspective of class welfare, publicizing the process leading to attorneys' fee allocation may discourage favoritism and unsavory dealings among attorneys even as it enables the court better to conduct oversight of the fees. If the attorneys are inclined to squabble over the generous fee award, they are well positioned to comment—publicly—on each other's relative contribution to the litigation.[10]

Some courts may require disclosure of fee agreements by an initial case management order; others may do so at the conclusion of the case.

Second, in evaluating the merits of the fee petition, courts have "given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion."[11] As the Advisory Committee that adopted Rule 23's fee provision states, "[t]he agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. 'Side agreements' regarding fees provide at least perspective pertinent to an appropriate fee award."[12] Moreover, the Committee noted that "[i]n some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with

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Telecommunications, Inc., 137 F.3d 844, 849, 1998-1 Trade Cas. (CCH) ¶ 72098, 40 Fed. R. Serv. 3d 462 (5th Cir. 1998))).

For a discussion of this fiduciary duty, *see* Rubenstein, 4 **Newberg on Class Actions** § 13:40 (5th ed.).

[9]In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 229, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008) (concluding that a "lack of transparency [in fee allocation process] supports a perception that many of these attorneys were more interested in accommodating themselves than the people they represent").

[10]In re High Sulfur Content Gasoline Products Liability Litigation, 517 F.3d 220, 230, 69 Fed. R. Serv. 3d 1516 (5th Cir. 2008).

[11]Fed. R. Civ. P. 23(h) advisory committee's note (2003).

[12]Fed. R. Civ. P. 23(h) advisory committee's note (2003).

th[e] goals [of ensuring an overall fee that is fair for counsel and equitable within the class], and the court might determine that adjustments in the class fee award were necessary as a result."[13] These passages suggest the relevance of fee agreements, another factor suggesting that courts should routinely order their disclosure.

Finally, as noted above, in addition to Rule 54's disclosure requirements, Rule 23(e), governing class action *settlement*—not *fee*—approval, states that "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the [settlement] proposal."[14] This generally references the settlement agreement itself, but, given the broader language covering agreements "made in connection with the [settlement] proposal," agreements beyond the settlement agreement itself—such as any agreements about fees—may also fall within the purview of Rule 23(e). Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests.[15] There may be some cases where this reasoning is incorrect, as some agreements among counsel would impact settlement terms and hence should be disclosed to the class. For example, if one set of counsel's fee allocation was capped at a certain amount, that counsel would have less interest in pushing further on behalf of the class once her cap was met. Moreover, there is little obvious downside from transparency so not only should courts order disclosure of fee agreements under Rule 54(d)(2), but settling parties should also readily provide them under Rule 23(e) in any case.

§ 15:13 Fee procedures at a class action's conclusion—Timing requirement

Rule 23(h) governs fee petitions in class action lawsuits and that Rule, in turn, adopts the procedures of Rule

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[13]Fed. R. Civ. P. 23(h) advisory committee's note (2003).

[14]Fed. R. Civ. P. 23(e)(3).

[15]Hartless v. Clorox Co., 273 F.R.D. 630, 646 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) ("The allocation of . . . fees amongst class counsel does not affect the monetary benefit to class members.").

Exhibit M

MOORE'S FEDERAL PRACTICE® THIRD EDITION

VOLUME 10

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The district court may suspend the finality of the merits judgment only prior to the filing of an effective notice of appeal.[10] If the fee opponent files an effective notice of appeal before the filing of the fee motion, the court is no longer in a position to suspend the finality of the merits judgment (*see generally* Ch. 58, *Entering Judgment*).

§ 54.154 Fee Motion Must State Basis for Fee Award and Estimate Amount Sought

As to the content of a motion for fees, Rule 54(d)(2)(B) is not demanding. The motion must:

- Specify the judgment entitling the movant to fees;[1]
- Specify the grounds for the fee award, i.e., identify the statutory,[2] equitable, or other basis for the award; and
- State or estimate the amount of the fee sought.[3]

The statute authorizing fees may impose additional requirements for the motion. For example, an applicant for a fee award against the federal government under the Equal Access to Justice Act (EAJA) must submit an application that (1) shows the applicant was the prevailing party, (2) shows the applicant is eligible to receive an award of fees, (3) shows the amount sought, and (4) alleges that the position of government in the case was not substantially justified (*see* § 54.172[1][b]).[4]

A fee movant need not, and indeed should not, submit copious evidentiary materials designed to prove the right to a fee or the amount of the fee. Those evidentiary materials should be submitted only as directed by the court (*see* § 54.155).

If the court so directs, the fee motion must also disclose the terms of any fee agreement with respect to the services implicated by the motion.[5] This authorization is broad enough to include not only the fee agreement between the fee movant and counsel, but also agreements between counsel splitting a fee to be awarded, or between adversaries settling a dispute when the dispute requires court approval, such as a class action suit or shareholder derivative action.[6] The compelled disclosure of such fee

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plaintiff's requests for prejudgment interest and for refund of payments made to defendant extends time to appeal).

[10] Fed. R. Civ. P. 58.

[1] Fed. R. Civ. P. 54(d)(2)(B)(ii).

[2] Fed. R. Civ. P. 54(d)(2)(B)(ii).

[3] Fed. R. Civ. P. 54(d)(2)(B)(iii).

[4] **Requirements for fee application under EAJA.** 28 U.S.C. § 2412(d)(1)(B); *see* Scarborough v. Principi, 319 F.3d 1346, 1348–1355 (Fed. Cir. 2003) (if fee applicant does not supply all required elements prior to expiration of EAJA's 30-day application deadline, trial court will lack jurisdiction to award fees under EAJA).

[5] Fed. R. Civ. P. 54(d)(2)(B)(iv). Pierce v. Barnhart, 440 F.3d 657, 664–665 (5th Cir. 2006) (motion for attorney's fees need not include terms of applicable fee agreement unless directed by court or required by local court rules).

[6] *See* Committee Note of 1993 to Amendment to Rule 54 (reproduced verbatim at § 54App.06[2]).

Exhibit N

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

In Re: Heartland Payment Systems, Inc. Customer Data Security Breach Litigation	§	Civil Action No. 4:09-MD-2046
This filing relates to:	§	
CONSUMER TRACK ACTIONS	§	

SETTLEMENT AGREEMENT

This Settlement Agreement, dated as of December 18, 2009, is made and entered into by and among the following Settling Parties (as defined below) to the above-captioned consolidated action: (i) Julie Barrett, Mark Hilliard, Derek Hoven, Talal Kaissi, Loretta A. Sansom, Scott Swenka, and Phillip Brown ("Representative Consumer Plaintiffs"), individually and on behalf of the Settlement Class (as defined below), by and through Ben Barnow, Barnow and Associates, P.C.; Lance A. Harke, Harke & Clasby LLP; and Burton H. Finkelstein, Finkelstein Thompson LLP (together, "Co-Lead Settlement Class Counsel"); and (ii) Heartland Payment Systems, Inc. ("Heartland"), by and through its counsel of record, Harvey J. Wolkoff and Mark P. Szpak, Ropes & Gray LLP. The Settlement Agreement is intended by the Settling Parties fully, finally, and forever to resolve, discharge, and settle the Released Claims (as defined below), upon and subject to the terms and conditions hereof.

I. THE LITIGATION

On January 20, 2009, Heartland issued a press release, stating that its processing system had incurred an unauthorized intrusion sometime in 2008 (the "Heartland Intrusion"), and that names, credit/debit card numbers, expiration dates, and other information on certain payment cards processed through Heartland ("Personal Financial Information") appeared to have been accessed as a result of the unauthorized intrusion. According to Heartland, its internal investigation revealed that

the hacker(s) had hidden malicious software in its payment processing system that allowed access to this sensitive consumer data.

The first consumer class action complaint in the nation related to the Heartland Intrusion was filed on January 23, 2009, on behalf of a putative nationwide class of consumers whose Personal Financial Information was alleged to have been negligently, willfully, and/or recklessly allowed to be stolen from Heartland.[1] A number of other consumer class action lawsuits were filed shortly thereafter.[2] The lawsuits collectively alleged, *inter alia*, that Heartland's failure to adequately protect consumers' Personal Financial Information violated the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.* ("FCRA"), was negligent, constituted a breach of express and implied contract, and violated various states' data breach notification statutes and consumer fraud and deceptive and unfair trade practices acts. The lawsuits sought statutory damages, compensatory damages, and injunctive relief stemming from the Heartland Intrusion.

On August 17, 2009, several individuals (the "Hackers") were indicted for hacking into the computer systems of various corporations, including Heartland. According to the Indictment, beginning on or about December 26, 2007, Heartland was the victim of an attack by the Hackers on its corporate computer network that resulted in malware being hidden in its payment processing

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[1] *Sansom, et al. v. Heartland Payment Systems, Inc.*, No. 3:09cv335 (D.N.J.).

[2] *Brown, et al. v. Heartland Payment Systems, Inc.*, No. 2:09cv86 (M.D. Ala.); *Swenka v. Heartland Payment Systems, Inc.*, No. 2:09cv179 (D. Ariz.); *Brown, et al. v. Heartland Payment Systems, Inc.* No. 4:09cv384 (E.D. Ark.); *Hilliard v. Heartland Payment Systems, Inc.*, No. 1:09cv219 (E.D. Cal.); *Mata v. Heartland Payment Systems, Inc.*, No. 3:09cv376 (S.D. Cal.); *Read v. Heartland Payment Systems, Inc.*, No. 3:09cv35 (N.D. Fla.); *Balloveras v. Heartland Payment Systems, Inc.*, No. 1:09cv2032 (S.D. Fla.); *Leavell v. Heartland Payment Systems, Inc.*, No. 3:09cv270 (S.D. Ill.); *Barrett, et al. v. Heartland Payment Systems, Inc.*, No. 2:09cv2053 (D. Kan.); *McLaughlin v. Heartland Payment Systems, Inc.*, No. 6:09cv3069 (W.D. Mo.); *Merino v. Heartland Payment Systems, Inc.*, No. 3:09cv439 (D.N.J.); *Kaissi v. Heartland Payment Systems, Inc.*, No. 3:09cv540 (D.N.J.); *Rose v. Heartland Payment Systems, Inc.*, No. 3:09cv917 (D.N.J.); *McGinty, et al. v. Heartland Payment Systems, Inc.*, No. 1:09cv244 (N.D. Ohio); *Watson v. Heartland Payment Systems, Inc.*, No. 4:09cv325 (S.D. Tex.); *Anderson, et al. v. Heartland Payment Systems, Inc.*, No. 2:09cv113 (E.D. Wis.).

system, allegedly resulting in the theft of approximately 130 million credit and debit card numbers and corresponding personal information.

Pursuant to the order of the Judicial Panel on Multidistrict Litigation ("JPML") dated June 23, 2009, the JPML transferred all related actions to the United States District Court for the Southern District of Texas ("the Court"). The actions were divided into a "consumer track," consisting of the actions asserting putative class claims on behalf of consumers, and a "financial institution track," consisting of the actions asserting putative class claims on behalf of financial institutions.[3]

Pursuant to the terms set out below, this Settlement Agreement resolves all actions and proceedings asserted or that could have been asserted against Heartland in relation to the Heartland Intrusion by and on behalf of Representative Consumer Plaintiffs and Settlement Class Members (as defined below) in the United States (including the District of Columbia), and any other such actions by and on behalf of putative classes of consumers originating or that may originate in jurisdictions in the United States (including the District of Columbia) against Heartland related to the Heartland Intrusion (collectively, "the Litigation").

II. CLAIMS OF THE REPRESENTATIVE CONSUMER PLAINTIFFS AND BENEFITS OF SETTLEMENT

Representative Consumer Plaintiffs believe that the claims asserted in the Litigation, as set forth in the various complaints, have merit. Representative Consumer Plaintiffs and Co-Lead

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[3] The actions asserting putative class claims on behalf of financial institutions are as follows: *PBC Credit Union, et al. v. Heartland Payment Systems, Inc.*, No. 9:09cv80481 (S.D. Fla.); *Lone Summit Bank v. Heartland Payment Systems, Inc.*, No. 3:09cv581 (D.N.J.); *Tricentury Bank, et al. v. Heartland Payment Systems, Inc.*, No. 3:09cv697 (D.N.J.); *Amalgamated Bank, et al. v. Heartland Payment Systems, Inc.*, No. 3:09cv776 (D.N.J.); *Lone Star National Bank NA v. Heartland Payment Systems, Inc.*, No. 7:09cv64 (S.D. Tex.); *First Bankers Trust Company, National Bank Association v. Heartland Payment Systems, Inc.*, No. H-09-925 (S.D. Tex.); *Community West Credit Union v. Heartland Payment Systems, Inc.*, No. H-09-1201(S.D. Tex.); *The Eden State Bank v. Heartland Payment Systems, Inc.*, No. H-09-1203 (S.D. Tex.); *Heritage Trust Federal Credit Union v. Heartland Payment Systems, Inc.*, No. H-09-1284 (S.D. Tex.); *Pennsylvania State Employees Credit Union v. Heartland Payment Systems, Inc.*, No. H-09-1330 (S.D. Tex.).

Settlement Class Counsel, however, recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Litigation against Heartland through motion practice, trial, and potential appeals. Co-Lead Settlement Class Counsel also have taken into account the uncertain outcome and the risk of further litigation, as well as the difficulties and delays inherent in such litigation. Co-Lead Settlement Class Counsel are also mindful of the inherent problems of proof and possible defenses to the claims asserted in the Litigation. Co-Lead Settlement Class Counsel believe that the settlement set forth in this Settlement Agreement confers substantial benefits upon the Settlement Class (as defined below). Co-Lead Settlement Class Counsel have determined that the settlement set forth in this Settlement Agreement is fair, reasonable, and adequate, and in the best interests of the Settlement Class.

III. DENIAL OF WRONGDOING AND LIABILITY

Heartland denies each and all of the claims and contentions alleged against it in the Litigation, and believes that these claims and contentions are totally without merit. Specifically, Heartland denies all charges of wrongdoing or liability as alleged against it in the Litigation. Nonetheless, Heartland has concluded that further conduct of the Litigation as it relates to the consumer track would be protracted and expensive, and that it is desirable that the Litigation be fully and finally settled in the manner and upon the terms and conditions set forth in this Settlement Agreement. Heartland also has taken into account the uncertainty and risks inherent in any litigation. Heartland has, therefore, determined that it is desirable and beneficial that the Litigation as it relates to the consumer track be settled in the manner and upon the terms and conditions set forth in this Settlement Agreement.

IV. TERMS OF SETTLEMENT

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among Representative Consumer Plaintiffs, individually and on behalf of the Settlement Class, by and

through Co-Lead Settlement Class Counsel, and Heartland that, subject to the approval of the Court, the Litigation and the Released Claims shall be finally and fully compromised, settled, and released, and the Litigation shall be dismissed with prejudice as to all Settling Parties, upon and subject to the terms and conditions of this Settlement Agreement, as follows.

1. Definitions

As used in the Settlement Agreement, the following terms have the meanings specified below:

1.1 "Claims" means known claims and Unknown Claims (as defined in ¶ 1.23), actions, allegations, demands, rights, liabilities, and causes of action of every nature and description whatsoever, whether contingent or non-contingent, and whether at law or equity.

1.2 "Claims Administration" means the processing of claims received from Settlement Class Members by the Claims Administrator.

1.3 "Claims Administrator" means such claims administrator as may be selected by Heartland and agreed to by Co-Lead Settlement Class Counsel.

1.4 "Co-Lead Settlement Class Counsel" means Ben Barnow, Barnow and Associates, P.C.; Lance A. Harke, Harke & Clasby LLP; and Burton H. Finkelstein, Finkelstein Thompson, LLP.

1.5 "Costs of Claims Administration" means all actual costs associated with or arising from Claims Administration.

1.6 "Effective Date" means the first date by which all of the events and conditions specified in ¶ 9.1 hereof have occurred and have been met.

1.7 "Eligible Payment Card Account" means an account used to make a transaction that was processed by Heartland between and including December 26, 2007 and December 31, 2008 (the "Settlement Class Period").

1.8 "Final" means the occurrence of all of the following events: (i) the settlement pursuant to this Settlement Agreement is approved by the Court; (ii) the Court has entered a Judgment (as that term is defined herein); (iii) the time to appeal or seek permission to appeal from the Judgment has expired or, if appealed, the appeal has been dismissed in its entirety, or the Judgment has been affirmed in its entirety by the court of last resort to which such appeal may be taken, and such dismissal or affirmance has become no longer subject to further appeal or review. Notwithstanding the above, any order modifying or reversing any attorneys' fee award made in this case shall not affect whether the Judgment is "Final" as defined in the preceding sentence, or any other aspect of the Judgment.

1.9 "Judgment" means a judgment rendered by the Court, in the form attached hereto as Exhibit E, or a judgment substantially similar to such form in both terms and cost.

1.10 "Named Plaintiff" means each Person (as defined in ¶ 1.13 herein) who is named as a plaintiff in any pending case in the Litigation and who, prior to the execution of the Settlement Agreement by Co-Lead Settlement Class Counsel, joins in this settlement by affirming in a writing (which will be filed with the Court by the Settling Parties) that he or she, or his or her counsel, approve and join in this settlement.

1.11 "Notice Specialist" means Hilsoft Notifications, Souderton, Pennsylvania, or such other notice specialist as may be jointly agreed upon by the Settling Parties and approved by the Court.

1.12 "Opt-Out Date" means the date by which members of the Settlement Class must mail their requests to be excluded from the Settlement Class in order for that request to be effective. The postmark date shall constitute the date of mailing for these purposes.

1.13 "Person" means an individual, corporation, partnership, limited partnership, limited liability company or partnership, association, joint stock company, estate, legal

representative, trust, unincorporated association, government or any political subdivision or agency thereof, and any business or legal entity, and their respective spouses, heirs, predecessors, successors, representatives, or assignees.

1.14 "Plaintiffs' Counsel" means Co-Lead Settlement Class Counsel and all other attorneys who represent Named Plaintiffs who have joined in this settlement.

1.15 "Related Parties" means an entity's past or present directors, officers, employees, principals, agents, attorneys, predecessors, successors, parents, subsidiaries, divisions and related or affiliated entities, and includes, without limitation, any Person related to such entity who is, was or could have been named as a defendant in any of the actions in the Litigation.

1.16 "Released Sponsoring Banks" means KeyBank National Association and Heartland Bank.

1.17 "Released Claims" shall collectively mean any and all Claims for Losses (as defined herein), including without limitation those arising under state or federal law of the United States (including, without limitation, any causes of action under the California Business & Professional Code § 17200 et seq., California Civil Code § 1798.80 – 84 et seq., California Civil Code § 1798.53, Tex. Bus. & Com. § 48.001 et seq., Georgia Code § 10-1-910 et seq., and any similar statutes in effect in any states in the United States; the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.*; the various states' data breach notification statutes; negligence; negligence *per se*; breach of contract; breach of fiduciary duty; breach of confidence; misrepresentation (whether fraudulent, negligent or innocent); unjust enrichment; and bailment), and also including, but not limited to, any and all claims in any state or federal court of the United States for damages, injunctive relief, disgorgement, declaratory relief, equitable relief, attorneys' fees and expenses, pre-judgment interest, credit monitoring services, the creation of a fund for future damages, statutory penalties, restitution, the appointment of a receiver, and any

other form of relief, that either have been asserted or could have been asserted by any Settlement Class Member against any of the Released Persons or any of the Indemnified Persons (as defined below) based on, relating to, concerning or arising out of the allegations, facts, or circumstances alleged in the Litigation or any other allegations, facts or circumstances with respect to the Heartland Intrusion. Without limitation of the foregoing, Released Claims specifically include Claims for Losses (as defined herein) stemming from the Heartland Intrusion that may have been or could have been asserted by any Settlement Class Member against any person or entity (such as, for example and without limitation, any entity that issued credit or debit cards to Settlement Class Members) (collectively, the "Indemnified Persons") that could seek indemnification or contribution from any of the Released Persons in respect of such Claim, except that Released Claims shall not include Claims by any individual Settlement Class Member against any card-issuing financial institution brought on an individual, case-by-case basis for reimbursement or waiver of purportedly fraudulent card charges (or other charges by the card-issuing financial institution in connection with purportedly fraudulent card charges) that such card-issuing financial institution assertedly should have reimbursed or waived but has refused to reimburse or waive. Released Claims shall not include the right of any Settlement Class Member or any Released Person or any Indemnified Person to enforce the terms of the settlement contained in the Settlement Agreement.

1.18 "Released Persons" means Heartland and its Related Parties and the Released Sponsoring Banks and their respective Related Parties.

1.19 "Representative Consumer Plaintiffs" means Julie Barrett, Mark Hilliard, Derek Hoven, Talal Kaissi, Loretta A. Sansom, Scott Swenka, and Phillip Brown.

1.20 "Settlement Class" means all Persons in the United States who had or have a payment card that was used in the United States between and including December 26, 2007 and

December 31, 2008 (the "Settlement Class Period"), and who allege or may allege that they have suffered any of the Losses defined herein. Excluded from the definition of Settlement Class are Heartland and its officers and directors, and those Persons who timely and validly request exclusion from the Settlement Class.

1.21 "Settlement Class Member(s)" means a Person(s) who falls within the definition of the Settlement Class.

1.22 "Settling Parties" means, collectively, Heartland and Representative Consumer Plaintiffs, individually and on behalf of the Settlement Class.

1.23 "Unknown Claims" means any of the Released Claims that any Settlement Class Member, including any Representative Consumer Plaintiff, does not know or suspect to exist in his favor at the time of the release of the Released Persons that, if known by him or her, might have affected his or her settlement with and release of the Released Persons, or might have affected his or her decision not to object to and/or to participate in this settlement. With respect to any and all Released Claims, the Settling Parties stipulate and agree that, upon the Effective Date, Representative Consumer Plaintiffs expressly shall have, and each of the other Settlement Class Members shall be deemed to have, and by operation of the Judgment shall have, waived the provisions, rights, and benefits conferred by California Civil Code § 1542, and also any and all provisions, rights, and benefits conferred by any law of any state, province or territory of the United States (including, without limitation, Montana Code Ann. § 28-1-1602; North Dakota Cent. Code § 9-13-02; and South Dakota Codified Laws § 20-7-11), which is similar, comparable, or equivalent to California Civil Code §1542, which provides:

> A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Settlement Class Members, including Representative Consumer Plaintiffs, and any of them, may hereafter discover facts in addition to or different from those that they, and any of them, now know or believe to be true with respect to the subject matter of the Released Claims, but Representative Consumer Plaintiffs expressly shall have, and each other Settlement Class Member shall be deemed to have, and by operation of the Judgment shall have, upon the Effective Date, fully, finally, and forever settled and released any and all Released Claims. The Settling Parties acknowledge, and Settlement Class Members shall be deemed by operation of the Judgment to have acknowledged, that the foregoing waiver is a material element of the settlement of which this release is a part.

1.24 "United States" as used in this Settlement Agreement includes the District of Columbia.

2. The Settlement

2.1 Actual Damages Fund: Within ten (10) days following preliminary approval of the settlement, Heartland will place the principal amount of $1,000,000 (the "Initial Funding") into an interest-bearing, escrow account (the "Actual Damages Fund"). The Initial Funding will be used to reimburse Settlement Class Members who are determined to have submitted Valid Claims (as defined and described pursuant to ¶ 2.2). Interest on the Initial Funding will inure to the benefit of Settlement Class Members as and to the extent provided below.

(a) In the event the Initial Funding and any interest accrued thereon is exceeded by the aggregate amount to be paid on approved Valid Claims pursuant to ¶ 2.2, Heartland will promptly replenish the Actual Damages Fund initially in the amount of $500,000, and in the event that the Actual Damages Fund is again so exceeded, Heartland will replenish it with an additional $500,000; and in the event that the Actual Damages Fund is again so exceeded, Heartland will replenish it with an additional $400,000, as advances for amounts needed to pay any additional Valid

Claims (the "Replenishment Fundings" and, jointly with the Initial Funding, the "Fundings"). In no event shall the Replenishment Fundings exceed a total of $1,400,000 in the aggregate, i.e., up to but not more than a total of $2,400,000 shall be placed cumulatively in the Actual Damages Fund by means of the Fundings.

(b) In the event the Initial Funding and any interest accrued thereon is not entirely depleted by the payment of Valid Claims pursuant to ¶ 2.2, the unpaid balance of the Initial Funding and any interest accrued thereon will be transferred to a non-profit organization(s) dedicated to the protection of consumers' privacy rights, with emphasis on advancing the implementation of end-to-end encryption of payment card authorization transactions or similar security enhancements. This *cy pres* provision shall not apply, however, to the Replenishment Fundings, and any unused balance of the Replenishment Fundings shall be returned promptly to Heartland, with the interest accrued thereon. The organization(s) referred to herein will be designated by Heartland and shall be subject to approval by Co-Lead Settlement Class Counsel, which approval shall not be unreasonably withheld.

2.2 Reimbursement of Valid Claims: Reimbursements to Settlement Class Members from the Actual Damages Fund will be made only for "Valid Claims." A Valid Claim shall consist of only those "Losses" (as defined in ¶ 2.2 (b)) that a Settlement Class Member claims in accordance with Paragraph 2.2(a) below, and proves by a preponderance of the evidence (i.e., more likely than not to be true), to have directly and proximately resulted from information relative to an Eligible Payment Card Account of such Settlement Class Member having been stolen or placed at risk of being stolen as a result of the Heartland Intrusion, as determined either by the Claims Administrator or, in the event the Claims Administrator's determination is reviewed pursuant to ¶ 2.2(d) below, by the dispute resolution firm appointed pursuant thereto.

(a) To be eligible for determination as a Valid Claim, a Settlement Class Member's claim for reimbursement of a Loss or Losses (a "Reimbursement Claim") must be submitted by mail on a written form agreed to by the parties and must be supported by documentation showing by a preponderance of the evidence, and a sworn certification attesting, that the claimant is a Settlement Class Member and that his or her or its claim is a Valid Claim. On the claim form, the Settlement Class Member must provide the number and expiration date of the payment card account that is the basis for such claim, for verification by Heartland and/or the Claims Administrator and/or the dispute resolution firm that such account is an Eligible Payment Card Account and evaluation of the claim, and such information shall be deemed confidential and protected as such by Heartland and/or the Claims Administrator and/or the dispute resolution firm, as appropriate.

(b) A "Loss" or "Losses" shall consist only of: (i) reasonable, unreimbursed, out-of-pocket expenses (specifically, telephone or postage costs, other third-party charges resulting from card cancellations or replacements, unauthorized and unreimbursed account charges, or Identity-Theft-Related Charges (as defined below)) actually incurred by the Settlement Class Member; and, (ii) whether or not the Settlement Class Member has incurred any out-of-pocket expenses as referenced in 2.2(b)(i) above, a reasonable amount for time (calculated at $10 per hour up to five (5) hours) actually expended by the Settlement Class Member to address such a card cancellation, card replacement, unauthorized account charge, or Identity-Theft-Related Charge. Losses shall in no event include credit monitoring or insurance costs incurred by Settlement Class Members, attorneys' fees, attorneys' costs or attorneys' expenses incurred by Settlement Class Members, or losses resulting from any information having been stolen or placed at risk of being stolen from an entity other than from Heartland. For purposes of the definition of Losses, an "Identity-Theft-Related Charge" shall mean a charge, other than a charge to the Eligible Payment Card Account of

the Settlement Class Member, incurred as a result of someone's assuming the Settlement Class Member's identity and taking out and using credit or otherwise obtaining monies and other things of value fraudulently in the name of the Settlement Class Member. Valid Claims shall be limited to $175 per Settlement Class Member, with no more than two Valid Claims allowed per household. However, in the event that the Losses in a Settlement Class Member's Valid Claim include Identity-Theft-Related Charges, up to $10,000 in such Identity-Theft Related-Charges may be included in such Settlement Class Member's Valid Claim, but in no event shall the Settlement Class Member's reimbursement for a Valid Claim exceed $10,000. All allowable amounts of Valid Claims are subject to the limit on the Actual Damages Fund as set forth in ¶ 2.1. Losses shall be net of and not include any other recovery by or reimbursement of the Settlement Class Member of the expense in question and shall not include any other type of alleged damage or expense, including, without limitation, exemplary or punitive damages or any alleged losses by reason of alleged mental anguish, emotional distress, or any claimed physical injury.

(c) In order to be eligible to have a Valid Claim, any Reimbursement Claim must be submitted to the Claims Administrator during the period beginning upon publication of the notice of settlement following preliminary approval and ending August 1, 2011 (the "Final Claim Date"), which is two and a half years from the date of the announcement of the Heartland Intrusion. Losses must have been incurred prior to the Final Claim Date. The Claims Administrator's review of Reimbursement Claims, including all requests for review of the denial of Reimbursement Claims, shall commence within sixty (60) days of the Effective Date, and proceed in order of the Claims Administration's receipt of completed claims, as determined by the Claims Administrator. Payment of Valid Claims shall commence no later than 120 days after all Reimbursement Claims have been finally decided, including any review of Reimbursement Claims and any reimbursement determinations pursuant to pursuant to ¶ 2.2(d), and shall be subject

to pro-rata reduction in the event such amounts together would otherwise exceed the Actual Damages Fund. However, in the event that the total Reimbursement Claims received and any amounts payable under § 2.2(d) can be calculated and would not exceed $2,400,000, then payment of Valid Claims may commence without awaiting all Reimbursed Claims to have been finally decided, if so requested in writing by Co-Lead Settlement Counsel and approved by Heartland, which approval shall not be unreasonably withheld.

(d) Any Settlement Class Member whose Reimbursement Claim is denied by the Claims Administrator may request review of the denial and resolution of the Reimbursement Claim through a dispute resolution firm to be agreed upon by the parties, such as JAMS. Similarly, Heartland shall have the right to request review of the allowance of a Reimbursement Claim through the same dispute resolution process. Heartland shall bear the costs of the dispute resolution firm, separate and apart from the Fundings, up to a total of $200,000, and Heartland shall contract to do so, so as to provide for dispute resolution for all such requests for review hereunder. Resolution of any Reimbursement Claim by the dispute resolution firm will commence only after the Final Claim Date and shall be based on the dispute resolution firm's review of the Reimbursement Claim file and any response by Heartland or the Settlement Class Member (as the case may be), and, in those cases in which the dispute resolution firm deems it necessary and appropriate, an oral hearing on the Reimbursement Claim (which shall be by telephone or in person, at the Settlement Class Member's election). There will be no recovery by any Settlement Class Member for exemplary or punitive damages, or for (except as may be provided for below in this paragraph) attorneys' fees, costs or expenses, or for any other amount that does not constitute a Valid Claim as defined above, provided, however, that in the event the Losses included in a Valid Claim as sustained by the dispute resolution firm include Identity-Theft-Related Charges, Heartland shall reimburse the Settlement Class Member for the reasonable attorneys' fees and costs (not including expert fees) incurred

by the Settlement Class Member in connection with such dispute resolution, not to exceed an amount equal to 25 percent of the amount of the Identity-Theft-Related Charges included in such Valid Claim, all subject to the limit on the Actual Damages Fund as set forth in ¶ 2.1 above. Reimbursement Claim determinations by the dispute resolution firm shall be final and not subject to further review.

(e) Reimbursement Claims shall be submitted to, and reimbursements shall be paid by, the Claims Administrator from the Actual Damages Fund, subject to the terms and conditions set forth herein.

2.3 Within thirty (30) days of the execution of the Settlement Agreement (or such later time as may be agreed to between Heartland and Co-Lead Settlement Class Counsel), an independent expert retained by Heartland will generate a written report setting forth any actions taken or planned to be taken by Heartland since January 20, 2009 to enhance the security of Heartland's computer system ("the Enhancement Actions"). Heartland will permit Representative Consumer Plaintiffs' designated independent expert to review the report. In the alternative, Heartland may, in its discretion, permit Representative Consumer Plaintiffs' designated independent expert to review a copy of Heartland's most recent Payment Card Industry Report on Compliance ("ROC"). Representative Consumer Plaintiffs' designated independent expert shall promptly provide a responsive letter to Co-Lead Settlement Class Counsel stating whether the Enhancement Actions (or the information reflected in ROC, as the case may be) are, in the judgment of Representative Consumer Plaintiffs' designated independent expert, a prudent and good faith attempt by Heartland to minimize the likelihood of intrusion in the future. Within fifteen (15) days thereafter, Co-Lead Settlement Class Counsel shall provide Heartland with a letter indicating whether they accept the report, or do not accept it; failure to provide such a letter to Heartland shall be deemed acceptance. The settlement is contingent upon Co-Lead Settlement Class Counsel's

acceptance of the report, which acceptance shall not be unreasonably withheld. The foregoing terms of this Paragraph shall be completed prior to any hearing on final approval of the settlement, and subject to such confidentiality restrictions as Heartland may reasonably require to protect the security of its computer system, the confidentiality of the ROC or other written report referenced above, or other proprietary information.

2.4 All costs associated with notice to the Settlement Class as required herein and Costs of Claims Administration shall be paid by Heartland. To the extent that such notice costs exceed $1,500,000.00, however, Heartland shall have the option, in its sole discretion, of rescinding the Settlement Agreement.

2.5 The Settling Parties agree, for purposes of this settlement only, to the certification of the Settlement Class. If the settlement set forth in this Settlement Agreement is not approved by the Court, or if the settlement is terminated or cancelled pursuant to the terms of this Settlement Agreement, then this Settlement Agreement, and the certification of the Settlement Class provided for herein, will be vacated and the Litigation shall proceed as though the Settlement Class had never been certified, without prejudice to any party's position on the issue of class certification or any other issue. The Settling Parties' agreement to the certification of the Settlement Class is also without prejudice to any position asserted by the Settling Parties in any other proceeding, case or action including, without limitation, the "financial institutions track" proceedings otherwise consolidated with the Litigation in the above-captioned civil action, as to which all of their rights are specifically preserved.

2.6 Heartland agrees that the time for Co-Lead Settlement Class Counsel to file a Master Amended Complaint related to the consumer track plaintiffs shall be treated by them as extended without date.

3. Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing

3.1 As soon as practicable after the execution of the Settlement Agreement, Co-Lead Settlement Class Counsel and counsel for Heartland shall jointly submit this Settlement Agreement to the Court, and, within 7 calendar days after the period for any termination of the Settlement Agreement pursuant to ¶¶ 2.3 [has expired without Co-Lead Settlement Class Counsel having taken such action, Co-Lead Settlement Class Counsel shall file a motion for preliminary approval of the settlement with the Court and apply for entry of an order (the "Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing"), in the form attached hereto as Exhibit A, or an order substantially similar to such form in both terms and cost, requesting, *inter alia*,

(a) certification of the Settlement Class for settlement purposes only pursuant to ¶ 2.5;

(b) preliminary approval of the settlement as set forth herein;

(c) approval of the publication of a customary form of summary notice (the "Summary Notice") in a form substantially similar to the one attached hereto as Exhibit B (in a manner certified by the Notice Specialist to have a reach of not less than approximately 80% of the putative class, targeted to adults with credit or debit cards over 18 years of age, in the United States), and a customary long form of notice ("Notice") in a form substantially similar to the one attached hereto as Exhibit C, which together shall include a fair summary of the parties' respective litigation positions, the general terms of the settlement set forth in the Settlement Agreement, instructions for how to object to or opt-out of the settlement, the process and instructions for making

claims to the extent contemplated herein, and the date, time, and place of the Final Fairness Hearing;

(d) appointment of Hilsoft Notifications as Notice Specialist (or such other provider of class action notification service, as may be jointly agreed to);

(e) appointment of Epiq Systems, Inc. as Claims Administrator; (or such other provider of claims administrative service, as may be jointly agreed to); and

(f) approval of a Claim Form in a form substantially similar to the one attached hereto as Exhibit D.

The forms of Summary Notice, Notice and Claim Form attached hereto as Exhibits B, C, and D shall be reviewed by the proposed Notice Specialist and Claims Administrator and may be revised as agreed upon by the Settling Parties prior to such submission to the Court for approval.

3.2 Heartland shall pay for and shall assume the administrative responsibility of providing notice to the Settlement Class in accordance with the Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing, and the costs of such notice, together with the Costs of Claims Administration, shall be paid by Heartland, subject to the terms set forth herein. Notice shall be provided to Settlement Class Members by publication in print and shall be designed to have a reach of not less than approximately 80% of the putative class, targeted to adults with credit or debit cards over 18 years of age, in the United States through publication of the Summary Notice, and which publication shall run, if approved by the Court, in a range of consumer magazines, newspapers, and/or newspaper supplements to be designated by the Notice Specialist and approved by the Court. The Claims Administrator shall establish a dedicated settlement website, and shall maintain and update the website throughout the Claim Period, with the forms of Summary Notice, Notice, and Claim Forms approved by the Court, as well as this Settlement Agreement. The Claims Administrator also will provide copies of the forms of Summary Notice, Notice, and Claim Forms

approved by the Court, as well as this Settlement Agreement, upon request. Prior to the Final Fairness Hearing, Co-Lead Settlement Class Counsel and Heartland shall cause to be filed with the Court an appropriate affidavit or declaration with respect to complying with this provision of notice. Notice shall be provided in English and/or Spanish, as appropriate. The forms of Summary Notice, Notice and Claim Form approved by the Court may be adjusted by the Notice Specialist and/or Claims Administrator, respectively, in consultation and agreement with the Settling Parties, as may be reasonable and not inconsistent with such approval.

3.3 Co-Lead Settlement Class Counsel and Heartland shall request that after notice is given, the Court hold a hearing (the "Final Fairness Hearing") and grant final approval of the settlement set forth herein.

3.4 Co-Lead Settlement Class Counsel and Heartland further agree that the proposed Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing shall provide, subject to Court approval, that, pending the final determination of the fairness, reasonableness, and adequacy of the settlement set forth in the Settlement Agreement, no Settlement Class Member, either directly, representatively, or in any other capacity, shall institute, commence, or prosecute against Heartland any of the Released Claims in any action or proceeding in any court or tribunal.

4. Opt-Out Procedures

4.1 Each Person wishing to opt out of the Settlement Class shall individually sign and timely submit written notice of such intent to the designated Post Office box established by the Claims Administrator. The written notice must clearly manifest an intent to be excluded from the Settlement Class. To be effective, written notice must be postmarked at least twenty-one (21) days prior to the date set in the Notice for the Final Fairness Hearing.

4.2 All Persons who submit valid and timely notices of their intent to be excluded from the Settlement Class, as set forth in ¶ 4.1 above, referred to herein as "Opt-Outs," shall neither

receive any benefits of nor be bound by the terms of this Settlement Agreement. All Persons falling within the definition of the Settlement Class who do not request to be excluded from the Settlement Class in the manner set forth in ¶ 4.1 above shall be bound by the terms of this Settlement Agreement and Judgment entered thereon.

5. Objection Procedures

5.1 Each Settlement Class Member desiring to object to the settlement shall submit a timely written notice of his or her objection. Such notice shall state: (i) the objector's full name, address, telephone number, and e-mail address; (ii) information identifying the objector as a Settlement Class Member, including (a) proof that they are a member of the Settlement Class (e.g., a letter from their financial institution indicating that their Personal Financial Information had been compromised in the Heartland Intrusion), including documentation of any Losses they claim to have suffered as a result of the alleged theft of their Personal Financial Information, if any, if they are objecting to any portion of the settlement dealing with reimbursement of Losses and for which they believe they would have an existing claim, or (b) an affidavit setting forth, in as much detail as the objector can reasonably provide, that they received a letter from their financial institution indicating that their Personal Financial Information had been compromised in the Heartland Intrusion, including the approximate date of said receipt; (iii) a written statement of all grounds for the objection, accompanied by any legal support for the objection; (iv) the identity of all counsel representing the objector; (v) the identity of all counsel representing the objector who will appear at the Final Fairness Hearing; (vi) a list of all persons who will be called to testify at the Final Fairness Hearing in support of the objection; (vii) a statement confirming whether the objector intends to personally appear and/or testify at the Final Fairness Hearing; and (viii) the objector's signature or the signature of the objector's duly authorized attorney or other duly authorized representative (along with documentation setting forth such representation). In order to be an effective objection, such

notice shall also identify, by case name, court, and docket number, all other cases in which the objector (directly or through counsel) or the objector's counsel (on behalf of any person or entity) has filed an objection to any proposed class action settlement, or has been a named plaintiff in any class action or served as lead plaintiff class counsel. To be timely, written notice of an objection in appropriate form must be filed with the Clerk of the United States District Court for the Southern District of Texas, P.O. Box 61010, Houston, TX 77208, twenty-one (21) days prior to the date set in the Notice for the Final Fairness Hearing, and served concurrently therewith upon one of Co-Lead Settlement Class Counsel (Ben Barnow, Barnow and Associates, P.C., One North LaSalle Street, Suite 4600, Chicago, IL 60602), and counsel for Heartland (Harvey J. Wolkoff, Ropes & Gray LLP, One International Place, Boston, MA, 02110). Counsel for Heartland may request that the objector's payment card number and expiration date be provided to the Claims Administrator, for the purposes described in Paragraph 2.2(a) above, with notice to Co-Lead Settlement Class Counsel of such request.

6. Releases

6.1 Upon the Effective Date, each Settlement Class Member, including Representative Consumer Plaintiffs, shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims. Further, upon the Effective Date, and to the fullest extent permitted by law, each Settlement Class Member, including Representative Consumer Plaintiffs, shall, either directly, indirectly, representatively, as a member of or on behalf of the general public, or in any capacity, be permanently barred and enjoined from commencing, prosecuting, or participating in any recovery in, any action in this or any other forum (other than participation in the settlement as provided herein) in which any of the Released Claims is asserted.

6.2 Upon the Effective Date, Heartland shall be deemed to have, and by operation of the Judgment shall have, fully, finally, and forever released, relinquished, and discharged, Representative Consumer Plaintiffs, each and all of the Settlement Class Members, Co-Lead Settlement Class Counsel, and all other Plaintiffs' Counsel who have consented to and joined in the settlement, from all claims, including Unknown Claims, based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims, except for enforcement of the Settlement Agreement. Any other Claims or defenses Heartland may have against such Persons, including without limitation any Claims based upon or arising out of any retail, banking, debtor-creditor, contractual or other business relationship with such Persons, that are not based upon or do not arise out of the institution, prosecution, assertion, settlement or resolution of the Litigation or the Released Claims, are specifically preserved and shall not be affected by the preceding sentence.

6.3 Notwithstanding any term herein, Heartland does not, by operation of this settlement, release any Claims it or its Related Parties may have based upon or arising out of the institution, prosecution, assertion, settlement or resolution of the Claims asserted against it in the "financial institution track" of the consolidated proceedings in the United States District Court for the Southern District of Texas, Claims based on its rights and duties under existing contracts with respect to fees, charges, penalties, assessments, fines, and allocations of loss by and all other obligations to payment card associations, and Claims based upon or arising out of any precompliance or compliance or noncompliance proceedings or any other proceedings under payment card association rules.

6.4 Notwithstanding any term herein, Heartland shall not have, or been deemed to have, released, relinquished, or discharged any Representative Consumer Plaintiff, Settlement Class Member, or Plaintiffs' Counsel who has consented to and joined in the settlement, from any claim

based on or arising out of any act of fraud, misrepresentation, or other misconduct in connection with the submission of any claim pursuant to the settlement set forth in this Settlement Agreement, or any claim against any of them based on or arising out of any failure to abide by the terms of the Settlement Agreement.

6.5 Notwithstanding any term herein, neither Heartland nor its Related Parties shall have or shall be deemed to have released, relinquished or discharged any Claim or defense against any Person other than Representative Consumer Plaintiffs, each and all of the Settlement Class Members, Co-Lead Settlement Class Counsel, and all other Plaintiffs' Counsel who have consented to and joined in the settlement. Persons not released by Heartland or its subsidiaries, divisions or affiliates of any Claim or defense include, without limitation, the Released Sponsoring Banks and their respective Related Parties.

7. Plaintiffs' Counsel's Attorneys' Fees, Costs, and Expenses, and Incentive Awards to Representative Consumer Plaintiffs and Named Plaintiffs

7.1 The Settling Parties did not discuss attorneys' fees, costs, and expenses, or incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs, as provided for in ¶¶ 7.2 and 7.3, until after the substantive terms of the settlement had been agreed upon, other than that Heartland would pay reasonable attorneys' fees, costs, and expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs as may be agreed to by Heartland and Co-Lead Settlement Class Counsel, and/or as ordered by the Court, or in the event of no agreement, then as ordered by the Court. Heartland and Co-Lead Settlement Class Counsel then negotiated and agreed as follows:

7.2 Heartland has agreed to pay, subject to Court approval, up to the amount of $725,000.00 to Co-Lead Settlement Class Counsel for attorneys' fees, and up to $35,000.00 to Co-Lead Settlement Class Counsel for reasonable costs and expenses, subject to reasonable

documentation. Co-Lead Settlement Class Counsel, in their sole discretion, to be exercised reasonably, shall allocate and distribute the amount of attorneys' fees, costs, and expenses awarded by the Court among Plaintiffs' Counsel. If any Plaintiff's Counsel disagrees with the allocation of fees and/or costs he or she has been awarded, they may, after fourteen (14) days of the receipt of said award, file a motion with the Court seeking an adjustment in said award. Co-Lead Settlement Class Counsel shall have fourteen (14) days to file a response to any such motion.

7.3 Heartland has agreed to pay incentive awards, subject to Court approval, up to the amount of $200.00 for each Representative Consumer Plaintiff, and $100.00 for each of the other Named Plaintiffs.

7.4 Within twenty (20) days of the Effective Date, Heartland shall pay the attorneys' fees, costs, and expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs, as set forth above in ¶¶ 7.2 and 7.3, to an account established by Co-Lead Settlement Class Counsel. Co-Lead Settlement Class Counsel shall thereafter distribute the award of attorneys' fees, costs, and expenses to Representative Consumer Plaintiffs and Named Plaintiffs consistent with ¶ ¶ 7.2 and 7.3.

7.5 The amount(s) of any award of attorneys' fees, costs, and expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs, is intended to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the settlement. No order of the Court or modification or reversal or appeal of any order of the Court concerning the amount(s) of any attorneys' fees, costs, or expenses, and incentive awards to Representative Consumer Plaintiffs and Named Plaintiffs awarded by the Court to Co-Lead Settlement Class Counsel shall affect whether the Judgment is Final or constitute grounds for cancellation or termination of this Settlement Agreement.

8. Administration of Claims

8.1 The Claims Administrator shall administer and calculate the claims submitted by Settlement Class Members under ¶ 2.2. Co-Lead Settlement Class Counsel and Heartland shall be given reports as to both claims and distribution, and have the right to review and obtain supporting documentation and challenge such reports if they believe them to be inaccurate or inadequate. The Claims Administrator's determination of the validity or invalidity of any such claims shall be binding, subject to the dispute resolution process set forth in ¶ 2.2(d).

8.2 Except as otherwise ordered by the Court, all Settlement Class Members who fail to timely submit a claim for any benefits hereunder within the time frames set forth herein, or such other period as may be ordered by the Court, or otherwise allowed, shall be forever barred from receiving any payments or benefits pursuant to the settlement set forth herein, but will in all other respects be subject to and bound by the provisions of the Settlement Agreement, the releases contained herein, and the Judgment.

8.3 No Person shall have any claim against the Claims Administrator, Heartland, or Co-Lead Settlement Class Counsel based on distributions of benefits made substantially in accordance with the Settlement Agreement and the settlement contained herein, or further order(s) of the Court.

9. Conditions of Settlement, Effect of Disapproval, Cancellation or Termination

9.1 The Effective Date of the settlement shall be conditioned on the occurrence of all of the following events:

(a) the Court has entered the Order of Preliminary Approval and Publishing of Notice of a Final Fairness Hearing, as required by ¶ 3.1, hereof;

(b) Heartland has not exercised its option to terminate the Settlement Agreement pursuant to ¶ 9.3 hereof;

(c) the Court has entered the Judgment granting final approval to the settlement as set forth herein; and

(d) the Judgment has become Final, as defined in ¶ 1.8, hereof.

9.2 If all of the conditions specified in ¶ 9.1 hereof are not satisfied, then the Settlement Agreement shall be canceled and terminated subject to ¶ 9.4 hereof, unless Co-Lead Settlement Class Counsel and counsel for Heartland mutually agree in writing to proceed with the Settlement Agreement.

9.3 Within seven (7) days after the deadline established by the Court for Persons to request exclusion from the Settlement Class, Co-Lead Settlement Class Counsel shall furnish to counsel for Heartland a complete list of all timely and valid requests for exclusion (the "Opt-Out List"). Heartland, in its sole discretion, shall have the option to terminate this Settlement Agreement if the aggregate number of Persons who submit valid and timely requests for exclusion from the Settlement Class exceeds 2,500 Persons eligible to be Settlement Class Members.

9.4 In the event that the Settlement Agreement is not approved by the Court or the settlement set forth in the Settlement Agreement is terminated in accordance with its terms, (a) the Settling Parties shall be restored to their respective positions in the Litigation, and shall jointly request that all scheduled litigation deadlines shall be reasonably extended by the Court so as to avoid prejudice to any Settling Party or litigant, which extension shall be subject to the decision of the Court, and (b) the terms and provisions of the Settlement Agreement shall have no further force and effect with respect to the Settling Parties and shall not be used in the Litigation or in any other proceeding for any purpose, and any judgment or order entered by the Court in accordance with the terms of the Settlement Agreement shall be treated as vacated, *nunc pro tunc*. Notwithstanding any

statement in this Settlement Agreement to the contrary, no order of the Court or modification or reversal on appeal of any order reducing the amount of attorneys' fees, costs, and expenses awarded to Co-Lead Settlement Class Counsel shall constitute grounds for cancellation or termination of the Settlement Agreement.

10. Miscellaneous Provisions

10.1 The Settling Parties: (a) acknowledge that it is their intent to consummate this agreement; and (b) agree to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Settlement Agreement, and any applicable requirements under the Class Action Fairness Act of 2005, and to exercise their best efforts to accomplish the terms and conditions of this Settlement Agreement.

10.2 The parties intend this settlement to be a final and complete resolution of all disputes between them with respect to the Litigation. The settlement compromises claims which are contested and shall not be deemed an admission by any Settling Party as to the merits of any claim or defense. The Settling Parties each agree that the settlement was negotiated in good faith by the Settling Parties, and reflects a settlement that was reached voluntarily after consultation with competent legal counsel. The Settling Parties reserve their right to rebut, in a manner that such party determines to be appropriate, any contention made in any public forum that the Litigation was brought or defended in bad faith or without a reasonable basis.

10.3 Neither the Settlement Agreement nor the settlement contained therein, nor any act performed or document executed pursuant to or in furtherance of the Settlement Agreement or the settlement: (a) is or may be deemed to be or may be used as an admission of, or evidence of, the validity or lack thereof of any Released Claim, or of any wrongdoing or liability of any of the Released Persons; or (b) is or may be deemed to be or may be used as an admission of, or evidence of, any fault or omission of any of the Released Persons, in any civil, criminal, or administrative

proceeding in any court, administrative agency, or other tribunal. Any of the Released Persons may file the Settlement Agreement and/or the Judgment in any action that may be brought against them or any of them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

10.4 Representative Consumer Plaintiffs shall be entitled to reasonable confirmatory discovery from Heartland to be conducted by Co-Lead Settlement Class Counsel. The period for confirmatory discovery shall begin no sooner than, and completed within ninety (90) days after, the date of preliminary approval of the settlement. Heartland shall cooperate in good faith to make such confirmatory discovery possible. At the conclusion of confirmatory discovery, Co-Lead Settlement Class Counsel shall, based upon all facts known to them, determine in good faith whether in their opinion the settlement is fair, reasonable and adequate. If Co-Lead Settlement Class Counsel determine that the settlement is not in their opinion fair, reasonable and adequate, Co-Lead Settlement Class Counsel shall terminate the Settlement and give notice to Heartland of such termination within ten (10) days after confirmatory discovery concludes. In such case, the settlement shall be null and void, and the parties shall return to their original positions. Heartland may defer incurring costs for notice under ¶ 3.2, and/or providing such notice under ¶ 3.2, until the period for Co-Lead Settlement Class Counsel to terminate the settlement pursuant to this paragraph has expired without Co-Lead Settlement Class Counsel taking such action.

10.5 All documents and materials provided by Heartland in confirmatory discovery shall be treated as confidential and returned to Heartland within sixty (60) days of the Effective Date.

10.6 The Settlement Agreement may be amended or modified only by a written instrument signed by or on behalf of all Settling Parties or their respective successors-in-interest.

10.7 This Settlement Agreement, together with the Exhibits attached hereto, constitutes the entire agreement among the parties hereto, and no representations, warranties, or inducements have been made to any party concerning the Settlement Agreement other than the representations, warranties, and covenants contained and memorialized in such document. Except as otherwise provided herein, each party shall bear its own costs.

10.8 Co-Lead Settlement Class Counsel, on behalf of the Settlement Class, are expressly authorized by the Representative Consumer Plaintiffs to take all appropriate actions required or permitted to be taken by the Settlement Class pursuant to the Settlement Agreement to effectuate its terms and also are expressly authorized to enter into any modifications or amendments to the Settlement Agreement on behalf of the Settlement Class which they deem appropriate.

10.9 Each counsel or other Person executing the Settlement Agreement on behalf of any party hereto hereby warrants that such Person has the full authority to do so.

10.10 The Settlement Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of original executed counterparts shall be filed with the Court.

10.11 The Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

10.12 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of the Settlement Agreement, and all parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in the Settlement Agreement.

10.13 This Settlement Agreement shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of Texas, and the rights and obligations of the parties to the Settlement Agreement shall be construed and enforced in accordance with, and

governed by, the internal, substantive laws of the State of Texas without giving effect to that State's choice of law principles.

10.14 As used herein, "he" means "he, she, or it;" "his" means "his, hers, or its," and "him" means "him, her, or it."

10.15 All dollar amounts are in United States dollars.

10.16 All agreements made and orders entered during the course of the Litigation relating to the confidentiality of information shall survive this Settlement Agreement.

IN WITNESS WHEREOF, the parties hereto have caused the Settlement Agreement to be executed, by their duly authorized attorneys.

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IN WITNESS WHEREOF, the parties hereto have caused the Settlement Agreement to be executed, by their duly authorized attorneys.

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Exhibit O

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHAWNDEE HARTLESS, on Behalf of Herself and All Others Similarly Situated and the General Public, Plaintiff, vs. CLOROX COMPANY, Defendant.	No. 06-CV-02705-CAB CLASS ACTION STIPULATION OF SETTLEMENT

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X. MISCELLANEOUS 17

This Stipulation of Settlement is made and entered into by plaintiff Shawndee Hartless, on behalf of herself, the general public, and all others similarly situated and defendant The Clorox Company.

I. DEFINITIONS

A. As used in this Stipulation the following capitalized terms have the meanings specified below:

1. "Action" means the case entitled *Hartless v. Clorox Company*, filed on December 13, 2006, in the U.S. District Court for the Southern District of California and assigned Case No. 06-CV-2705-CAB.

2. "Approved Claim(s)" means the claims approved by the Claim Administrator according to the claims criteria in Exhibit A.

3. "Claim Administrator" means the independent company agreed upon by the Parties to provide the Class and Publication Notice and administer the claims process. The Parties agree that The Garden City Group, Inc. will be retained as the Claim Administrator.

4. "Claims Cost Estimate" is the Claim Administrator's good faith best estimate of all the expenses to be incurred in the claims process.

5. "Claim Forms" mean the forms that are substantially in the form of Exhibit F hereto. The "Claim Form 1" is Exhibit F(1) hereto; the "Claim Form 2" is Exhibit F(2) hereto.

6. "Claim Fund" means the fund for payment of Class Members' claims, certain notice and administration costs, and expenses related to maintaining the fund (including taxes that may be owed by the Claim Fund), if any.

7. "Claim Fund Balance" means the balance at the end of the Claim Review Period, consisting of: (a) the first $7 million paid into the Claim Fund; and (b) additional amounts, if any, up to $1 million, paid into the Claim Fund as necessary to pay Class Members' claims, minus (i) the total amount paid to Class Members who submit Approved Claims; (ii) $750,000 paid to the Claim Administrator toward notice and claim administration costs; and (iii) expenses associated with maintaining the Claim Fund (including taxes that may be owed by the Claim Fund), if any.

8. "Claim Review Period" means the three month period beginning no later than 10 days after the Effective Date.

9. "Claim Submission Period" means the period beginning on the date notice to the Class is first published, and continuing until 30 days after the date of the Final Approval Hearing.

10. "Class" and/or "Class Members" means all persons or entities in the United States who purchased, used, or suffered any property damage from the use of Clorox Automatic Toilet Bowl Cleaner with Bleach ("CATBC") during the Class Period. Specifically excluded from the Class are: (a) all federal court judges who have presided over this Action and their immediate family; (b) all persons who have submitted a valid request for exclusion from the Class; (c) Defendant's employees, officers, directors, agents, and representatives and their family members; and (d) those who purchased CATBC for the purpose of re-sale.

11. "Class Counsel" means the attorneys of record for plaintiffs in the Clorox Lawsuits.

12. "Co-Lead Counsel" means the law firm of Blood Hurst & O'Reardon LLP and the law firm of Bonnett, Fairbourn, Friedman & Balint, P.C.

13. "Class Notice" means the "Notice of Class Action Settlement" substantially in the same form as Exhibit E attached hereto.

14. "Class Notice Package" means the information as approved in form and content by Class Counsel and Defendant's Counsel and to be approved by the Court. Class Notice Packages will include: (a) the Class Notice; and (b) the Claim Forms. The Class Notice Package will also be available in Spanish.

15. "Class Period" is from December 13, 2002 to the date notice to the Class is first published.

16. "Clorox Lawsuits" means the following cases:

(a) *Hartless v. The Clorox Co.*, No. 37-2009-93810-CU-BT-CTL (San Diego Superior Court);

(b) *Hartless v. Clorox Company*, Case No. 06-CV-2705-CAB (Southern District of California); and

(c) *Wachowski v. Clorox Company*, Case No. CV-09-138-CAB (Southern District of California).

17. "Court" means the U.S. District Court for the Southern District of California.

18. "Defendant" means The Clorox Company, also referred to herein as "Clorox."

19. "Defendant's Counsel" means the law firm of O'Melveny & Myers LLP.

20. "Distribution Plan" means a written final accounting and plan of distribution prepared by the Claim Administrator, identifying: (a) each claimant whose claim was approved, including the dollar amount of the payment awarded to each such claimant, and the dollar amount of any pro rata reduction required by ¶III.B.2(e); (b) each claimant whose claim was rejected; (c) the dollar amount of the Claim Fund Balance to be disbursed to the recipient(s) selected by the Court as provided in ¶III.B.2(d); and (d) a final accounting of all administration fees and expenses incurred by the Claim Administrator.

21. "Effective Date" means the date described in ¶VII.A.

22. "Final Approval Hearing" means the hearing to be held by the Court to consider and determine whether the proposed settlement of the Action as contained in this Stipulation should be approved as fair, reasonable, and adequate, and whether the Final Settlement Order and Judgment approving the settlement contained in this Stipulation should be entered.

23. "Final Settlement Order and Judgment" means an order and judgment entered by the Court:

(a) Giving final approval to the terms of this Stipulation as fair, adequate, and reasonable;

(b) Providing for the orderly performance and enforcement of the terms and conditions of the Stipulation;

(c) Dismissing the Action with prejudice;

(d) Discharging the Released Parties of and from all further liability for the Released Claims to the Releasing Parties; and

(e) Permanently barring and enjoining the Releasing Parties from instituting, filing, commencing, prosecuting, maintaining, continuing to prosecute, directly or indirectly, as an

individual or collectively, representatively, derivatively, or on behalf of them, or in any other capacity of any kind whatsoever, any action in the California Superior Courts, any other state court, any federal court, before any regulatory authority, or in any other tribunal, forum, or proceeding of any kind, against the Released Parties that asserts any Released Claims that would be released and discharged upon final approval of the Settlement as provided in ¶¶IV.A and B of this Stipulation.

(f) The actual form of the Final Settlement Order and Judgment entered by the Court may include additional provisions as the Court may direct that are not inconsistent with this Stipulation, and will be substantially in the form attached hereto as Exhibit G.

24. "Notice Plan" or "Notice Program" means the plan for dissemination of the Publication Notice and Class Notice Package as described in ¶VI.

25. "Fund Institution" means a third party institution which the Parties will approve and to which Clorox shall pay $7 million in trust to a fund, and shall pay up to an additional $1 million if needed to pay class member claims as described in ¶III.B.1.

26. "Parties" means the Plaintiff and the Defendant.

27. "Plaintiff" means Shawndee Hartless.

28. "Preliminary Approval Order" means the "Order re: Preliminary Approval of Class Action Settlement," substantially in the form of Exhibit B.

29. "Publication Notice" means information as approved in form and content by Co-Lead Counsel and Defendant's Counsel and to be approved by the Court, substantially in the same form as Exhibit C attached hereto. The Publication Notice will be translated into Spanish for dissemination in Spanish publications pursuant to the Notice Plan.

30. "Rejected Claims" means all claims rejected according to the claims criteria in Exhibit A.

31. "Released Claims" means those claims released pursuant to ¶¶IV.A and B of this Stipulation.

32. "Released Parties" means Defendant and each of its parent, affiliated and subsidiary corporations and all of their agents, employees, partners, predecessors, successors, assigns, insurers, attorneys, officers and directors.

33. "Releasing Parties" means the named plaintiffs in the Clorox Lawsuits, individually and as representatives of the general public, and the Class Members.

34. "Settlement Website" means the website established by the Claim Administrator that will contain documents relevant to the settlement including the Class Notice Package in English and Spanish. Claim Forms may be submitted by Class Members via the Settlement Website.

35. "Stipulation of Settlement" and/or "Stipulation" means this Stipulation of Settlement, including its attached exhibits (which are incorporated herein by reference), duly executed by plaintiffs of record in the Clorox Lawsuits, Class Counsel, Defendant and Defendant's Counsel.

B. Capitalized terms used in this Stipulation, but not defined above, shall have the meaning ascribed to them in this Stipulation and the exhibits attached hereto.

II. RECITALS

A. On December 13, 2006, plaintiff Hartless filed a complaint against Defendant in the U.S. District Court for the Southern District of California. The complaint alleged: (1) violation of the Consumers Legal Remedies Act ("CLRA"), California Civil Code ("Civil Code") §1750 *et seq.*; (2) breach of the Implied Warranty of Merchantability; and (3) violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code ("Bus. & Prof. Code") §17200 *et seq.*

B. On March 19, 2007, Clorox's motion to dismiss was granted in part and denied in part and plaintiff Hartless was given leave to file an amended complaint.

C. On November 28, 2007, plaintiff Hartless filed her First Amended Complaint alleging causes of action for: (1) violation of the CLRA; and (2) violation of the UCL.

D. The *Hartless* complaint alleges that on each package of its Automatic Toilet Bowl Cleaner with Bleach ("CATBC" or "Drop-In Tablets"), Clorox falsely and deceptively states that the CATBC "Does not harm plumbing." Plaintiff alleges that the chemicals in the Drop-In Tablets are highly corrosive and attack the toilet tank components, in particular causing the rubber and plastic parts to deteriorate until the components fail or no longer seal properly, and that Plaintiff suffered such property damage. Plaintiff also claims that Clorox – based on its own tests as well as independent testing – knew or should have known that the Drop-In Tablets would deteriorate the

toilet tank parts, and yet sold the product by telling its customers that the CATBC would not harm plumbing. The complaint seeks monetary damages and restitutionary relief. The allegations of the complaint are incorporated herein for reference.

E. Clorox denies Plaintiff's allegations, and on December 17, 2007 Clorox filed its answer to the *Hartless* complaint.

F. On November 20, 2008, Peter Wachowski independently filed a complaint against Clorox in the U.S. District Court for the Northern District of California, asserting substantially similar allegations. On January 22, 2009, the *Wachowski* action was transferred to the U.S. District Court for the Southern District of California and deemed a related action to the *Hartless* case.

G. On July 10, 2009, Shawndee Hartless filed a claim in Superior Court of the State of California, County of San Diego ("*Hartless II*"). The state court complaint seeks injunctive and declatory relief.

H. Before commencing the respective actions, counsel for plaintiff Hartless and counsel for plaintiff Wachowski affirm that each conducted separate examinations and evaluations of the relevant law and facts to assess the merits of their respective plaintiff's claims and to determine how to best serve the interests of the members of the proposed classes. After instituting her action, plaintiff Hartless served formal written discovery requests on Clorox in the form of: Requests for Production of Documents; First and Second Sets of Interrogatories; and First and Second sets of Requests for Admissions. Clorox provided written responses to each set of requests and, in some cases, supplemental responses after the parties met and conferred. Plaintiff Hartless also served document subpoenas on five of the companies involved in marketing and advertising for Clorox and received responsive documents from some of them.

I. In response to the document requests, Clorox produced approximately 42,400 pages of documents. By the fall of 2009, Hartless' Counsel completed their review of the Clorox documents. In further preparation for class certification and trial, Hartless served a Fed. R. Civ. P. 30(b)(6) notice of deposition on Clorox and an individual deposition notice of a Clorox employee. In addition, Hartless served a deposition subpoena on a former employee of Clorox who was responsible for some testing of Clorox's CATBC. The depositions were scheduled for November

2009. In addition, Hartless' Counsel conducted an informal interview of a former Clorox employee and worked with consultants to review and analyze the CATBC testing documents produced by Clorox. Plaintiffs' motions for class certification were due to be filed in the federal actions on December 7, 2009.

J. On October 27, 2009, Class Counsel and Clorox and its counsel participated in a settlement mediation with the Honorable Gary Taylor (Retired). Based upon Plaintiff's investigation and evaluation of the facts and law relating to the matters alleged in the pleadings, Plaintiff and Class Counsel agreed to settle the Action pursuant to the provisions of this Stipulation after considering, among other things: (1) the substantial benefits available to the Class under the terms of this Stipulation; (2) the attendant risks and uncertainty of litigation, especially in complex actions such as this, as well as the difficulties and delays inherent in such litigation; and (3) the desirability of consummating this Stipulation promptly to provide effective relief to plaintiffs and the Class.

K. Clorox has denied and continues to deny each and all of the claims and contentions alleged by plaintiffs. Clorox has expressly denied and continues to deny all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Action and states that its CATBC is a safe product when used as directed. Clorox also has denied and continues to deny that its CATBC label was false or misleading.

L. Nonetheless, Clorox has concluded that further defense of the Action would be protracted and expensive, and that it is desirable that the Action be fully and finally settled in the manner and upon the terms and conditions set forth in the Stipulation. Defendant also has taken into account the uncertainty and risks inherent in any litigation. Clorox, therefore, has determined that it is desirable and beneficial to it that the Action be settled in the manner and upon the terms and conditions set forth in the Stipulation.

III. SETTLEMENT RELIEF

In consideration of the covenants set forth herein, the Parties agree as follows:

A. Prospective Relief

Clorox will do the following:

1. Clorox will cease using the language "Does not harm plumbing" or substantially similar language that reasonably conveys the same meaning on future CATBC labels and packages, promotional materials, and/or advertisements.

B. Retrospective Relief

Clorox does not sell the CATBC directly to consumers and thus has no way to identify individual Class Members. Additionally, an individual Class Member's recovery may be too small to make traditional methods of proof economically feasible. Further, Class Members are not likely to retain records of small purchases or repairs for long periods of time. In order to assure that Class Members have access to the proceeds of this settlement, a Claim Fund will be established and administered as follows:

1. Clorox shall pay up to $8 million to the Fund Institution to establish the Claim Fund for payment of Class Member claims for alleged property damage (which damages may be measured by the purchase price) resulting from the purchase and/or use of CATBC, and for the payment of certain notice and administration costs and expenses, as follows:

(a) Not more than 30 days after the Court's order granting Preliminary Approval, Clorox shall pay $760,000 to the Fund Institution.

(b) Within 30 days after the Effective Date, Clorox shall pay $6,240,000 in trust to the Fund Institution.

(c) If, and only if, amounts to be paid from the Claim Fund under ¶¶III.B.2(a), (b) and (c) exceed $7 million, Clorox shall pay up to an additional $1 million into the Claim Fund as needed to pay Class Members' Approved Claims.

2. The Claim Fund shall be applied as follows:

(a) To reimburse or pay $750,000 of the total costs reasonably and actually incurred by the Claim Administrator in connection with providing notice to and administering claims submitted by the Class. All costs incurred by the Claim Administrator and/or Clorox in

connection with providing notice to and administering claims for the Class in excess of $750,000, shall be paid separately by Clorox and shall not be paid out of the Claim Fund;

(b) To distribute to Class Members who submit Approved Claims to the Claim Administrator and to pay class representative service awards;

(c) To pay for expenses associated with maintaining the Claim Fund (including taxes that may be owed by the Claim Fund), if any;

(d) If the amounts to be paid from the Claim Fund under ¶¶III.B.2(a), (b) and (c) do not exceed $7 million, the remainder of the Claim Fund (the "Claim Fund Balance") shall be distributed to an appropriate non-profit or civic entity(ies) agreed to by the Parties and approved by the Court for use in a manner that the Court shall determine will be an appropriate vehicle to provide the next best use of compensation to Class Members arising out of claims that have been made by Plaintiff in this Action and as consideration for the extinguishment of those claims;

(e) If the amounts to be paid from the Claim Fund under ¶¶III.B.2(a), (b) and (c) above exceed $8 million, all Approved Claims will be reduced pro rata, based on the respective dollar amounts of the Approved Claims, until the total aggregate of Approved Claims, $750,000 paid in notice and/or claim administration costs, and expenses associated with maintaining the Claim Fund, if any, equals $8 million.

3. Class Members shall have the opportunity to submit a claim to the Claim Administrator during the Claim Submission Period.

4. The claim process will be administered by a Claim Administrator, according to the criteria set forth in Exhibit A, and neither Class Counsel nor Clorox shall participate in resolution of such claims.

5. The decision of the Claim Administrator shall be final and binding on Clorox and all Class Members submitting Claims, and neither Clorox nor such Class Members shall have the right to challenge or appeal the Claim Administrator's decision.

6. All expenses of the Claim Administrator shall be paid as provided in ¶III.B.2(a).

7. The Claim Administrator shall approve or reject all claims according to the claims criteria in Exhibit A. The determination of claims shall occur during the Claim Review Period.

8. Within 15 days after conclusion of the Claim Review Period, the Claim Administrator shall provide to Clorox and Co-Lead Counsel a written final accounting and Distribution Plan identifying: (a) each claimant whose claim was approved, including the dollar amount of the payment awarded to each such claimant, and the dollar amount of any pro rata reduction required by ¶III.B.2(e); (b) each claimant whose claim was rejected; (c) the dollar amount of the Claim Fund Balance to be disbursed to the recipient(s) ordered by the Court as provided in ¶III.B.2(d); and (d) a final accounting of all administration fees and expenses incurred by the Claim Administrator. No sooner than 20 days, but not later than 45 days after delivering the Distribution Plan, the Claim Administrator shall disburse the remaining amounts in the Claim Fund according to the Distribution Plan and mail letters to all claimants with Rejected Claims explaining the rejection. In no event shall a Class Member's claim be paid until the conclusion of the Claim Review Period.

9. If any distribution checks mailed to Class Members are returned as non-deliverable, or are not cashed within 180 days, or are otherwise not payable, any such funds shall be disbursed to the recipients ordered by the Court as provided in ¶III.B.2(d).

IV. RELEASES

A. As of the Effective Date, in consideration of the settlement obligations set forth herein, any and all claims, demands, rights, causes of action, suits, petitions, complaints, damages of any kind, liabilities, debts, punitive or statutory damages, penalties, losses and issues of any kind or nature whatsoever, asserted or unasserted, known or unknown (including, but not limited to, any and all claims relating to or alleging deceptive or unfair business practices, false or misleading advertising, intentional or negligent misrepresentation, negligence, concealment, omission, unfair competition, promise without intent to perform, unsuitability, unjust enrichment, and any and all claims or causes of action arising under or based upon any statute, act, ordinance, or regulation governing or applying to business practices generally, including, but not limited to, any and all claims relating to or alleging violation of Bus. & Prof. Code §§17200-17209 and §17500, the CLRA (Civil Code §§1750-1784), or any and all other federal, state, and /or local statutes analogous or similar to the California statutes cited herein), arising out of or related to the Clorox Lawsuits, that were asserted or reasonably could have been asserted in the Clorox Lawsuits by or on behalf of all

Releasing Parties, whether individual, class, representative, legal, equitable, administrative, direct or indirect, or any other type or in any other capacity, against any Released Party ("Released Claims") shall be finally and irrevocably compromised, settled, released, and discharged with prejudice.

B. Each of the Releasing Parties hereby waives any and all rights and benefits arising out of the facts alleged in the Clorox Lawsuits by virtue of the provisions of Civil Code §1542, or any other provision in the law of the United States, or any state or territory of the United States, or principle of common law or equity that is similar, comparable or equivalent to Civil Code §1542, with respect to this release. The Releasing Parties are aware that Civil Code §1542 provides as follows:

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

The Releasing Parties expressly acknowledge that they may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, but the Releasing Parties, upon the Effective Date, shall be deemed to have, and by operation of law shall have, fully, finally and forever settled, released, and discharged any and all Released Claims, known or unknown, suspected or unsuspected, whether or not concealed or hidden, that now exist or heretofore have existed upon any theory of law or equity, including but not limited to, Released Claims based on conduct that is negligent, reckless, intentional, with or without malice, or a breach of any duty, law or rule, without regard to the subsequent discovery or existence of such different or additional facts. The Parties agree that the Released Claims constitute a specific and not a general release.

C. The Releasing Parties shall be deemed to have agreed that the release set forth in ¶¶IV.A and B (the "Release") will be and may be raised as a complete defense to and will preclude any action or proceeding based on the Released Claims.

D. As of the Effective Date, by operation of entry of judgment, the Released Parties shall be deemed to have fully released and forever discharged Plaintiff, all other Class Members and Class Counsel from any and all claims of abuse of process, malicious prosecution, or any other claims arising out of the initiation, prosecution or resolution of the Clorox Lawsuits including, but not

limited to, claims for attorneys' fees, costs of suit or sanctions of any kind, or any claims arising out of the allocation or distribution of any of the consideration distributed pursuant to this Stipulation of Settlement.

V. CLASS CERTIFICATION FOR SETTLEMENT PURPOSES ONLY

Solely for the purposes of the settlement of this Action, the Parties agree to the certification of a Class of all persons or entities in the United States who purchased, used, or suffered any property damage from the use of Clorox Automatic Toilet Bowl Cleaner from December 13, 2002, to the date notice to the Class is to be published. Plaintiff Shawndee Hartless shall make this request for certification to the U.S. District Court for the Southern District of California, currently assigned to the Honorable Cathy Ann Bencivengo; and Co-Lead Counsel shall request the Court to enter an order, which, among other things, certifies the Class for settlement purposes, as set forth in this paragraph. Defendant contends that certification of the alleged class (other than on a settlement basis) would not be possible absent this settlement because individual issues would predominate.

In the event this Stipulation of Settlement and the settlement proposed herein is not finally approved, or is terminated, cancelled, or fails to become effective for any reason whatsoever, this class certification, to which the parties have stipulated solely for the purpose of the settlement of the Action, shall be null and void and the Parties will revert to their respective positions immediately prior to the execution of this Stipulation of Settlement. Under no circumstances may this Stipulation of Settlement be used as an admission or as evidence concerning the appropriateness of class certification in these or any other actions against Clorox.

VI. CLASS NOTICE AND COURT APPROVAL

A. Notice Order; Preliminary Approval

Within 30 days after the execution of the Stipulation of Settlement, the Parties shall apply to the Court for a Preliminary Approval Order substantially in the form and content of Exhibit B, conditionally certifying the Class for settlement purposes as defined in ¶V, for preliminary approval of the settlement, for scheduling a final approval hearing, and for approving the contents and method of dissemination of the proposed Publication Notice and Class Notice Package.

B. The Notice Program

The notice program shall consist of notice by publication (the Publication Notice, attached hereto as Exhibit C) which generally describes the settlement and directs all interested parties to a detailed Class Notice available on the Settlement Website and, at the request of interested parties, by U.S. Mail. Co-Lead Counsel shall also place a link to the Settlement Website on the websites of Blood Hurst & O'Reardon, LLP and Bonnett, Fairbourn, Friedman & Balint, P.C. for a period starting from the date the Publication Notice is published, and continuing no longer than the end of the Claim Submission Period. Clorox shall pay the cost associated with the Publication Notice and Class Notice Package, except those costs associated with posting and maintaining notice on Plaintiffs' Counsel's Internet websites.

1. Publication Notice

Commencing at least 105 days before the Final Approval Hearing or some other date as set by the Court, Clorox shall cause to be published the Publication Notice substantially in the form and content of Exhibit C pursuant to the Notice Plan described in Exhibit D. The Publication Notice as shown in Exhibit C shall incorporate Claim Form 1. The Notice Plan shall include dissemination of the Publication Notice translated into Spanish and published in Spanish.

2. Class Notice Package

The Class Notice Package shall be available in electronic format on the Settlement Website and mailed as a hard copy by the Claim Administrator upon request. In addition, Clorox shall direct the Claim Administrator to mail the Class Notice Package to counsel for the plaintiff(s) in any pending litigation that concerns property damage or false advertising related to CATBC against Defendant. To the extent that Clorox has an address for any persons who complained to or inquired of Clorox concerning CATBC during the Class Period, Clorox shall also direct the Claim Administrator to mail the Class Notice Package to the last known address of each such person.

Each Class Notice Package shall contain a Class Notice substantially in the form of Exhibit E and the Claim Forms substantially in the forms of Exhibits F(1) and F(2).

3. Notice of Deadlines

Both the Publication Notice and the Class Notice shall inform Class Members of the dates by which they must file any objections, requests for exclusions, and submit a Claim Form. Class Members shall have 45 days from the date notice to the Class is to be last published to file objections, to file notices of intent to appear at the Final Approval Hearing, or to submit exclusion requests. Class Members will have the opportunity to submit a Claim Form during the period beginning on the date notice to the Class is first published, and continuing until 30 days after the date of the Final Approval Hearing.

C. Final Approval Hearing

The Parties shall request that after notice is given, the Court hold a Final Approval Hearing for the purpose of determining whether final approval of the settlement of the Action as set forth herein is fair, adequate, and reasonable to the Class Members, and enter a Final Settlement Order and Judgment dismissing the Action with prejudice substantially in the form and content of Exhibit G.

D. Requests for Exclusion

If prior to the Final Approval Hearing, the number of putative Class Members who timely request exclusion from the class in accordance with the provisions of the Preliminary Approval Order exceeds 2,000, Clorox shall have the right, but not the obligation, to terminate this Stipulation of Settlement or to seek appropriate modifications to this Stipulation of Settlement that adequately protect the Parties. Copies of all Requests for Exclusion received by the Claim Administrator, together with copies of all written revocations of Requests for Exclusion received, shall be delivered to the Parties' counsel no later than 8 days after the Class Members' deadline to submit such exclusion requests, or at such other time as the Parties may mutually agree in writing.

E. The *Hartless* State Court Action and the *Wachowski* Action

1. Upon execution of the Stipulation of Settlement by all signatories, Co-Lead Counsel shall notify the San Diego Superior Court in which the injunctive relief action captioned *Hartless v. The Clorox Co.*, No. 37-2009-93810-CU-BT-CTL ("*Hartless II*"), is pending of the intent to settle that action through this Stipulation of Settlement and request a stay of the state court action during the settlement process. Once the events and conditions set forth in ¶¶VII.A 1, 2, and 5 have been

met or have occurred, Co-Lead Counsel shall request that the *Hartless II* state court action be dismissed with prejudice.

2. Upon execution of the Stipulation of Settlement by all signatories, counsel for plaintiff Peter Wachowski shall notify the Court of the intent to settle the *Wachowski* action through this Stipulation of Settlement and request a stay of his action during the settlement process. Once the events and conditions set forth in ¶¶VII.A 1, 2, and 5 have been met or have occurred, counsel for Wachowski shall request that his action be dismissed with prejudice.

VII. CONDITIONS; TERMINATION

A. This Settlement shall become final on the first date after which all of the following events and conditions have been met or have occurred (the "Effective Date"):

1. The Court has preliminarily approved this Stipulation (including all attachments), the settlement set forth herein and the method for providing notice to the Class;

2. The Court has entered a Final Settlement Order and Judgment in the Action;

3. The San Diego Superior Court has entered an order dismissing *Hartless v. The Clorox Co.*, No. 37-2009-93810-CU-BT-CTL, with prejudice;

4. The U.S. District Court for the Southern District of California has entered an order dismissing *Wachowski v. Clorox Co.*, No. CV-09-138-CAB, with prejudice; and

5. One of the following has occurred:

(a) The time to appeal from such orders has expired and no appeals have been timely filed;

(b) If any such appeal has been filed, it has finally been resolved and the appeal has resulted in an affirmation of the Final Settlement Order and Judgment; or

(c) The Court, following the resolution of any such appeals, has entered a further order or orders approving the Settlement of the Action on the terms set forth in this Stipulation of Settlement, and either no further appeal has been taken from such order(s) or any such appeal has resulted in affirmation of the settlement order.

B. If the Settlement is not made final (per the provisions of ¶VII.A.), this entire Stipulation shall become null and void as set forth in ¶V of this Stipulation, except that the Parties

shall have the option to agree in writing to waive the event or condition and proceed with this settlement, in which event the Stipulation of Settlement shall be deemed to have become final on the date of such written agreement. In the event the Stipulation becomes null and void, Clorox shall be responsible for all administrative and notice costs incurred as of the date the Stipulation becomes null and void, including the costs of notifying the Class and any claim administration costs.

VIII. COSTS, FEES AND EXPENSES

A. Attorneys' Fees and Expenses

1. The Parties agree that an award of attorneys' fees and expenses to Class Counsel will be in addition to the consideration to Plaintiff, the Class Members and the general public, and shall in no way reduce the settlement consideration.

2. Co-Lead Counsel shall make, and Clorox agrees not to oppose, an application for an award of attorneys' fees and expenses not to exceed a total of $2,250,000. Defendant shall make all reasonable efforts to pay the award of Class Counsels' fees and expenses within 15 days and in no event later than 30 days after the Effective Date or after the issuance of an order awarding such amount, whichever is later.

3. Class Counsel, in their sole discretion, shall allocate and distribute the award of attorneys' fees and expenses among Class Counsel.

B. Class Representative Award

Defendant agrees not to oppose an application for class representative service awards to be paid out of the Claim Fund to the named plaintiffs in the Clorox Lawsuits in an amount not to exceed $4,000 for Hartless and $2,000 for Wachowski. Such awards shall be paid within 30 days after the Effective Date or within 30 days after the issuance of an order awarding such amount, whichever is later. In the event that a Class Member appeals the award of attorneys' fees and costs, or the class representative service awards, Defendant shall not take a position contrary to this Stipulation.

C. Claim Administration Costs

Clorox shall bear the costs associated with administering the claim process, and implementing the prospective relief, as provided in ¶III.

D. Costs of Class Notice

Clorox shall bear the costs of notifying the Class of this proposed settlement, as provided in ¶III.B.2(a).

IX. COVENANTS AND WARRANTIES

A. Authority to Enter Agreement

Plaintiff and Defendant each covenants and warrants that she/it has the full power and authority to enter into this Stipulation of Settlement and to carry out its terms, and that they have not previously assigned, sold, or otherwise pledged or encumbered any right, title or interest in the claims released herein or their right, power and authority to enter into this Stipulation of Settlement. Any person signing this Stipulation of Settlement on behalf of any other person or entity represents and warrants that he or she has full power and authority to do so and that said other person or entity is bound hereby.

B. Represented by Counsel

In entering into this Stipulation of Settlement, the Parties represent they have relied upon the advice of attorneys, who are the attorneys of their own choice, concerning the legal consequences of this Stipulation of Settlement; that the terms of this Stipulation of Settlement have been explained to them by their attorneys; and that the terms of this Stipulation of Settlement are fully understood and voluntarily accepted by the Parties.

C. No Other Actions

As of the date of executing this Stipulation, aside from lawsuits identified in documents produced in this Action, Plaintiff and Co-Lead Counsel represent and warrant that they are not aware of any action or potential action other than the Clorox Lawsuits that: (1) raises allegations similar to those asserted in the Clorox Lawsuits; and (2) is pending or is expected to be filed in any forum by any person or entity against Clorox. Until the Effective Date, Plaintiff and her Counsel shall have a continuing duty to notify Clorox if Plaintiffs or Plaintiffs' Counsel become aware of any such action.

X. MISCELLANEOUS

A. Governing Law. The interpretation and construction of this Stipulation of Settlement shall be governed by the laws of the State of California.

B. Counterparts. This Stipulation of Settlement may be executed in counterparts. All counterparts so executed shall constitute one agreement binding on all of the Parties hereto, notwithstanding that all Parties are not signatories to the original or the same counterpart.

C. No Drafting Party. Any statute or rule of construction that ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Stipulation of Settlement and the Parties agree that the drafting of this Stipulation has been a mutual undertaking.

D. Entire Agreement. All agreements, covenants, representations and warranties, express or implied, written or oral, of the Parties hereto concerning the subject matter hereof are contained in this Stipulation of Settlement and the exhibits hereto. Any and all prior or contemporaneous conversations, negotiations, drafts, terms sheets, possible or alleged agreements, covenants, representations and warranties concerning the subject matter of this Stipulation of Settlement are waived, merged herein and superseded hereby.

E. Retained Jurisdiction. The Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of this Stipulation, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Stipulation.

F. Cooperation. Each of the Parties hereto shall execute such additional pleadings and other documents and take such additional actions as are reasonably necessary to effectuate the purposes of this Stipulation of Settlement.

G. Amendments in Writing. This Stipulation of Settlement may only be amended in writing signed by Co-Lead Counsel and Defendant's Counsel.

H. Binding Effect; Successors and Assigns. This Stipulation of Settlement shall inure to the benefit of, and shall be binding upon, the Parties hereto as well as the legal successors and assigns of the Parties hereto and each of them.

I. Construction. As used in this Stipulation of Settlement, the terms "herein" and "hereof" shall render to this Stipulation in its entirety, including all exhibits and attachments, and not limited to any specific sections. Whenever appropriate in this Stipulation of Settlement, the singular

shall be deemed to refer to the plural, and the plural to the singular, and pronouns of any gender shall be deemed to include both genders.

J. Waiver in Writing. No waiver of any right under this Stipulation of Settlement shall be valid unless in writing.

K. Computation of Time. All time periods set forth herein shall be computed in business days if seven days or less and calendar days if eight days or more unless otherwise expressly provided. In computing any period of time prescribed or allowed by this Stipulation or by order of the Court, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal or court holiday, or, when the act to be done is the filing of a paper in Court, a day in which weather or other conditions have made the office of the clerk of the Court inaccessible, in which event the period shall run until the end of the next day as not one of the aforementioned days. As used in this subsection, "legal or court holiday" includes New Year's Day, Martin Luther King Jr. Day, Presidents' Day, Memorial Day, Independent Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day and any other day appointed as a holiday by the President or the Congress of the United States or by the State of California.

L. No Admission of Liability. Each of the Parties understands and agrees that he, she or it has entered into this Stipulation of Settlement for purpose of purchasing peace and preventing the risks and costs of any further litigation or dispute. This settlement involves disputed claims; specifically, Clorox denies any wrongdoing, and the Parties understand and agree that neither this Stipulation of Settlement, nor the fact of this settlement, may be used as evidence or admission of any wrongdoing by Clorox.

M. Notice. Any notice to the Parties required by this Stipulation of Settlement shall be given in writing by first class US Mail and e-mail to:

For Plaintiff:

Timothy G. Blood
Leslie E. Hurst
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: (619) 338-1100
tblood@bholaw.com
lhurst@bholaw.com

For Defendant:

Sabrina H. Strong
Adam G. Levine
O'Melveny & Myers LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
sstrong@omm.com
alevine@omm.com

IN WITNESS WHEREOF, the parties hereto have executed this Stipulation of Settlement as of the dates set forth below.

DATED: May , 2010

Shawn Dee Hartless
SHAWNDEE HARTLESS

DATED: May , 2010

PETER WACHOWSKI

DATED: May _____, 2010

THE CLOROX COMPANY

BY: _____

TITLE: _____

For Plaintiff:

Timothy G. Blood
Leslie E. Hurst
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: (619) 338-1100
tblood@bholaw.com
lhurst@bholaw.com

For Defendant:

Sabrina H. Strong
Adam G. Levine
O'Melveny & Myers LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
sstrong@omm.com
alevine@omm.com

IN WITNESS WHEREOF, the parties hereto have executed this Stipulation of Settlement as of the dates set forth below.

DATED: May , 2010

SHAWNDEE HARTLESS

DATED: May 17 , 2010

Peter C. Wachowski

PETER WACHOWSKI

DATED: May _____, 2010

THE CLOROX COMPANY

BY: _____

TITLE: _____

For Plaintiff:

Timothy G. Blood
Leslie E. Hurst
Blood Hurst & O'Reardon, LLP
600 B Street, Suite 1550
San Diego, CA 92101
Telephone: (619) 338-1100
tblood@bholaw.com
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For Defendant:

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O'Melveny & Myers LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
sstrong@omm.com
alevine@omm.com

IN WITNESS WHEREOF, the parties hereto have executed this Stipulation of Settlement as of the dates set forth below.

DATED: May , 2010

SHAWNDEE HARTLESS

DATED: May , 2010

PETER WACHOWSKI

DATED: May 21, 2010

THE CLOROX COMPANY

BY: LAURA STEIN

TITLE: SENIOR VICE PRESIDENT — GENERAL COUNSEL

DATED: May 19, 2010

BLOOD HURST & O'REARDON, LLP
TIMOTHY G. BLOOD
LESLIE E. HURST

LESLIE E. HURST

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LIST OF EXHIBITS

A. Claims Administration Protocols

B. Order re: Preliminary Approval of Class Action Settlement

C. Publication Notice

D. Notice Plan

E. Notice of Class Action Settlement

F(1). Claim Form 1

F(2). Claim Form 2

G. Final Settlement Order and Judgment

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CF/ECF participants indicated on the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 21, 2010.

s/Leslie E. Hurst
LESLIE E. HURST

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Exhibit P

USCS Fed Rules Civ Proc R 23, Part 1 of 9

Current through changes received May 14, 2018.

USCS Court Rules > Federal Rules of Civil Procedure > Title IV. Parties

Rule 23. Class Actions [Effective until December 1, 2018]

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1)the class is so numerous that joinder of all members is impracticable;

(2)there are questions of law or fact common to the class;

(3)the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4)the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.A class action may be maintained if Rule 23(a) is satisfied and if:

(1)prosecuting separate actions by or against individual class members would create a risk of:

(A)inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B)adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2)the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3)the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A)the class members' interests in individually controlling the prosecution or defense of separate actions;

(B)the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C)the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D)the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1)*Certification Order.*

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2)*Notice.*

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i)the nature of the action;

(ii)the definition of the class certified;

(iii)the class claims, issues, or defenses;

(iv)that a class member may enter an appearance through an attorney if the member so desires;

(v)that the court will exclude from the class any member who requests exclusion;

(vi)the time and manner for requesting exclusion; and

(vii)the binding effect of a class judgment on members under Rule 23(c)(3).

(3)*Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A)for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B)for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4)*Particular Issues.* When appropriate, an action may be maintained as a class action with respect to particular issues.

(5)*Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1)*In General.* In conducting an action under this rule, the court may issue orders that:

(A)determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B)require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i)any step in the action;

(ii)the proposed extent of the judgment; or

(iii)the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C)impose conditions on the representative parties or on intervenors;

(D)require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E)deal with similar procedural matters.

(2)*Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals.A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1)*Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A)must consider:

(i)the work counsel has done in identifying or investigating potential claims in the action;

(ii)counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii)counsel's knowledge of the applicable law; and

(iv)the resources that counsel will commit to representing the class;

(B)may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C)may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D)may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E)may make further orders in connection with the appointment.

(2)*Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3)*Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4)*Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1)A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2)A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

History

Amended Feb. 28, 1966, eff. July 1, 1966; March 2, 1987, eff. Aug. 1, 1987; April 24, 1998, eff. Dec. 1, 1998; March 27, 2003, eff. Dec. 1, 2003; April 30, 2007, eff. Dec. 1, 2007; March 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2018, eff. Dec. 1, 2018.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Prospective amendments:

Other provisions:

Notes of Advisory Committee on Rules. *Note to Subdivision (a).* This is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L J 551, 570 et seq. (1937); Moore and Cohn, *Federal Class Actions*, 32 Ill L Rev 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill L Rev 555–567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn L Rev 34 (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn L Rev 501 (1931).

The general test of former Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest and numerous persons, as provided for in former Equity Rule 38, see Del Ch Rule 113; Fla Comp Gen Laws Ann (Supp, 1936) § 4918(7); Georgia Code (1933) § 37-1002, and see *English Rules Under the Judicature Act* (The Annual

Practice, 1937) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest or when the parties are numerous, see Ala Code Ann (Michie, 1928) § 5701; 2 Ind Stat Ann (Burns, 1933) § 2-220; NYCPA (1937) § 195; Wis Stat (1935) § 260.12. These statutes have, however, been uniformly construed as though phrased in the conjunctive. See *Garfein v Stiglitz*, 260 Ky 430, 86 SW2d 155 (1935). The rule adopts the test of former Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich L Rev 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn L Q 399 (1934); Note, 36 Harv L Rev 89 (1922).

Clause (1), Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster v Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa 419, 114 A 377 (1921); *Pickett v Walsh*, 192 Mass 572, 78 NE 753, 6 LRA NS 1067 (1906); *Colt v Hicks*, 97 Ind App 177, 179 NE 335 (1932). Compare Rule 17(b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America v Coronado Coal Co.*, 259 US 344, 66 L Ed 975, 42 S Ct 570, 27 ALR 762 (1922) (an unincorporated association was sued as an entity for the purpose of enforcing against it a federal substantive right); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Georgetown L J 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith v Swormstedt*, 16 How 288, 14 L Ed 942 (US 1853). Compare *Christopher et al. v Brusselback*, 302 US 500, 82 L Ed 388, 58 S Ct 350 (1938).

For an action to enforce rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur v Cauble*, 255 US 356, 41 S Ct 338, 65 L Ed 673 (1921). See also *Terry v Little*, 101 US 216, 25 L Ed 864 (1880); *John A. Roebling's Sons Co. v Kinnicutt*, 248 F 596 (DC NY, 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander v Tennessee Valley Authority*, 297 US 288, 80 L Ed 688, 56 S Ct 466 (1936); Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 Yale L J 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L J 421 (1937). See also *Subdivision (b)* of this rule which deals with Shareholder's Action; Note, 15 Minn L Rev 453 (1931).

Clause (2). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (3). See *Everglades Drainage League v Napoleon Broward Drainage Dist.*, 253 F 246 (DC Fla, 1918); *Gramling v Maxwell*, 52 F2d 256 (DC NC, 1931), approved in 30 Mich L Rev 624 (1932); *Skinner v Mitchell*, 108 Kan 861, 197 P 569 (1921); *Duke of Bedford v Ellis* (1901) AC 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich L Rev 878 (1932).

Note to Subdivision (b). This is former Equity Rule 27 (Stockholder's Bill) with verbal changes. See also *Hawes v Oakland*, 104 US 450, 26 L Ed 827 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 US IX.

Note to Subdivision (c). See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L J 421 (1937).

Notes of Advisory Committee on 1966 Amendment. *Note to Subdivision (b).* Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant "shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co. v Tompkins*, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v Tompkins*, clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the Courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes v Oakland*, 1882, 104 US 450, 26 L Ed 827, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v Tyson*, 1842, 16 Peters 1, 10 L Ed 865, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v Tompkins* in 1938, concerned with the question whether *Hawes v Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes v Oakland*, and at the same term, the Court, to implement its decision, adopted former Equity Rule 94, which contained the same provision above quoted from Rule 23 FRCP. The provision in former Equity Rule 94 was later embodied in former Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy v Steel*, 1887, 120 US 241, 245, 30 L Ed 624, 7 S Ct 520, the Court referring to *Hawes v Oakland* said: “In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States.”

Some other cases dealing with former Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v Tompkins* are *Dimpfel v Ohio & Miss. R.R.* (1884), 110 US 209, 28 L Ed 121, 3 S Ct 573; *Illinois Central R. Co. v Adams*, 1901, 180 US 28, 34, 45 L Ed 410, 21 S Ct 251; *Venner v Great Northern Ry.* (1908), 209 US 24, 30, 52 L Ed 666, 28 S Ct 328; *Jacobson v General Motors Corp.*, SD NY 1938, 22 F Supp 255, 257. These cases generally treat *Hawes v Oakland* as establishing a “principle” of equity, or as dealing not with jurisdiction but with the “right” to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no “title” and results in a dismissal “for want of equity.”

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v Gould*, 1911, 202 NY 11, 94 NE 1088.

The first case arising after the decision in *Erie R. Co. v Tompkins*, in which this problem was involved, was *Summers v Hearst*, SD NY 1938, 23 F Supp 986. It concerned former Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: “The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law.” He quoted *Pollitz v Gould* (1911), 202 NY 11, 94 NE 1088, as saying that the United States Supreme Court “seems to have been more concerned with establishing this rule as one of practice than of substantive law” but that “whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.”

He then concluded that, although the federal decisions treat the equity rule as “stating a principle of substantive law”, if former “Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule.”

Some other federal decisions since 1938 touch the question.

In *Picard v Sperry Corporation*, SD NY 1941, 36 F Supp 1006, 1009–10, affirmed without opinion, CCA 2d, 1941, 120 F2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court

held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23(b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v Tompkins.* In *York v Guaranty Trust Co. of New York*, CCA 2d, 1944, 143 F2d 503, rev'd on other grounds, 1945, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by FRCP 23(b) or other state statutes are procedural," citing the Picard and other cases.

In *Gallup v Caldwell*, CCA 3d, 1941, 120 F2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that "under the circumstances the proper course was to follow Rule 23(b)."

In *Mullins v DeSoto Securities Co.*, WD La 1942, 45 F Supp 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

In *Toebelman v Missouri-Kansas Pipe Line Co.*, D Del 1941, 41 F Supp 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v Tompkins*, or its effect on the rule.

In *Perrott v United States Banking Corp.*, D Del 1944, 53 F Supp 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. . . . Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp. v Barr*, SD NY 1945, 9 Fed Rules Serv 23b 11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz v Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that "in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b). These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt v Moffett*, Ct App 1945, 294 NY 180, 61 NE 2d 435, revg 51 NYS 2d 188, affg 49 NYS 2d 64; *Noel Associates, Inc. v Merrill*, Sup Ct 1944, 184 Misc 646, 63 NYS 2d 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum v Clinton Trust Co.*, Sup Ct 1944, 183 Misc 340, 48 NYS 2d 267; *Noel Associates, Inc. v Merrill*, supra. In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the Pollitz case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b) . . ." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc. v Merrill*, supra (inapplicable).

With respect to § 61-b, which may be regarded as a separate problem, *Noel Associates, Inc. v Merrill*, supra, it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt v Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v Atkinson*, Sup Ct 1944, 182 Misc 675, 49 NYS 2d 703 (constitutional); *Citron v Mangel Stores Corp.*, Sup Ct 1944, 50 NYS 2d 416 (unconstitutional); Zlinkoff, *The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 1945, 54 Yale LJ 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch 131, R S Cum Supp 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v Moffett*, Sup Ct NY 1945, 184 Misc 1074, 56 NYS 2d 134.

See also generally, 2 *Moore's Federal Practice*, 1938, 2250–2253, and Cum. Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b)(1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b)(1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

Notes of Advisory Committee on 1966 amendments. Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called "true" category was defined as involving "joint, common, or secondary rights"; the "hybrid" category, as involving "several" rights related to "specific property"; the "spurious" category, as involving "several" rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the res judicata effect of the judgment if questioned in a later action. Thus the judgments in "true" and "hybrid" class actions would extend to the class (although in somewhat different ways); the judgment in a "spurious" class action would extend only to the parties including intervenors. See Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo LJ 551, 570–76 (1937).

In practice the terms "joint," "common," etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. See Chafee, *Some Problems of Equity*, 245–46, 256–57 (1950); Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U of Chi L Rev 684, 707 & n 73 (1941); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn LQ 327, 329–36 (1948); *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 Harv L Rev 874, 931 (1958); Advisory Committee's Note to Rule 19, as amended. The courts had considerable difficulty with these terms. See, e.g., *Gullo v Veterans' Coop. H. Assn.*, 13 FRD 11 (DDC 1952); *Shipley v Pittsburgh & L.E.R. Co.*, 70 F Supp 870 (WD Pa 1947); *Deckert v Independence Shares Corp.*, 27 F Supp 763 (ED Pa 1939), revd, 108 F2d 51 (3d Cir 1939), revd 311 US 282, 85 L Ed 189, 61 S Ct 229 (1940), on remand, 39 F Supp 592 (ED Pa 1941), revd sub nom *Pennsylvania Co. for Ins. on Lives v Deckert*, 123 F2d 979 (3d Cir 1941) (see Chafee, supra, at 264–65).

Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as "true" or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word "several" of coherent meaning. See, e.g., *System Federation No. 91 v Reed*, 180 F2d 991 (6th Cir 1950); *Wilson v City of Paducah*, 100 F Supp 116 (WD Ky 1951); *Citizens Banking Co. v Monticello State Bank*, 143 F2d 261 (8th Cir 1944); *Redmond v Commerce Trust Co.*, 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 188 (1944); *United States v American Optical Co.*, 97 F Supp 66 (ND Ill 1951); *National Hairdressers' & C. Assn. v Philad Co.*, 34 F Supp 264 (D Del 1940), 41 F Supp 701 (D Del 1940), affd mem, 129 F2d 1020 (3d Cir 1942). Second, we find cases classified by the courts as "spurious" in which, on a realistic view, it would seem fitting for the judgments to extend to the class. See, e.g., *Knapp v Bankers Sec. Corp.*, 17 FRD 245 (ED Pa 1954), affd 230 F2d 717 (3d Cir 1956); *Giesecke v Denver Tramway Corp.*, 81 F Supp 957 (D Del 1949); *York v Guaranty Trust*

Co., 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231, reh den 326 US 806, 90 L Ed 491, 66 S Ct 7 (1945) (see Chafee, supra, at 208); cf. *Webster Eisenlohr, Inc. v Kalodner*, 145 F2d 316, 320 (3d Cir 1944), cert den 325 US 867, 89 L Ed 1986, 65 S Ct 1404 (1945). But cf. the early decisions, *Duke of Bedford v Ellis*, [1901] AC 1; *Sheffield Waterworks v Yeomans*, LR 2 Ch App 8 (1866); *Brown v Vermuden*, 1 Ch Cas 272, 22 Eng Rep 796 (1866).

The "spurious" action envisaged by original Rule 23 was in any event an anomaly because, although denominated a "class" action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the "spurious" category that it would invite decisions that a member of the "class" could, like a member of the class in a "true" or "hybrid" action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. See 3 *Moore's Federal Practice*, pars 23.10 [1], 23.12 (2d ed 1963). These results were attained in some instances but not in others. On the statute of limitations, see *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), pet cert dism 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); but cf. *P. W. Husserl, Inc. v Newman*, 25 FRD 264 (SD NY 1960); *Athas v Day*, 161 F Supp 916 (D Colo 1958). On ancillary intervention, see *Amen v Black*, 234 F2d 12 (10th Cir 1956), cert granted 352 US 888, 1 L Ed 2d 84, 77 S Ct 127 (1956), dism on stip 355 US 600, 2 L Ed 2d 523, 78 S Ct 530 (1958); but cf. *Wagner v Kemper*, 13 FRD 128 (WD Mo 1952). The results, however, can hardly depend upon the mere appearance of a "spurious" category in the rule; they should turn on more basic considerations. See discussion of subdivision (c)(1) below.

Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class. See Chafee, supra, at 230–31; Keeffe, Levy & Donovan, supra; Developments in the Law, supra, 71 Harv L Rev at 937–38; Note, Binding Effect of Class Actions, 67 Harv L Rev 1059, 1062–65 (1954); Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum L Rev 818, 833–36 (1946); Mich Gen Court R 208.4 (effective Jan. 1, 1963); Idaho R Civ P 23 (d); Minn R Civ P 23.04; N Dak R Civ P 23(d).

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Subdivision (a) states the prerequisites for maintaining any class action in terms of the numerousness of the class making joinder of the members impracticable, the existence of questions common to the class, and the desired qualifications of the representative parties. See Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L Rev 433, 458–59 (1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 562, at 265, § 572, at 351–52 (Wright ed 1961). These are necessary but not sufficient conditions for a class action. See, e.g., *Giordano v Radio Corp. of Am.*, 183 F2d 558, 560 (3d Cir 1950); *Zachman v Erwin*, 186 F Supp 681 (SD Tex 1959); *Baim & Blank, Inc. v Warren-Connelly Co., Inc.*, 19 FRD 108 (SD NY 1956). Subdivision (b) describes the additional elements which in varying situations justify the use of a class action.

Note to Subdivision (b)(1). The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class here furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device. The considerations stated under clauses (A) and (B) are comparable to certain of the elements which define the persons whose joinder in an action is desirable as stated in Rule 19(a), as amended. See amended Rule 19(a)(2) (i) and (ii), and the Advisory Committee's Note thereto; Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum L Rev 1254, 1259–60 (1961); cf. 3 *Moore*, supra, par 23.08, at 3435.

Clause (A): One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish incompatible standards to govern his conduct. The class action device can be used effectively to

obviate the actual or virtual dilemma which would thus confront the party opposing the class. The matter has been stated thus: "The felt necessity for a class action is greatest when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways." Louisell & Hazard, *Pleading and Procedure: State and Federal* 719 (1962); see *Supreme Tribe of Ben-Hur v Cauble*, 255 US 356, 366–67, 65 L Ed 673, 41 S Ct 338 (1921). To illustrate: Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication. See *Maricopa County Mun. Water Con. Dist. v Looney*, 219 F2d 529 (9th Cir 1955); *Rank v Krug*, 142 F Supp 1, 154–59 (SD Calif 1956), on app, *State of California v Rank*, 293 F2d 340, 348 (9th Cir 1961); *Gart v Cole*, 263 F2d 244 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959); cf. *Martinez v Maverick Cty. Water Con. & Imp. Dist.*, 219 F2d 666 (5th Cir 1955); 3 Moore, supra, par 23.11 [2], at 3458–59.

Clause (B): This clause takes in situations where the judgment in a nonclass action by or against an individual member of the class, while not technically concluding the other members, might do so as a practical matter. The vice of an individual action would lie in the fact that the other members of the class, thus practically concluded, would have had no representation in the lawsuit. In an action by policy holders against a fraternal benefit association attacking a financial reorganization of the society, it would hardly have been practical, if indeed it would have been possible, to confine the effects of a validation of the reorganization to the individual plaintiffs. Consequently a class action was called for with adequate representation of all members of the class. See *Supreme Tribe of Ben-Hur v Cauble*, 255 US 356, 65 L Ed 673, 41 S Ct 338 (1921); *Waybright v Columbian Mut. Life Ins. Co.*, 30 F Supp 885 (WD Tenn 1939); cf. *Smith v Swormstedt*, 16 How 288, 14 L Ed 942 (US, 1853). For much the same reason actions by shareholders to compel the declaration of a dividend, the proper recognition and handling of redemption or pre-emption rights, or the like (or actions by the corporation for corresponding declarations of rights), should ordinarily be conducted as class actions, although the matter has been much obscured by the insistence that each shareholder has an individual claim. See *Knapp v Bankers Securities Corp.*, 17 FRD 245 (ED Pa 1954), affd, 230 F2d 717 (3d Cir 1956); *Giesecke v Denver Tramway Corp.*, 81 F Supp 957 (D Del 1949); *Zahn v Transamerica Corp.*, 162 F2d 36 (3d Cir 1947); *Speed v Transamerica Corp.*, 100 F Supp 461 (D Del 1951); *Sobel v Whittier Corp.*, 95 F Supp 643 (ED Mich 1951), app dism, 195 F2d 361 (6th Cir 1952); *Goldberg v Whittier Corp.*, 111 F Supp 382 (ED Mich 1953); *Dann v Studebaker-Packard Corp.*, 288 F2d 201 (6th Cir 1961); *Edgerton v Armour & Co.*, 94 F Supp 549 (SD Calif 1950); *Ames v Mengel Co.*, 190 F2d 344 (2d Cir 1951). (These shareholders' actions are to be distinguished from derivative actions by shareholders dealt with in new Rule 23.1). The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust. See *Boesenberg v Chicago T. & T. Co.*, 128 F2d 245 (7th Cir 1942); *Citizens Banking Co. v Monticello State Bank*, 143 F2d 261 (8th Cir 1944); *Redmond v Commerce Trust Co.*, 144 F2d 140 (8th Cir 1944), cert den 323 US 776, 89 L Ed 620, 65 S Ct 187 (1944); cf. *York v Guaranty Trust Co.*, 143 F2d 503 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945).

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem. Cf. *Dickinson v Burnham*, 197 F2d 973 (2d Cir 1952), cert den 344 US 875, 97 L Ed 678, 73 S Ct 169 (1952); 3 Moore, supra, at par 23.09. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditors' claims. See *Heffernan v Bennett & Armour*, 110 Cal App 2d 564, 243 P2d 846 (1952); cf. *City & County of San Francisco v Market Street Ry.*, 95 Cal App 2d 648, 213 P2d 780 (1950). Similar

problems, however, can arise in the absence of a fund either present or potential. A negative or mandatory injunction secured by one of a numerous class may disable the opposing party from performing claimed duties toward the other members of the class or materially affect his ability to do so. An adjudication as to movie "clearances and runs" nominally affecting only one exhibitor would often have practical effects on all the exhibitors in the same territorial area. Cf. *United States v Paramount Pictures, Inc.*, 66 F Supp 323, 341–46 (SD NY 1946); 334 US 131, 144–48, 92 L Ed 1260, 68 S Ct 915 (1948). Assuming a sufficiently numerous class of exhibitors, a class action would be advisable. (Here representation of subclasses of exhibitors could become necessary; see subdivision (c)(3)(B).).

Note to Subdivision (b)(2). This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. Declaratory relief "corresponds" to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages. Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class.

Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. See *Potts v Flax*, 313 F2d 284 (5th Cir 1963); *Bailey v Patterson*, 323 F2d 201 (5th Cir 1963), cert den 376 US 910, 11 L Ed 2d 609, 84 S Ct 666 (1964); *Brunson v Board of Trustees of School District No. 1, Clarendon Cty.*, S.C., 311 F2d 107 (4th Cir 1962), cert den 373 US 933, 10 L Ed 2d 690, 83 S Ct 1538 (1963); *Green v School Bd. of Roanoke, Va.*, 304 F2d 118 (4th Cir 1962); *Orleans Parish School Bd. v Bush*, 242 F2d 156 (5th Cir 1957), cert den 354 US 921, 1 L Ed 2d 1436, 77 S Ct 1380 (1957); *Mannings v Board of Public Inst. of Hillsborough County, Fla.*, 277 F2d 370 (5th Cir 1960); *Northcross v Board of Ed. of City of Memphis*, 302 F2d 818 (6th Cir 1962), cert den 370 US 944, 8 L Ed 2d 810, 82 S Ct 1586 (1962); *Frasier v Board of Trustees of Univ. of N.C.*, 134 F Supp 589 (MD NC 1955, 3-judge court), affd, 350 US 979, 100 L Ed 848, 76 S Ct 467 (1956). Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.

Note to Subdivision (b)(3). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. Cf. Chafee, supra, at 201.

The court is required to find, as a condition of holding that a class action may be maintained under this subdivision, that the questions common to the class predominate over the questions affecting individual members. It is only where this predominance exists that economies can be achieved by means of the class-action device. In this view, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand, although having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed. See *Oppenheimer v F. J. Young & Co., Inc.*, 144 F2d 387 (2d Cir 1944); *Miller v National City Bank of N. Y.*, 166 F2d 723 (2d Cir 1948); and for like problems in other contexts, see *Hughes v Encyclopaedia Britannica*, 199 F2d 295 (7th Cir 1952); *Sturgeon v Great Lakes Steel Corp.*, 143 F2d 819 (6th Cir 1944). A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages

but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried. See *Pennsylvania R.R. v United States*, 111 F Supp 80 (DNJ 1953); cf. Weinstein, supra, 9 Buffalo L Rev at 469. Private damage claims by numerous individuals arising out of concerted antitrust violations may or may not involve predominating common questions. See *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); cf. *Weeks v Bareco Oil Co.*, 125 F2d 84 (7th Cir 1941); *Kainz v Anheuser-Busch, Inc.*, 194 F2d 737 (7th Cir 1952); *Hess v Anderson, Clayton & Co.*, 20 FRD 466 (SD Calif 1957).

That common questions predominate is not itself sufficient to justify a class action under subdivision (b)(3), for another method of handling the litigious situation may be available which has greater practical advantages. Thus one or more actions agreed to by the parties as test or model actions may be preferable to a class action; or it may prove feasible and preferable to consolidate actions. Cf. Weinstein, supra, 9 Buffalo L Rev at 438–54. Even when a number of separate actions are proceeding simultaneously, experience shows that the burdens on the parties and the courts can sometimes be reduced by arrangements for avoiding repetitious discovery or the like. Currently the Coordinating Committee on Multiple Litigation in the United States District Courts (a subcommittee of the Committee on Trial Practice and Technique of the Judicial Conference of the United States) is charged with developing methods for expediting such massive litigation. To reinforce the point that the court with the aid of the parties ought to assess the relative advantages of alternative procedures for handling the total controversy, subdivision (b)(3) requires, as a further condition of maintaining the class action, that the court shall find that that procedure is “superior” to the others in the particular circumstances.

Factors (A)–(D) are listed, non-exhaustively, as pertinent to the findings. The court is to consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit. See *Weeks v Bareco Oil Co.*, 125 F2d 84, 88–90, 93–94 (7th Cir 1941) (anti-trust action); see also *Pentland v Dravo Corp.*, 152 F2d 851 (3d Cir 1945), and Chafee, supra, at 273–75, regarding policy of Fair Labor Standards Act of 1938, § 16(b), 29 USC § 216(b), prior to amendment by Portal-to-Portal Act of 1947, § 5(a). [The present provisions of 29 USC § 216(b) are not intended to be affected by Rule 23, as amended.]

In this connection the court should inform itself of any litigation actually pending by or against the individuals. The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretical rather than practical: the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable. The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered. (See the discussion, under subdivision (c)(2) below, of the right of members to be excluded from the class upon their request.).

Also pertinent is the question of the desirability of concentrating the trial of the claims in the particular forum by means of a class action, in contrast to allowing the claims to be litigated separately in forums to which they would ordinarily be brought. Finally, the court should consider the problems of management which are likely to arise in the conduct of a class action.

Note to Subdivision (c)(1). In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

An order embodying a determination can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type. A determination once made can be altered or amended before the decision on the merits if, upon fuller development of the facts, the original determination appears unsound. A negative determination means that the action should be stripped of its character as a class action. See subdivision (d)(4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may

cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass action shall be permitted to claim "ancillary" jurisdiction or the benefit of the date of the commencement of the action for purposes of the statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts.

Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2).

Subdivision (c)(2) makes special provision for class actions maintained under subdivision (b)(3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him.

The notice, setting forth the alternatives open to the members of the class, is to be the best practicable under the circumstances, and shall include individual notice to the members who can be identified through reasonable effort. (For further discussion of this notice, see the statement under subdivision (d)(2) below.).

Note to Subdivision (c)(3). The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b)(3) action the judgment "specifies" the individual members who have been identified and describes the others.

Compare subdivision (c)(4) as to actions conducted as class actions only with respect to particular issues. Where the class-action character of the lawsuit is based solely on the existence of a "limited fund," the judgment, while extending to all claims of class members against the debtor. See ordinarily left unaffected the personal claims of nonappearing members against the debtor. See 3 Moore, supra, par 23.11 [4].

Hitherto, in a few actions conducted as "spurious" class actions and thus nominally designed to extend only to parties and others intervening before the determination of liability, courts have held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision. See, as to the propriety of this so-called "one-way" intervention in "spurious" actions, the conflicting views expressed in *Union Carbide & Carbon Corp. v Nisley*, 300 F2d 561 (10th Cir 1961), pet cert dism, 371 US 801, 9 L Ed 2d 46, 83 S Ct 13 (1963); *York v Guaranty Trust Co.*, 143 F2d 503, 529 (2d Cir 1944), revd on grounds not here relevant, 326 US 99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231 (1945); *Pentland v Dravo Corp.*, 152 F2d 851, 856 (3d Cir 1945); *Speed v Transamerica Corp.*, 100 F Supp 461, 463 (D Del 1951); *State Wholesale Grocers v Great Atl. & Pac. Tea Co.*, 24 FRD 510 (ND Ill 1959); *Alabama Ind. Serv. Stat. Assn. v Shell Pet. Corp.*, 28 F Supp 386, 390 (ND Ala 1939); *Tolliver v Cudahy Packing Co.*, 39 F Supp 337, 339 (ED Tenn 1941); *Kalven & Rosenfield*, supra, 8 U of Chi L Rev 684 (1941); Comment, 53 Nw UL Rev 627, 632–33 (1958); *Developments in the Law*, supra, 71 Harv L Rev at 935; 2 Barron & Holtzoff, supra, § 568; but cf. *Lockwood v Hercules Powder Co.*, 7 FRD 24, 28–29 (WD Mo 1947); *Abram v Sam Joaquin Cotton Oil Co.*, 46 F Supp 969, 976–77 (SD Calif 1942); Chafee, supra, at 280, 285; 3 Moore, supra, par 23.12, at 3476. Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class, as above stated.

Although thus declaring that the judgment in a class action includes the class, as defined, subdivision (c)(3) does not disturb the recognized principle that the court conducting the action cannot predetermine the *res judicata* effect of the judgment; this can be tested only in a subsequent action. See Restatement, *Judgments* § 86, comment (h), §

116 (1942). The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of *res judicata* are less likely to be raised at a later time and if raised will be more satisfactorily answered. See Chafee, supra, at 294; Weinstein, supra, 9 Buffalo L Rev at 460.

Note to Subdivision (c)(4). This provision recognizes that an action may be maintained as a class action as to particular issues only. For example, in a fraud or similar case the action may retain its "class" character only through the adjudication of liability to the class; the members of the class may thereafter be required to come in individually and prove the amounts of their respective claims.

Two or more classes may be represented in a single action. Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.

Subdivision (d) is concerned with the fair and efficient conduct of the action and lists some types of orders which may be appropriate.

The court should consider how the proceedings are to be arranged in sequence, and what measures should be taken to simplify the proof and argument. See subdivision (d)(1). The orders resulting from this consideration, like the others referred to in subdivision (d), may be combined with a pretrial order under Rule 16, and are subject to modification as the case proceeds.

Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class. Such notice is not a novel conception. For example, in "limited fund" cases, members of the class have been notified to present individual claims after the basic class decision. Notice has gone to members of a class so that they might express any opposition to the representation, see *United States v American Optical Co.*, 97 F Supp 66 (ND Ill 1951), and 1950–51 CCH Trade Cases 64573–74 (par 62869); cf. *Weeks v Bareco Oil Co.*, 125 F2d 84, 94 (7th Cir 1941), and notice may encourage interventions to improve the representation of the class. Cf. *Oppenheimer v F. J. Young & Co.*, 144 F2d 387 (2d Cir 1944). Notice has been used to poll members on a proposed modification of a consent decree. See record in *Sam Fox Publishing Co. v United States*, 366 US 683, 6 L Ed 2d 604, 81 S Ct 1309 (1961).

Subdivision (d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion. In the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum. These indicators suggest that notice under subdivision (d)(2) may be particularly useful and advisable in certain class actions maintained under subdivision (b)(3), for example, to permit members of the class to object to the representation. Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. See *Hansberry v Lee*, 311 US 32, 85 L Ed 22, 61 S Ct 115, 132 ALR 741 (1940); *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950); cf. *Dickinson v Burnham*, 197 F2d 973, 979 (2d Cir 1952), and studies cited at 979 n 4; see also *All American Airways, Inc. v Elderd*, 209 F2d 247, 249 (2d Cir 1954); *Gart v Cole*, 263 F2d 244, 248–49 (2d Cir 1959), cert den 359 US 978, 3 L Ed 2d 929, 79 S Ct 898 (1959).

Notice to members of the class, whenever employed under amended Rule 23, should be accommodated to the particular purpose but need not comply with the formalities for service of process. See Chafee, supra, at 230–31; *Brendle v Smith*, 7 FRD 119 (SD NY 1946). The fact that notice is given at one stage of the action does not mean that it must be given at subsequent stages. Notice is available fundamentally "for the protection of the members of the class or otherwise for the fair conduct of the action" and should not be used merely as a device for the undesirable solicitation of claims. See the discussion in *Cherner v Transitron Electronic Corp.*, 201 F Supp 934 (D Mass 1962); *Hormel v United States*, 17 FRD 303 (SD NY 1955).

In appropriate cases the court should notify interested government agencies of the pendency of the action or of particular steps therein.

Subdivision (d)(3) reflects the possibility of conditioning the maintenance of a class action, e.g., on the strengthening of the representation, see subdivision (c) (1) above; and recognizes that the imposition of conditions on intervenors may be required for the proper and efficient conduct of the action.

As to orders under subdivision (d)(4), see subdivision (c)(1) above.

Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action.

Notes of Advisory Committee on 1998 amendments. *Note to Subdivision (f).* This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1292(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

Changes Made after Publication (GAP Report). No changes were made in the text of Rule 23(f) as published.

Several changes were made in the published Committee Note. (1) References to 28 U.S.C. § 1292(b) interlocutory appeals were revised to dispel any implication that the restrictive elements of § 1292(b) should be read in to Rule

23(f). New emphasis was placed on court of appeals discretion by making explicit the analogy to certiorari discretion. (2) Suggestions that the new procedure is a "modest" expansion of appeal opportunities, to be applied with "restraint," and that permission "almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion," were deleted. It was thought better simply to observe that courts of appeals will develop standards "that reflect the changing areas of uncertainty in class litigation."

Notes of Advisory Committee on 2003 amendments. *Note to Subdivision (c).* Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26–36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim class counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Note to Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

Paragraph (3). Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23 (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court’s discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court’s decision. Among these are changes in

the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Note to Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to “fire” class counsel.In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court’s duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint “class counsel.” In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps of numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class “at an early practicable time,” and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation — that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant’s existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court’s later determination of a reasonable attorney fee.

Note to Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to “an action certified as a class action.” This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for

Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 [103 L. Ed. 2d 67, 76] (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount,

for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. “Side agreements” regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court’s objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel’s motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel’s motion for attorney fees must be “directed to the class in a reasonable manner.” Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel’s fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

Changes Made After Publication and Comment. Rule 23(c)(1)(B) is changed to incorporate the counsel-appointment provisions of Rule 23(g). The statement of the method and time for requesting exclusion from a (b)(3) class has been moved to the notice of certification provision in Rule 23(c)(2)(B).

Rule 23(c)(1)(C) is changed by deleting all references to "conditional" certification.

Rule 23(c)(2)(A) is changed by deleting the requirement that class members be notified of certification of a (b)(1) or (b)(2) class. The new version provides only that the court may direct appropriate notice to the class.

Rule 23(c)(2)(B) is revised to require that the notice of class certification define the certified class in terms identical to the terms used in (c)(1)(B), and to incorporate the statement transferred from (c)(1)(B) on "when and how members may elect to be excluded."

Rule 23(e)(1) is revised to delete the requirement that the parties must win court approval for a precertification dismissal or settlement.

Rule 23(e)(2) is revised to change the provision that the court may direct the parties to file a copy or summary of any agreement or understanding made in connection with a proposed settlement. The new provision directs the parties to a proposed settlement to identify any agreement made in connection with the settlement.

Rule 23(e)(3) is proposed in a restyled form of the second version proposed for publication.

Rule 23(e)(4)(B) is restyled.

Rule 23(g)(1)(C) is a transposition of criteria for appointing class counsel that was published as Rule 23(g)(2)(B). The criteria are rearranged, and expanded to include consideration of experience in handling claims of the type asserted in the action and of counsel's knowledge of the applicable law.

Rule 23(g)(2)(A) is a new provision for designation of interim counsel to act on behalf of a putative class before a certification determination is made.

Rule 23(g)(2)(B) is revised to point up the differences between appointment of class counsel when there is only one applicant and when there are competing applicants. When there is only one applicant the court must determine that the applicant is able to fairly and adequately represent class interests. When there is more than one applicant the court must appoint the applicant best able to represent class interests.

Rule 23(h) is changed to require that notice of an attorney-fee motion by class counsel be "directed to class members," rather than "given to all class members."

Notes of Advisory Committee on 2007 amendments. The language of Rule 23 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 23(d)(2) carries forward the provisions of former Rule 23(d) that recognize two separate propositions. First, a Rule 23(d) order may be combined with a pretrial order under Rule 16. Second, the standard for amending the Rule 23(d) order continues to be the more open-ended standard for amending Rule 23(d) orders, not the more exacting standard for amending Rule 16 orders.

As part of the general restyling, intensifiers that provide emphasis but add no meaning are consistently deleted. Amended Rule 23(f) omits as redundant the explicit reference to court of appeals discretion in deciding whether to permit an interlocutory appeal. The omission does not in any way limit the unfettered discretion established by the original rule.

Notes of Advisory Committee on 1966 amendments. A derivative action by a shareholder of a corporation or by a member of an unincorporated association has distinctive aspects which require the special provisions set forth in the new rule. The next-to-the-last sentence recognizes that the question of adequacy of representation may arise

when the plaintiff is one of a group of shareholders or members. Cf. 3 Moore's Federal Practice, par 23.08 (2d ed 1963).

The court has inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to shareholders or members.

Notes of Advisory Committee on 2007 amendments. The language of Rule 23.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Advisory Committee on 2009 amendments. The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Notes of Advisory Committee on 2018 Amendments. Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain,

easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such

results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or

withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Prospective amendments:

By order dated April 26, 2018, the Supreme Court of the United States approved the following amendments to Rule 23, effective Dec. 1, 2018, and authorized their transmission to Congress in accordance with 28 USCS § 2074:

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) *Notice.*

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class.*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General.* Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection.* Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal.* If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

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Exhibit Q

ADVISORY COMMITTEE
ON
CIVIL RULES

Philadelphia, PA
April 10, 2018

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AGENDA

Meeting of the Advisory Committee on Civil Rules
April 10, 2018

1. Opening Business

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   B. Report on the March Meeting of the Judicial Conference of the United States

2. **ACTION ITEM**: Approve Minutes of the November 2017 meeting of the Advisory Committee on Civil Rules

3. **Information Item**: Legislation

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10. **Information/ACTION Items**: **Other Docket Matters**

    A. Rule 5(b)(2)(C): Return Receipt

    B. Rule 55(a): Duty to Enter Default

    C. Rule 8: Simplified Complaints

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Exhibit R

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, THE CITY OF BRISTOL PENSION FUND, and THE CITY OF OMAHA POLICE AND FIRE RETIREMENT SYSTEM, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 15-12345-MLW
INSULET CORPORATION, DUANE DESISTO, ALLISON DORVAL, BRIAN ROBERTS, and CHARLES LIAMOS,	)	
Defendants.	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING

March 9, 2018
4:19 p.m.

John J. Moakley United States Courthouse
Courtroom No. 10
One Courthouse Way
Boston, Massachusetts 02210

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P R O C E E D I N G S

THE COURT: Good afternoon. Would counsel please identify themselves for the court and for the record.

MR. HARROD: Good afternoon, Your Honor. James Harrod, Bernstein, Litowitz, Berger & Grossman, for the plaintiffs.

MR. FREDERICKS: William Fredericks, Scott & Scott, Attorneys At Law, LLP, also for lead plaintiffs.

MS. BULLERJAHN: Good afternoon, Your Honor. Caroline Bullerjahn of Goodwin Procter on behalf of defendants.

MS. BIRNBACH: Deborah Birnbach from Goodwin for defendants.

THE COURT: Okay. We're here today in connection with the motion for preliminary approval of the class action settlement. I've read the memo and, with some distractions, examined the proposed order of notice. I'm interested in hearing you on the request for preliminary approval, and then if I allow or am inclined to allow it, we can focus on the documents.

MR. HARROD: Okay. Thank you, Your Honor.

I'd initially like to thank you. I had asked you to move this hearing from Monday, so I greatly appreciate you were able to do so.

THE COURT: It's turned out to be a busy day, as you saw, and I'm sorry you had to wait.

MR. HARROD: It's quite all right. It was actually quite interesting I think for us to see that.

THE COURT: Actually, as you say, good for you. I also think it's good for the administration of justice. We don't have a lot of time to philosophize. But the bar has become so specialized. If you wonder why it takes time to get into court on a class action matter, you know, if you see the end of a criminal case like that one, it gives you some idea of the range of things that are done in the court, and I think that's in the interests of the administration of justice. But go ahead.

MR. HARROD: So thank you. And so it's a $19.5 million settlement we're here to seek preliminary approval for. We view preliminary approval as does the law, which is I think stated fairly well in our memo, as this is a two-step process and this is the first step. The primary objective of obtaining preliminary approval is so that we can send out notice to the class and schedule a final approval hearing so that the class and the court will have the opportunity to sort of look at a more complete record in support of the various things that we're going to be requesting at that point.

I think readily this case meets the standard for preliminary approval, both from a procedural and substantive perspective. The recovery itself is excellent in --

THE COURT: Well -- I'm sorry. Go ahead. It's

excellent because of what?

MR. HARROD: Well, I think principally it's excellent because there were very significant risks in this case that I think always existed but became more acute and apparent to us as the discovery proceeded. The risks included principally proof on the allegation that the product problems that were the core allegation in the case were pervasive. Defendants were able to put forward evidence which we disputed but which provided a viewpoint that not only were the product problems cabined off, but they were within the company's internal tolerances, which, even if you disagree with, would have undermined potentially arguments about falsity but also arguments about scienter. There was evidence which contradicted that, but we felt that that was a significant risk that we would have to overcome to win at trial.

04:21

THE COURT: So the $19.5 million you estimated I think would be 47 percent per share recovery to the class?

MR. HARROD: So yeah. Well, so can I break that down a little bit for you, Your Honor?

04:22

THE COURT: Well, let me ask you a couple of questions to make sure you include this in your answers. One, is that before or after the award of attorney's fees, the 47 cents?

MR. HARROD: Right. So 47 cents is a number that's required for us to include in the notice. Under the Reform Act, one of the statutory items is the recovery on a per-share

basis. I don't -- I obviously don't know and I can give you some other information about that. 47 cents is the number before fees and expenses. There's a latter paragraph in the notice that says that the fees and expenses I think, if granted at the levels that are set forth in the notice now, would be 13 cents per share.

THE COURT: I may have missed that.

MR. HARROD: Okay.

THE COURT: And what I didn't see in your memo and I don't think it's in the notice but I'll give you a chance to correct any misunderstanding I may have about the notice, what do your damage experts say are the estimated losses?

MR. HARROD: So let me -- I want to answer that question, and I'm very prepared to do that, but I just wanted to give you one clarification on the 47 cents number.

THE COURT: Actually, I still don't know. Where did the 47 cents --

MR. HARROD: So the 47 cents, what it does is it assumes everyone in the class has the same amount of injury, and it assumes every single share that was in the class, which I think our expert said was 48 million shares, is injured in the exact same amount and that they all file claims. And in our experience, those numbers, while required under the statute, don't necessarily reflect the reality of either what the settlement achieved or what class members actually get.

But we have not discerned a better way of doing it, nor has congress allowed us to do it a different way. So the that's the answer to the 47 cents.

THE COURT: But basically, so it's, what, $19.5 million divided by the number of shares before attorney's fees expenses are taken out.

MR. HARROD: Correct, yes.

THE COURT: If somebody had 100 shares, $47?

MR. HARROD: Well, yeah. But that's not actually how -- that's not actually how the money gets distributed. That's the way the statute says we have to.

04:25

THE COURT: Well --

MR. HARROD: Right. I don't -- yeah. Let me answer your other question because I think that will provide better context for what I think you're really getting at is what is the quantum of what we got here.

So to preface that I would say the damage and loss causation issues were hugely disputed.

THE COURT: I know, I know. They can be discounted. And a settlement might be reasonable even if it provides a fraction, small fraction of alleged or actual losses. But I want to know. Because it was notably absent from your memorandum, and the case you saw me end started on Monday and we missed one day because of the snow.

04:25

MR. HARROD: Okay.

THE COURT: So I've been doing other things this week, but I did read your memorandum, and I thought I would see, and in fact I believe the PSLRA requires that it be in the notice. And I'm not -- I don't think it's in the notice. What does your expert say are the amount of damages that should be awarded if you prevail?

MR. HARROD: If we won on all of our claims and you attribute the entire amount of the loss to each of those disclosures, which I think would probably not be the case, but the best estimate I have for that is 151 million to 226 million.

THE COURT: 151 million to what?

MR. HARROD: 226 million.

THE COURT: So 19 million is what percentage of that?

MR. HARROD: At the top end of the damages, it's about nine percent.

THE COURT: Nine percent?

MR. HARROD: Yeah.

THE COURT: Nine percent of the 226?

MR. HARROD: Correct.

THE COURT: Okay.

MR. HARROD: Does that -- I can elaborate on that. I don't think I'm at liberty -- defendants obviously had a different number.

THE COURT: Well, I mean, that contributes to the

reasonableness. I should know that, too. And in fact, doesn't the PLSRA section 78u-4-7(B)(ii) require that the notice have a statement from each party concerning the issue or issues, if the parties do not agree on the average amount of damages -- in other words, I don't know why I can't be told, I think the notice is supposed to tell the class, you know, plaintiffs say the damages are up to 226 million. The defendants say it would be this.

MR. HARROD: I read that as saying that the notice has to disclose that there was a disagreement about damages but that it doesn't require you to disclose what the amounts of that are.

THE COURT: Well, look, the adversary system doesn't work here because now you both want me to approve the settlement, and the first named plaintiff here is Arkansas Teacher, right?

MR. HARROD: Mm-hmm.

THE COURT: And they've been supervising this litigation?

MR. HARROD: They and the other lead plaintiffs, yes.

THE COURT: And have you seen the documents I finally approved after requiring revisions of the Arkansas Teacher V. State Street Bank litigation?

MR. HARROD: I'm not -- I'm generally familiar with that. I'm not sure I'm specifically familiar with what you're

referring to.

THE COURT: Well, in several class actions in the last couple of years, while I've preliminarily approved them, I found the notices were inadequate, and I ordered that they be revised. And my present sense is that your notice substantively in what's covered is inadequate, so you're not going to go home with a signed order today at best. So you haven't looked at those?

MR. HARROD: No, I can't say that I have looked at those.

04:29

THE COURT: Who drafted the notice that I was given, you?

MR. HARROD: My firm, yes.

THE COURT: Was your firm in the Aegerion case?

MR. HARROD: No.

THE COURT: You haven't seen the notice in that case either.

MR. HARROD: I have not.

THE COURT: These are two cases in which I've ordered

04:29

counsel to re-write the notices after finding preliminary approval is appropriate. But anyway, keep going.

MR. HARROD: So --

THE COURT: Well, don't keep going. What's the defendant's estimate of damages?

MS. BULLERJAHN: Your Honor, our damages expert

determined that the greatest number of damages would be approximately 106 million. There were six alleged corrective disclosures in the case. And in our view, which is somewhat set forth in our class certification opposition, there were not statistically significant drops in stock prices for some of those, so damages should not be attributed to those. So 106 million was the maximum recoverable damages, and that's a plaintiff-style estimate.

THE COURT: All right. So that would be, 19.5 million would be maybe --

MS. BULLERJAHN: About 18.4 percent, to be precise, Your Honor.

THE COURT: About.

MS. BULLERJAHN: Just off the top of my head.

THE COURT: All right. That's not bad. Why don't you keep going.

MR. HARROD: All right. Thank you, Your Honor. So on the basis of the risks in the case and on the basis -- which I can talk more about. I'm not sure if Your Honor is interested in that or not.

THE COURT: No. I studied it. Look, you reached this proposed settlement after substantial discovery following my denial of the motion to dismiss. So my understanding is it's presumptively reasonable. We have arm's length bargaining between, as far as I know, experienced counsel. There was a

significant effort to mediate and then further efforts to settle. Did you discuss attorney's fees as part of agreeing on the amount of the settlement?

MR. HARROD: We -- that was not part of the negotiation with the defendant.

THE COURT: You know, these are indicia of reasonableness. With regard to the attorney's fees, the notice says now that you may ask for up to 25 percent; is that correct?

04:32 MR. HARROD: Yes.

THE COURT: Is it your intention to actually ask for 25 percent?

MR. HARROD: This is a completely honest answer. My expectation is that's what we will ask for.

THE COURT: I hope every answer you give is honest. Right. So the notice -- I mean, recently required that it say that. If it's your intention to ask for 25 percent, all you have to say is the lawyer is going to ask for 25 percent.

MR. HARROD: I'm sorry. The only caveat I would make

04:32 there is there's a process where our clients would have the opportunity to review, you know, a more complete record in support of final approval. And I have had a conversation with them about it, but they have not said yes, you can do that.

THE COURT: Well, it's your intention to seek it. I don't think anybody will complain if it's less.

MR. HARROD: Correct.

THE COURT: And your clients are supposed to scrutinize that.

MR. HARROD: Right.

THE COURT: So you'd get 25 percent of attorney's fees plus expenses?

MR. HARROD: Correct.

THE COURT: How much are the expenses?

MR. HARROD: The expenses that we've capped at $600,000, I expect that it would be less than that. The expenses currently right now paid and incurred are about $350,000.

04:33

THE COURT: 25 percent of 19.5 million is how much, approximately?

MR. HARROD: I have it right here, but I can't find -- oh, 4.875 million.

THE COURT: And what do you say your lodestar is? Because that's a benchmark.

MR. HARROD: The lodestar is 4.3 -- about 4,350,000.

04:34

THE COURT: So there's virtually no multiplier.

MR. HARROD: The multiple on that would be 1.12, assuming a 25 percent fee is granted and requested.

THE COURT: Are you familiar with the issues that prompted me to appoint a special master to review the award of attorney's fees in the Arkansas Teacher v. State Street case?

MR. HARROD: Yes, Your Honor.

THE COURT: How many law firms are there who have appeared for lead counsel in this case, three?

MR. HARROD: There are two lead counsel firms. There are two other firms who have done work on the case who would be included in that, and there's some attorney's fees that will be treated as expenses.

THE COURT: Some attorney's fees that --

MR. HARROD: That are not part of --

04:35 THE COURT: Who are the four firms who have a appearances?

MR. HARROD: My firm, Bernstein, Litowitz, Berger & Grossman; Mr. Frederick's firm, Scott & Scott. We are the two co-lead counsel firms. The third firm is Berman Tabacco.

THE COURT: The Bernstein firm, what's the second firm?

MR. HARROD: Scott & Scott.

THE COURT: All right. The third firm?

MR. HARROD: The third firm is Berman Tabacco, which

04:35 is formerly Berman DeValerio.

THE COURT: That's Berman DeValerio?

MR. HARROD: Yeah, that's what they used to be called.

THE COURT: Are they --

MR. HARROD: They're the Boston liaison.

THE COURT: Local counsel?

MR. HARROD: Yes.

THE COURT: And what's the fourth?

MR. HARROD: The fourth firm is Glancy Promgay & Murray, who actually filed the first two complaints that were filed in this action.

THE COURT: Okay. And they've all worked on this case?

MR. HARROD: Yes.

THE COURT: And did you say there are other attorneys who haven't filed an appearance that would share in the settlement?

MR. HARROD: They have not appeared in this case or represented plaintiffs in the case, so they're not included in the application for plaintiff's fees.

THE COURT: But they would be in expenses? What are the names of those firms?

MR. HARROD: The names of those two firms, one is Shapiro Haber & Urmy, which is a firm based in Boston. They have a small bill.

THE COURT: What's the other firm?

MR. HARROD: The other firm is -- I'm not going to pronounce the names right -- Hach, H-a-c-h, Rose -- rose like the flower. They were -- my client, Arkansas Teacher, had an outside investment visitor that they were retained to represent as part of the discovery process. So ostensibly an expense

that the class bore to represent a third party.

THE COURT: What do you mean, your firm had an investment advisor?

MR. HARROD: Not my firm. My client. So my client, Arkansas Teacher, has investment advisors that make investment decisions for them, that monitor and make investments in the portfolio that they've, you know, maintained for the teachers retirement. And their outside investment advisor was subpoenaed by defendants in this case, and there was a
04:37 significant amount of discovery involving that firm. They did not have in-house counsel and did not have outside counsel.

THE COURT: Is there one or more other attorneys that would benefit, get money from the settlement of this case?

MR. HARROD: No.

THE COURT: Are you going to be seeking service awards for the named plaintiffs?

MR. HARROD: We will, Your Honor. I don't know the amounts of those.

THE COURT: Is that in the memo?

04:38 MR. HARROD: No. I mean, it's embodied in the $600,000, but it is not addressed specifically in the memo. It's something we would address at the final approval stage.

THE COURT: Is it in the notice?

MR. HARROD: Yes, it's referred to in the notice. The amounts are not specifically set forth. But the way that that

would work, ideally is that the notice would go out, it would direct the class to the settlement website where we will file our final approval papers, and those papers will set forth all the detail regarding these matters.

THE COURT: Why wouldn't you put the amount of the -- do you know how much you intend to seek in service awards for each of the named plaintiffs?

MR. HARROD: We do not. We know in a ballpark sense. I think we've decided for estimating the expenses that they would be no more than $30,000.

MR. FREDERICKS: In the aggregate.

MR. HARROD: Per, per, $90,000. I don't know that there will be that much, Your Honor.

THE COURT: Well, you're going to have to put that in the service award -- in the notice. Have you already received the $19.5 million?

MR. HARROD: We have not.

MR. FREDERICKS: Your Honor, I believe that the defendant's obligation to deposit the money runs from such date as the court may grant preliminary approval.

THE COURT: Okay. And where are you going to put the money?

MR. FREDERICKS: Your Honor, Huntington National Bank has been designated the escrow agent in the settlement papers. They have a long record of handling similar escrow accounts in

other matters, and they've waived all their fees in this case.

THE COURT: And there will be a separate account for this?

MR. FREDERICKS: There will be a separate escrow account. We've negotiated an arrangement whereby they are not charging us fees for their investment services.

THE COURT: How are they getting compensated?

MR. FREDERICKS: I believe it benefits the bank simply for their capital requirements to have deposits on account. So they're happy to have the money without charging a retail rate, shall we say.

THE COURT: All right. So what else should I know?

MR. HARROD: So the process would be, if Your Honor were to sign the preliminary approval order, if you find that that's appropriate, that the order would provide for the notice to be mailed to the class within 20 business days of that order. The defendants are required under the stipulation and under the preliminary approval order to provide us with a list of record holders of the Insulet company's shares.

The claims administrator also has a list it maintains of nominees, these are the banks who hold securities in what's called street name, meaning like most people and most investors have the shares held in a custodial bank or investment advisor, and so those people will receive the notice. They are required within seven days to either request notices so that they can

mail them to their clients or to send a file with the names and addresses of their clients to the claims administrator, who will then send them out.

THE COURT: They have to do it within seven days?

MR. HARROD: They have to -- they have to either request or send the file within seven days. If they request the notices themselves, they have seven days from the time that they receive the notices to mail them out to their customers. I don't know, standing here today, what the balance of that is. I think most nominees send labels or files to the claims administrator so they handle the mailing and it goes out promptly.

04:42

THE COURT: And then what happened next?

MR. HARROD: So the next thing that happens is that the one blank in the preliminary approval order, were you to sign it, would be to set a date for a final approval hearing. All the other events are keyed off of that date.

THE COURT: But assume I've set the final approval hearing -- roughly, what's the date if I sign the order today?

04:43

MR. HARROD: If you sign the order today, the earliest date that we could do it is Monday, June 18.

THE COURT: Okay. So that's June 18. And when would exclusions and opt-outs have to be filed?

MR. HARROD: They would be due, under that scenario, 21 days before, so I think that's May 29.

THE COURT: Right. And how much after your motion for final approval papers and requests for attorney's fees are filed?

MR. HARROD: So the final approval papers are to be filed 35 days, so there's 14 days between --

THE COURT: That's the way I read it. So people are supposed to get this and in two weeks decide, you know, maybe I want to consult a lawyer, figure out what's going on, collect all their papers to show they're members of the class? That's one of the things your proposed order requires, right?

MR. HARROD: Well, the notice starts going out, would need to be mailed by April 20. So they would have from April 20 until May 29 to make a decision about opt-out or objections.

THE COURT: Well, I think in the other Arkansas Teacher case I required that they have not two weeks but 30 days. I mean, it just struck me, looking at the notice and the terms, that everything is calculated to make it very difficult for somebody to object or opt out. I mean, they have to serve you, right?

MR. HARROD: They have to -- objections have to be served and filed. Opt-outs --

THE COURT: Right, but if the objections are filed, you would get notice of it through ECF?

MR. HARROD: Correct, yes.

THE COURT: And then you're going to send notice to

people that you and the claims administrator believe are members of the class, right?

MR. HARROD: I mean, I can't say 100 percent, but I think that the notice process that's being employed here, which is used in most securities cases, is pretty good in the sense that because the nominees have records of who traded the stock during the class period, I can't say it's 100 percent, but it's more effective than in most other class actions.

THE COURT: Right. Then why does somebody who wants
04:45 to object have to submit all of those documents that your proposal suggests they submit to show they're members of the class?

MR. HARROD: Well, those requirements apply to different things differently. I understand what you're saying. We want to be sure that -- anybody can get on a website and print off a copy of the notice. So we have to have some process for verifying that the people who purport to be in the class are in the class, given that there's money at stake and whatever money we distribute reduces whatever everyone else
04:46 gets. So those requirements exist for that purpose. And just because somebody held shares during the class period doesn't mean that they're a class member. They could have not have purchased any.

THE COURT: But isn't that equally true for anybody who doesn't opt out? They just file a claim?

MR. HARROD: No. They have to provide documentation to get paid. Your Honor, should I keep going? Are there things that you would like me to address or focus on?

THE COURT: You can keep going.

MR. HARROD: So 35 days under the plan that we proposed, the final approval papers would get filed. And Your Honor is correct that 14 days after that opt-outs and objections would be due. We would have seven days after the opt-outs and objections are due, which is seven days prior to the final approval hearing, to put in replies in response to any of that information.

The final approval hearing would happen, and with all hope there would be, you know, you would find that the settlement is approvable and approve it and enter a judgment. I think, you know, I've addressed and Your Honor has addressed and noted that the settlement based on the risks and the recovery is adequate and certainly more than acceptable for this stage of approval.

THE COURT: What does the defendant say about all of this?

MS. BULLERJAHN: Your Honor, defendants agree with plaintiffs that the settlement is adequate and preliminary approval is appropriate. I can personally attest that this was hotly litigated, as plaintiffs' counsel said in a memo, and certain the terms of the settlement were very carefully

negotiated at arm's length.

The only other thing I would like to add on behalf of defendants is that as set forth in the settlement stipulation, defendants are entering into this settlement, by doing so are not conceding any liability or the merits of the claims asserted by plaintiffs. Rather they are entering the settlement or have entered the settlement to avoid future costs, burden and uncertainty associated with litigating the case.

04:48 THE COURT: Okay.

MS. BULLERJAHN: Thank you.

THE COURT: And did you have any discussion about the plaintiffs' attorney's fees before you agreed on the settlement amount?

MS. BULLERJAHN: We did not, Your Honor. The settlement amount was agreed to first. We actually had no negotiations whatsoever about the plaintiff fees or about the 25 percent that was set forth.

THE COURT: You're indifferent to where the money
04:48 goes. You'll pay 19.5 million and don't have an interest in who gets it.

MS. BULLERJAHN: The only thing I will add to that, Your Honor, is that it's very clearly set forth in the stipulation that the determination with respect to attorney's fees is completely separate from the approval of the settlement

and should not hold up the approval of the settlement if the court deems the attorney's fees to not be reasonable.

THE COURT: And what else should I know to make an informed decision on the motion for preliminary approval?

MS. BULLERJAHN: From our perspective, Your Honor, I think Mr. Harrod covered it. I don't think there's anything else from defendants' perspective that we need to add.

THE COURT: All right. Well, I'll probably prove to be satisfied that the settlement -- you know, that I should

04:49 certify a class for settlement purposes and the settlement is within the range of being fair, reasonable and adequate, that it should be considered through a fair process by properly informed class members.

I do have some concerns about the schedule and the notice. I didn't have as much time to study this as I had intended. I'm looking at your proposed order and the settlement that's as part of -- I think Exhibit 1, right?

MR. HARROD: Your Honor, it's Exhibit 1 to the motion for preliminary approval. It's also an exhibit to the

04:50 stipulation settlement, but I think for ease, it's --

THE COURT: It's attached to the proposed order?

MR. HARROD: It's attached to the motion. It's docket entry 108-1.

THE COURT: Correct. Is there a cover page summarizing the information contained in the final settlement

agreement?

MR. HARROD: You're referring to the notice?

THE COURT: Yes.

MR. HARROD: Yes.

THE COURT: I don't think so.

MR. HARROD: Some of this may be a function of the way the document is typeset here, because when they typeset it for actual mailing, it does get condensed a little bit. So the summary is what we would typically refer to as paragraphs 1 through 7 of the notice, and there's a preamble to that that's even shorter, and it says basically who the parties are and that this is a notice of settlement issued by the court. If I can just direct you, it's at the top of the ECF stamp, it's page 18 of 55 is where that starts.

THE COURT: Hold on just one second. I'm sorry to jump around on you. Is there anything that expresses the authority that I have and always require be included that I can alter or excuse any deadline or requirement for good cause shown?

MR. HARROD: You mean deadlines under -- there's a specific provision in the preliminary approval order that says you can change the date of the final approval hearing.

THE COURT: I'm talking about anything. If somebody files an objection a day or two late, I have the authority to consider it if I think it's justified. I want --

MR. HARROD: Your Honor --

THE COURT: -- there to be notice of that.

MR. HARROD: Your Honor, I don't believe that there is any such provision on either the preliminary approval or to the notice, but I would just say to you I'm not sure that's required because I think it's inherently --

THE COURT: I think people should know it because they might look at it and say, "I missed the deadline and I'm out of luck."

04:54 So let's see. In Arkansas Teacher v. State Street and in the Aegerion case, I believe I required a different kind of summary, especially in Aegerion. Aegerion is 114-10105 and Arkansas Teacher is 11-10230. In Aegerion you would look at docket number 145.2. In State Street you would look at docket numbers 95.1, 3 and 5. Five is the summary notice.

MR. HARROD: Your Honor, those are the documents as revised per your instructions to counsel.

THE COURT: Right. I'm going to give you a chance to basically bring me something that looks like that and has the

04:55 same kind of timeframes. I went through this a couple of times to figure out what I believe was reasonable, and, you know, give meaningful opportunities to object and all that.

So let's see. One, you would look at the cover page summaries of those two cases. They're not the same format, but they have the information that I think should be there at the

outset. Here you have -- do you have the statement of potential outcome of the case?

MR. HARROD: I don't think we have something that's captioned that way. We have -- in the last paragraph of that section as 7 is Reasons For Settlement, which I think encompasses the same idea.

THE COURT: Okay.

MR. HARROD: And Your Honor, just trying to find the right page.

04:57 THE COURT: Page of?

MR. HARROD: The notice. Paragraph 30 of the notice is under the caption What Might Happen If There Were No Settlement.

THE COURT: This is the type of information that I think should be in the summary. It really summarizes the key things. These are our claims. They have defenses. We think we would win. But we might lose. We think if we win, we'd get $220 million. They think at most we would get 106 and argue that the damages would be much less. You'll see what I

04:58 approved in other instances, but I think that the summary requires that it really all be up front.

As I say, nobody will complain if you're going to ask for less, but I think you'll find in these that what I approved said, you know, the attorneys are going to see 25 percent, not up to 25 percent, which is what was originally proposed. If

your clients change their mind and tell you you can't seek 25 percent, that's okay.

MR. HARROD: Fair enough.

THE COURT: That's okay. If you're going to seek service awards, I think this is important to shareholders, or the lead plaintiffs representing us or somebody might think $30,000 is a lot of money, they're getting $30,000 we're not getting, and maybe I ought to scrutinize things more carefully because they're going to get another $30,000. Is that all the named plaintiffs get?

04:59

MR. HARROD: Well, they get whatever they're entitled to under the claims process.

THE COURT: Right, yes.

MR. HARROD: That would be the only two sources.

THE COURT: Except for that service award, they're treated the same as every other class member?

MR. HARROD: Yes. Let me just amend that to make one clarification which I'm not sure will happen in this case. If they had out-of-pocket expenses, it would be included in the award. So if they had, you know, travel costs or whatever, then that, but I'm not sure that's the case here.

04:59

THE COURT: And how do you propose to determine how much of a service award they should each get?

MR. HARROD: I will speak for my client because I have had the conversation with them about it and we've done it in

the past for them, and I think Your Honor might have approved one in State Street, subject to the review process that's going on there. But we do it as basically a lost wages sort of calculation, the hours that they expended on the litigation, times a reasonable hourly rate. And I think for Arkansas Teacher employees there's a statutory formula for that.

THE COURT: Okay. It's going to be tied to the effort invested in this case.

MR. HARROD: For ATRS I can explicitly say that's the case.

MR. FREDERICKS: That would be similar for City of Bristol and Omaha Police and Fire. And I think, as with ATRS, they're both in-house counsel as well as professionals who are involved in the litigation.

THE COURT: Well, it's 5:00. I wish I could be more precise for you, but I'm not going to decide this matter today, but I am inclined to preliminarily approve the settlement for distribution. I think the requirements of Rule 23 are met, and it seems to me that, given the risks of litigation as you described it and the procedural integrity of the process that led to the settlement, it seems within the range of reason.

I just want to make sure the notice complies with the PLSRA as I've been coming to understand and apply it and that it's fair to the class members if they want to take a different view, if they want to opt out, if they want to object. So if

you look at the -- and I haven't compared the time limits in Arkansas Teacher v. State Street and Aegerion, which are the two templates I'm using. But as I said, I think I've been giving people like 30 days to decide what they want to do, not 14 days. And, you know, if that means the approval has to go out another couple of weeks, I don't think that's nearly as important. And the order has to clearly say the court retains the discretion to --

MR. HARROD: Extend.

05:02 THE COURT: -- extend any deadlines for good cause shown.

MR. HARROD: Just so I'm clear, you want that in the notice that the class understands that as well?

THE COURT: Yes, exactly.

MR. HARROD: Correct. Okay. Your Honor, just to sort of logistically propose a way forward, what I think we should do is, we will certainly go back and look at those notices. There's one sort of point that I would make. My understanding is that State Street is not a PSLRA case because it was a

05:03 consumer and contract type claim.

THE COURT: Yes.

MR. HARROD: So I will --

THE COURT: That's a good point, but Aegerion is a PSLRA case.

MR. HARROD: Right. We will look at that, and we'll

make every effort to revise the notice. We'll of course need to show that to the defendants because it is an exhibit to the stipulation. I don't anticipate that they will have any significant issues with that.

THE COURT: Do the defendants anticipate any problem with issues that I've been raising?

MS. BULLERJAHN: No, Your Honor.

THE COURT: All right. What's the minimum reasonable time to give me, you know, a new proposed order, documents and
05:04 a memorandum describing what you've done?

MR. HARROD: Yeah. For those items, I think it's safe to say we could do it by next Friday. Is that acceptable to the court?

THE COURT: It's not too long. Let me see your book. Are you sure it's enough?

MR. HARROD: I'm trying to think --

THE COURT: You can do this, and I know I'm old, but it used to be we had to mail things to people. And then they could go home for a couple of days or do something else, but
05:04 now everything goes at such breakneck speed. I don't object to getting it next Friday, and I'd like to keep this moving along. But I don't see that this is -- but it really does need to match up, and you're going to have to explain to me, you know, what you've changed, and I expect it's going to look quite different. So I don't know that a redline version is going to

be quite right, but if you're just making edits, send me a redline version, but I'd rather give you a deadline that's reasonable and realistic.

MR. HARROD: Well, why don't you give us then 14 days from today, and we can, you know, unless there's something --

THE COURT: I think that's the way to do it, and then if you can get it done sooner --

MR. HARROD: Earlier.

THE COURT: -- fine. And I'll ask the deputy clerk, my law clerk, to let me know promptly when it comes in, because we do have a lot going on, so the easiest thing to do would be to approve what you gave me, but I'm not comfortable with it. All right?

MR. FREDERICKS: Logistically, would Your Honor like us to come back for a hearing?

THE COURT: I'll let you know if you need to come back. It may not be necessary, if you satisfy me. I would like you to give me a disk, though, with whatever you send.

MR. HARROD: We can -- we can email the files if that's easier.

THE COURT: Whatever it is.

MR. HARROD: You want electronic versions?

THE COURT: I don't understand the technology. I want to be able to edit it.

MR. HARROD: We can certainly make that available,

Your Honor.

MR. FREDERICKS: I think logistically, if we don't have a hearing, we may also suggest some dates for a final approval hearing.

THE COURT: Exactly, exactly. Suggest some dates, and say, you know, if I approve this one week after you submit it, these would be the dates. Don't schedule a hearing in July. I won't be here. And actually, I may have to move -- I'll deal with the hearing date, but I'm doing some international travel, law-related, so there's times that I'm not here. All right.

MR. HARROD: Before we submit that, would it be helpful if we confer with your deputy to talk about dates to make sure we're not shooting in the dark about possible dates?

THE COURT: Yeah, you can do that. With regard to August -- I'm going to be out almost all of July. I'll be out one week in August, which is --

COURTROOM CLERK: The week of the 13th.

(Discussion off the record.)

THE COURT: Don't schedule the week of the 13th, and then as of now, much of August I'm going to be here in a multibillion dollar patent case getting ready to try or trying it. But if you do this right, the final approval hearing shouldn't take long. All right?

MR. HARROD: That's our hope, Your Honor.

THE COURT: It's your hope. You're going to get

almost $5 million. That will be considerably more than I made in my 33-year career as a judge, so we've got to get it right. All right. Court is in recess.

(Adjourned, 5:08 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 18th day of March, 2018.

/s/ Kelly Mortellite

_____

Kelly Mortellite, RMR, CRR

Official Court Reporter

10:33

Exhibit S
Redacted

Exhibit T

NEWBERG
ON CLASS ACTIONS

FIFTH EDITION

Volume 3
Chapters 7 to 10

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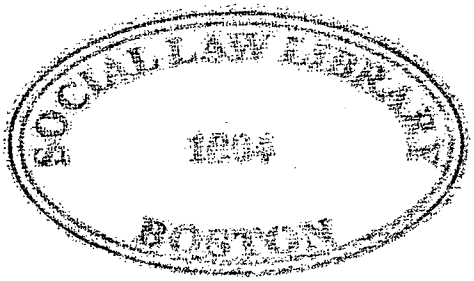

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settlement.[8] CAFA's settlement notice criteria are discussed in depth elsewhere in the Treatise.[9]

§ 8:17 Settlement notice content

Rule 23(e)(1) requires that a court considering a proposed class action settlement "direct notice in a reasonable manner to all class members who would be bound by the proposal."[1] Yet other than requiring that the notice be made "in a reasonable manner," Rule 23 does not dictate that the notice contain any specific content, with one caveat: if a class is certified at the same time that a settlement is reached, the court must issue notice that complies with both 23(c)(2)(B)'s certification notice requirements (that do require specific content)[2] and 23(e)'s settlement notice requirement (which does not).[3] Aside from that scenario, the content of the settlement notice itself is dictated by two other aspects of Rule 23(e): the requirement that the settlement be fair, reasonable, and adequate[4] and the guarantee that class members have the right to object to the settlement if, in their opinion, it does not hit this mark.[5] To safeguard class members' opportunity to object, notice must be sufficiently clear and informative to make those opportunities meaningful.

The content of settlement notice is committed to the discre-

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[8]28 U.S.C.A. § 1715(b).

[9]*See* Rubenstein, 3 **Newberg on Class Actions** §§ 8:18 to 8:21 (5th ed.).

[Section 8:17]

[1]Fed. R. Civ. P. 23(e)(2).

[2]*See* Fed. R. Civ. P. 23(c)(2)(B) (enumerating seven items that must be contained in certification notice). For a discussion, *see* Rubenstein, 3 **Newberg on Class Actions** § 8:12 (5th ed.).

[3]*See* Fed. R. Civ. P. 23(e)(1) (requiring that notice be sent "in a reasonable manner").

On the requirement that both types of notice need to be sent in a settlement class action situation, *see, e.g.,* In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp. 450, 526 (D.N.J. 1997), aff'd, 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998) ("The combined Class Notice must meet the requirements of both Rule 23(c)(2) and Rule 23(e).")

[4]Fed. R. Civ. P. 23(e)(2).

[5]Fed. R. Civ. P. 23(e)(5).

tion of the trial judge.[6] Indeed, courts have interpreted Rule 23(e)'s absence of specific guidance, and its use only of the "reasonable manner" standard, as creating greater discretion for judges than the discretion afforded by Rule 23(c)(2)(B), which enumerates specific items to be contained in certification notice.[7] The *Manual for Complex Litigation* has attempted to fill Rule 23(e)(1)'s content void by stating that settlement notice should:

- define the class and any subclasses;
- describe clearly the options open to the class members and the deadlines for taking action;
- describe the essential terms of the proposed settlement;
- disclose any special benefits provided to the class representatives;

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[6]**Second Circuit**

Masters v. Wilhelmina Model Agency, Inc., 473 F.3d 423, 438, 2007-1 Trade Cas. (CCH) ¶ 75542 (2d Cir. 2007) (stating, in a discussion of 23(e) notice, that "a district court's decision regarding the form and content of notices sent to class members is reviewed only for an abuse of discretion" (citing In re Agent Orange Product Liability Litigation MDL No. 381, 818 F.2d 145, 168 (2d Cir. 1987))).

Third Circuit (District Court)

In re Prudential Ins. Co. of America Sales Practices Litigation, 962 F. Supp. 450, 527 (D.N.J. 1997), aff'd, 148 F.3d 283, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998) ("The nature and extent of Rule 23(e) class notice of a proposed settlement lies squarely within the discretion of the trial judge.").

Seventh Circuit (District Court)

Kaufman v. American Exp. Travel Related Services, Inc., 283 F.R.D. 404, 406 (N.D. Ill. 2012) ("The court also has nearly complete discretion to determine the form and content of notice to class members.").

Mangone v. First USA Bank, 206 F.R.D. 222, 231 (S.D. Ill. 2001) ("[T]he form and content of the class notice are committed to the sound discretion of the court . . ." (citing In re Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 299, 41 Fed. R. Serv. 3d 596 (3d Cir. 1998))).

[7]In re Motor Fuel Temperature Sales Practices Litigation, 271 F.R.D. 263, 295 (D. Kan. 2010) ("Regarding notice of class certification, subsection (c)(2) imposes more stringent requirements than subsection (e) imposes with regard to class settlement. With respect to a proposed class settlement, subsection (e) requires only that the Court direct notice 'in a reasonable manner to all class members who would be bound by the proposal.' " (internal citations omitted)).

- provide information regarding attorney's fees;[8]
- indicate the time and place of the hearing to consider approval of the settlement;
- describe the method for objecting to (or, if permitted, for opting out of) the settlement;
- explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set forth those variations;
- explain the basis for valuation of nonmonetary benefits if the settlement includes them;
- provide information that will enable class members to calculate or at least estimate their individual recoveries, including estimates of the size of the class and any subclasses;
- and prominently display the address and phone number of class counsel and how to make inquiries.[9]

The *Manual's* list is, of course, not binding, and courts have found certification notice to be sufficient if it simply informs the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing.[10] Courts have similarly held that notice is sufficient if it "fairly apprises" class members of the action and their

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[8]Rule 23 now independently requires this disclosure in Rule 23(h)(1). *See* Rubenstein, 3 **Newberg on Class Actions** §§ 8:22 to 8:25 (5th ed.).

[9]*See* Manual for Complex Litigation, Fourth, § 21.312.

[10]Gooch v. Life Investors Ins. Co. of America, 672 F.3d 402, 423, 81 Fed. R. Serv. 3d 832 (6th Cir. 2012) ("When a class has settled its claims, '[t]he contents of a . . . notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, . . . that any class member may appear and be heard at the hearing . . .' " (quoting **Newberg on Class Actions**)).

In re Packaged Ice Antitrust Litigation, 2011-2 Trade Cas. (CCH) ¶ 77727, 2011 WL 6209188, *5 (E.D. Mich. 2011) ("The contents of a Rule 23(e) notice are sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing." (quoting **Newberg on Class Actions**)).

In re AT & T Mobility Wireless Data Services Sales Litigation, 270 F.R.D. 330, 351 (N.D. Ill. 2010) ("The contents of a Rule 23(e) notice are

rights.[11] There is some flexibility built into this standard, however: notice need not be overly long and stuffed with every relevant bit of information,[12] and parties are not always strictly bound to the language approved by the court.[13]

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sufficient if they inform the class members of the nature of the pending action, the general terms of the settlement, that complete and detailed information is available from the court files, and that any class member may appear and be heard at the hearing." (quoting **Newberg on Class Actions**)).

[11]In re Integra Realty Resources, Inc., 262 F.3d 1089, 1111, 50 Fed. R. Serv. 3d 900 (10th Cir. 2001) ("The standard for the settlement notice under Rule 23(e) is that it must 'fairly apprise' the class members of the terms of the proposed settlement and of their options.").

Thompson v. Metropolitan Life Ins. Co., 216 F.R.D. 55, 67 (S.D. N.Y. 2003) ("Although no rigid standards govern the contents of notice to class members, the notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings." (quoting Weinberger v. Kendrick, 698 F.2d 61, 70, Fed. Sec. L. Rep. (CCH) P 98755, Fed. Sec. L. Rep. (CCH) P 99074, 34 Fed. R. Serv. 2d 450 (2d Cir. 1982) (internal quotation marks omitted))).

See also In re Katrina Canal Breaches Litigation, 628 F.3d 185, 197, 78 Fed. R. Serv. 3d 294 (5th Cir. 2010) (citing **Newberg on Class Actions**) ("Notice of a mandatory class settlement, which will deprive class members of their claims, therefore requires that class members be given *information reasonably necessary for them to make a decision* whether to object to the settlement." (emphasis added)).

[12]Kagan v. Wachovia Securities, L.L.C., 2012 WL 1109987, *10 (N.D. Cal. 2012) ("[The proposed notice] is simply too long. The Court is concerned that few class members will read a fifteen-page, single-spaced Class Notice . . . The parties should provide an industry-standard short-form notice that directs them to the long-form notice for details.").

Manual for Complex Litigation, Fourth, § 21.312 ("In most instances, the notice does not include the full text of the proposed settlement. If the agreement itself is not distributed, however, the notice must contain a clear, accurate description of the key terms of the settlement and inform class members where they can examine or obtain a copy, such as from the Internet, the clerk's office, class counsel, or another readily accessible source.").

Wright and Miller's Federal Practice and Procedure, Civil § 1797.6 ("[C]ourts have approved notices that did not contain some of the precise details of the settlement, such as the distribution or allocation plan, or the amount of attorney fees to be taken out, as long as sufficient contact information is provided to allow the class members to obtain more detailed information about those matters.").

[13]*See* Casey v. Coventry Healthcare of Kansas, Inc., 53 Employee Benefits Cas. (BNA) 1381, 2011 WL 8007035, *3 (W.D. Mo. 2011),

As important as the specific content is the guideline that the notice be written in simple, straightforward language. The 2003 Advisory Committee notes emphasized this goal with respect to certification notice, writing

> The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.[14]

It is equally—if not more—important that settlement notice serve the same goals.[15]

Elsewhere,[16] the Treatise's author has argued that the practice of settlement notice would be more transparent and meaningful if the text of the settlement notice was accompanied by a simple table like the FDA's nutrition label, especially if such a label was used repeatedly and hence made familiar to the public assessing the value of a settlement:

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subsequent determination, 2012 WL 860395 (W.D. Mo. 2012) ("The parties may make minor changes to the proposed notice, by agreement, without further approval of the Court.").

[14]Fed. R. Civ. P. 23 advisory committee's note (2003).

[15]*See* Wright and Miller's Federal Practice and Procedure, Civil § 1797.6 ("The 2003 amendment to Rule 23(c)(2)(B) added an express requirement to class certification that class-action notices be written in 'plain, easily understood language.' This same requirement appears equally justifiable in the settlement-notice context.").

[16]William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. Rev. 1435 (2006).

Exhibit U

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * * * * * * * * * * * * * * * * *
*ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated
Plaintiffs
vs.
*STATE STREET CORPORATION, STATE STREET BANK AND TRUST COMPANY, AND STATE STREET GLOBAL MARKETS, LLC,
Defendants
* * * * * * * * * * * * * * * * * * * *

CIVIL ACTION
No. 11-10230-MLW

Related cases: 11-cv-12049-MLW
12-cv-11698-MLW

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE
HEARING
May 30, 2018

Courtroom No. 10
1 Courthouse Way
Boston, Massachusetts 02210

JAMES P. GIBBONS, RPR/RMR
Official Court Reporter
1 Courthouse Way, Suite 7205
Boston, Massachusetts 02210
jmsgibbons@yahoo.com

APPEARANCES:

DONOGHUE BARRETT & SINGAL, (By William F. Sinnott, Esq., and Amy McEvoy, Esq.), One Beacon Street, Suite 1320, Boston, Massachusetts 02108-3106, on behalf of the Hon. Gerald E. Rosen, Special Master

CHOATE, HALL & STEWART, LLP, (By Joan A. Lukey, Esq., and Justin J. Wolosz, Esq.), 100-150 Oliver Street, Boston, Massachusetts 02110, on behalf of Labaton Sucharow, LLP

NIXON PEABODY, LLP, (By Brian T. Kelly, Esq.), 100 Summer Street, Boston, Massachusetts 02110, on behalf of the Thornton Law Firm, LLP

LIEFF CABRASER HEIMANN & BERNSTEIN, (By Richard M. Heimann, Esq.), 275 Battery Street, 30th Floor, San Francisco, California 94111-3339, on behalf of Plaintiffs

WILMER HALE, LLP, (By William H. Paine, Esq., and Daniel W. Halston, Esq.), 60 State Street, Boston, Massachusetts 02109, on behalf of Defendants

McTIGUE LAW, LLP, (By J. Brian McTigue, Esq.), 4530 Wisconsin Ave., N.W., Washington, D.C. 20016, on behalf of various ERISA Funds

ZUCKERMAN SPAEDER, LLP, (By Carl S. Kravitz, Esq.), 1800 M Street, N.W., Washington, D.C. 20036, on behalf of various ERISA Funds

KELLER ROHRBACK, LLP, (By Laura R. Gerber, Esq., via phone), 1201 Third Avenue, Suite 3200, Seattle, Washington 98101, on behalf of The Andover Companies and James Pehoushek-Stangeland

ALSO PRESENT: George Hopkins

P R O C E E D I N G S

THE CLERK: All rise for this Honorable Court.

(Whereupon, the Court entered the courtroom.)

THE CLERK: This is Civil Action No. 11-10230, Arkansas Teacher Retirement System versus State Street Corporation.

Court is open. You may be seated.

THE COURT: Good afternoon.

There's Mr. Sinnott.

MR. SINNOTT: You may not have recognized me.

THE COURT: Would counsel please identify themselves for the record.

MR. SINNOTT: Good afternoon, your Honor. My name is William Sinnott, and I'm counsel to the Special Master.

MS. McEVOY: Good afternoon, your Honor. Elizabeth McEvoy, also counsel to the Special Master.

MR. KELLY: Good afternoon, your Honor. Brian Kelly on behalf of the Thornton Law Firm.

MR. WOLOSZ: Good afternoon, your Honor. Justin Wolosz on behalf of Labaton Sucharow.

MS. LUKEY: Good afternoon, your Honor. Joan Lukey, also on behalf of Labaton Sucharow.

MR. HEIMANN: Good afternoon, your Honor. Richard Heimann, on behalf of Lieff Cabraser Heimann & Bernstein.

MR. PAINE: Bill Paine and Dan Halson from Wilmer

Hale for State Street.

THE COURT: Okay.

MR. KRAVITZ: Your Honor, Carl Kravitz, one of the ERISA counsel for the *amicus* plaintiffs.

THE COURT: You can come in. What are you doing out there?

MR. KRAVITZ: I don't know.

(Laughter.)

THE COURT: Who just came into the enclosure?

MR. McTIGUE: Brian McTigue, representing several of the ERISA plaintiffs.

THE COURT: And Mr. Kravitz also for the some ERISA plaintiffs?

MR. KRAVITZ: Yes, your Honor.

THE COURT: And who is on the phone, please?

MS. GERBER: Good afternoon. This is Laura Gerber at Keller Rohrback for the Andover Companies, and James Pehoushek-Stangeland.

THE COURT: All right.

I apologize for the delay in starting. I wanted to get a little further organized.

Is Mr. Hopkins here from Arkansas Teachers?

MR. HOPKINS: Yes, your Honor.

THE COURT: Why don't you come in, and you can sit in the jury box.

Do you have anybody else from Arkansas Teachers with you?

MR. HOPKINS: No, your Honor.

(Whereupon, Mr. Hopkins moves to the jury box.)

THE COURT: I would like to try to assure that we have a clear and common sense of where we are at the moment.

On March 8, 2017, I appointed retired Judge Gerry Rosen to serve as Master in connection with investigating and providing a Report and Recommendation on issues relating to the $75 million in attorney's fees that I awarded in this class action.

On May 14, 2018, the Master filed his Report and Recommendations and an executive summary temporarily under seal to permit the interested parties to propose redactions.

On May 16, I issued an order relating to a process for presenting proposed redactions. I described the applicable standards as I understand them. Essentially, judicial records, or records on which judicial decisions are based, are, presumptively, public. In some circumstances redactions may be justified, and I mentioned properly invoked attorney-client privilege and certain privacy interests.

I ordered the parties to file any motions for redactions, memos, and affidavits by May 31 under seal, and I directed that redacted copies of those submissions be made

for the public record.

Labaton, Thornton, and Lieff, who I will refer to as "the Lawyers" with a capital L, filed a motion for clarification regarding what should be included in the record to be filed in support of the Report and Recommendation.

I ordered the parties to confer and report by May 24 on that issue.

On May 24, the Lawyers filed a motion for a revised schedule regarding redactions and unsealing of the Report and Recommendation.

On May 25, I issued an order scheduling today's hearing to address issues relating to redactions, to unsealing, to the record to be filed by the Master, and to discuss whether Arkansas Teacher should be replaced as lead plaintiff based on the information in the Report and Recommendation; whether there is now a conflict of interest between the Customer Class counsel, Labaton, Thornton, and Lieff, and the class; and whether new class counsel should be appointed to provide independent advice to the lead plaintiff regardless whether Arkansas Teacher continues in that role.

The Lawyers had asked for an extension of time to make their submissions concerning redactions to June 11. In my order I provide an extension to June 5 without prejudice to granting a further extension to June 11 as requested.

So it is my intention to discuss these matters today. Is there anything else that should be on the agenda?

MS. LUKEY: I don't believe so from our perspective, your Honor.

MR. SINNOTT: Nothing from the Special Master, your Honor.

THE COURT: All right.

I would like to start by telling you what my general interests are and then hearing what yours are before we get to the specifics.

My interests are in resolving the issues presented by the Report and Recommendation fairly and as expeditiously as reasonably possible.

I have an interest in recognizing the presumption of public access to judicial records and proceedings. I think it's particularly pronounced or important in this case that there be maximum appropriate public access. This case essentially was triggered by media interest, and investigations and the adversary process did not work previously. Now there is somewhat of an adversary process with the Special Master, perhaps, but there may be relevant information that should be brought to the Court's attention that is known to members of the public or others who might be interested that has not been presented. And I want to use a fair process to make informed decisions concerning

whether any exceptions to the presumption of public access to judicial records and proceedings are justified.

I also want to ensure that the interests of the class are properly represented by a lead plaintiff who at this point, as the case has evolved, satisfies the Rule 23 requirements of typicality and adequacy, and will vigorously represent the interests of the class, and I want to make sure that there is suitable counsel for the lead plaintiff.

So those are essentially my interests, my goals.

Perhaps we start with Labaton, since it seems to have taken a leading role in some of the submissions to me. What are Labaton's interests at this point?

MS. LUKEY: Your Honor, I would say that our interests do not differ materially, but we do wish to be sure that you understand certain context as we go forward.

First, I would like to be sure that you are aware that the -- that many of the findings recommended, the findings of fact and rulings of law, are very vigorously disputed. Your Honor, of course, will be obligated to make *de novo* decisions on these matters, and we do not want to go forward with you thinking that the findings, or suggested findings, set forth are undisputed or that there was not contrary evidence on many of them; indeed there was.

But, more significantly, we wish to draw to your attention some material disputes as to the law. Your Honor

has probably not, at this point in time, had the opportunity to pore through all of it. The Report and Recommendation, with its exhibits is 10,000 pages long, unless the ERISA counsel submitted something, which we wouldn't know, and then it's even longer. So it is very weighty matter to get through. And we would suggest to the Court that you will quickly come to realize that each of the proposed rulings of law forming the basis for recommendations is novel; that is, there is no case support for any of the rules which are suggestive as forming a basis for remedies, although generally not sanctions, since, for the most part, the recommendations are not sanctions.

So we do want to be sure that as you proceed today, particularly with regard to Arkansas and Mr. Hopkins, but also as to the class counsel issues, that you have only seen one side of a very, very hotly disputed story. It looks like you're reading two different books, if you put them side by side.

So, respectfully, we would suggest that it is very much premature to suggest that this would be a time, on the basis of the recommend finding and rulings, to replace Arkansas, or certainly Mr. Hopkins, who has done what can only be described as a phenomenal job as class rep.

And on a point --

THE COURT: Mr. Hopkins, have are you read the

Report and Recommendation?

MR. HOPKINS: Yes, your Honor, I have.

THE COURT: Okay. Thank you.

MS. LUKEY: On a point of special privilege here, I would like to point out that when your Honor issued the order on Friday requiring Mr. Hopkins' presence, it generated, as unfortunately often occurs, some pretty extraordinary and inflammatory online media reactions, including language such as Mr. Hopkins must have done something explosive, or there must have been shenanigans.

If I may, without violating the seal, I would simply like, since I know the room is full of reporters, to be clear, that the issue here was whether Mr. Hopkins should have taken a role in the fee allocation process after the award of fees and chose not to do so at any point.

THE COURT: And I have not studied the Report and Recommendation or the exhibits as deeply as I will.

I would say that is not the only issue with regard to Mr. Hopkins and Arkansas Teacher, in my mind, and I will also say the following.

I regretted issuing that order on Friday afternoon. This was going very fast. I do, and I think you do, too, want to get to the point where what should be public is public, and the Master's Report and Recommendations will be known, and then, by my schedule, no later than seven days

later the response will be known, and then we can get to the merits of the case.

And this is not the only matter, let alone the only particularly consequential matter I am dealing with this month. So looking at my schedule, and the schedule I have given you, I wanted to get you in quickly, and I am pleased that people, even on the eve of Memorial Day weekend, were able to arrange their schedules to be here. So that's good.

MS. LUKEY: I'm sorry.

THE COURT: No, and we will go through the specifics, and I -- I mean, we will go through some of the motions.

And I may have some thoughts for Mr. Hopkins -- well, I'm interested in his responses to certain questions I will have for him, and this may be part of a continuing colloquy.

MS. LUKEY: I am hoping that the impression would not be left that Mr. Hopkins has somehow taken a personal benefit in any way from this process, since he has himself received nothing.

THE COURT: You have evidently read more than I have.

Anyway, Mr. Kelly, what are Thornton's interests at this point?

MR. KELLY: Well, your Honor, we would echo much of what Ms. Lukey says, and we agree that to date the Court's

only heard one side of the story, and there is a second side of the story, and we do intend to object to both the accuracy of the facts and the accuracy of the law as portrayed in this Report.

We also believe at this juncture it may be premature for the Court to take action on the issues listed in Part 3 of the Court's order because it has, in fact, only heard one side of the story and it may be best for the Court to hear the rest of the story when we make or submissions.

THE COURT: I have to go look.

MR. KELLY: Part 3 would be a series of issues you suggested could lead to action by the Court, vis-a-vis Mr. Hopkins, and Customer Class counsel, and I would respectfully suggest the Court should hear the rest of the story before it take actions on those issues outlined there.

So that's how we would view Part 3.

Part 4 is the question of the 230,000 pages of discovery, and we strongly urge the Court not to make those public for a couple of reasons. First of all, there is no doubt that they are discovery materials. The Special Master's Report itself refers to these documents 19 different times as "discovery."

THE COURT: We're going to do these one at a time.

Let me tell you, and tell anybody else who might have a different view, at the moment I regard your proposal as

reasonable as to what should be in the record, but we will get to that.

So you are concerned about the dimensions -- why are you concerned about the dimensions of --

MR. KELLY: A couple of reasons.

First of all, as the Court has given us the opportunity to do, we are going to make some proposed redactions to the Court. And there are some legitimate legal redactions that must be made to the submission that went to the Court. That takes time, and we have to put eyes on these documents and make the proposal to the Court as to what should be redacted.

The Special Master's Report itself, as indicated by Ms. Lukey, with exhibits is already 10,000 pages. So, as a practical matter, to also put eyes on the additional 230,000 pages is going to take a long, long time. And I'm not sure that's in anyone's interest here. But, more importantly, unlike what has been suggested, Rule 53 on Civil Procedures does not require it to be made part of the public record; and, secondly, they are discovery documents, and the law is clear in the First Circuit that discovery documents, there's no presumption of public access. This Court ruled on this same issue over 20 years ago in the Salemme case. It said the exact same thing, discovery documents are not subject --

THE COURT: September 10, 1997, and earlier in May,

but who remembers.

(Laughter.)

MR. KELLY: But the principle remains valid today, and so we do not think we should have to --

THE COURT: Actually, it was June. It was about 21 years ago.

MR. KELLY: So I think, your Honor, there's multiple reasons we don't want to have to spend the time to go through 230,000 pages of discovery, A, because we're not required to under either Rule 53 or existing case law in the First Circuit and this Court. And, C, it would be an enormous undertaking to go through all those pages and redact them and then present to the Court our various redactions.

Thornton may have some redactions. Labaton may have some redactions. Lieff may have some other redactions. So we'll be here next year at this time arguing about redactions if we have to go through those 200,000 pages.

So I would respectfully suggest that we don't have to do that.

And the other issue the Court touched upon is the timing of our filing. We had asked for June 11. The Court gave us until June 5 but without prejudice to ask again, and we're asking again on behalf --

THE COURT: I've got a thought on that as I'll

explain to you.

I really want to, and I think you want to, get these redaction issues resolved as soon as they reasonably can on an informed basis, and then, you know, get on to the substance.

I am going be to emersed in a multi-billion-dollar patent case the week of June 11, so that's one of our considerations, but I have a thought on that, or how to deal with that.

What are Lieff's particular interests at this point?

MR. HEIMANN: I don't think I have anything to add, your Honor, to what's been said at this point.

THE COURT: And do counsel for the ERISA plaintiffs want to tell me what their interests are?

MR. KRAVITZ: I don't think we have anything to add right now. We'll just see how things play out.

MS. GERBER: This is Laura Gerber. Your Honor, we share the interests that you have already articulated regarding the matters today.

MR. McTIGUE: Your Honor, it's Brian McTigue. I share your Honor's interests. And I must say that before I practiced law, I was a journalist, and an investigative journalist, so I can appreciate the interest of the public in the proceedings as well, but I am not here in that role.

MR. PAINE: For State Street, really our interests

are exclusively the privacy interests of State Street and its customers.

And in that regard, really, all that we're looking for is to echo the idea that we need a little more time. We first got a gander at this stuff late last Friday, and it's hard to wade through.

Secondly, with respect to the expansive record, we haven't seen it, and just as soon never see it. That being said, we understand that it might have a lot of our stuff in there. So, to the extent that that's the case, then we also would be wading through a big pile, and that would be expensive and inconsistent with what we've tried to achieve at your suggestion with the whole mediation process. We forewent formal discovery and active litigation and engaged in a process that cooperatively led to an agreement that hived off these issues from State Street. And we'd just as soon not be, you know, engaging in a process of trying to figure out whether we or our clients are going to be disadvantaged by the bigger pile if, in fact, it's going to be filed.

THE COURT: Okay.

And what are the Master's interests at this point?

MR. SINNOTT: Your Honor, on behalf of the Master, who, as the Court is aware, is not present here, there are two priorities, and those two priorities are protection of

the class and the public interest in information.

Now, with respect to those two priorities, I would just note -- and I'm disappointed to hear that there has been press or blogging about Mr. Hopkins' role and allegations that he did anything illegal or nefarious.

I would note with respect to the case, and I won't elaborate on the contents of our Report unless the Court requests it, but Mr. Hopkins did an admirable job in pushing this case and proactively representing his members during the life of the case itself. I don't think it's a reach to say that he was instrumental -- and I don't think that my brother's representing State Street would argue with this, let alone counsel for the plaintiffs -- he was instrumental in securing the settlement in this case.

But, having said that, I would note, as the Court has seen in our Report, that beyond the allegations that were raised in the press that precipitated this second look at this case, a declaration was filed, and there was testimony by Mr. Hopkins that was very troubling. And not for nefarious reasons, but with respect to what he saw as his role with respect to the class and the members.

And this being an open hearing, I'll leave it at that. But I just wanted to provide some balance on that particular issue.

With respect to the public interest in access, the

Special Master finds that that is a priority because this case at its core involves issues of nondisclosure, and the Special Master, to the greatest extent possible, would ask that the Court keep that in mind. He understands that there are very valid issues, and the Court has alluded to those with respect to attorney-client privilege, with respect to --

THE COURT: Well, if there is anything in the Report that is privileged, but we'll get to that.

MR. SINNOTT: And other issues, personal issues, proprietary issues potentially. But those are his priorities. Those are his interests moving forward.

THE COURT: Thank you.

Well, let's go over some of the procedural issues, and then we'll get to Mr. Hopkins.

So, I provided the parties, I'll call them "the Lawyers," an opportunity to propose redactions, and I had indicated earlier I would do that in my orders. But what are the categories? I actually did not anticipate that this would be a major challenge. What are the categories of proposed redactions?

When I say, "the Lawyers" -- I did this in my order -- as I may have already said, I am thinking of Labaton, Thornton, and Lieff.

What are the categories of redactions you anticipate

proposing?

MS. LUKEY: Earlier you had asked about the fact that Labaton was taking the lead. You actually had appointed me as liaison counsel at the same time that you appointed the Special Master. That's the reason that I have taken the lead.

The categories, we assume, are to be tracked from the order as you provided them. And, as I recall them, that, of course, includes attorney-client privilege information, any personal information. There actually is, by the way, as I understand it, included in there all the W-2s and W-9s involved --

THE COURT: I'm not talking about the record now.

MS. LUKEY: Oh, okay.

THE COURT: The record I have put aside.

My approach to this is once I decide what information can properly be redacted from the Report and Recommendation and the Executive Summary, we would get the record, however it ends up being defined later, and the redactions, consistent with my earlier rulings, would be made on the records.

So right now you do not have the record, to my knowledge. I do not have the record. All we have is the Report and Recommendation, which admittedly, is lengthy, and an Executive Summary.

So in the Report and Recommendation, which is, of course, more complete than the Executive Summary, what are the categories of information that you expect you would ask be redacted?

MS. LUKEY: Are you including within that request the 10,000 pages of exhibits?

THE COURT: Yes. In what categories?

MS. LUKEY: The categories are attorney-client privilege, personal information, and I think that does extend to some of what I was starting to reference, that there may be some personal identifying information and personal documents, and proprietary information.

In the latter category, that would be, I assume, firm-specific as to what they consider to be proprietary.

At least as far as I am aware, no counsel anticipates attempting to redact information on the basis that they disagree with the findings, for example.

I believe you will be seeing a separate motion from Labaton that asks you to consider striking a specific phrase that appears six times and that we think is an inappropriate and inflammatory phrase. It's a simple three- or four-word phrase, but there is no intention on our part to -- there is no intent on our part, as far as I know on the part of either firm, to keep the public from understanding what the issue or issues is or are and proceeding.

The problem is when you're going into -- it's not so much the Report -- although it's, what, 375 pages, I think -- it's the exhibits. When you're going into the exhibits to do the redactions, it takes a lot of time.

THE COURT: Let me ask this. With regard to the Report, other than the exhibits, and this is not a rhetorical question, is there something in here that you or your colleagues claim is covered by an attorney-client privilege?

MS. LUKEY: In the Report itself?

THE COURT: Yes.

MS. LUKEY: Honestly, your Honor, I can't recall at the moment.

The attorney-client privilege issues are not to this case. The attorney-client privilege issues that we're talking about are generally, at least on Labaton's part, related to the identification of other clients, for example, or information --

THE COURT: Is that privileged? The existence of an attorney-client relationship I don't think is privileged.

MS. LUKEY: In those instances where we feel it is appropriate and privileged, we will make a claim of redaction -- your Honor will see the whole thing -- but it is often a difficult line to draw. But if you're talking about having discussed the same issue with other clients,

for example, and then you identify the clients, that, arguably, infringes their privilege and actually has nothing to do with this case.

More difficult, frankly --

THE COURT: Frequently I know the answers to the questions. I think I know the answers to the questions -- I am asking this time. I'm familiar with the Report and Recommendation, but I have not studied all of it, I have studied parts of it, and I haven't read all the exhibits. But, I mean, is there that type of information in the Report and Recommendation?

MS. LUKEY: As I indicated, your Honor, I can't recall and say to you off the top of my head that there is.

I have not separated -- in my consideration, I didn't separate the exhibits. I treated them as if they had been incorporated into the Report. So I apologize, but I can't make that distinction.

It may be that on the language we'll face in the Report the same issue doesn't exist, but since I take the exhibit and go to it in order to read it to make the determination, I can't give you that answer.

THE COURT: Because one of the things I could do, if there are no appropriate redactions or they're easily identifiable, is make the Report available with appropriate redactions before the exhibits are available.

MS. LUKEY: We could, your Honor, but the problem I have with that is, as I told you at the very beginning, there is a serious difference of opinion between counsel and the Master on the meaning of certain exhibits and what he says.

THE COURT: That's a different point.

MS. LUKEY: No, no, but it's not, your Honor, because this is the point. We don't want the Report released without the exhibits.

THE COURT: I know, and all of these are synergistic. I know you don't.

I doubt you are going to persuade me -- well, I want to go -- well, you may persuade me.

I want to go step by step. I want to know what the redactions are going to be, and then you should be working assiduously, all of you, on your objections because the rules give you -- Mr. Paine, have a seat. The rules give you 21 days to formulate your objections unless otherwise ordered. As a practical matter, you are going to get longer than that.

But the issue is I am going to decide the redactions at some point, and either the Report, as would ordinarily be the case, in redacted form immediately becomes part of the public record, and seven days later your objections are filed; or, as you have requested, I keep the Report sealed

seven days until your objections, your side of the story, is released simultaneously.

My intention is to go step by step on that. We'll see.

But you really want to be working to get your objections prepared because they are really independent, I think, of the redactions.

MS. LUKEY: I think they are.

THE COURT: As I said, we'll see -- the Master has a different view -- but we're not there yet. I want to have a document that I can properly make part of the public record either before you file your objections a week later or a week later. That's the present goal.

MS. LUKEY: I understand, your Honor.

What I am saying to you is, because the exhibits are incorporated into the Report, all we are asking for is what would be six additional days, which happens to include a weekend, so it's not very many business days.

We would like to see the Report and the exhibit redactions come in at the same time, so that steps you're talking about, the process to be followed, includes the incorporated materials. That's very important to us.

THE COURT: All right, then -- because one of the things I am thinking about, and tell me if this is feasible, is that you file your memos regarding the law relating to redactions. Say, We want to redact everything that's

attorney-client privilege. This is what is attorney-client privilege. You know, This is what's subject to the attorney-client privilege.

We want to redact proprietary information, and maybe give me an example or two.

And we want to redact personal information, like somebody's home address, which could be in a deposition transcript, theoretically.

And then you can spend another six days making the redactions, but not actually giving me the specific redactions.

Because I'm anxious to get to work on this when I'm not absorbed in something else.

Would that be feasible?

MS. LUKEY: If I'm understanding you, your Honor, you're suggesting that we tell you -- we go to the Report with its exhibits which we want to consider at the same time, and tell you, Here are the categories that we're going to be redacting, which, I could be wrong, it could go beyond or be different from or not include privilege, proprietary information, or personal information. You want us to give you that by the 5th and then give you the actual redactions by the 11th?

THE COURT: Correct.

MS. LUKEY: I believe that would be feasible for

Labaton and feasible for Lieff.

MR. HEIMANN: That's fine.

MR. KELLY: Yes, we can do that, your Honor.

THE COURT: Kind of give me a preview of coming attractions.

MS. LUKEY: Yes.

THE COURT: Because once there's a framework, it can be applied to the particular proposed redactions.

MS. LUKEY: We can do that, your Honor.

THE COURT: And then, in my tentative view -- and I will let the Master be heard on this, too, because I think he may want an opportunity to respond -- I would have you file those memos -- so it would be a motion, a memo, and affidavits under seal.

I would have you prepare redacted versions of those, also to be filed under seal temporarily by me. Because this is going to become, I think -- we're developing a protocol that will probably be applied in other areas. So there are certain things -- I ordered what I almost always order when there are sealed documents, that redacted versions be filed for the public record. That means simultaneously. But if you think there is a good reason for me to take the redacted version under seal and you want to make an argument why even the redacted version shouldn't be made public, I'll consider it. However, in view of the strong presumption of public

access to judicial records, you have to recognize the substantial risk that I will make the redacted version part of the public record promptly, and it would be even better if, on reflection, you just filed it. But if you want to ask me to -- you know, you want to make a special argument for the redacted version held under seal, I'll seriously consider it.

MS. LUKEY: Well, the first problem we would have is if each of us is filing our proposed redactions under seal, and that would include, of course, ERISA counsel and State Street, as well as the three separate Customer Class counsel, the redactions may differ.

THE COURT: Yes, I saw that.

Here, let me do it this way.

Right now I am talking about the memo you are going to file next week. So you have a June 5 date, and now I may give you to until June 11 to file the actual proposed redactions.

MS. LUKEY: Yes.

THE COURT: But what I am talking about is on June 5 you are going to file a memo and say, We intend to assert attorney-client privilege with regard to certain information in the Report or, not in the report, in some of the exhibits, and then, you know, Here is the law on attorney-client privilege.

And it is axiomatic that the privilege has to be asserted by the client, not the lawyer. So at the moment, Mr. Hopkins is the personification of a client.

Do you disagree with anything I've said so far?

MS. LUKEY: No, your Honor.

THE COURT: All right. So he would have to decide if there's anything as to which he thinks privilege should be asserted, if it is still him, and, therefore, the class and the public won't know that particular piece of information.

MS. LUKEY: I understand that, your Honor. That goes into the memo.

The issue was if we're each filing -- even if -- whether it's under seal or it's going to be made public immediately or later, they have to be consolidated.

THE COURT: They will be. I am going to tell you how we will do that.

MS. LUKEY: They can't be filed if you're going to turn them around at some point and make them public.

THE COURT: Yes, they can.

I thought there was one thing before that.

This relates, I think, to your request for a hearing on the proposed redactions. I want to see the submissions before I decide whether a hearing is necessary. I may well give you a hearing if you want a hearing. And I think that

hearing would have to be closed to the public because you want to discuss the redactions right --

MS. LUKEY: Yes, your Honor.

THE COURT: -- that's your position.

And the transcript would be made, and then the transcript, or a redacted version of the transcript, would be made public once I decide what redactions are appropriate or could be made public.

And do you anticipate that the Master would participate in this proceeding -- I do -- with regard to redactions?

MS. LUKEY: Well, I would assume he's not going to be making any redactions.

THE COURT: No, he can oppose the redactions.

MS. LUKEY: In opposing the redactions?

Well, we have had an issue whether the role should be as adversarial as it is if we're paying for it, but I would have to think about it.

THE COURT: This case -- let's go back to basics.

I said when I granted that $75 million in attorney's fees that the adversarial process didn't work, and this -- okay, so that's a concern I have.

I do not want to do anything without a genuine adversarial process, and this is part of my concern about Mr. Hopkins continuing in this role.

MS. LUKEY: We are not suggesting the absence of an

adversarial process --

THE COURT: Who is going to be your adversary with regard to redactions?

MS. LUKEY: More typically, your Honor, as you know, it would be done by a magistrate judge without the costs.

THE COURT: The magistrate judge, no. The magistrate judge would be a substitute for me, and right now you're dealing with me. Maybe at some point the magistrate judge will get delegated a slice of this.

No, the magistrate judge is not adversarial. The magistrate -- I mean, this is fundamental.

I think it's appropriate to remember the case started with allegations that State Street did not disclose what it should have to its clients on foreign currency exchange transactions, right. And plaintiffs' counsel artfully argued that. And there was a global settlement, and the Department of Labor agreed to it. I think the SEC and the Justice Department agreed to it, and I was the last piece, and I agreed to it. And then I awarded $75 million in attorney's fees, and I noted that the adversary process did not work at that time.

And so now, we've got a report about alleged failures to disclose things that allegedly should have should have been disclosed and that goes beyond the original questions I

put to the Special Master, but which were in the parameters of my general directions to him, and apparently you're going to want certain things redacted.

MS. LUKEY: Right.

THE COURT: If the Master wants to be heard on it, I would be interested in having the Master heard.

MS. LUKEY: Let's take that as a given then, your Honor.

The question that I had and what I was going to suggest to the Court is if we're going to end up so that you can see, or the Master can see, whoever is looking at it, which party is requesting which redaction --

THE COURT: There is a way to do that.

I've thought about this, not that deeply, but there would be two documents, two sets of documents. Each party files its own redactions, and then you make up a master that includes everybody's redactions and in some way identifies which firm wants that redaction. So you essentially consolidate it. But I do think I want to know the particular positions of the particular firms.

MS. LUKEY: Well, I had proposed to my colleagues, including ERISA colleagues, that Labaton -- that we would take on the role -- Choate Hall -- would take on the role of consolidating.

What I was going to suggest to the Court is if there is

anything that is going to be filed at that point --

(Whereupon, Mr. Hopkins rises to exit the jury box.)

THE COURT: Mr. Hopkins, where are you going?

MR. HOPKINS: I was going to ask a question of one of my attorneys, your Honor.

THE COURT: I asked if anybody -- one of your attorneys?

MS. LUKEY: Well, Labaton is his counsel, your Honor.

MR. HOPKINS: I'm sorry, your Honor. I'll sit back down.

THE COURT: Yes, sit down.

I'm sorry, who are you referring to when you said one of your attorneys?

MR. HOPKINS: Eric Belfi.

THE COURT: Mr. Belfi?

MR. HOPKINS: Yes.

THE COURT: From Labaton?

MR. HOPKINS: Correct.

THE COURT: Have you consulted anybody but a lawyer from Labaton for advice regarding this matter since I appointed the Special Master?

MR. HOPKINS: For legal advice for me?

THE COURT: For Arkansas Teacher.

MR. HOPKINS: Well, they represent Arkansas Teacher

Retirement.

In terms of legal advice on how we need to proceed to make sure we comply with the Court's order and things like that, sure, your Honor. But for legal advice on how to protect Arkansas Teacher Retirement in terms of the global issue here, no.

THE COURT: Okay, thank you.

MS. LUKEY: I'm not sure -- I think what I was going to say, your Honor, is if anything is going to be filed on the public record at that point, if we would just do the consolidated version --

THE COURT: That may make sense.

MS. LUKEY: -- with the others going in? If you wish to still have separate versions coming in --

THE COURT: I'm going to want separate versions, and then if there's a consolidated version and there is a good reason not to unseal every version, I will consider it.

But, again, step by step.

MS. LUKEY: But someone, either you or, apparently, Judge Rosen, would be reviewing the redactions and making a decision?

THE COURT: My present intention, I wrote this, is to do it myself. If I -- I mean, I could appoint another lawyer to create an adversarial, you know, sort of an *amicus* on this, and then you will have to pay for that.

MS. LUKEY: We do not.

THE COURT: It will come out of the fund.

No, but this may be a point I should think about. I mean, the Master has made a recommendation, and you are going to have objections to the Recommendation, the findings of fact, the conclusions of law, the recommendations, and I'm going to consider them *de novo*.

It may have been imprecise to call it "adversarial." In other words, I'm interested in hearing from everybody who's got an interest in the Report and Recommendation as to what should be on the public record. The Master may agree with you on all of it, or the Master may think you've drawn the line in the wrong place. And then I want to consider everybody's views. Not all the lawyers may agree on every issue. I mean, not all the lawyers for the class or the different classes, subclass.

So adversarial -- my point is I'm interested in hearing from the Master as well as from the lawyers as to what ought to be redacted.

MS. LUKEY: Perhaps we can cross the bridge later then when you see it, and we see whether there are differences of opinion or not as to what happens next.

THE COURT: Differences of opinion between?

MS. LUKEY: The Master and --

THE COURT: Precisely. That's what I want to do.

Step by step.

MS. LUKEY: So we would then be filing on the record what we will consolidate on behalf of all counsel.

If we're consolidating, way may need an extra day or two so that the individual filings come in, and then we have time to do the consolidation. If we can have to the 11th for everybody to get their individual filings in, and we can --

THE COURT: That's fine. They can file them with me on the 11th. If you want another day or two to consolidate them, you can do it.

MS. LUKEY: I will need to -- yes.

They would file with you, and then we'll consolidate when everybody's is in and try to get them to you on the 13th.

And that would be, as I understand it, a public filing. So it's everybody's redactions.

THE COURT: I hope it's a public filing.

MS. LUKEY: But you're suggesting --

THE COURT: I'm saying, if you want to make an argument that it should remain sealed until I decide which redactions are appropriate, I will probably let you -- you know, you have to file a motion, you can file it temporarily under seal, and tell me why it should be maintained under seal, and if the Master disagrees, he can tell me why he

thinks it shouldn't be maintained under seal.

MS. LUKEY: What is the date for us to do that, your Honor, because it would clearly be our preference that until you have ruled on what should be redacted --

THE COURT: I'm ordering that you file the motion, the affidavits, and the memos on categories of redactions by next Tuesday, June 5. And you can file that under seal with redacted versions that I will make public, unless you persuade me that they shouldn't be.

Then the individual filings shall be made by June 11 under seal, and those are going to be redacted versions, and your consolidated version can be filed June 13.

MS. LUKEY: Under seal until you review it?

THE COURT: Under seal.

MS. LUKEY: We will take care of that, your Honor correct.

MR. KELLY: Excuse, your Honor.

Maybe I'm misunderstanding this, but on June 5 we submit to the Court examples of what we think are legal bases to redact, not our actual proposed redactions on June 5?

THE COURT: Yes. You may want -- you don't even have to necessarily illustrate it with examples, although it may be more intelligible if you do, and you might want to redact the examples. But, like I said, "attorney-client

privilege." Here's and affidavit on behalf of the client, the class.

Or -- I haven't thought of this -- maybe it's a client in another case, but it has to be a asserted by the client, not by the lawyer.

Then you say, This is why it's privileged. Here's the lawyer concerning attorney-client privilege.

If I agree that's the law, I will say, Well, if you get an assertion by the client, if you have that, you will have that next Tuesday.

If Mr. Hopkins still has this role, or wants it, he'll say, I'm asserting attorney-client privilege regarding everything that qualifies with regard to Labaton. And then on the 11th I'll see what you think that is. But it will give my head start on law.

MR. KELLY: I really think the volume of redactions is not going to be large. It's just the volume of work needed to get there is large.

THE COURT: All right, but you told me you could do it by June 11?

MR. KELLY: Yeah, I'm not quibbling with you.

THE COURT: So I'm giving you to June 11.

But I'm glad to hear you say that you don't expect the volume of redactions to be large, because I don't either.

You know, I want to be careful and I want to be fair,

but I don't want this to be become a ponderous, protracted process.

MS. LUKEY: So that takes us through the Report and Recommendation, I think, right? We've done our redactions for that part of the --

THE COURT: Right, and once I see what it is, I'll decide whether a hearing is necessary, and if I think -- if you ask for one and I think it will be helpful to my decision-making, I'll give it to you.

MS. LUKEY: Thank you.

THE COURT: And it will probably have to be a closed hearing because we'll be discussing matters about whether certain things should continue to be under seal.

And then after I decide the redactions -- and this relates to something else I ordered you to do.

Talk with Mr. Sinnott about the categories of redactions that you are going to propose and the authority for it, because I suppose until the Master sees the proposed redactions, he can't -- well, I don't know. He can't really respond whether these are appropriate categories or not. How should we deal with this?

MR. SINNOTT: And, your Honor, I was going raise that issue. At some point, either after the June 5 filing under seal, or the June 11 filing, can I assume the Court will wish to hear the Special Master's position on what's

been proposed by counsel?

THE COURT: Yes.

MR. SINNOTT: And what is the timetable for that, your Honor?

THE COURT: With regard to the categories, if possible, and if you confer, you should know what these are starting after this hearing, you should see if you can get me a memo by June 8. Then I'll have it. And if that proves not to be possible, you can ask me for a little more time. Then they'll make their filing on the 11th, and you should read it quickly, and tell me the minimum reasonable amount much of time you want to respond, if you want to respond.

MS. LUKEY: I suspect we're tracking the categories that you put in your order, your Honor, so I don't anticipate that the categories will be disputed.

THE COURT: Mr. Paine, does State Street have a particular concern here?

MR. PAINE: Yes. We've got one extra category, which is the mediation privilege. I just didn't want that to get lost in the shuffle, since I don't think it's in your order, and it hasn't been mentioned yet today.

THE COURT: Have you read the Report and Recommendation yet?

MR. PAINE: I read the summary in detail, and I've

read some of the Report, your Honor.

THE COURT: Did you see anything in there that you think is subject to the mediation privilege?

MR. PAINE: Definitely in the exhibits. I'm not sure with respect to the Report because I haven't made my way all the way through.

THE COURT: I keep forgetting about you, which is why I put out that order without giving notice to -- I hadn't thought it was your information in there, State Street's information. So you've got to operate on this schedule that I've ordered, too.

MR. PAINE: Got it. Thank you.

THE COURT: And you need to talk to the Master about it.

All right, so at some point, hopefully relatively soon, I will decide what redactions are justified, and the redacted version will be made part of the public record. Then -- well, there's going to be a redacted version.

Then the lawyers want me to decide whether to make it immediately part of the public record, which ordinarily would occur, or make it part of the public record when they file their objections, so it -- both sides -- I mean, you asked me in your written submission to keep the Report sealed until I rule on the objections.

I think it's going to be very hard for you to persuade

me to do that. The ruling on the objections are judicial decisions. I think this is in the heart of what's supposed to be public. So people are supposed to be able to absorb in real time the decisions I am making. It's a way of holding the Court accountable, among other things.

But do you want to advocate now that I keep the Report sealed until I rule on the objection?

MS. LUKEY: Well, that would certainly be our preference, your Honor, because we think there are some items that, when you rule on the objections, you will -- you may decide to take out, and they are extremely injurious to the reputations of the three firms. And if you agree with us that they are -- that there are statements that are in the Report that are based on, in the first instance, errors of law as to what the Massachusetts law is on the subject at issue, and you recognize that this could have very substantial and existential, even, effect on these firms and perhaps others in the plaintiffs' class action bar, then it would seem to be the more prudent course, because the time period is not very long, to keep the seal in place.

That is our strong preference because we do believe so strongly there are issues that will come out and that the damage will -- that is, you will take out of the Report or not accept, but that will leave the injury to the firms, and it will be irreparable.

And if I may defer to Mr. Heimann.

MR. HEIMANN: I do need to speak.

Given the fact that the press is here, I can't let this go past.

We don't think there's anything in the Report that would be injurious to the reputation of Lieff Cabraser Heimann & Bernstein, but we do take issues with -- particularly take issues with certain of the recommendations about, particularly, financial matters that are in the Report.

THE COURT: Okay.

Well, this is not ripe for a decision by me, and you can -- this will become more concrete as we go step by step. I don't know what the proposed redactions are. I don't know what the foreseeable objections exactly are.

So if you want to advocate that the Report not become public until I rule on the objections, you make whatever arguments you want in proper form. But, as I said, it would be hard, in view of the jurisprudence, to persuade me that's appropriate, but I haven't studied the issue in the context of this case.

But basically what does remain open is whether I make -- once I decide the redactions, the redacted version of the Report and Recommendations and Executive Summary becomes public, and then the response become public when

it's filed.

You know, part of the reason it's important to -- and I don't need any more litigants, particularly this month with everything that I'm juggling, but sometimes in cases like this somebody moves to intervene -- the media moves to intervene, somebody else moves to intervene. Now, because we're doing this in public proceeding, it's known what the range of options are, and if somebody who's not a party thinks they have an interest and a right to be heard on the issue, they know it's an issue, okay.

Let's go to the motion regarding what should be in the record.

MS. LUKEY: Your Honor, on that --

THE COURT: Hold on just one second. I'm trying to find the --

So your motion was Docket No. 222, and it generated a number of filings, including a memorandum by you.

And if I understand it correctly, the lawyers' proposal is that everything the Special Master has be preserved in case, in the course of litigating this or on appeal, there is some perceived, or at least in the course of litigating it at this level, there's some perceived need for more, but that your proposal is that the record to be filed in the court and public, subject to appropriate redactions, would be the exhibits to the Report and Recommendation, any

additional documents the Master wants to provide for the record, documents he regards as relevant, perhaps relied upon by him, additional documents the parties want to offer, and anything the Court requests.

MS. LUKEY: Correct. We're not -- we want everybody to be able to take what they want. We're trying to avoid the 236,000 pages from being part of the record.

THE COURT: Okay.

MS. LUKEY: And that would be a lot of redacting, because then you've got the W-2 and W-9 issue and so forth.

THE COURT: Well, we'll have to see what the Master -- I am not sure, at quick glance, that some of those might be -- they might be relevant. One of the original triggers for this case was that it was represented to me that the regular hourly rates of certain people were about 400, 450 dollars an hour. I know what somebody gets paid is not necessarily what a client gets charged, or is not what a client -- well, may not be what a client gets charged, but it may be evidence of an hourly rate.

But, in any event, those are the four categories.

And the Special Master felt constrained by my order to preserve and file everything, but now this issue is coming into sharper focus.

Have you had an opportunity to think about the Master's view as to what ought to be in the record filed?

MR. SINNOTT: Your Honor, unlike the Report and the exhibits, which we feel were vetted by the Special Master, and, we feel everything in there is necessary to the Court's consideration, we do not take that strict view of the record as a whole. And at this point the Special Master looks upon his role as carrying out the will of the Court.

With respect to that great, massive 237,000 pages that Mr. Kelly talked about, we will review and we will vet, as deemed appropriate. The original order by the Court we felt was not ambiguous, so to that extent we would stand by that, but we will do as that Court desires.

THE COURT: Well, I would expect you would look and see if there were things that you did not make exhibits that, nevertheless, are relevant, potentially important.

I may have overlooked it, but, for example, if I had to I will request it, but it would help if you sort of anticipate what the Court would be likely -- there's a reference in there that there were a relatively small number of emails from Michael Bradley evidencing work that he did, but I don't think they were made exhibits to the Report.

I'm interested in those.

MR. SINNOTT: Let me make it clear, Judge, that, as I said before, one of the priorities of the Special Master is the public interest in information.

I'm just saying that there may be a different standard

with respect to how flexible the Special Master is, subject to the Court's direction, with respect to those things. But the Special Master is very much adamant that there is a public interest in much of what's in that broad file.

THE COURT: I would expect. I just use that as an example that quickly came to mind.

You know, what else do you think should be in the record, and then it can be supplemented during the period of *de novo* review.

MS. LUKEY: Right, at any time.

THE COURT: If we're having hearings, and there is a dispute about whether the work was done and it turns out that there are documents that are relevant that weren't included in the record, the record could be supplemented, as I understand it. Because anything I order -- I mean, I make that clear in my order. But anything I order -- any order I issue I can revise. But it seems to me that this was a reasonable approach.

MS. LUKEY: I thought it wouldn't even be by motion. If the Court were amenable to it, it would just be a notice of supplementation of some kind, and whoever needs to add, adds.

MR. SINNOTT: I think the trick is going to be in defining what's relevant.

THE COURT: But I can't do that. I don't know what

you have, and I don't know what you thought, you know, had some value, was helpful to you, but --

MR. SINNOTT: Understood, your Honor. I think we're --

THE COURT: What we're doing here is setting up a process or different processes for different things, and it will work.

All right, now I have a few questions for Mr. Hopkins. But, Mr. Hopkins, if I'm going to ask you some questions, you've got to go in the witness box and be sworn.

MR. HOPKINS: Thank you, your Honor.

GEORGE HOPKINS, sworn

THE COURT: Would you please state your name for the record.

MR. HOPKINS: Your Honor, my name is George Hopkins.

THE COURT: And what is your position?

MR. HOPKINS: I am the Executive Director of the Arkansas Teacher Retirement System.

THE COURT: How long have you served in that position?

MR. HOPKINS: Approximately nine-and-a-half years.

THE COURT: Who was your predecessor?

MR. HOPKINS: Paul -- well, my direct predecessor was Gail Bolden, who was interim Executive Director.

THE COURT: How do you spell her name?

MR. HOPKINS: G-A-I-L. Last name, Bolden, B-O-L-D-E-N.

THE COURT: And who was her predecessor?

MR. HOPKINS: Paul Doane.

THE COURT: D-O-A-N-E?

MR. HOPKINS: I think so.

THE COURT: Have you read the Special Master's Report and Recommendation and Executive Summary to it?

MR. HOPKINS: I have. Some parts more thoroughly than others. You know, it's a long report. I've been doing school-hall meetings across Arkansas, and retirees. I've been meeting with actuaries, but in my time in between those, I have. Some parts more skimming, other parts very directly.

THE COURT: What parts have you read particularly carefully?

MR. HOPKINS: Well, the parts that applied to the issues about the law firms, and basically the findings, any issue about Arkansas Teacher Retirement and the Class concerns that existed.

You know, other parts that was more factual about how the attorneys interacted with each other during that part, you know, I read through it to see if there was anything that would catch my attention, but lists or, you know, word

for word, the total basis, as most attorneys would do.

THE COURT: Have you read carefully the parts about the origins and evolution of Labaton's relationship with Arkansas Teacher?

MR. HOPKINS: I have.

THE COURT: And in my order directing you to be here, I cited my March 16, 2018 decision in the Garbowski case.

Did you read that decision, by any chance?

MR. HOPKINS: No, but Ms. Lukey summarized it for me.

THE COURT: Do you want, on behalf of Arkansas Teacher, to continue as lead plaintiff in this case?

MR. HOPKINS: I do, your Honor, to protect the class. I sure do.

THE COURT: Why do you think it's important to protect the class at this point, or for you to protect the class at this point?

MR. HOPKINS: Can I give you a little history about my views on that?

THE COURT: Okay.

MR. HOPKINS: Your Honor, when I got to Arkansas Teacher Retirement, I didn't think these cases were important, and I was more busy trying to take care of a retirement system in the middle of a financial crisis.

And when Arkansas leaders told me I needed to do this, one thing I learned was there was no instruction manual on how to be a good class representative.

Thankfully, as a practicing attorney, I've been in some national class actions at a very small level, both on the defense and plaintiffs' side of that.

And I used the skills I learned working in the log woods, watching my parents, which is, You do the best you can every day.

You -- as a fiduciary you give, essentially, all that you have and surrender that and take care of the people you have a duty to take care of it.

And, you know, in the mediations about mid points, and insurance, and how the insurance tower is developed, and all the issues about scienter, and all the different parts, you know, coming to court hearings, you know, I wanted to be, and I always tried to be, the best I can. Not for a ATRS, the Arkansas Teacher Retirement, but for the class.

And, you know, I have never -- I have never asked a law firm to hire some attorney. I have never asked a law firm to make a political contribution. And I have done everything I can to focus for the class.

I can give you two examples.

You know, when there was a circumstance that it appeared that the class period needed to be extended, which

would greatly reduce ATRS's financial interest in the class later on, I told the attorneys, Do not -- do what's right for the class. Don't try to preserve some class period that doesn't makes sense.

And a more recent case, where there was silos of recovery based upon knowledge of investment managers, and it became sort of an issue of what silo we should be in, I said, Put ATRS in the lowest silo, because I always want to represent the class interest.

And in this case, you know -- you know -- and I don't know what I'm allowed to say, because this is under seal. But I think what Judge Rosen, if you read his Report about how I acted in the class, what Mr. Sinnott said -- and I will tell you, you know -- I was always told not to brag growing up, you know. But I will brag. I'm the one who found this case. I'm the one who helped develop this case over several months before it was ever filed. I chose the law firm that would proceed in this case, because I interviewed several. I went to Chicago to meet --

THE COURT: This really isn't so much about you personally, but let me ask you this.

When you became Executive Director of Arkansas Teacher about nine years ago, did you say?

MR. HOPKINS: Nine-and-a-half years ago.

THE COURT: Did it have a contractual relationship

with Labaton?

MR. HOPKINS: It did.

THE COURT: And has it had a contractual relationship with Labaton ever since?

MR. HOPKINS: Continuously, your Honor.

THE COURT: What has Labaton's role been? What have its roles been in those nine years?

MR. HOPKINS: Well, as I said, when I first got there, I didn't move on the cases originally. Then our political leaders in Arkansas convinced me that I should.

THE COURT: The political leaders --

MR. HOPKINS: Well --

THE COURT: I'm sorry, what did you say? The political leaders convinced you that you should be interested in these class actions?

MR. HOPKINS: Right, because I was really -- as a new Executive Director with the Retirement System that was going into -- when I got to ATRS, two weeks after I got to ATRS, we started a legislative session that I had a -- about a 22-bill package to try to pass in the Legislature, and I passed every one of them.

I had to redraft a lot of legislation. So I was not focused on trying to do these cases.

THE COURT: But you said -- is Arkansas Teacher regulated in the some way by the government of Arkansas?

MR. HOPKINS: Absolutely, your Honor.

Can I explain to you how that works?

THE COURT: No. Listen to my questions. Say what's necessary to answer fully, and then I may give the lawyers a chance to --

MR. HOPKINS: And let me say this. If I don't get to say all I want, I would like -- after this hearing is over, I would like to proffer some things in the record if necessary.

THE COURT: Well, if we don't resolve this today -- I'm going to give you some time to think about what we're discussing, okay?

MR. HOPKINS: Yes, your Honor.

THE COURT: I would like to make informed decisions, too, and sometimes it takes a little while, but you have to start a process.

But okay.

So you said that political leaders persuaded you that you should give some priority to class action lawsuits, correct?

MR. HOPKINS: Yes, your Honor.

THE COURT: Who were those political leaders?

MR. HOPKINS: Well, a person I served with in the State Senate who had been a former Executive Director at Arkansas Teacher Retirement, David Malone.

I talked to several legislators.

I talked to people at the Governor's staff, and generally people in the Department of Finance Administration of Arkansas who suggested that these were important cases, and that they -- Arkansas Teacher Retirement had gone from one securities monitoring firm to five very recently before I got there, and I think the purpose of that --

THE COURT: One at a time.

So you spoke to David Malone --

MR. HOPKINS: Right.

THE COURT: Who was one of you predecessors, right?

MR. HOPKINS: -- right, yes.

THE COURT: Do you know the name Steve Faris?

MR. HOPKINS: I never spoke to Steve Faris about that, your Honor.

THE COURT: I didn't ask you that.

MR. HOPKINS: Okay.

THE COURT: Do you know the name -- do you know a man named Steve Faris?

MR. HOPKINS: I do, your Honor.

THE COURT: Who, in two thousand -- who was Steve Faris back at the time you became Executive Directer?

MR. HOPKINS: He was a state senator.

THE COURT: And did he have any involvement with Arkansas Teacher in that capacity?

MR. HOPKINS: Not directly.
THE COURT: Did he have some involvement indirectly?
MR. HOPKINS: Yes. He was a member of the Arkansas General Assembly. The General Assembly, you know, has indirect supervision of ATRS because they adopt all the laws by which we operate, you know, how our board is configured, how benefits are paid, how we proceed with investments, the type of investment rules that we have, and Mr. Faris was a member of the General Assembly. So indirectly, yes.
THE COURT: Have you ever had any conversations with Mr. Faris about class action lawsuits?
MR. HOPKINS: At any time?
THE COURT: Yes.
MR. HOPKINS: Sure.
THE COURT: Did you say "yes"?
MR. HOPKINS: Yes, your Honor.
THE COURT: Once, or more than once?
MR. HOPKINS: More than once.
THE COURT: Have you ever had any discussions with him about law firms that might participate in either monitoring the market for possible class action lawsuits or represent Arkansas Teacher?
MR. HOPKINS: I don't think I have in that context. You know, I know Mr. Faris, and I told him that we were

doing cases, and I talked him over coffee, or whatever, to say that, you know, We're involved in this case or that case and that type of thing.

THE COURT: Have you ever discussed this State Street case with him or the aftermath of it?

MR. HOPKINS: Yes, your Honor.

THE COURT: When was that?

MR. HOPKINS: I probably -- again, I think he left the State Senate in 2013 -- 2011 or '13, I'm not sure, somewhere in that time period. But I remember talking to him about this -- you know, I've talked to several people about this case because it was sort of known in Arkansas. And I don't remember the specifics, but generally that we were doing this lawsuit, and it was very interesting, and that we were proceeding forward.

THE COURT: Have you talked to Mr. Faris since the issues arose that prompted the appointment of the Special Master?

MR. HOPKINS: I have.

THE COURT: You have or have not?

MR. HOPKINS: I have, your Honor.

THE COURT: Once, or more than once?

MR. HOPKINS: More than once ones.

THE COURT: When was the first time?

MR. HOPKINS: The first time after the appointment

of the Special Master?

THE COURT: Or after the issues arose concerning the propriety of the attorney's fees that led to the appointment of the Special Master.

So let's take it back to about November 2016.

MR. HOPKINS: I don't recall when the first time I talked to him after that, you know, but I am positive I talked to him and said, you know, there is -- you know, the attorney fee thing sort of blew up, and I've got to deal with it, but I don't recall any particulars or even the exact date.

THE COURT: Did you contact him to have that communication?

MR. HOPKINS: Well, let me try to put it in better context.

I've known Steve Faris since 1980. We went to the same college.

When I was the Senate Co-Chair of the Public Retirement Committee, he was House Co-Chair. And I'd see him -- you know, we grew up in the same hometown, so -- well, I actually grew up in Donaldson, he grew up in Malvern, but same county, I should say.

But I see him very often in circumstances, and he will ask me about my children. I'll ask him about his Godson, and talk about a lot of things.

But he's always -- he's always asking about, What's going on with Arkansas Teacher Retirement? What benefit changes are we making? What are doing?

And this has been a pretty prominent part of what I had to deal with, and I'm sure I mentioned it to him, but not in the context -- just in the context of general discussion.

THE COURT: Did you ever speak with Mr. Doane -- well, when did, as you understand it, Labaton become -- well, begin working with Arkansas Teacher?

MR. HOPKINS: I think the procurement for the contract association with Labaton probably was finalized in the summer of 2008, but I don't know the exact date.

THE COURT: Did anybody ever tell you how Labaton came to be one of the lawyers for Arkansas Teacher?

MR. HOPKINS: Yes, through the Special Master.

THE COURT: Put aside the Special Master's Report.

MR. HOPKINS: No, I never knew.

THE COURT: Did you ever discuss that issue with Mr. Doane?

MR. HOPKINS: No. I've had very few discussions with Mr. Doane. The first time I talked to Mr. Doane was probably two years after I was ATR's Executive Director.

THE COURT: Did you ever discuss with Mr. Faris about -- well, did you ever discuss Labaton with Mr. Faris?

MR. HOPKINS: I've already told you I had.

THE COURT: But tell me again. I've heard a lot of things.

MR. HOPKINS: Okay.

I discussed with -- I discussed with Mr. Faris Labaton. You know, sometimes we'd get an interesting case, and I would tell him, Here's this case and Labaton represents us. The same with Bernstein Litowitz; same with Kessler Topay; same with Nix Patterson; some with Kaplan Fox.

THE COURT: Did Mr. Faris ever say anything to you about Labaton?

MR. HOPKINS: No, not -- other than, Sounds like they're a good law firm, but, not -- I think in the context you're asking, which is did he encourage me to use them in any case or -- no, no, your Honor.

THE COURT: Did he ever tell you that he had a role in introducing Labaton to Arkansas Teacher?

MR. HOPKINS: No, he never told me that.

Well, let me say, until after the Special Master --

THE COURT: Leave that.

Have you discussed this with him since the Special Master's Report?

MR. HOPKINS: Just very -- just very briefly. Because I just said, "I didn't know you had anything to do with Labaton. You've been there."

And he said, "Well, it was a long time ago," and that

he had met a couple of Labaton attorneys and met -- introduced Mr. Doane. And as far as he -- as far as how he remembered, he just said "introduced them," because he introduced some attorneys that he knew, and sort of rolled out of the room.

That's, sort of, how he presented it to me.

THE COURT: You know an attorney in Arkansas named "Herron"?

MR. HOPKINS: I have never -- as I told the Special Master, I've heard the name, but, as far as I know, I've never met him.

THE COURT: Did Mr. Doane ever mention Mr. Herron to you?

MR. HOPKINS: No.

Mr. Doane in conversations with me was very general about, you know, being a former Executive Director of Arkansas Teacher Retirement when he was at St. Paul Teachers'.

THE COURT: I'm sorry. I misspoke.

Have you ever talked with Mr. Faris -- I want to make sure I did not confuse Mr. Doane with Mr. Faris. These names are new to me.

Did you discuss Labaton with Mr. Faris?

MR. HOPKINS: Back, at the -- after -- you know, as I told you, Mr. Faris, a former state senator I knew real

well, I'm sure I discussed Labaton, like all the other securities firms.

THE COURT: Did he tell you, or discuss with you, that he had introduced Arkansas Teacher to Labaton?

MR. HOPKINS: No, not until -- I didn't discuss that with him until after I learned it through this process.

THE COURT: When did you have that discussion?

Well, was it one discussion or more than one discussion?

MR. HOPKINS: It may be -- maybe two, but, I mean, it was more casual, just --

THE COURT: No. Just when?

So when was the first of the two?

MR. HOPKINS: I'm trying to remember the context of when.

It was probably when I saw doc -- it was probably after -- probably right after my deposition here on the day after Labor Day, because I think that's when I saw documents that Ms. Lukey had that had been provided by the Special Master.

THE COURT: And did you have that conversation with Mr. Faris in person or by telephone?

MR. HOPKINS: I honestly don't remember, your Honor.

THE COURT: What, to the best of your memory, did

you say and what did he say?

MR. HOPKINS: Well, to the best of my memory, it was something more like, I didn't know that you had introduced Labaton to Teacher Retirement. And he -- and it was like it was a distant memory to him, and he said, Yeah, I think I did.

He said, I think I remember they came into town. I, you know, introduced Paul Doane to them, and sort of left them to discuss the matter.

THE COURT: When did you have the second conversation with him?

MR. HOPKINS: Well, I don't know. It could have been a couple of days later. But, as I said, it was more of a passing deal, not in terms of a, you know, some kind of a -- you know, I wasn't trying to interrogate him, let's put it that way.

THE COURT: Have you talked to him, or otherwise communicated with him, since you received the Report, the Master's Report and Recommendation last week?

MR. HOPKINS: Well, he actually -- I work every Memorial Day, because it's sort of the end of our retirement season, and we have a crew there. And he actually drove by my office, and -- to get a cup of coffee about nine o'clock on Monday morning.

And he said, What do you have this week?

And I said, I got to go up there.

And he said, Why?

And I said, Because there is a hearing on, you know about the -- you know, about the State Street case.

And that was sort of the extent of it.

THE COURT: What did he say?

MR. HOPKINS: He said, I thought that was probably already going to be over?

And I said, No, it's still going on.

And, you know, I -- you know -- you know -- I don't go -- I don't try to go around, your Honor, talking about all -- you know, I have plenty -- you know, it takes 15 minutes -- it take 15 minutes to even start explaining what's going on in State Street, and if I did that to everybody who wanted to find out what I was doing --

THE COURT: I asked you what he said.

MR. HOPKINS: Oh, okay.

I -- I -- I think he said, basically, Enjoy Boston and, good luck, kind of deal.

Then he asked me what my son was doing.

THE COURT: Had he ever come to see you on Memorial Day before?

MR. HOPKINS: I don't remember, but he comes by my office pretty regularly.

I mean, he's an old political guy who, you know, shows

up and has coffee with a lot of people I guess.

THE COURT: He's left the state Legislature?

MR. HOPKINS: Yes. He's a retiree that acts like he is retired.

THE COURT: What does that mean?

MR. HOPKINS: It means that, you know, that he shows up at the worst times, when I'm the most busy. Because on Monday I have an ATRS board meeting, and I was working on executive summaries and trying to develop resolutions, and he showed up in my office while I was wanting to be very busy, not talking to him.

THE COURT: I was here all day Monday, too. I know the --

MR. HOPKINS: We're laudable folks.

THE COURT: And the Internal Revenue Service thinks I'm retired.

All right.

Is Christa Clark still the chief counsel of Arkansas Teacher?

MR. HOPKINS: No, your Honor, she's not.

THE COURT: Do you know if she's still alive?

MR. HOPKINS: As far as I know.

THE COURT: If Arkansas Teacher continues as lead plaintiff in this case, how do you intend to discharge the lead plaintiffs' duties to the class.

MR. HOPKINS: Number one, to the best of my ability.

Secondly, selflessly as to myself and ATRS.

And, third, I would say that I will do some of the things I've already done and will continue to do concerning, you know, I'll call it the Customer Class and the others, and that is to try to do everything I can to make sure that, you know, once you decide what the attorney fees are, which is your role, not mine, that I will try to make sure that the administrator makes all the appropriate decisions.

If there's is some issue that comes up about how that administrator should divide up the funds that go back to the class, I will be highly involved and make sure it's fair and reasonable.

If there's any issue, as I told you before, about what silo ATRS would involved in there, I will defer.

And I will -- I will -- I will die honoring my father's instructions when he was dying when I was a teenager, and that is, you know, Do everything to the best of your ability. Learn from others, but do it -- do it in a way that would make me proud.

THE COURT: Let me ask you this, do you remember that you filed a declaration and affidavit with the Special Master on about March 15, 2018?

MR. HOPKINS: Is that the declaration about the

ratification of the referral fees?

THE COURT: Yes.

MR. HOPKINS: Yes, your Honor, I remember.

THE COURT: Who drafted that document?

MR. HOPKINS: Well, Ms. Lukey partly drafted it, I think. I think ms. Lukey sent it to me, I discussed it with her, and I think I -- I think I -- I almost never take a draft of something that somebody gives me and leave it alone. It's just not my nature. And I think part of that's what she put in, and part of it what I put in, and I don't know who helped her.

THE COURT: Are you still getting legal advice from Labaton or lawyers they've hired, like Ms. Lukey, in connection with this case?

MR. HOPKINS: I'm not sure what I had was legal advice from her. I -- you follow what I'm saying?

She asked me, you know, would you -- would you consider filing a declaration, and explained to me what it was.

And I said I would consider that.

I don't think I was seeking legal advice from her or obtaining it.

THE COURT: With regard to your role -- Arkansas Teacher's role as lead plaintiff, are you getting legal advice from anybody?

MR. HOPKINS: No.

THE COURT: In the course of the case have you received --

MR. HOPKINS: Well, maybe I don't understand the context.

THE COURT: Do you remember I appointed you the lead plaintiff in this case?

MR. HOPKINS: Yes, your Honor.

THE COURT: And do you recall that I approved your selection of Labaton, among others, as counsel to the lead plaintiff, counsel to the class?

MR. HOPKINS: Yes, your Honor.

THE COURT: And without telling me what it was, while you were the personification of the lead plaintiff representing the class, did you get advice in this case from Labaton?

MR. HOPKINS: Constantly, your Honor, from before the time the complaint was filed.

THE COURT: All right.

And are you now getting any legal advice from anybody, other than Labaton and other lawyers they've hired or lawyers working with them?

MR. HOPKINS: No.

THE COURT: Did you hear me have some discussion with Ms. Lukey and Mr. Kelly about the attorney-client privilege?

MR. HOPKINS: I did, and I'm sitting -- my mind's -- I'm sitting here filtering that out, if you're continuing to question me. But, as far as I'm concerned, I guess to this point I have waived the attorney-client privilege on anything I've had discussions with my client so far for any question I've answered to you.

THE COURT: Well, I don't -- I wasn't trying -- I don't know about -- well, I don't know.

But what I wanted to know is, if you're the lead plaintiff and the representative of the class, you will have to decide whether to assert attorney-client privilege with regard to any information that the Special Master receives; do you understand that?

MR. HOPKINS: Well, if you tell me that's the standard I have, I will.

I haven't researched that issue, but I will. If you tell me that's the standard, I will assume it's the standard, your Honor, and I will faithfully discharge that.

You have to understand, I live in a glass bowl, too. Arkansas has all -- is a freedom of information state. So, you know, I understand the press and all those things, and will do the best of my ability to ensure that an attorney-client-privilege assertion is appropriate to protect some viable interest and not to cover somebody's circumstance, I'll say.

That's to go back to my sawmill days. I'm sorry.

But I will say this, your Honor, I will err on the side of not asserting the privilege on anything associated with Arkansas Teacher Retirement, because that's how I handle all my duties.

THE COURT: The lawyers made some reference to what's in the Report and Recommendation, you have, too. And just answer this, I think, "yes" or "no."

Are you aware that the Special Master has recommended that Labaton and other lawyers be ordered by me to repay or return some of the fees they received, and that if I issue that order, they recommend that a lot of that money go to the class?

MR. HOPKINS: Yes, your Honor.

THE COURT: Do you understand, therefore, that I have a concern that there may be a conflict at this point between the interests of Labaton and the other Lawyers, who want to vindicate the propriety of everything they did and keep the money, and the class that would benefit if I ordered some of that money paid back?

MR. HOPKINS: You want a "yes" or "no"?

THE COURT: You don't have to answer that --

MR. HOPKINS: I would like to, if you would let me.

THE COURT: I was going to say, You don't have to answer it "yes" or "no."

MR. HOPKINS: I don't want to answer it "yes" or "no."

THE COURT: I didn't think you wanted to answer it "yes" or "no."

MR. HOPKINS: I'm totally aware of that, your Honor.

But let me tell you, I've been involved in a lot of these cases now, and I've been involved with a lot of co-counsel or our co-leads. And since this happened, not only have I talked to Mr. Faris, I've talked to other, you know, funds that are very active in this area, and -- along with Professor Joy in the back, and another professor.

And that's why I was going back to ask Mr. Belfi. I'm terrible with names, and I was going to ask the name of this professor, I think from Harvard, that's in that Report, too, that essentially says, Your job is to award attorney fees and potentially to take them back.

My job is to tell you whether I think that the aggregate awarded fee is fair and reasonable.

And if you want to take fees from these attorneys and return them to the class, that's -- you know, I will -- I understand my role, and I always try to understand my role. And I don't try to be an attorney in these case. And I don't try to be a judge, because you wouldn't let me anyway.

And I think the precedent -- in fact, Federal Rule of

Civil Procedure Rule 23 essentially says that it's the judge who awards the attorney fees.

And, by the way, I expect to see you August 2.

And I did notice in your order on Insulet that you ordered the attorneys to reveal referral fees. And I think that's great, because that's -- I think that's not my job to ferret that out, that's your job. And if they were paid referral fees, and you wanted them not to pay it, I'm happy with it. And if you say to them to give up referral fees and -- whatever you do about the attorney fees, I'm happy because you --

THE COURT: You're talking about another case before me, Arkansas Teacher v. Insulet.

MR. HOPKINS: Right, but I'm also saying in this case, whatever you do about the attorney fees, I'm not going to argue with you, because that's -- that's -- when I originally file a declaration saying I supported the attorney fees that you originally awarded, you know, I left it --

I always have tried to leave it up to the federal judge to say what's fair and reasonable, and if you think something else is fair and reasonable, you know, they may object, but I don't.

THE COURT: Have you thought about the fact that if I find there was -- well, Arkansas Teacher, you, chose

Labaton for this case, right? You chose them to represent -- did you choose them?

MR. HOPKINS: I sure did. I interviewed two or three firms. I --

THE COURT: Okay. Okay.

Now, you know -- putting aside what's even in the Report and Recommendation -- that they have been accused of misconduct.

MR. HOPKINS: I don't think so.

THE COURT: You don't think they've been accused of misconduct?

MR. HOPKINS: First of all, let me say this. I think if you read the order, you know they say -- and again, a sanction versus -- I don't think they did -- I think the recommendation is they've not done anything that was -- subjected them to a sanction of the court.

There is a reallocation remedy based upon one professor's position. Two other professors have a different one. But my point is, I don't think -- I don't think that they're accused of misconduct.

THE COURT: Oh, you don't think failure, if it's proven, to be candid with the Court is misconduct?

MR. HOPKINS: Well, I think -- I think this, your Honor. And without trying to inflame you, I think what you should have done in this case is what experience taught you

to do in Insulet, which is, if want to take a referral fee, ask.

THE COURT: I know. I was educated by this case.

MR. HOPKINS: And I'm educated by this case, too.

THE COURT: Stop.

Have you thought -- you picked Labaton to represent the class in this case. Have you thought about whether it would injure the reputation of Arkansas Teacher, and perhaps its opportunities to serve as lead plaintiff in future cases, if the Court finds Labaton engaged in misconduct?

MR. HOPKINS: No.

Well, to say I thought about -- you know, I thought about a lot of things. But, you know, I have not thought about it in a way that would motivate me to do anything differently than what I would otherwise, I think was the question you were asking.

THE COURT: No. They're two separate questions.

So, if I can parse out what you just said to me, it has occurred to you that this case, particularly if I find that Labaton engaged in misconduct, could also be harmful to Arkansas Teacher's reputation?

MR. HOPKINS: Well, I'm not -- well, let me answer it this way.

I have not thought about it the way you've presented it.

You know, any time you're in a case that blows up, you know, the impact of it affects everybody in the case. So, sure, we're impacted to a slight amount.

But I don't think you can impute any kind of misconduct finding you would make to me about what happened, and I wouldn't worry about ATRS.

Because, you know, your Honor, I think if you asked any of the main mediators -- Layn Phillips, Judge Weinstein, and all those others -- I think I will just be as effective.

But I will also say that this has taken up a lot of my time. And there may be times where I say, I would be less active just because, you know -- you know, I'm over 60, and there's a lot to be done at home, but not because of Labaton.

And I think you ought to do what's right as to all these attorneys and let the chips fall where they may.

But I'll say this --

THE COURT: Do you intend to, on behalf of the class, take a position on what the Court should do?

MR. HOPKINS: If you ask me, your Honor, I would.

But I don't think -- let me tell you two or three things. Can I tell you my view?

Number one, a class rep should be very cautious about trying to allocate attorney fees between law firms and a class.

But please give me -- let me have my -- explain my view.

Because, first of all, I've been in cases where -- not as a class rep but in other areas -- where everybody tried to impress me how great an attorney they were versus trying to do attorney work.

I don't want to be the judge in a beauty contest, and I don't see what happens in the trenches and between these law firms about which ones really have that staff really pulling together and doing great work, which ones were, you know, following in the wake of the others.

You know, I had great contact with all of them, but I was at the point of the spear in terms of what firms really, you know, pulled the load more and which ones sort of followed in behind. I don't know.

You know, if you look at all the time the Special Master has spent doing that, I -- I think that's beyond the scope of a class representative. But if you asked me to do it, I would give you an opinion, but I think -- I think it would be -- if you followed my opinion, you would probably be following the least-quality opinion that you should follow in terms of your ultimate decision.

THE COURT: Well, this all goes back to the decision I had to make without the benefit of the adversary process as to what would be fair to the class. I mean,

that's what's I was doing when I approved the settlement, and then I approved the requested attorney's fees.

And I think you just told me that you don't view it as your role at this point to tell me what would be most fair to the class.

MR. HOPKINS: Well, what I said was, you know, without doing the extensive investigation about who all pulled their weight, you know, that -- your realliance on me -- if you ask me to, I will.

No judge has ever asked me to opine on how to divide the attorney fees to the class, ever. And I know of no class rep who -- that I've talked to or I've been in a case with who has ever done it either.

But, if that's -- if that is a new role that I should have in this case or any other, I will do it.

THE COURT: Have you ever been in a case where a judge appointed a Special Master to investigate the conduct of the lawyer that you picked to represent the class before?

MR. HOPKINS: No, your Honor.

THE COURT: Have you ever heard of a case where there was a 376-page Report and Recommendation regarding the conduct of the attorneys that you selected?

MR. HOPKINS: No, your Honor.

But -- but, again, let me say, if you all ask me to make a recommendation and you give me -- if you give me a

short deadline, I will make one.

THE COURT: It depends on what the question is. I'm talking about your role here.

Today is Wednesday. I'm ordering that you file a report, that you write, where you tell me -- I mean, you can talk to whoever you want to talk to -- as to whether, on reflection, you want to continue to have Arkansas Teacher, personified by you, serve as lead plaintiff.

Based on what I know now, I continue to be satisfied that, you know, in negotiating the settlement, Arkansas Teacher, particularly you, did a good job. And this isn't really about you personally.

But when the case started, I found that Arkansas Teacher had a big stake, and that its interest was typical, it was not different in any possibly material way from the other investors, and that it was adequate, that it would vigorously litigate on behalf of the class. I expected that it would direct the attorneys and -- that's what I expected.

But now -- here's the reasons for my concern, and this is why I want -- I know you take this seriously.

Think about this, and, as I say, it's not a question of whether I made the right decision in finding Arkansas Teacher would be a good lead plaintiff originally.

But now Arkansas Teacher has one, or more than one, way in which it is not typical of the class members.

The conduct of Labaton and the other lawyers you selected has been called into question. The Special Master, as you know, recommends that what, by my standards, is a significant amount of money be returned by those lawyers and distributed to the class.

Arkansas Teacher has a relationship with those lawyers and is still getting legal advice from them.

You haven't thought in these circumstances to go to another lawyer who doesn't have a dog in this fight to advise you as to what would be in the best interest of the class that you personify, represent, at the moment.

And, I don't want to get into more detail about this, but you know that questions have been raised by the Report and Recommendation about the origins of Labaton's relationship with Arkansas Teacher, and they're just questions. But to the extent that those issues are litigated in this case, they could be at least embarrassing to Arkansas Teacher.

And that may give you an incentive, even if you're confident that you would resist it, to not vigorously represent the class the way somebody who did not have this historic relationship in these issues would.

So being as transparent as possible because I think you will think about this --

MR. HOPKINS: Well --

THE COURT: Let me just finish, because I --

MR. HOPKINS: I'm sorry.

THE COURT: My intention was to send you home so you can think about it.

So these are my concerns.

And my paramount responsibility is to the class and to make sure -- try to assure that at this point it's represented by a lead plaintiff who's typical and adequate, and will not have its or his role representing the class complicated by unique issues and potential conflicts of interest.

That's my concern. I would like you to think about that.

MR. HOPKINS: Can I respond? First, because I think you said some things that -- that I -- things right now I would like to respond to.

Please, your Honor?

THE COURT: Go ahead.

MR. HOPKINS: Number one, you know -- you know, again, your whole position assumes that the class rep should be -- the class representative should be involved in the decision about the distribution of an aggregate fee award, and I don't think that's the law. I don't think that's in compliance with Rule --

THE COURT: And I will tell you, that's not the

only issue, and the fact that you apparently can't understand that that's not the only issue is magnifying my concerns.

MR. HOPKINS: But that wasn't the only one, your Honor.

The other one is you seem to assume that, you know, how Labaton became associated with ATRS was in some way improper, illegal, or untoward, and I don't think the record shows that.

In fact, the record specifically says they didn't even inquire into that area.

That's just for the record.

THE COURT: I have not assumed anything.

What I told you is that it raises questions. And you uniquely, among all the investors, have a vested interest -- "you," Arkansas Teachers -- in the answers to those questions.

MR. HOPKINS: Thank you, your Honor.

THE COURT: I am ordering that the parties order the transcript on an expedited basis.

I am ordering that you read this when you get it, my questioning of you, and I am ordering that you think about it, because I think you're a thoughtful man.

And do not take this personally, but just think that, you know, at this point do you want to require that I decide

whether Arkansas Teacher should be allowed to continue as lead plaintiff?

And the second question is the other one I identified: If I do, tell me whether you would continue to get legal advice from the people who have given you legal advice up to now in this case or do something else?

Those are the questions.

So you think about them. If, on reflection, you do not feel you have done anything wrong but you think the class would be better served, Arkansas Teacher would be better served, by somebody else being lead plaintiff, I will expect to appoint somebody else, and if that is not your judgment -- and you are correct, this is the Judge's decision, and anything I have ordered I can reconsider. So I ordered something based upon what I knew when I appointed Arkansas Teachers; now I know something else.

If you would like to continue to be lead plaintiff, I will continue to consider this seriously, and we will see. All right?

You can take your seat.

(Whereupon, Mr. Hopkins stepped down.)

THE COURT: Okay. We have gone through my agenda for today.

Is there anything further?

MS. LUKEY: Your Honor, respectfully, I have a real

concern that in your comments just now to Mr. Hopkins, you made some statements that revealed items that are under seal.

THE COURT: Yes, the same -- just as you did earlier.

MS. LUKEY: We would like the opportunity for the public to know right now the nature, just a nugget, not all of the language, nothing else, of what you have characterized as "misconduct," because I fear, again, as happened over the weekend with Mr. Hopkins, there will be assumptions of nefarious conduct. I would request leave that we have a brief opportunity to speak with you at the bench and to make a brief statement as to the nature of what is at issue so people aren't sitting there --

THE COURT: That's fine. Okay.

Everybody.

(Transcript of sidebar conference sealed per order of the Court.)

THE COURT: Ms. Lukey, is there something you would like to say.

MS. LUKEY: Yes. Thank you, your Honor.

We wish to make it clear that the nature of the misconduct which is asserted relates to the existence of a so-called bare referral or origination or forwarding fee, as permitted under Massachusetts Rules of Professional Conduct,

which was not disclosed to the Court under the premises of Rule 54(d)(2), and which the Master feels was inappropriately withheld from the court.

I did not wish anyone publicly present to be left with the impression that there was anything more nefarious than that.

Thank you for the opportunity to speak.

THE COURT: Mr. Sinnott?

MR. SINNOTT: Thank you, your Honor.

Just to respond to my sister. This was not a referral fee. This was a finder's fee. And, more importantly, this was a finder's fee that was not disclosed to the client, to the class, to co-counsel, nor to the Court.

And that is why it is so important this the Court conduct the inquiry that it has conducted today, because it is very important that, faced with the decisions that the Court is making in this case, and the answers, and the inquiry that the Court directed the Special Master to make, that the Court be assured that the representative of the class, which has an ongoing stake in this matter and for whom there could be, to use the Court's characterization, "significant implications" in the future with respect to the monies that the class may be entitled to, that that representative be a representative that's not conflicted, and that the firm also not be conflicted within that

relationship or by the circumstances described in the Special Master's Report.

Thank you.

THE COURT: Thank you.

Those statements are helpful.

I don't have any answers to any of these issues now, but I did put to Mr. Hopkins questions that I think are important in the discharge of my duty to try to ensure that the class is properly represented and to try to get these issues resolved sooner rather than later so the Court can get the benefit of views of the class. And we'll go step by step.

I've given Mr. Hopkins a week to let me know whether he wants to continue to have Arkansas Teacher serve as class representative, and if the issue does not become moot, I think at the sidebar you have raised some questions that I will give you a chance to address.

MS. LUKEY: Thank you, your Honor.

THE COURT: All right.

I'll see counsel briefly in the lobby before I send you home.

THE CLERK: All rise for the Honorable Court.

(Transcript of lobby conference sealed per order of the Court.)

(Proceedings adjourned.)

C E R T I F I C A T E

I, James P. Gibbons, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/s/James P. Gibbons
James P. Gibbons

June 1, 2018

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Exhibit V
Redacted

Exhibit W
Redacted

Exhibit X
Redacted

Exhibit Y
Redacted

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. June 28, 2018

On June 21, 2018, I issued an Order denying Labaton Sucharow, LLP's ("Labaton") motion seeking my recusal pursuant to 28 U.S.C. §455(a) (Docket No. 275) because a reasonable person could not question my impartiality in this case, and stated that the reasons for that decision would be explained in a forthcoming Memorandum and Order. See Docket No. 315. That Memorandum and Order was issued on June 28, 2018. See Docket No. 358.

After the June 21, 2018 Order was issued, the Master filed a letter under seal asking for permission to identify documents and information in the record which, in the Master's opinion, refute certain assertions made by Labaton at the May 30, 2018 hearing and in its motion for my recusal. See Docket No. 329 (under seal). The Master also proposed to enlarge the record to some, unclear extent. A redacted version of the June 21, 2018 letter was made part of the public record. See Docket No. 335.

The Master' request was made after the motion for recusal was denied. Most of the documents and information the Master proposes to bring to my attention are already in the record of this case and, therefore, are available if Labaton moves for a writ of mandamus requesting that the First Circuit order my recusal. I did not consider any evidence not already in the record in deciding that my recusal is not justified. Therefore, the Master's request is being denied.

Also after I issued the June 21, 2018 Order denying Labaton's motion for my recusal, which was filed on June 5, 2018, see Docket No. 275, Labaton filed a Motion for an Order Directing Master to Respond to Inquiry Regarding Ex Parte Communication With the Court. See Docket No. 334. Labaton expressed concern that the Master "may have engaged in substantive ex parte communications with the Court from which a reasonable person could form the belief that an untainted de novo review by the Court is no longer possible." Id. at 1. Labaton also stated that "[i]n significant part, the genesis of this concern arises from the May 30, 2018 hearing and its aftermath . . . ." Id. Labaton could have, but did not, request discovery when it filed its motion for my recusal after the May 30, 2018 hearing and prior to the denial of the motion. Moreover, the 71-page June 28, 2018 Memorandum and Order includes a thorough discussion of my ex parte communications with the Master, which were lmited to administrative matters, and explains why they could not cause a reasonable person to question my impartiality. See Docket No. 358 at 6, 10-11, 33-40, 62-68. Therefore, Labaton's motion is being denied.

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

1. The request to clarify the record made in the Master's June 21, 2018 letter to the court (Docket No. 329-1)(under seal) is DENIED.

2. Labaton's Motion for Order Directing Master to Respond to Inquiry Regarding Ex Parte Communications With The Court (Docket No. 334) is DENIED.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

ORDER

WOLF, D.J. June 28, 2018

In a June 21, 2018 letter to the court, see Docket Nos. 329-1 (under seal), 335 (redacted version), the Master asked whether he should respond to issues raised in Customer Class Counsel's Motion for Accounting, and for Clarification that the Master's Role Has Concluded (Docket No. 302) (the "Motion"). As stated at the June 22, 2018 hearing that was closed to the public, the Master shall respond to the Motion by July 3, 2018, or request a reasonable extension of time to do so. The Motion raises questions concerning whether the court should exercise its authority to amend the Order appointing the Master to recognize or create a continuing role for the Master in these proceedings, the scope of any such role, and the justification for the possible amendment. These issues, among others, shall be addressed in the Master's response.

On June 25, 2018, the Master filed another letter to the court seeking guidance as to whether he may file a motion to remove Arkansas Teacher Retirement System as class representative and Labaton Sucharow, LLP as Lead Class Counsel. See Docket No. 345-1 (under seal).[1] Labaton opposes that request. See Docket No. 353 (under seal). It is most appropriate to defer deciding the

[1] The redacted versions of the Master's June 25, 2018 letter, Docket No. 345-2) and Labaton's Opposition (Docket No. 353-1) are hereby UNSEALED.

Master's request until his future role in these proceedings, if any, is determined.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LABATON SUCHAROW LLP'S MOTION TO IMPOUND ITS OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS AND THE TRANSMITTAL DECLARATION OF JUSTIN J. WOLOSZ IN SUPPORT OF LABATON SUCHAROW LLP'S OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

1. Pursuant to Fed. R. Civ. P. 7(b) and District of Massachusetts Local Rule 7.2, Labaton Sucharow LLP ("Labaton") respectfully moves to impound (1) its Objections to Special Master's Report and Recommendations ("Labaton's Objections") and (2) the Transmittal Declaration of Justin J. Wolosz in Support of Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations ("Labaton's Supporting Declaration").[1]

2. Labaton's Objections discuss information from the exhibits to the Master's Report and Recommendations that are not yet public. On June 28, 2018, the Court ordered that "[i]f the parties are unable to file a redacted version of the exhibits before filing their objections, the memoranda in support of objections to the Report may cite and quote from any portion of an exhibit not proposed for redaction in the June 13, 2018 consolidated submission, Docket No. 297. The memoranda may also quote any information that was subject to a redaction request denied in this Memorandum and Order. Any references to other information redacted from an exhibit may be included in memoranda filed, at least temporarily, under seal." ECF 356 at 33.

3. Labaton's Objections include discussion of information in exhibits to the Master's Report and Recommendations that remain subject to a pending redaction request. Accordingly, pursuant to the Court's Order (ECF 356 at 33), Labaton requests that the unredacted version of Labaton's Objections be filed under seal.

4. Labaton's Objections and Labaton's Supporting Declaration also attach and discuss documents from the record generated by the Special Master's investigation that were not attached as exhibits to his Report and Recommendations. Accordingly, these documents are

[1] This Motion to Impound is being filed via ECF. Redacted versions of Labaton's Objections and Labaton's Supporting Declaration were also filed via ECF on June 28, 2018. Labaton is filing non-redacted versions of those documents conventionally, consistent with this request that they be filed under seal.

subject to the protocol that the parties proposed for filing additional documents from the record. *See* All Parties' Response to May 31, 2018 Order (ECF No. 237) Regarding Additional Documents From the Record. ECF 259. Labaton was unable to complete conferral with all counsel before filing these documents with the Court. Accordingly, as set forth in the referenced protocol, Labaton seeks to file these documents and this information under seal, temporarily, until all parties have the opportunity to request redactions from these materials.

5. For the foregoing reasons, there is good cause pursuant to D. Mass. L.R. 7.2 to impound the non-redacted version of Labaton's Objections and Labaton's Supporting Declaration.

6. Labaton has filed via ECF redacted versions of Labaton's Objections and Labaton's Supporting Declaration. In these redacted versions, the information discussed in Paragraphs 2-4 above has been blacked out.

WHEREFORE, for the reasons set forth herein, Labaton requests that the Court impound the non-redacted versions of (1) Labaton's Objections to Special Master's Report and Recommendations and (2) the Transmittal Declaration of Justin J. Wolosz in Support of Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations.

Dated: June 28, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)

Labaton's counsel contacted other counsel in this case in order to confer regarding the substance of this motion. The Thornton Law Firm, Lieff Cabraser Heimann & Bernstein LLP, McTigue Law LLP, the Special Master, State Street, Zuckerman Spaeder LLP, and Keller Rohrback L.L.P. do not oppose the request.

/s/ Joan A. Lukey
Joan A. Lukey

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on June 28, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff,

No. 11-cv-10230-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs,

No. 11-cv-12049-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs,

No. 12-cv-11698-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

SPECIAL MASTER'S MOTION FOR CLARIFICATION

On May 31, 2018, the Court ordered counsel for the plaintiffs and State Street to file their proposed redactions to the Report and Recommendations, the exhibits, and the Executive Summary by June 11, 2018, to which the Special Master was ordered to respond by June 18, 2018. Due to the large number of redactions proposed, each of which required individual analysis and consideration, the Special Master requested additional time to respond to the entirety, including the proposed redactions to the exhibits. Dkt. # 296. On June 14, 2018, the Court issued a sealed order [Dkt. # 299] allowing, in part, the Master's request, and granting him until June 21, 2018 to respond to the proposed redactions to the exhibits.

On June 21, 2018, the Special Master filed his responses to the propose redactions to the First Set of Exhibits to the Report and Recommendations.[1] The following day, June 22, 2018, the Special Master filed his responses to the proposed redactions to the Second Set of Exhibits.[2] To date, the Special Master's responses to the proposed redactions to the remaining exhibits have not yet been filed with the Court or served on the parties.

On June 28, 2018, the Court issued a Memorandum and Order [Dkt.# 356] directing the Special Master to file redacted versions of the exhibits to the Report and Recommendations ("Final Redacted Exhibits") by July 10, 2018. Per the Court's Order, the redacted exhibits shall include each of the redactions proposed by the parties in their consolidated filing made on June 13, 2018 [Dkt. # 297] that the Court has not ordered be made public and/or that the parties have not agreed to make public. The parties were ordered to meet and confer about the substance of the Final Redacted Exhibits prior to the Special Master filing them with the Court on July 10.

[1] This filing addressed proposed redactions to Exhibits 4, 11, 12, 16-21, 25, 26, 35, 237-241, 252, 253, 260.

[2] This filing addressed proposed redactions to Exhibits 2, 28, 32, 33, 34, 37, 38, 41, 42, 105, 118, 120, 121, 122, 123, 127, 130, 131, 132, 133, 134, 135, 203.

In the June 28, 2018 Order, the Court ruled on several categories of proposed redactions to which the Special Master had objected, first arising in the Report and Recommendations. Dkt. # 356, p. 33. In light of these rulings, and the Court's latest instruction ordering the Special Master to file the Final Redacted Exhibits in conformance with the Court's Memorandum and Order, the Special Master seeks the Court's guidance as to whether it still wishes the Special Master to file formal responses to the proposed redactions to the remaining exhibits.[3] The Special Master has conferred with liaison counsel, and has agreed to provide the firms guidance concerning the Special Master's position as to the remaining objections and the reasons therefor. The Special Master believes that it will be most efficient to direct his efforts toward working collaboratively with the parties to review, and then confer about any remaining areas of disagreement as to the scope of material that should be redacted, and thereupon submit Final Redacted Exhibits by July 10, 2018. The Special Master is prepared, however, to file formal objections if the Court instructs him to do so.

Dated: June 29, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

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[3] Per the Court's order, the Special Master must file his unredacted responses under seal, as well as redacted versions of those responses.

CERTIFICATE OF SERVICE

I hereby certify that this Notice of Appearance was filed electronically on June 29, 2018 and thereby delivered by electronic means to all registered participants as identified on the Notice of Electronic Filing ("NEF"). Paper copies were sent to any person identified in the NEF as a non-registered participant.

/s/ *William F. Sinnott*
William F. Sinnott

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully submits this Response and Objections to the Special Master's Report and Recommendations ("Report"), and Executive Summary thereof ("Executive Summary"), dated May 16, 2018.[1]

I. INTRODUCTION

In his Report and Executive Summary, the Special Master Honorable Gerald E. Rosen (Ret.) (the "Special Master"), makes the following findings and conclusions with which Lieff Cabraser concurs:

- The Special Master acknowledges the risks, difficulties and challenges of the State Street Action, the skill and dedication of plaintiffs' counsel, including Lieff Cabraser, and the outstanding accomplishment of the $300 million settlement in the captioned action (the "State Street Action");
- The Special Master finds the roughly 25% fee awarded to plaintiffs' counsel was appropriate based solely on the work performed and the result achieved;
- The Special Master concludes that the hourly rates for, and the number of hours worked by, Lieff Cabraser's attorneys, including its staff attorneys (whose work the Master compared favorably to junior to mid-level associates), were reasonable;[2]
- The Special Master finds the contemporaneous time records of Lieff Cabraser's attorneys, including its 18 staff attorneys, to be sufficiently and reliably detailed;
- The Special Master concludes that Lieff Cabraser's role in the double-counting of any lodestar for staff attorneys was "inadvertent," and as between the three Customer Class Counsel, Lieff Cabraser bears the least responsibility for that error;

[1] All references herein to the Report, or the Executive Summary, are to ECF No. 357 and 357-1.

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

- The Special Master finds that Lieff Cabraser was not aware of the origins or details of the relationship between lead counsel, Labaton Sucharow ("Labaton"), and attorney Damon Chargois, and justifiably believed Chargois to be "local counsel" for Labaton and the named plaintiff, and therefore bears no responsibility for Chargois' involvement (or lack thereof) in the State Street Action; and,

- The Special Master concludes that Lieff Cabraser should be "relieved of its obligations to Labaton under the claw-back letter as to Chargois."

Lieff Cabraser objects, however, to the following of the Special Master's findings, conclusions, and recommendations:

- The Special Master recommends that Lieff Cabraser "disgorge" one-third of the aggregate amount of inadvertently double-counted staff attorney lodestar, and that this money be "returned" to the class;

- The Special Master recommends that the time of Lieff Cabraser's seven staff attorneys who were paid, at least in part, by an agency (which in turn billed Lieff Cabraser) be treated as a cost, instead of including that time in the firm's lodestar;

- The Special Master recommends that Lieff Cabraser "disgorge" the difference between: (a) the total of the firm's "agency" attorneys' lodestar, multiplied by 1.8; and, (b) $50 per hour for the agency lawyers' time; and,

- The Special Master concludes that even after the "imposition of the monetary remedies recommended here" Lieff Cabraser "will still be left with not only their base lodestar claim, but a substantial multiplier."

Based on the required *de novo* review of the factual record and controlling case law, for the reasons summarized below, the Court should sustain Lieff Cabraser's objections and grant the relief it seeks.

Lieff Cabraser should not be required to disgorge any portion of the firm's inadvertently double-counted lodestar. The Special Master recommends that Labaton, Thornton Law Firm ("Thornton"), and Lieff Cabraser (together "Customer Class Counsel"), disgorge and "return" to the class the $4,058,000 in double-counted staff attorney time. Lieff Cabraser objects to this recommendation by the Special Master, and urges the Court to reject it, for the following reasons: (1) the double-counting of lodestar (which, in the case of Lieff Cabraser, concerned only

four staff attorneys for two-three months) was found by the Master to be "inadvertent"; (2) the Special Master's recommendation is contrary to controlling law in that it miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (3) the inadvertent double-counting caused no harm to the class; and, (4) Customer Class Counsel, including Lieff Cabraser, have already been penalized for the accidental double-counting. Contrary to the Special Master's recommendation, the proper way to address the double-counting issue is simply to remove the double-counted lodestar from the aggregate lodestar used in the cross-check of the 25% fee award, and then determine whether the resulting aggregate multiplier of 2.0 (and Lieff Cabraser's resulting individual multiplier of 1.69) is appropriate. Lieff Cabraser submits that it is.

In the event the Court requires Lieff Cabraser to disgorge any portion of the firm's double-counted lodestar, that disgorgement should be commensurate with the firm's "relative" role in the double-counting. In the event the Court overrules Lieff Cabraser's objection to the imposition of any "remedy" for the double-counting, the firm objects to the Special Master's recommendation that the appropriate result is "disgorgement by all three firms in equal amounts" of the $4,058,000 in inadvertently double-counted time (i.e., $1,352,667 each). Lieff Cabraser objects to this recommendation because such an outcome is inconsistent with the factual record and the Special Master's own substantive findings. Based on the firm's limited fee interest in the State Street Action (24% among Customer Class Counsel and 20.3% among all plaintiffs' counsel), the actual amount of the lodestar the firm inadvertently double-counted ($868,417), the relatively small percentage of the total double-counted amount that can be attributed to Lieff Cabraser (21%), and given the Special Master's findings that the firm was least responsible for failing to catch and correct the inadvertent double-counting, if the Court requires any

disgorgement (an outcome not supported by the law or the facts), the firm should be obliged to pay significantly less than an "equal share" of the total double-counted lodestar (i.e., not 33 1/3%).

Lieff Cabraser should not retroactively be required to treat the firm's staff attorneys paid by an agency as a "cost" instead of including them as part of the aggregate lodestar for cross-check purposes. The Special Master recommends that the time of Lieff Cabraser's seven staff attorneys who were paid, at least in part, by an agency be treated as a cost, and not as a component of lodestar for cross-check purposes. Lieff Cabraser objects to this recommendation on the following grounds: (1) the controlling and relevant case law, including from within the First Circuit, expressly *rejects* the Special Master's recommendation that the time of the firm's agency lawyers be treated as a cost; and (2) the purported "factual" distinctions the Special Master attempts to draw between the firm's staff attorneys on payroll and those paid by an agency are either insignificant or not supported by a fair reading of the record. No matter what the Special Master's academic views on best practices may be with respect to the treatment of agency (contract) attorneys in the context of class action fee applications, those views should not displace the controlling law or the relevant facts.

Even if the Court agrees that the firm's agency lawyers should be treated differently than the staff attorneys on firm payroll for purposes of the lodestar cross-check, the Special Master's recommended disgorgement remedy should be rejected. The Special Master recommends that Lieff Cabraser "disgorge" and "return" to the class the difference between: (a) the total of the firm's agency attorneys' lodestar, multiplied by 1.8, and (b) $50 per hour for the

agency lawyers' time ($2,241,098.40)[3]. Lieff Cabraser objects to this recommendation by the Special Master for the following reasons: (1) the Special Master's recommendation is contrary to controlling law in that it miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (2) the inclusion of Lieff Cabraser's agency lawyers in the cross-check caused no harm to the class; and (3) penalizing Lieff Cabraser for adhering to controlling legal principles and having committed no violation of law or ethics is blatantly unjust. In the event the Court agrees to treat the time of the firm's agency attorneys as a cost, the proper way to address the matter would be to remove those attorneys' lodestar (along with the double-counted lodestar) from the aggregate lodestar used in the cross-check of the 25% fee award, and then determine whether the resulting aggregate multiplier of 2.07 (and resulting individual multiplier of 1.99 for Lieff Cabraser) is appropriate. Lieff Cabraser submits that it is.

Lieff Cabraser should be reimbursed for the amount of money it has spent responding to the Chargois investigation. The Special Master finds that Lieff Cabraser has no responsibility for Chargois' involvement (or lack thereof) in the State Street Action. The Special Master also concludes that the firm should be relieved of any obligation to contribute to the $4.1 million the Master recommends Labaton disgorge as a "remedy" for the "non-disclosure" of the Chargois payment. When invited by the Special Master near the close of his investigation, the firm declined to seek reimbursement from Labaton and/or Thornton of the approximately $1 million the firm effectively contributed toward Chargois' $4.1 million fee. Lieff Cabraser will abide by that position now. However, the firm does seek reimbursement from Labaton and/or Thornton of the amount Lieff Cabraser has spent responding to the Chargois investigation, an exercise for

[3] For this calculation, the firm is using the correct total hours worked by agency (contract) lawyers, based on Lieff Cabraser's time records, of 2899.2. The Special Master uses different hour totals (i.e., 2949.5 or 2833.5) for these attorneys at various places in his Executive Summary and Report. *See, e.g.,* Executive Summary at 50, Report at 367.

which the firm was not responsible. The firm seeks repayment of the amount it has contributed to the Special Master's fees and expenses that are attributable to the Chargois investigation, as well as the amount of costs and lodestar expended by the firm in addressing the Special Master's Chargois-related inquiries.

Contrary to the Special Master's "calculations," after the imposition of the recommended monetary "remedies" against Lieff Cabraser, along with the costs of the investigation already incurred by the firm, the firm will not receive its "base lodestar" plus a "substantial multiplier." Far from it. Having found that Lieff Cabraser engaged in no intentional or professional misconduct and violated no rule of law or ethics, the Special Master seeks to justify (or rationalize) the "imposition of the monetary remedies recommended here," by incorrectly claiming that "even after the allocation of all monetary amounts, and the cost of the investigation, [Lieff Cabraser] will still receive its base lodestar plus a significant multiplier." To be clear, the Special Master recommends that the firm disgorge $3,593,765 – or roughly 24% of the $15,116,965.50 in fees Lieff Cabraser actually received – *in addition* to (a) the $912,000 the firm has already spent to fund its share of the Special Master's investigation, and (b) the $2.39 million the firm has spent in time and costs since February 6, 2017 responding to the investigation, a combined $3.3 million. Altogether, this would mean a total reduction in Lieff Cabraser's fee of $6,897,590. Contrary to the Special Master's arithmetic, "after the allocation of all monetary amounts, and the cost of the investigation," Lieff Cabraser would receive *less* than its "base lodestar" and, in fact, a *negative* individual multiplier (0.92) for its exemplary service to the class in the State Street Action.

The financial impact on Lieff Cabraser of the Special Master's disgorgement recommendations is unjust and entirely disproportionate to the firm's conduct and the

absence of harm to the class. The Special Master claims that the "intent here has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and the harm." Yet, with respect to Lieff Cabraser, the Special Master does not "identify" *any* "true and unmistakable professional misconduct," concludes that the firm bears the least responsibility for the inadvertent double-counting error, and finds that it contributed to a laudable result for the class with stellar work by the firm's attorneys (including its staff attorneys).

Despite these findings, and without support of any controlling or relevant case law, the Special Master's recommendations would impose the harshest financial penalty on Lieff Cabraser (as a percentage of individual fees paid) of any firm in these proceedings. The financial impact that would be inflicted on Lieff Cabraser by the Special Master's disgorgement recommendations is entirely disproportionate to the firm's role in the events giving rise to this investigation and the absence of harm suffered by the class.

Lieff Cabraser submits that the firm has already been excessively penalized for inadvertently double-counting $868,417 in lodestar for four staff attorneys (for two to three months' work) by paying 24% ($912,000) of the Special Master's $3.8 million investigation (to date), plus $2.39 million in time and costs spent responding to the investigation. This aggregate expense of $3.3 million is wildly disproportionate to the firm's double-counting mistake and the wholly appropriate manner in which it included its agency attorneys in the firm's submission of lodestar for cross-check purposes.

The essential facts concerning Lieff Cabraser's inadvertent double-counting of the lodestar of just four staff attorneys for a limited time-frame, and the propriety of the number of hours and the hourly rates of the firm's attorneys, including its 18 staff attorneys, who worked on

the State Street Action, were communicated to the Special Master within the first month of his appointment. Nevertheless, the firm was obliged to respond to the same inquiries about these topics (and other topics that were mostly irrelevant to the investigation) through the production of thousands of pages of documents, responses to dozens of interrogatories and other written submissions, and in numerous depositions attended by the Special Master and as many as four other members of his team. All of this time and effort was devoted to questions that were simple and uncomplicated, the answers to which did not change from the firm's first engagement with the Special Master in April 2017 through the filing of the Master's Report more than 11 months later in May 2018.

Moreover, the costs incurred by the firm were and continue to be occasioned by dramatic changes in the scope of the Special Master's investigation. As the Special Master finds, Lieff Cabraser has no responsibility for Chargois' involvement (or lack thereof) in the State Street Action. Nevertheless, the firm was required to respond to multiple, duplicative discovery requests, appear for two depositions, and submit expert testimony, all to repeat the same basic facts – that the firm agreed to pay its share (24%) for the services of an attorney the firm believed to be Labaton's local counsel in Arkansas; that the firm was told and understood that this lawyer, Chargois, had performed valuable services for Labaton and its client; that based on the firm's experience, there was nothing unusual in such a local counsel arrangement for a public pension fund in a financial fraud case; and, that the firm knew nothing about the origins or the actual details of the relationship between Labaton and Chargois.

Finally, the Special Master states in his Report that the "intent" of the investigation was, among other things, to "put the law firms and the class roughly in a position that is proportionate to the conduct and the harm." The Master sums up his efforts by touting the possible "return" of

"between $7.4 and $8.1 million to the class." But, there is no factual, legal or policy basis for the firm to be required to "return" approximately one quarter of its well-earned fees to the class. Indeed, it would appear the Special Master does not entirely believe that it was the "intent" of his investigation to "put the law firms and the class roughly in a position that is proportionate to the conduct and the harm," as the Master recommends that $3.4 million of the $4.1 million paid to Chargois should now be redirected to counsel for ERISA plaintiffs and not "returned" to the class. In any event, the firm has now expended additional resources to address the Special Master's recommended "remedies" against Lieff Cabraser. The firm should have to pay no more.

II. STATEMENT OF FACTS

A. Lieff Cabraser's Relevant Business Practices, Including How the Firm Manages Complex Litigation, Uses Staff Attorneys, and Sets Hourly Rates.

1. Lieff Cabraser's Complex Litigation Practice Involves Large Scale Document Review and Analysis.

Lieff Cabraser is a plaintiff-side litigation firm founded in 1972, based in San Francisco, with additional offices in New York, Nashville, and Seattle.[4] More than 100 attorneys, including partners, associates, and staff attorneys currently work for the firm.[5] Lieff Cabraser engages in predominantly contingent fee practice for plaintiff classes, groups and individuals, on behalf of public and private institutional investors, small business, shareholders, consumers and

[4] *See* April 5, 2017 Presentation to the Special Master, LCHB 0000001 - 0067, attached as Exhibit ("Ex.") A to the Declaration of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLLP to the Special Master's Report and Recommendations ("Fineman Declaration"), filed herewith. *See also* Lieff Cabraser resume, LCHB 0049987 – 50109, earlier filed as ECF No. 104-17 (Ex. C). Documents and pleadings produced or provided to the Special Master by Lieff Cabraser in this proceeding that are referenced herein, but are not exhibits to the Master's Report or are not already in the public docket, are attached to the Fineman Declaration. *See also* Fineman Declaration at ¶ 19.

[5] Ex. A to Fineman Declaration at 4; ECF No. 104-17 (Ex. C); Ex. 57 to Report at 2-3; Fineman Declaration at 19.

employees.[6] The firm also occasionally represents plaintiffs on an hourly basis.[7] Lieff Cabraser is "considered by many to be one of the preeminent plaintiffs' class action firms in the nation."[8]

Lieff Cabraser has litigated and resolved hundreds of class action lawsuits and thousands of group and individual cases (many in the context of multi-district litigation ("MDL") proceedings), including in the fields of securities and financial fraud.[9] Most of the firm's cases involve major corporate defendants (e.g., banks and other financial institutions, pharmaceutical and medical device companies, oil and energy companies, technology corporations, and consumer product manufacturers).[10] These kinds of defendants are represented by the largest and most sophisticated law firms in the world.[11] Most of the firm's large, complex cases involve production by defendants of enormous numbers of pages of documents (frequently in the millions).[12]

Lieff Cabraser staffs its complex cases to maximize effectiveness and efficiency in light of the defendants' typically significant advantage in economic and personnel resources.[13] The firm's complex cases are normally supervised by a senior partner, and staffed with an additional senior partner and one or more junior partners, and the appropriate number of associates, staff attorneys and litigation support personnel (e.g., paralegals, financial analysts, investigators, and

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[6] *Id.*

[7] *Id.*; Ex. 175 to Report at 8.

[8] Report at 16.

[9] Ex. A to Fineman Declaration at 5; ECF No. 104-17 (Ex. C); Fineman Declaration at ¶ 20; Ex. 57 to Report at 2-3.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Ex. A to Fineman Declaration at 6-7; Fineman Declaration at ¶ 21.

the like).[14] Investigations, pleadings, briefs, written discovery, depositions, court appearances, trial and settlement are handled by partners and associates depending on the level of experience required.[15] Document review, analysis, issue memoranda and witness kits (for deposition and trial) are conducted or prepared by a combination of junior partners, associates, and staff attorneys.[16]

2. Lieff Cabraser's General Use of Staff Attorneys.

As stated above, Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast number of documents produced in these cases.[17] In addition, Lieff Cabraser staff attorneys support all aspects of the firm's complex cases by identifying documents and frequently drafting issue, witness, and liability memoranda.[18] The work product generated by the firm's staff attorneys is used, for example, in support of class certification, in preparation for the conduct of fact and expert depositions, in opposition to motions for summary judgment, for settlement negotiations, and in other pre-trial and trial proceedings.[19]

As described more fully below with respect to the staff attorneys who worked on the State Street Action, the firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and in document review and analysis in complex cases, and have made the lifestyle and career choice to work a more limited number of hours

[14] *Id*.
[15] *Id*.
[16] *Id.*
[17] *Id.*
[18] *Id*.
[19] Fineman Declaration at ¶ 22.

than do traditional law firm partners and associates.[20] Many of the firm's staff attorneys are paid directly by the firm and receive benefits provided by the firm.[21] Other firm staff attorneys work at the firm's direction, but are paid directly by agencies that bill the firm for those lawyers' services.[22]

During and since the State Street Action, Lieff Cabraser has employed as many as 30 staff attorneys at one time who are paid directly by the firm.[23] Given the number of large complex cases the firm handles at one time, Lieff Cabraser sometimes has need for attorney document review and analysis support beyond the firm's available staffing (for example, the firm may just need additional attorneys, or may require lawyers with specific subject experience or language expertise).[24] When such a need arises, the firm seeks and receives resumes from "preferred" agencies: preferred because those agencies have long-standing relationships with the firm and understand the lawyer qualifications and experience the firm requires.[25] Frequently, as was the case for four of the staff attorneys who worked on the State Street Action, staff attorneys who start working for the firm while paid by an agency transition to direct employment by the firm.[26]

Whether on Lieff Cabraser's payroll or paid via an agency, all firm staff attorneys have comparable educational backgrounds and work experiences, and all perform substantially the same document review and analysis functions.[27] And, all utilize, to varying degrees, the firm's

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[20] *Id.* at ¶ 23; Appendices A and B.
[21] *Id*.
[22] *Id*.
[23] Fineman Declaration at ¶ 24.
[24] *Id.*; Ex. 18 to Report at 31-32.
[25] Fineman Declaration at ¶ 24.
[26] *Id.*; Appendices A and B.
[27] *Id.*; Ex. 10 to Report at 113-116.

infrastructure and resources, including physical office space (for the majority working in firm offices instead of remotely); information technology support (both in the office and remotely); administrative support (e.g., human resources, accounting, and word processing); assistance from the firm's litigation support department; supervision from firm partners and senior associates; and the cost to the firm for the staff attorneys' services.[28]

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

Although the firm is compensated predominantly on a contingent fee basis, Lieff Cabraser's attorneys and litigation staff maintain contemporaneous time records that identify specific tasks performed and the amount of time devoted to those tasks.[29] The firm's contemporaneously recorded time, when multiplied by applicable hourly rates, generates what is known as "lodestar."[30] In certain class actions handled by the firm, aggregate lodestar is used as a "cross-check" to assure that the firm's fee in a "percentage-of-the-recovery" context is appropriate (i.e., that the multiplier on the lodestar is not excessive).[31] In other class actions the firm is compensated based on its lodestar plus an appropriate multiplier.[32] The firm also uses its lodestar figures in cases for hourly rate paying clients.[33]

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[28] Fineman Declaration at ¶ 25; Ex. 18 to Report at 49.

[29] Fineman Declaration at ¶ 27; Exs. 206 and 247 to Report.

[30] Fineman Declaration at ¶ 27; Ex. A to Fineman Declaration at 60; Ex. 175 to Report at 8-9.

[31] *Id*

[32] *Id.*

[33] Both prior to and in the early stages of the Special Master's investigation, there was a question about whether Customer Class Counsel have bill-paying clients (in addition to contingent fee clients) who pay the firms' hourly rates. Lieff Cabraser has consistently and correctly reported to the Court and the Special Master that it periodically has bill-paying clients who pay the firm's hourly rates. *See* Fineman Declaration at ¶ 27; Ex. A to Fineman Declaration at 55-59; Ex. B to Fineman Declaration at 20-21; Ex. 89 to Report, ECF No. 104-17, at 3; Ex. 175 to Report at 7-10 and 16; ECF No. 176 at 92-93.

All Lieff Cabraser hourly rates, including those for staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for a lawyer's services, primarily in the San Francisco and New York market places.[34] The firm's management evaluates and adjusts hourly rates on an annual basis, based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys. Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys (whether on the firm's payroll or employed through an agency), based on what the firm pays them (or for them).[35] Again, firm hourly rates are based on what is reasonable in the applicable market places for our services.[36]

For a number of years prior to 2016, hourly rates of the firm's staff attorneys were set to be consistent with the rates of "on-track" firm attorneys with the same or comparable levels of experience. However, as the firm's staff attorneys (payroll and agency) became increasingly experienced and senior, that approach began to result in rates the firm believed were too high.[37] Therefore, beginning in 2016, with limited exceptions, all firm staff attorneys were assigned an hourly rate of $415 per hour (then the equivalent of a fourth year "on-track" associate).[38] This rate was determined based on the firm's understanding of the market for staff attorneys performing document review, coding and analysis, and the preparation of issue and witness

[34] Fineman Declaration at ¶ 28; Ex. A to Fineman Declaration at 8-9; Ex. 175 to Report at 5-9; Ex. 18 to Report at 57-62.

[35] *Id*.

[36] *Id.*

[37] Fineman Declaration at ¶ 29; Ex. A to Fineman Declaration at 8-9; Ex. 176 to Report at 5-9.

[38] *Id*.; *see also* Appendices A and B.

memoranda in the kind of large complex cases handled by Lieff Cabraser. The firm determined this to be a fair and appropriate rate, even though Lieff Cabraser's staff attorneys, by and large, have many more than four years of relevant experience.[39]

The vast majority of fee awards in the firm's class action cases over the years have been awarded on a percentage of the recovery basis.[40] In recent years, however, courts have increasingly conducted a lodestar cross-check to determine that the percentage of the recovery award is not excessive.[41] And, in rare cases, courts have determined our class action fees on a lodestar basis.[42] In both the lodestar cross-check and lodestar fee award context, Lieff Cabraser's hourly rates, including the firm's staff attorney rates, have routinely been approved.[43] In addition, in those infrequent instances when Lieff Cabraser has represented plaintiffs on an hourly basis, the firm has been paid the applicable hourly rates for its attorneys, including its staff attorneys.[44]

B. The Background of Lieff Cabraser's Involvement in the State Street Action.

1. Lieff Cabraser's Role in the California *Qui Tam* Action.

Lieff Cabraser began investigating and pursuing claims of alleged deceptive practices and overcharges by State Street related to foreign currency exchange ("FX") products and services in 2008.[45] Along with Thornton, Lieff Cabraser was co-counsel of record in a *qui tam* FX lawsuit filed against State Street under seal in California on April 14, 2008 (the "California Action").[46]

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[39] *Id*.
[40] Ex. A to Fineman Declaration at 60; Ex. 175 to Report at 8.
[41] *Id.*
[42] *Id.*
[43] Ex. A to Fineman Declaration 61-67; Ex. 175 to Report at 9, 16-18; Ex. 18 to Report at 62.
[44] *See* note 33, *supra*.
[45] Ex. A to Fineman Declaration at 10; Ex. 57 to Report at 3-4.
[46] *Id*.

The California Attorney General intervened in the California Action in October 2009, making the FX scheme public.[47] The attendant publicity caused a number of custodial clients to question whether they had been overcharged on FX trades in a similar manner. The questions were not restricted to State Street; BNY Mellon faced similar allegations in *qui tam* lawsuits that were unsealed in early 2011.[48]

2. Lieff Cabraser's Role in the BNY Mellon Action.

In July 2011, Lieff Cabraser filed, with co-counsel (including Thornton), a class action suit against BNY Mellon in the United States District Court for the Northern District of California on behalf of custodial customers of BNY Mellon who were wrongly overcharged on FX trades (the "BNY Mellon Action"). That complaint was subsequently amended and BNY Mellon's motion to dismiss was denied in February 2012. The case was put on an aggressive schedule by Judge William Alsup, resulting in the plaintiff filing its opening brief on class certification in April 2012.[49]

Shortly after the plaintiff filed its class certification motion, however, in April 2012, the case was transferred to Judge Lewis A. Kaplan of the Southern District of New York and consolidated with several other customer, ERISA, and securities fraud cases all alleging the same underlying facts about BNY Mellon's custodial FX practices. These cases (now part of an MDL) were in turn coordinated for discovery purposes with a later-filed civil suits brought by the United States Department of Justice ("DOJ") and the New York State Attorney General ("NYAG").[50]

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[47] Ex. A to Fineman Declaration at 10; Ex. 57 to Report at 4.

[48] Ex. 57 to Report at 4.

[49] *Id*.

[50] Ex. 57 to Report at 4-5; Ex. 10 to Report at 24-26.

Once before Judge Kaplan, Lieff Cabraser was appointed co-lead counsel for the proposed class of custodial customers affected by the BNY Mellon FX scheme. In addition, the firm was appointed to the three-member executive committee overseeing all plaintiffs in the MDL.[51] Between 2012 and early 2015, BNY Mellon aggressively defended the actions, taking 57 depositions of the plaintiffs, absent class members, or third parties, and filing counterclaims against the named customer plaintiffs and absent class members.[52] The plaintiffs in the MDL and the DOJ took more than 50 depositions of BNY Mellon.[53] BNY Mellon produced more than 29 million pages of documents.[54]

Lieff Cabraser, working closely with its co-counsel and the DOJ, reviewed and analyzed these documents with the aid of 13 Lieff Cabraser staff attorneys (including six "agency" lawyers), most of whom later went on to work on the State Street Action.[55] In addition to reviewing, analyzing and coding documents, Lieff Cabraser's staff attorneys, who individually averaged nearly 2,200 hours on the BNY Mellon Action, prepared highly detailed witness kits and issue memoranda to assist the lead attorneys in preparing for depositions.[56]

In January 2015, fact discovery closed in the BNY Mellon action and settlement discussions began, which resulted in a global resolution in March 2015. The settlement, approved by Judge Kaplan in September 2015, provided $504 million for the benefit of BNY Mellon customers, with $335 million attributed to resolution of the customer class case co-lead

[51] *Id*.
[52] Ex. 57 to Report at 5.
[53] *Id*.
[54] *Id.*
[55] Ex. A to Fineman Declaration at 18-20; Ex. 57 to Report at 15; Appendices A and B.
[56] *Id.*

by Lieff Cabraser (the settlement also resolved claims by the DOJ and NYAG, and the United States Department of Labor).[57]

3. Lieff Cabraser's Inclusion in the State Street Action.

During its involvement in the California Action and throughout its early work on the BNY Mellon Action, Lieff Cabraser investigated possible claims to be brought on a class basis for the benefit of custodial customers of State Street.[58] In that regard, the firm discussed with several institutional investors the possibility that they would serve as class representatives in a customer class action against State Street. The firm however, was not retained by any State Street client for that purpose.[59]

As noted above, Lieff Cabraser worked with Thornton on the California and the BNY Mellon Actions. Based on Lieff Cabraser's prior working relationship with Thornton and the firm's expertise and institutional knowledge concerning custodial FX pricing practices, the firm was invited to participate in the State Street Action by Thornton and Labaton, after Labaton's client, the Arkansas Teacher Retirement System ("ATRS"), decided to proceed with the filing of a class action against State Street in the District of Massachusetts.[60]

Throughout the State Street Action, Labaton served as lead counsel for ATRS and the putative and settlement class; Thornton served as liaison counsel for ATRS and the putative and settlement class; and, Lieff Cabraser served as "additional counsel" for ATRS and the putative and settlement class.[61] Lieff Cabraser had no formal attorney client relationship with ATRS during the State Street Action, and has not represented ATRS before or after the State Street

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[57] Ex. A to Fineman Declaration at 12-13; Ex. B to Fineman Declaration at 7-8.

[58] Ex. 18 to Report at 9-10, 13; Ex. 19 to Report at 12-13.

[59] *Id.*

[60] Ex. A to Fineman Declaration at 11; Ex. 57 to Report at 7.

[61] ECF No. 28; Ex. 113 to Report, ECF No. 110, at ¶ 4.

Action. [62] Prior to and during the pendency of the State Street Action, Lieff Cabraser had no direct substantive communication with ATRS.[63]

During the course of the State Street Action, Labaton, Thornton and Lieff Cabraser asserted claims on behalf of all eligible custody clients of State Street (including plans eligible under the Employee Retirement Income Security Act of 1974 ("ERISA")), and were known, and are collectively referred to herein, as "Customer Class Counsel." Other attorneys ("ERISA Counsel") filed cases asserting strictly ERISA-based claims solely for the benefit of ERISA plan custody clients of State Street.[64] Customer Class Counsel and ERISA Counsel are collectively referred to herein as "Plaintiffs' Counsel."

C. The State Street Action

1. Plaintiffs' Underlying Allegations and Claims against State Street.

Lieff Cabraser assumes the Court's familiarity with State Street's allegedly unfair and deceptive practice of charging its custody and trust customers excessive rates and spreads in connection with certain FX transactions, in alleged violation of State Street's statutory, common law, contractual and fiduciary obligations.[65] Therefore, the firm does not restate here those allegations and claims. It does bear noting, however, that both this Court and the Special Master have acknowledged the complexity, difficulty and challenges of the State Street Action.[66]

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[62] Ex. 10 to Report at 45-47.

[63] Ex. 57 to Report at 7.

[64] Those attorneys include Keller Rohrback, LLP ("Keller Rohrback"), McTigue Law, LLP ("McTigue Law"), and Zuckerman Spaeder, LLP ("Zuckerman Spaeder") (collectively, "ERISA Counsel"). *See* Exs. 23, 24, and 29 to Report.

[65] Ex. 7 to Report, ECF No. 10.

[66] Ex. 78 to Report, ECF No. 114, at 19-20, 36, 38; Ex. 113 to Report, ECF No. 110, at 5; ECF No. 110 at 4; Executive Summary at 3; Report at 6, 29-33, 152-156. *See also* Ex. 57 to Report at 12-13 (risk factors identified by Lieff Cabraser at the outset of the State Street Action).

2. Procedural Litigation and Mediation History of the Litigation.

Lieff Cabraser assumes the Courts' knowledge of the procedural, litigation and mediation history of the State Street Action from its inception in February 2011 to the execution and filing of the final settlement agreement in July 2016. For the Court's reference, a detailed history of the litigation can be found in the Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, etc., filed September 15, 2016 ("Omnibus Declaration").[67]

3. Lieff Cabraser's Specific Tasks in the State Street Action.

Lieff Cabraser worked closely from the outset of the State Street Action with Labaton and Thornton on, among other things: (a) researching potential causes of action against State Street for overcharging custodial customers on FX trades; (b) drafting both the complaint and amended complaint; (c) briefing plaintiff's opposition to defendants' motion to dismiss (with particular responsibility for (i) countering defendants' statutes of limitations arguments and (ii) supporting plaintiff's claims under M.G.L. ch. 93A); (d) researching and drafting memoranda on the viability of class certification (particularly as applied to M.G.L. ch. 93A); and, (e) drafting plaintiffs' final settlement approval memorandum.[68]

Lieff Cabraser was principally responsible for developing the M.G.L. ch. 93A theory of liability, which was particularly valuable since it allowed for double or treble damages (plus prejudgment interest), and (as directed against a Massachusetts-based company and conduct) provided a potentially more readily-certifiable class claim for State Street custodial customers

[67] Ex. 3 to Report, ECF No. 104, at ¶¶ 39-106. The Report refers to Sucharow's September 15, 2016 Declaration as the "Omnibus Declaration," and Lieff Cabraser therefore adopts that same definition here. Report at 54-55.

[68] Ex. A to Fineman Declaration at 11; Ex. 57 to Report at 8-9.

from across the country.[69] During the parties' numerous mediation sessions, Lieff Cabraser took the lead in researching and presenting on the viability of class certification under M.G.L. ch. 93A in particular, as well as the availability of double or treble damages and the elements and standards of proof necessary to achieve those results.[70] Lieff Cabraser attorneys attended and participated in every mediation session and in all related plaintiff-side meetings.[71]

In addition, Lieff Cabraser participated in the review and analysis of more than nine million pages of documents produced by State Street.[72] State Street's productions largely took place between December 2012 and November/December 2013.[73] The initial production (in December 2012) of more than 300 CDs and a hard drive consisted principally of materials gathered and produced by State Street in the California Action, and totaled more than 260,000 documents.[74] The latter productions (bringing the total number of documents to be reviewed in the database to more than 750,000 [including 84,000 native Excel files], and more than nine million pages or 500 gigabytes) included documents produced by State Street in *Hill v. State Street Corporation*, No. 09-cv-12146-GAO (D. Mass.) (a securities fraud lawsuit filed in the wake of the disclosure of the California Action which contained overlapping allegations of unfair or deceptive custodial FX pricing practices by State Street).[75]

The State Street productions contained, among other things, internal and external email correspondence, custodial contracts and fee schedules, marketing materials, internal compliance and training manuals, investment manager guides, internal and external presentations, analyst

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[69] Ex. 10 to Report at 15-19, 55-58, 68, 70-74.

[70] Ex. A to Fineman Declaration at 11; Ex. 10 to Report at 15-19, 55-58, 68, 70-74.

[71] *Id*.

[72] Ex. A to Fineman Declaration at 11; Ex. 57 to Report at 13-14.

[73] Ex. 57 to Report at 13-14.

[74] *Id.*

[75] *Id.*

reports, customer surveys, codes of conduct, competitive analyses, and FX revenue/profit and loss reports.[76] All of these documents and materials were uploaded to a Catalyst e-discovery database hosted and chiefly administered by Lieff Cabraser in the firm's San Francisco office.[77] As explained below, most of the review, reading and analysis of the documents produced by State Street were performed by staff attorneys working for Customer Class Counsel, including Lieff Cabraser.

D. The Role Of Lieff Cabraser's Staff Attorneys In The State Street Action.

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

As explained above, State Street produced more than nine million pages of documents potentially relevant to the issues and claims in the State Street Action. Consistent with Lieff Cabraser's practice in complex litigation document review (*see* discussion, *supra*, at 11, the firm's staff attorneys, along with staff attorneys from Labaton and staff attorneys paid for by Thornton, reviewed, issue-coded, analyzed, and completed issue memoranda concerning State Street's documents. The scope of that effort is described below.

All staff attorneys had access to the Catalyst document database hosted by Lieff Cabraser.[78] Online technical training on how to the use the database was provided by Lieff Cabraser's litigation support department Manager, Kirti Dugar, in conjunction with the staff at Catalyst.[79] The documents maintained in the Catalyst database consisted of all those documents produced by the parties in the State Street Action.[80]

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[76] *Id.*

[77] *Id.* at 16-17.

[78] *Id*. at 16; Ex. B to Fineman Declaration at 17-18.

[79] *Id.*

[80] *Id.*

Before the staff attorneys began their review and analysis of the documents, they were instructed to review relevant pleadings in the State Street Action, including the operative class action complaint and plaintiffs' memorandum in opposition to State Street's motion to dismiss.[81] In addition, each staff attorney was provided with and expected to read and understand the State Street Document Review Protocol, including the Document Review Coding Fields Quick Reference Guide, in which issue codes were listed, followed by descriptions of their relevance to the case.[82] In addition to these materials, emails from supervising attorneys communicating assignments on proposed topics for the factual, legal and/or discursive memoranda to be prepared by staff attorneys (discussed further below) contained descriptions, context and/or explanations for the topics assigned.[83]

The staff attorneys' job responsibilities and tasks included reviewing and coding of all documents produced by State Street for relevance and/or strength or weakness in support of plaintiffs' theory of the case.[84] In addition, the staff attorneys identified specific issues and topics addressed by each of the documents so they could be sorted and searched by subject matter or issue at a later date.[85] Staff attorneys also had the ability to enter attorney notes to explain or clarify the decision behind their coding determinations.[86] There were more than 30 different issue or document type codes available for assignment by staff attorneys to the

[81] *Id.* at 18.
[82] Ex. A to Fineman Declaration at 43-47; Ex. 57 to Report at 18.
[83] Ex. 57 to Report at 18.
[84] Ex. A to Fineman Declaration at 41; Ex. 57 to Report at 15-16.
[85] Ex. 57 to Report at 21.
[86] *Id.*

documents they reviewed.[87] The staff attorneys received appropriate supervision from Lieff Cabraser partners and senior staff to assure the quality of their work.[88]

The review and coding of State Street's documents was largely completed by the end of April 2015, after which the staff attorneys were tasked with preparing detailed memoranda on approximately 18 selected themes, issues or witnesses to be further developed in depositions and follow-up discovery.[89] Each memorandum prepared by the staff attorneys contained hyperlinks to supporting documents from State Street's productions, with some of the memoranda exceeding 100 pages.[90] The memoranda were circulated to the supervising attorneys on a rolling basis as they were completed.[91] Had the mediation ended without resolution of the State Street Action, the memoranda and included documents would have formed the principal repository of knowledge for the supervising attorneys as they prepared for depositions and pretrial litigation.[92]

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

Attached as Appendix A is narrative biographical information about each of Lieff Cabraser's 18 staff attorneys (with citations to the factual record), who worked on the State Street Action. Attached as Appendix B is a chart summarizing key information about each of these firm staff attorneys (with citations to the factual record).[93] The 18 Lieff Cabraser staff

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[87] Ex. A to Fineman Declaration at 41; Ex. 57 to Report at 21.

[88] *Id*. These memoranda were all produced to the Special Master at.

[89] Ex. A to Fineman Declaration at 41-42; Ex. 57 to Report at 21-22.

[90] *Id.*

[91] Ex. 57 to Report at 22-23.

[92] *Id.*

[93] All of the specific information about Lieff Cabraser's staff attorneys presented herein can be found in Ex. A to the Fineman Declaration at 18-40, and in Lieff Cabraser's Responses to Special Master Hon. Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017, dated July 10, 2017, particularly in the firm's responses to Interrogatory Nos. 24 and 25. This

attorneys who worked on the State Street Action were, in alphabetical order (with the number of hours each worked for Lieff Cabraser on the Action noted parenthetically): Tanya Ashur (843.50); Joshua Bloomfield (2,033.20); Elizabeth Brehm (1,682.90); Jade Butman (24.00); James Gilyard (882.00); Kelly Gralewski (1,475.90); Christopher Jordan (539.90); Jason Kim (904.00); James Leggett (893.00); Coleen Liebmann (24.00); Andrew McClelland (58.00); Scott Miloro (658.80); Leah Nutting (1,940.10); Marissa Oh (800.30); Peter Roos (780.00); Ryan Sturtevant (796.00); Virginia Weiss (473.50); and Jonathan Zaul (495.20).

The Lieff Cabraser staff attorneys who worked on the State Street Action each attended good to excellent colleges and law schools.[94] They each had years of experience in civil litigation and in document review and analysis in complex cases for major American law firms.[95] For example, as of 2016, five of the staff attorneys who worked on the State Street Action had more than 15 years of experience, six had between 10 and 15 years of experience, and six had between five and 10 years of experience.[96]

Lieff Cabraser's staff attorneys who worked on the State Street Action were selected in large part from the pool of staff attorneys who had worked previously or simultaneously on the BNY Mellon Action, and who had acquired substantial relevant experience concerning custodial FX trading, pricing, and marketing.[97] The thirteen Lieff Cabraser staff attorneys who worked on the BNY Mellon Action before and/or during the State Street Action were (with the number of hours each worked on that Action noted parenthetically): Ashur (2,414.50); Bloomfield (2,183); Gilyard (2,614.50); Gralewski (301.50); Jordan (1,572.90); Kim (2,659); Leggett (2,476.20);

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set of discovery Responses is not included as an exhibit to the Special Master's Report. The Responses are therefore attached as Ex. B to the Fineman Declaration.

[94] Appendices A and B.

[95] *Id*.

[96] *Id*.

[97] Ex. A to Fineman Declaration at 18; Ex. 57 to Report at 16.

McClelland (1,799); Miloro (3,146.80); Nutting (3,128.40); Oh (2,576.70); Weiss (1,445.80); and Zaul (2,197.90).[98]

Five other Lieff Cabraser staff attorneys who were assigned to the State Street Action did not work on the BNY Mellon Action. Of these, attorneys Brehm, Roos and Sturtevant brought significant relevant litigation experience to their contributions to the State Street Action, including: a background in document review analysis in financial fraud cases for plaintiff-side litigation firms (Brehm); extensive experience in financial and corporate transactions and documentation during an 18 year career with Baker & MacKenzie (Roos); and, significant experience in securities and financial fraud class actions while working for numerous major American law firms (Sturtevant).[99] Staff attorneys Butman and Liebmann also had meaningful prior experience in document review and analysis, but devoted only 24 hours each to the State Street Action.[100]

Of the 18 Lieff Cabraser staff attorneys who worked on the State Street Action, the following 11 were compensated directly by the firm during the time they worked on the Action: Ashur, Brehm, Gilyard, Gralewski, Jordan, Kim, Liebmann, Miloro, Oh, Roos, and Zaul.[101] The following four Lieff Cabraser staff attorneys were compensated initially by an agency (which billed the firm directly for their services), but became payroll employees of the firm in January 2015, during the pendency of the State Street Action: Bloomfield, Leggett, Nutting, and Sturtevant.[102] The following three Lieff Cabraser staff attorneys were compensated by an

[98] Appendices A and B.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id.*

agency throughout their work for the firm on the State Street Action: Butman, McClelland, and Weiss.[103]

The following Lieff Cabraser staff attorneys physically worked on the State Street Action in the firm's San Francisco offices: Ashur, Butman, Gilyard, Kim, Leggett, Liebmann, McClelland, Oh, Roos, and Sturtevant. Miloro worked in Lieff Cabraser's New York office.[104] The following Lieff Cabraser staff attorneys worked remotely on the State Street Action (with their remote work locations noted parenthetically): Bloomfield (San Francisco, California); Brehm (Shoreham, New York); Gralewski (San Diego, California); Jordon (Houston, Texas and Atlanta, Georgia); Nutting (San Francisco, California); Weiss (Rochester, Minnesota and Sacramento, California); and Zaul (San Francisco, California).[105]

The following 13 Lieff Cabraser staff attorneys who worked on the State Street Action are still employed by or are working on behalf of the firm (with the total number of years worked for Lieff Cabraser, as of June 2018, noted parenthetically): Ashur (5 years), Gralewski (9 years), Jordan (6 years), Kim (7 years), Leggett (5 years), Liebmann (4 years), Miloro (7 years), Nutting (6 years), Oh (5 years), Roos (6 years), Sturtevant (6 years), and Zaul (6 years).[106] Five of the Lieff Cabraser staff attorneys who worked on the State Street Action are no longer with the firm: Bloomfield, Brehm, Butman, Gilyard and McClelland.[107]

Consistent with the firm's rate setting policies (*see* discussion *supra* at 13-15), with the exceptions noted below, all of the Lieff Cabraser staff attorneys who worked on the State Street

[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

Action (payroll and agency) were billed at an hourly rate of $415.[108] That hourly rate was consistent with the rate of a fourth year associate at the firm in 2016. *See* discussion *supra* at 14. Staff attorneys Bloomfield (class of 2000) and Butman (class of 1997) had an hourly rate of $515 per hour, which was equivalent to the hourly rate of a firm attorney in the class 2008.[109] The hourly rates used for these two attorneys were their rates in 2015, the year in which they left the firm and the year before the firm set all staff attorney rates at $415 per hour.[110] Staff Attorney Oh also had a billing rate of $515 per hour (equivalent to a Lieff Cabraser attorney in the class of 2008).[111] This rate was deemed appropriate by firm management in light of Oh's educational background (Stanford Law School), her graduation year (2004) and her extensive experience as a partner-track attorney at major law firms.[112]

3. Lieff Cabraser Shared and Hosted Staff Attorneys Paid For By Thornton.

By January 2015, more than half of the documents produced by State Street remained to be analyzed and coded.[113] The global settlement in the BNY Mellon Action and that settlement's attendant publicity created a pivotal moment in the State Street Action mediation. The parties needed to be prepared to proceed quickly to class certification, depositions and trial preparation should resolution not be achieved. Therefore, the parties agreed that the mediation should/would not extend past mid-2015.[114] Customer Class Counsel, including Lieff Cabraser,

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[108] *Id.*

[109] *Id.*

[110] *See* Appendices A and B; Ex. A to Fineman Declaration at 48.; Ex. 89 to Report, ECF No. 104-17, at 4.

[111] *Id.*

[112] Appendices A and B; Ex. A to Fineman Declaration at 48.

[113] Ex. A to Fineman Declaration at 49; Ex. B to Fineman Declaration at 7-8.

[114] Ex. A to Fineman Declaration at 13 and 49; Ex. B to Fineman Declaration at 7-8.

ramped up their document review accordingly in order to prepare the detailed issue, witness and liability memoranda described above.[115]

In early 2015, Lieff Cabraser agreed to share and/or host approximately five staff attorneys that would be partially or fully paid for by Thornton.[116] Labaton similarly agreed to share and/or host a number of staff attorneys that would be compensated, in whole or in part, by Thornton.[117] This arrangement was used due to Thornton's limited physical facilities and so that Thornton could bear an appropriate share of the cost of the document review and analysis.[118] It was also understood by Lieff Cabraser that Thornton would include the lodestar of the staff attorneys it paid for in any later fee request.[119]

Two of the staff attorneys Lieff Cabraser "shared" with Thornton were Jordan and Zaul.[120] As noted above, Jordon and Zaul both worked extensively for Lieff Cabraser on the BNY Mellon Action, both were on Lieff Cabraser's payroll, and both continue to work for Lieff Cabraser to this day.[121] For roughly a nine-week period between February and April 2015, Lieff Cabraser invoiced Thornton, and Thornton paid Lieff Cabraser, for the work performed by Jordan and Zaul.[122] For all other time periods during the State Street Action, Lieff Cabraser compensated Jordan and Zaul directly for any work they performed, without reimbursement from Thornton.[123]

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[115] Ex. A to Fineman Declaration at 49; Ex. B to Fineman Declaration at 7-8.
[116] Ex. A to Fineman Declaration at 50; Ex. 57 to Report at 23.
[117] Ex. 57 to Report at 23; Ex. 178 to Report, ECF No. 116.
[118] Ex. A to Fineman Declaration at 50; Ex. 57 to Report at 24; Ex. 175 to Report at 3.
[119] Ex. 57 to Report at 24; Ex. B to Fineman Declaration at 19; Ex. 10 to Report at 136-37.
[120] Appendices A and B; Ex. B to Fineman Declaration at 12, 18.
[121] Appendices A and B.
[122] Ex. 57 to Report at 25; Ex. B to Fineman Declaration at 18; Ex. 10 to Report at 156, 172.
[123] Appendices A and B; Ex. B to Fineman Declaration at 18; Ex. 10 to Report at 172.

Two other of these staff attorneys, McClelland and Weiss, had also worked extensively on the BNY Mellon Action for Lieff Cabraser.[124] Throughout their time with Lieff Cabraser, both of these attorneys were paid by an agency.[125] McClelland, who worked in Lieff Cabraser's San Francisco office, spent only 58 hours for Lieff Cabraser on the State Street Action (the bulk of his remaining hours were correctly allocated to Thornton, without duplication).[126] Weiss, who worked remotely, put in 473.50 hours on behalf of Lieff Cabraser in the State Street Action (with some additional hours also being correctly allocated to Thornton, without duplication).[127] Ms. Weiss continues to perform work for Lieff Cabraser today.[128] From February to mid-April, 2015, Thornton paid an agency directly for the legal services of McClelland and Weiss.[129]

Two additional staff attorneys – Ann Ten Eyck and Rachel Wintterle – were hired through and paid by an agency, which in turn was paid directly by Thornton.[130] These two staff attorneys worked physically in Lieff Cabraser's San Francisco office between February and June, 2015.[131] Neither Ten Eyck nor Wintterle had a prior or subsequent relationship with Lieff Cabraser.[132]

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[124] Appendices A and B.
[125] *Id.*
[126] Ex. 10 to Report at 151-152, 154; Ex. 41 to Report at 61.
[127] *Id.*; Appendices A and B.
[128] Appendices A and B.
[129] *Id.*; Ex. 57 to Report at 27; Ex. 10 to Report at 151-152, 154.
[130] Ex. A to Fineman Declaration at 50; Ex. B to Fineman Declaration at 11 and 18.
[131] *Id.*
[132] *Id.*

E. The Settlement And Attorneys' Fees Approval Process.

1. The Resolution of the State Street Action.

The parties in the State Street Action reached an agreement in principle to resolve the Action for $300 million on June 30, 2015.[133] The settlement term sheet, however, was not executed until September 2015, during which time the parties continued to negotiate a plan of allocation.[134] Almost nine months passed after the term sheet was executed, while State Street negotiated separate settlements with the DOJ and the Securities and Exchange Commission.[135] At a status conference on June 23, 2016, the parties notified the Court of the pending settlement and plans to submit it for preliminary approval.[136] At that hearing, the Court opined both on the likely fairness of the settlement, as well as the seeming reasonableness of Plaintiffs' Counsel's anticipated 25% attorneys' fee request.[137]

On July 26, 2016, Plaintiffs' Counsel filed a fully executed settlement agreement, along with a motion for preliminary approval of the settlement which included proposed forms of class notice.[138] Following a hearing held on August 8, 2016, on August 11, 2016, the Court issued a preliminary approval order which, among other things: preliminarily found the settlement to be fair, reasonable and adequate; preliminarily certified the settlement class; appointed Labaton as lead counsel, Thornton as liaison counsel, and Lieff Cabraser as additional counsel for the settlement class; approved the forms, substance and method of dissemination of the class notice; set deadlines and procedures for the serving and filing of objections to the settlement and/or

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[133] Ex. A to Fineman Declaration at 15; Ex. 3 to Report, ECF No. 104, at 20-24.
[134] *Id.*
[135] Ex. A to Fineman Declaration at 16; Ex. 3 to Report, ECF No. 104, at 20-24.
[136] *Id.*; ECF No. 85.
[137] *Id.*
[138] Ex. 75 to Report, ECF No. 89; ECF Nos. 90-92.

attorneys' fee request; set deadlines and procedures for requesting exclusion from the settlement class; and set a final approval hearing for November 2, 2016.[139]

2. Notice to the Class.

On August 22, 2016, notice of the settlement was provided to the class via direct mail and publication.[140] The notice advised class members of the factual background of the State Street Action; summarized the class settlement, the benefits available to class members, the plan of allocation of settlement proceeds, and Plaintiffs' Counsel's request for attorneys' fees and reimbursement of expenses; described the method and timing for opting out or objecting to the settlement; and provided the date for final settlement approval.[141]

With respect to attorneys' fees, the notice advised class members: "Lead counsel, on behalf of ERISA and Customer Counsel, will apply to the Court awarding attorneys' fees in an amount not to exceed $74,541,250.00 [approximately 25% of the settlement fund] and payment of Litigation Expenses in an amount not to exceed $1,750,000.00, plus interest earned on these amounts."[142]

3. The Final Settlement Approval Papers and Request for Payment of Attorneys' Fees.

On September 15, 2016, all plaintiffs (ATRS and the ERISA plaintiffs) filed their motion and legal memorandum in support of final settlement approval.[143] Also on September 15, 2016, Labaton, as lead counsel acting on behalf of all Plaintiffs' Counsel, filed a motion and

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[139] Exs. 111 and 112 to Report, ECF Nos. 93 and 97.

[140] Ex. 81 to Report.

[141] *Id*.

[142] *Id*. at 4. The notice further advised class members that they could obtain copies of the settlement agreement, as well as other litigation and settlement-related documents at www.statestreetindirectfxclasssettlement.com, or by contacting Labaton (as lead counsel) or the claims administrator. *Id*. at 15.

[143] ECF No. 101-1.

memorandum for an award of attorneys' fees, payment of expenses, and payment of service awards, along with the Omnibus Declaration and exhibits.[144] Among the exhibits attached to the Omnibus Declaration were individual firm declarations and lodestar reports from Plaintiffs' Counsel (showing those firms' timekeepers and their individual and aggregate hours worked and hourly rates).[145] Labaton, as lead counsel, took primary responsibility for the preparation of the attorneys' fee and expenses request, drafting the memorandum and the Omnibus Declaration.[146] Lieff Cabraser provided Labaton with editorial comments on both of those documents.[147] Lieff Cabraser did not, however, see the individual lodestar reports of Labaton, Thornton or ERISA Counsel before they were filed with the Court as exhibits to the Omnibus Declaration.[148]

Lieff Cabraser partner Daniel P. Chiplock prepared a declaration on behalf of the firm in support of the motion for award of attorneys' fees and expenses (the "Chiplock Declaration"), which was filed as an exhibit to the Omnibus Declaration.[149] The Chiplock Declaration summarized the history of the firm's involvement in the California Action, the specific tasks performed by the firm in the State Street Action, and attached a "Lodestar Report"

> indicating the amount of time spent by each attorney and professional support staff-member of my firm who was involved in the prosecution of the Class Actions, and the lodestar calculation based on my firm's current billing rates. For personnel who are no longer employed by my firm, the lodestar calculation is based on the billing rates for each such personnel in his or her final year of employment by my firm. The schedule was prepared from contemporaneous daily time records regularly prepared and maintained by my firm, which are available at the request of the Court.[150]

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[144] Exs. 3 and 110 to Report, ECF Nos. 103-1 and 104.

[145] Ex. 3, 66, 88-95 and 100 to Report.

[146] Ex. A to Fineman Declaration at 17; Ex. 175 to Report at 9-13.

[147] *Id.*

[148] *Id.*

[149] Ex. 89 to Report, ECF No. 104-17 at 1-3 and Exhibit "A"; Ex. 175 to Report at 9-10.

[150] *Id.* at 2-3.

Among other things, the Lieff Cabraser Lodestar Report specified which firm timekeepers were partners, associates and staff attorneys.[151] In total, Lieff Cabraser reported 20,458.5 hours worked for a total lodestar of $9,800,487.50.[152]

Labaton, on behalf of all Plaintiffs' Counsel, requested a percentage-of-the-recovery fee award of roughly 25% of the total settlement fund of $300 million based on the factors commonly considered by courts within the First Circuit and in typical contingent fee percentages awarded in complex class cases such as the State Street Action.[153] The reasonableness of the fee request was bolstered by the Court's comments during the June 23, 2016 status conference during which the Court stated that a 25% fee percentage was "great" and was the level at which the Court "start[ed] ordinarily."[154] The lodestar of each of the Plaintiffs' Counsel firms, including Lieff Cabraser, was submitted to the Court solely for "cross-check" purposes in order to assist the Court in determining whether a 25% fee was appropriate in light of the work performed and risks undertaken.[155]

4. The Court's Approval of the Settlement and the Attorneys' Fees Request.

The final fairness hearing of the settlement of the State Street Action occurred on November 2, 2016.[156] During that hearing, the Court announced that it did not believe "either the question of class certification or the question of whether the settlement is fair, reasonable and adequate is a close question. I think the answer to both is yes."[157] Observing that the class

[151] *Id.*, Ex. A.
[152] *Id*.
[153] Ex. 110 to Report, ECF No. 103-1 at 3-24; Ex. B to Fineman Declaration at 25-26.
[154] ECF No. 85; Ex. A to Fineman Declaration at 16; Ex. B to Fineman Declaration at 25-26.
[155] Exs. 3, 66, 88-95 and 110 to Report.
[156] Ex. 78 to Report, ECF No. 114.
[157] *Id*. at 18.

members were sophisticated institutional investors, the Court found that the "settlement of $300 million is fair, reasonable and adequate, again essentially for the reasons stated on August 8, 2016 [at the preliminary approval hearing] and the additional facts that no class member has objected, no class member has opted out."[158]

In considering the attorneys' fee request, the Court found Plaintiffs' Counsel's request for $74,541,250 in fees and $1,257,699.94 in expenses was reasonable.[159] The Court stated that it is "appropriate in this case to use the percentage of the common fund approach in determining the amount of attorneys' fees that should be awarded."[160] The Court went on to state:

> I have used the percentage of common fund method. I have used the reasonable lodestar to check on that I've also considered the awards in comparable cases. The $74,500,000 plus is about – well, is 24.48 percent of the settlement fund. Adding in litigation expenses brings it to 25.27 percent of the settlement fund. Adding the service awards makes it a little higher. This is in the 20 to 30 percent range usually awarded by me in class action common fund cases and in many cases with settlements in the First Circuit and in many cases where the settlements are [in] a $250 million to $500 million range.[161]

The Court also used the "reasonable lodestar" of $41.3 million to determine that the approximately 25% percentage-of-the-recovery fee request was appropriate: "The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain."[162]

On the same day as the final fairness hearing, November 2, 2016, the Court entered orders finally approving the settlement and the plan of allocation, as well the award of attorneys'

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[158] *Id*. at 18-19.
[159] *Id*. at 35.
[160] *Id*. at 22-23.
[161] *Id*. at 35.
[162] *Id*. at 36.

fees "in the amount of $74,541,250.00, plus any accrued interest, which was approximately 25% of the Class Settlement Fund, along with payment of expenses in the amount of $1,257,697.94,…"[163] The Court specifically found that the "amount of attorneys' fees awarded is fair and reasonable and consistent with fee awards approved in cases within the First Circuit and other Circuits with similar recoveries."[164]

F. The Inadvertent Double-Counting Of Certain Staff Attorney Time.

1. Lieff Cabraser's Discovery and Response to the Inadvertent Double-Counting of Some of Their Staff Attorneys' Hours.

On November 8, 2016, David J. Goldsmith of Labaton informed Chiplock of Lieff Cabraser that a reporter from the Boston Globe had inquired about the appearance of certain attorneys on more than one of Customer Class Counsel's lodestar reports.[165] Upon learning of that inquiry, Lieff Cabraser, through Chiplock, promptly identified time and lodestar included in the firm's Lodestar Report that was also included as part of the Thornton fee submission (the latter of which had not been shared with Lieff Cabraser before it had been filed with the Court).[166] Chiplock identified these duplicative time entries: (a) by reviewing prior email correspondence between and among Lieff Cabraser and the other Customer Class Counsel during the early to mid-2015 timeframe; (b) through confirmatory emails by and between personnel at Lieff Cabraser and Thornton; (c) by reviewing the detailed time reports for the staff attorneys Lieff Cabraser shared with or hosted for Thornton; and, (d) by reviewing Thornton's fee submission (which, again, the firm had not seen prior to its filing with the Court).[167]

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[163] ECF Nos. 110, 111 at ¶4, and 112.

[164] ECF No. 111 at ¶6(a).

[165] Ex. 175 to Report at 19.

[166] Ex. A to Fineman Declaration at 51-53; Ex. 175 to Report at 20; Ex. B to Fineman Declaration at 27-28.

[167] *Id.*

Lieff Cabraser's internal review showed that two of the staff attorneys who split time performing work for both Lieff Cabraser and Thornton – McClelland and Weiss (*see* discussion *supra* at 30) – showed no duplicative time in Lieff Cabraser's or Thornton's reports. In other words, the reported hours for McClelland and Weiss were correctly allocated between Lieff Cabraser and Thornton, and there was no error to report for them.[168]

Two other staff attorneys who split time between Lieff Cabraser and Thornton, however – Jordan and Zaul (*see* discussion *supra* at 29) – did have time that was inadvertently duplicated in Lieff Cabraser's Lodestar Report.[169] As explained above, Jordan and Zaul worked for Lieff Cabraser and were paid directly by the firm before, during, and after their brief stints for Thornton, and were therefore accustomed to submitting their contemporaneous time records to the firm on a daily basis.[170] The inadvertent duplication of their time in Lieff Cabraser's Lodestar Report occurred because the time these two attorneys spent reviewing documents assigned to Thornton between February 9, 2015 and April 14, 2015 was mistakenly not removed from Lieff Cabraser's timekeeping records after the firm's accounting department invoiced and received payment for those hours from Thornton.[171] This was an inadvertent bookkeeping error.[172]

The two other staff attorneys whose time was incorrectly included in Lieff Cabraser's Lodestar Report – Ten Eyck and Wintterle – were hired through an agency that was paid directly by Thornton. *See* discussion *supra* at 30.[173] Those attorneys should not have entered any time

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] Ex. 175 to Report at 20; Ex. B to Fineman Declaration at 27-28; Ex. 10 to Report at 152-157.
[173] *Id.*

summaries into the Lieff Cabraser timekeeping system.[174] However, they did so throughout the three to four months they worked in Lieff Cabraser's San Francisco office (March – June 2015), by emailing their time summaries directly to the firm's word processing department (consistent with typical staff attorney practice) while also reporting their time to both their employing agency and to Thornton, unbeknownst to the attorneys and staff overseeing the case.[175] This was an inadvertent oversight in their training in San Francisco.[176]

After these errors were discovered on November 9, 2016, Chiplock instructed Lieff Cabraser's accounting department to remove all of the erroneously recorded hours that in fact had been Thornton's financial responsibility from Lieff Cabraser's timekeeping records.[177] This resulted in Lieff Cabraser correcting its lodestar as follows: [178]

Originally Reported Hours and Lodestar	
Hours	Lodestar
20,458.50	$9,800,487.50
Corrected Hours and Lodestar	
Hours	Lodestar
18,696.70	$8,932,070.50
Difference	
Hours	Lodestar
1,761.80 (8.6%)	$868,417.00 (8.8%)

Lieff Cabraser provided its "corrected lodestar" figures to Labaton and assisted in the drafting of the November 10, 2016 corrective letter from Goldsmith to the Court.[179]

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[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] Ex. 57 to Report at 26.

[178] Ex. A to Fineman Declaration at 53.

[179] Ex. 175 to Report at 21; Ex. 10 to Report at 184-189.

2. The November 10, 2016 Goldsmith Letter.

On November 10, 2016, Goldsmith, writing on behalf of Customer Class Counsel, informed the Court of the inadvertent double counting of certain staff attorneys shared with or hosted by Labaton and Lieff Cabraser on behalf of Thornton (the "Goldsmith Letter").[180] Goldsmith explained that because of these "inadvertent errors, Plaintiffs' Counsel's reported combined lodestar of $41,323,895.75, and reported combined time of 86,113.70 hours were overstated."[181] Goldsmith explained that deducting the "duplicative time from the $41.32 million reported combined lodestar results in a reduced combined lodestar of $37,265,241.25, and reduced combined time of 76,790.80 hours."[182]

Goldsmith went on to point out that "[c]ross-checking the $37.27 million in reduced combined lodestar against the $74,541,250 percentage-based fee awarded by the Court yields a lodestar multiplier of 2.00. [Footnote omitted.] This is higher than the 1.8 multiplier we proffered in our submissions and during the hearing."[183] Goldsmith, on behalf of Plaintiffs' Counsel, then respectfully submitted that a "2.00 multiplier remains reasonable and well-within the range of multipliers found reasonable for cross-check purposes in common fund cases within the First Circuit…," and requested that the Court "adhere" to its prior ruling on attorneys' fees notwithstanding the reduced lodestar."[184]

Goldsmith concluded the letter by apologizing to the Court for the "inadvertent errors in our written submissions and presentation during the hearing," and advised the Court that counsel

[180] Ex. 178 to Report, ECF No. 116.
[181] *Id*. at 2.
[182] *Id*. at 3.
[183] *Id*.
[184] *Id*.

was "available to respond to any questions or concerns the Court may have."[185] The Court did not hold a hearing or otherwise communicate with Plaintiffs' Counsel about this matter until almost three months later.[186]

G. The "Clawback" Agreement and Distribution of Attorneys' Fees.

In a letter to Plaintiffs' Counsel dated November 21, 2016, Sucharow of Labaton noted that the settlement of the State Street Action would become effective on December 7, 2016, and that because there were no objections to the settlement or requested fees, no class member had standing to appeal.[187] Sucharow observed that the Court had not yet responded to the Goldsmith Letter, and stated that if the "Court remains silent as of close of business on December 7, 2016, we [Labaton, as lead counsel] will begin the process of withdrawing the approved fees, expenses and service awards from the Lead Counsel Escrow Account for prompt distribution to your respective firms pursuant to our agreements."[188]

Sucharow continued by acknowledging that it remained "possible, however, that the Court, on or after December 8, 2016, will respond adversely to the [Goldsmith Letter] and ultimately reduce the fee award… after the fees, expenses and service awards have been distributed to your respective firms (and to the other ERISA counsel)."[189] Accordingly, Labaton required that before fees and expenses be distributed, "we will require an undertaking, evidenced by your signature below, confirming your agreement to refund to us within five (5) business days, for redeposit into the Lead Counsel Escrow Account, your *pro rata* share of any Court-

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[185] *Id.*
[186] Ex. 180 to Report, ECF No. 117.
[187] Ex. 179 to Report, ECF No. 116.
[188] *Id.*
[189] *Id.*

ordered reduction of fees, expenses, and/or service awards."[190] Plaintiffs' Counsel, including Lieff Cabraser, consented to this "clawback" agreement.[191]

Pursuant to a written agreement entered into on August 30, 2016, Lieff Cabraser was entitled to 24% of the attorneys' fees allocated to Customer Class Counsel, which received 84.5% of the total fee award, with 10% of the balance going to ERISA Counsel and 5.5% of the total going to "Labaton Sucharow's local counsel."[192] This meant that Lieff Cabraser was entitled to 20.3% of the total attorneys' fee award, along with reimbursement of the firm's expenses.[193] On December 7, 2016, Labaton distributed to Lieff Cabraser its share of the awarded attorneys' fee, $15,116,965.50, along with $271,944.53 in expenses.[194] Using Lieff Cabraser's corrected lodestar total of $8,932,070.50, the corrected and actual lodestar multiplier for Lieff Cabraser was at that time 1.69, below the aggregate corrected lodestar multiplier of 2.0 (and, indeed, below the original uncorrected aggregate reported lodestar multiplier of 1.8).[195]

H. The Attorneys' Fees Investigation By The Special Master.

1. Order Appointing the Special Master.

On December 17, 2016, the Boston Globe published an article, "Critics hit law firms' bills after class-action lawsuits."[196] That article addressed, among other things, the double-counting of certain staff attorney time, the position asserted in the Goldsmith Letter that the Court's fee award remained appropriate after deducting the incorrectly included lodestar, and

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[190] *Id.*
[191] *Id.*
[192] Ex. I to Fineman Declaration at 3-4; Report at 86-88.
[193] *Id.*
[194] *Id.*
[195] Ex. A to Fineman Declaration at 54; Ex. B to Fineman Declaration at 26.
[196] ECF No. 117.

new questions about whether the hourly rates attributed to the staff attorneys who worked on the State Street Action were justified.[197]

Referring to the Goldsmith Letter and the Boston Globe article, in a Memorandum and Order dated February 6, 2017, the Court proposed to appoint former United States District Judge Gerald E. Rosen as a special master to investigate issues that "have arisen with regard to the accuracy and reliability of information submitted by plaintiffs' counsel on which the court relied, among other things, in deciding that it was reasonable to award them almost $75,000,000 in attorneys' fees and more than $1,250,000 in expenses."[198]

Following written responses from Plaintiffs' Counsel, including Lieff Cabraser, and after a March 7, 2017 hearing, in a Memorandum and Order dated March 8, 2017, the Court appointed Judge Rosen as Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure ("Federal Rules"), and directed that Judge Rosen investigate and prepare a report and recommendation concerning, among other issues:

> (a) the accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses, including but not limited to whether counsel employed the correct legal standards and had a proper factual basis for what was represented to be the lodestar for each firm; (b) the accuracy and reliability of the representations made in the November 10, 2016 Letter from David Goldsmith, Esq. of Labaton Sucharow, LLP to the Court (Docket No. 116); (c) the accuracy and reliability of the representations made by the parties requesting service awards; (d) the reasonableness of the amounts of attorneys' fees, expenses, and service awards previously ordered, and whether any or all of them should be reduced; (e) whether any misconduct occurred in connection with such awards; and, if so, (f) whether it should be sanctioned, *see e.g.*,

[197] *Id.* Although mentioned briefly in the Boston Globe article, Lieff Cabraser was not contacted for comment nor given the opportunity to respond to the class action "critics" cited liberally in the piece.

[198] Ex. 180 to Report, ECF No. 117, at 1-2.

Fed.R.Civ.P. 11(b)(3) & (c); Massachusetts Supreme Judicial Court Rule of Professional Conduct 3.3(a)(1) & (3).[199]

The Court's March 8, 2017 Order further directed Customer Class Counsel to pay $2 million into a fund to be used by the Special Master for purposes of his investigation.[200] The Court ordered that that fund would be used to "pay the reasonable fees and the expenses of the Master and any firm, organization, or individual he may retain to assist him."[201] In subsequent orders dated October 24, 2017 and April 23, 2018, the Court further instructed Customer Class Counsel to pay an additional $1.8 million toward the Special Master's fees and expenses.[202] To date, Customer Class Counsel has collectively paid $3.8 million for the fees and expenses of the Special Master and his team. The economic impact on Lieff Cabraser from funding its share of the Special Master's investigation, and all other aspects of the investigation, is described below. *See* discussion *infra* at 64-66.

2. The "Informal" Phase of the Investigation.

The Special Master's investigation began with an "informal" phase. After providing the Special Master with all settlement approval and fee request documentation, the Master invited each of the Plaintiffs' Counsel firms to meet with him in non-sworn, informal fact-gathering sessions. Lieff Cabraser, through the firm's general counsel and senior partner, Richard M. Heimann, the firm's managing partner, Steven E. Fineman, and Chiplock, met with the Special

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[199] Ex. 163 to Report, ECF No. 173, at 2-3.

[200] *Id*. at 6.

[201] *Id.* In total, the Special Master's team included William Sinnott, Elizabeth McEvoy and Brian Mulcahy, of Barrett & Singal, P.C. (collectively referred to herein as "counsel" for the Special Master); Linda Hylenski, a former law clerk for Judge Rosen and currently a research attorney with JAMS; the Hon. Mary Beth Kelly, a former justice of the Michigan Supreme Court, currently a JAMS mediator and arbitrator; John Toothman, an attorney and purported authority on legal fees; and, Professor Stephen Gillers, a proffered expert on ethical and professional conduct issues. Report at 137.

[202] ECF Nos. 208 and 217.

Master, his assistant, Hylenski, his counsel, Sinnott and McEvoy, and the Special Master's attorneys' fee consultant, Toothman, on April 5, 2017 at the New York offices of JAMS.[203]

During Lieff Cabraser's April 5, 2017 meeting with the Special Master and his team, the firm provided the Master with a 67 page written presentation which framed and guided much of that multi-hour interview ("Presentation").[204] That Presentation addressed the following topics:

- About Lieff Cabraser
- How Lieff Cabraser staffs large complex cases
- How Lieff Cabraser sets hourly rates, including for staff attorneys
- Involvement in the *State Street* case
- Involvement in the *BNYM FX* case
- Resolution of the *BNYM* and *State Street* cases
- Fee application process in *State Street*
- Background of Lieff Cabraser staff attorneys who worked on *State Street*
- Role of Lieff Cabraser staff attorneys in *State Street*
- *State Street* Document Review Protocol
- Hourly rates applied to Lieff Cabraser staff attorneys in *State Street*
- Coordination of staff attorneys with Labaton and Thornton firms
- Lieff Cabraser's hourly duplication mistake explained
- Lieff Cabraser's fee and corrected lodestar in *State Street*
- Hourly rates of Lieff Cabraser staff attorneys paid by clients
- Lieff Cabraser staff attorneys are routinely included in and approved in class action fee awards[205]

The essential facts as they relate to Lieff Cabraser, including the firm's inadvertent double counting of time of four staff attorneys, and the propriety of the hourly rates applied to Lieff Cabraser's attorneys (including its staff attorneys), were included in the firm's April 5, 2017 Presentation, discussed during that meeting with the Special Master, and were later

[203] Throughout the Special Master's investigation, Lieff Cabraser has represented itself through Messrs. Heimann, Fineman and Chiplock.

[204] Ex. A to Fineman Declaration.

[205] *Id.*

reiterated through formal written and deposition discovery.[206]

3. The "Formal" Phase of the Investigation.

On May 18, 2017, the Special Master, through his counsel, propounded on Lieff Cabraser 53 document requests and 77 interrogatories.[207] Similar discovery was served on Labaton and Thornton. On May 23, 2017 the Special Master, through his counsel, propounded annotated and revised written discovery on Lieff Cabraser (and Labaton and Thornton), reducing the number of document requests and interrogatories that would require responses from the firm to 35 and 64, respectively, and modified the schedule for responding to the discovery to three dates (June 1, June 9, and July 10, 2017).[208] Lieff Cabraser responded to the Special Master's written discovery as follows:

- May 26, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents (written responses to 35 document requests).[209]
- June 1, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017 (responses and objections to 20 interrogatories).[210]
- June 1, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due June 1, 2017 via link to LCHB's file-share system.
- June 2, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due June 1, 2017 via link to LCHB's file-share system.

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[206] In addition to providing the Presentation to the Special Master and his counsel at the time of the informal meeting, it was later produced to the Special Master during the formal phase of the investigation. *See* note 4, *supra*. The Presentation is not included among the exhibits to the Special Master's Report

[207] Ex. C to Fineman Declaration.

[208] Ex. D to Fineman Declaration.

[209] Ex. E to Fineman Declaration.

[210] Ex. 57 to Report.

- June 9, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories due on June 9, 2017 (written responses and objections to 22 interrogatories).[211]

- June 9, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due June 9, 2017 via link to LCHB's file-share system.

- July 10, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017 (written responses and objections to 22 interrogatories).[212]

- July 10, 2017 – Lieff Cabraser's production of documents responsive to the Special Master's request for production due July 10, 2017 via link to LCHB's file-share system.

Between June 5, 2017 and July 17, 2017, the Special Master took 39 depositions of personnel from the Plaintiffs' Counsel firms.[213] Attached as Appendix C is a chart identifying each deponent, the date of deposition, the number of pages of testimony, the total deposition time, and the Special Master's personnel in attendance at the deposition.

The Special Master, and his counsel, took depositions of nine representatives from Lieff Cabraser, including firm partners Heimann, Fineman, and Chiplock; staff attorneys Ashur, Gralewski, Jordan, Oh, and Zaul; and, the firm's litigation support manager, Dugar.[214] The deposition testimony of Lieff Cabraser's attorneys and staff reiterated the information provided

[211] Ex. 175 to Report.

[212] Ex. B to Fineman Declaration.

[213] The firm uses the phrase the "Special Master and as counsel" because typically both the Master and his counsel, Sinnott, alternated asking questions of the witnesses, frequently covering the same ground, and in the case of the Special Master, periodically offering his views on the topic being covered.

[214] Exs. 10, 18, 19, 55, 59, 61, 101, 104 and 106 to Report.

by the firm in the November 10, 2016 Goldsmith Letter, the April 5, 2017 Presentation, and its responses to the Special Master's written discovery, and is further reflected in this Response and Objections.[215]

On July 5, 2017, the Special Master made a request for a supplemental submission from Customer Class Counsel, inviting Counsel to "provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his final Report and Recommendation."[216] In particular, the Special Master asked Customer Class Counsel to address the issues relating to the "areas of concern" identified in the Court's March 8, 2017 Memorandum and Order, and to provide input on additional "topics which have arisen during the course of the Special Master's investigation and are related to his mandate from Judge Wolf."[217]

On August 1, 2017, Customer Class Counsel submitted a Consolidated Response to the Special Master's July 5, 2017 request. In its Response, Customer Class Counsel specifically addressed the areas of concern raised by the Court and the specific topics identified by the Special Master, all with citations to the written discovery responses and deposition testimony to date. The Response was augmented by an accompanying July 31, 2017 Expert Declaration of William B. Rubenstein, the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular ("Rubenstein Declaration I").[218]

In their Consolidated Response, Customer Class Counsel stated:

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[215] *Id.*

[216] Ex. F to Fineman Declaration.

[217] *Id.*

[218] Neither the Consolidated Response nor Rubenstein Declaration I are exhibits to the Special Master's Report, and therefore are attached as Exs. G and H to the Fineman Declaration.

- Counsel employed the correct legal standards in their request for an award of attorneys' fees and expenses;

- Except for the inadvertent double-counting of certain staff attorneys' time, as reported in the November 20, 2016 Goldsmith Letter, the representations made by counsel in their request for awards of attorneys' fees and expenses were accurate and reliable.

- The attorneys' fees and expenses awarded to Plaintiffs' Counsel were reasonable when made, and should not be reduced beyond the $2 million already contributed to the cost of the Special Master's investigation; and

- The billing rates for staff attorneys who worked on the State Street Action were based on the firms' understanding of appropriate market rates for the legal services rendered, and that based on the work performed by those staff attorneys, the hourly rates submitted as part of the lodestar cross-check against the percentage of the fee recovery were appropriate.[219]

In the Consolidated Response, Lieff Cabraser specifically addressed questions raised by the Special Master about whether it was appropriate to assign the same hourly rates to staff attorneys paid directly by the firm and those paid by an agency, and whether such agency attorneys should be treated as a cost instead accounting for their time as part of the firm's lodestar.[220] With reference to the factual record and the Rubenstein Declaration I, Lieff Cabraser made the following points on this topic:

- Some staff attorneys began their work on the litigation as agency attorneys before being hired directly by the firm;

- By the time the staff attorneys were working on the detailed issue memoranda only one Lieff Cabraser staff attorney was still being paid through an agency (Weiss);

- Staff attorneys and agency attorneys were given the same type of assignments, supervised in the same manner, and were expected to produce the same quality of work (Weiss, for example, authored detailed issue memoranda just like the others);

[219] Ex. G to Fineman Declaration at 2-5.

[220] *Id.* at 4-5.

- Ten Eyck and Wintterle, agency lawyers paid by Thornton but working in Lieff Cabraser's offices, also prepared issue memoranda just like the others;

- Billing rates for all firm staff lawyers, including those from an agency, were set based on the firm's understanding of the appropriate market rates for similar legal services; and,

- The amount paid by the firm to an agency for an agency attorney's work on an hourly basis was comparable to the hourly pay for staff attorneys paid directly by the firm.[221]

With the submission of the August 1, 2017 Consolidated Response, Lieff Cabraser assumed the Special Master's investigation was complete and that the Master would proceed to prepare a final report and recommendation. As explained below, however, the Special Master's investigation took, what was for Lieff Cabraser at least, an unexpected turn.

4. The "Chargois" Investigation.

During the course of its investigation, the Special Master learned that 5.5% (or $4.1 million) of the attorneys' fee awarded by the Court in the State Street Action was allocated to attorney Damon Chargois, at all times understood by Lieff Cabraser to be Labaton's "local counsel" in Arkansas.[222] According to the Special Master, because Chargois had not appeared on any of the pleadings in the State Street Action and had not been identified to the Court as a prospective recipient of attorneys' fees, the Master commenced an investigation into the relationship between Chargois and Customer Class Counsel and the basis upon which Chargois was compensated.[223]

[221] *Id.* In his June 6, 2017 deposition testimony, Lieff Cabraser managing partner Fineman made many of these same points, and emphasized to the Special Master that the firm incurs "overhead" expenses in connection with all of its staff attorneys, including those paid directly by an agency. Ex. 18 to Report at 47-55.

[222] Report at 87.

[223] *Id.*

a. August 11, 2017 Written Discovery Responses.

The Chargois investigation commenced with written discovery propounded on Lieff Cabraser (and on the other Plaintiffs' Counsel) on August 7, 2017. Lieff Cabraser responded as follows:

- August 11, 2017 – Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Interrogatories Due on August 11, 2017 (responses and objections responding to one multi-part interrogatory);[224] and,
- Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Request for the Production of Documents (responses and objections to one request for all documents in the firm's possession concerning Chargois).[225]

In Lieff Cabraser's August 11, 2017 interrogatory responses, the firm informed the Special Master of its limited knowledge of and complete lack of contact with Chargois. In particular, Lieff Cabraser advised the Special Master that the firm had no contact with Chargois in the State Street Action other than several emails on which Lieff Cabraser attorneys were copied, and that no Lieff Cabraser attorney had ever met or spoken with Chargois.[226] Lieff Cabraser explained to the Special Master that the firm was informed and understood at all times that Chargois was "local counsel" in Arkansas (the location of the lead plaintiff ATRS); that Labaton owed Chargois 20% of its share of any fee award in the State Street Action; and, that at the request of Labaton and Thornton, the firm agreed that 5.5% of the aggregate fee award in the Action (an amount estimated to equal Labaton's 20% obligation) would be paid to Chargois for his services.[227]

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[224] Ex. I to Fineman Declaration.

[225] Ex. J to Fineman Declaration.

[226] Ex. I to Fineman Declaration.

[227] *Id.* In their August 11, 2017 interrogatory responses, Lieff Cabraser also responded to the Special Master's inquiry why the firm had not previously produced the fee allocation

b. September/October 2017 Depositions.

Between September 1, 2017 and October 25, 2017, the Special Master, through his counsel, conducted 15 depositions concerning the Chargois investigation.[228] Only two of those deponents – Chiplock and Robert L. Lieff – were from Lieff Cabraser. *Id.*[229] During their depositions, Chiplock and Lieff confirmed that Chargois was repeatedly described and represented to the firm as "local counsel" for Labaton and/or ATRS; that they were informed that Chargois had played an "important" role in the litigation and had provided legal services that were of value to the client and therefore to the class; that they were familiar with the role of local counsel in large financial fraud cases (particularly those led by public pension fund clients); that they appreciated that Chargois' role was similar to that of the local counsel for the firm's public pension fund client in the BNY Mellon Action; and, that based on their past experience, they did not believe that fees of approximately 5% to local counsel were unreasonable in view of what they understood about Chargois' role in the case.[230]

Further, it was not until certain deposition testimony in September and October 2017, that Lieff Cabraser first learned that Labaton had an agreement in place to pay Chargois (or his law firm) up to 20% of attorneys' fees received by Labaton in any litigation involving an institutional

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agreement or related emails showing that 5.5% of any aggregate fee award would be paid to "Labaton Sucharow's local counsel." *Id*. Lieff Cabraser explained to the Special Master that the firm "simply in good faith did not understand [the fee allocation agreement or related emails] to be responsive to the Master's prior discovery requests," pointing out that the originally propounded document request seeking such information had been specifically withdrawn by the Master's counsel and that no interrogatory sought the specific fee allocation by and among Plaintiffs' Counsel. *Id*. When the Special Master asked for the fee allocation agreement and related email correspondence, Lieff Cabraser promptly and thoroughly complied. *See* LCHB-0053483 – LCHB-0053569. In his Report, the Special Master notes that he "does not conclude that the non-disclosure constitutes discovery misconduct." Report at 119, n. 98.

[228] *See* Appendix C.

[229] *Id.*; Exs. 41 and 139 to Report.

[230] Ex. 41 to Report at 100-105, 109-111, 115-118, 150-152; Ex. 139 to Report at 57-68, 72-97.

investor for whom Chargois had facilitated the introduction, including ATRS, or that this arrangement dated back to approximately 2007.[231] Moreover, it was not until conduct of the depositions in September and October 2017 that Lieff Cabraser first learned that Chargois had not served as local counsel for Labaton and/or ATRS in the State Street Action, had performed no work in the Action, and was not known to the client representative for ATRS.[232] Lieff himself testified that had he known of the true nature of the Chargois arrangement he would not have agreed that the firm share in the payment of fees to Chargois.[233]

c. November 3, 2017 Submission.

On September 7, 2017 the Special Master propounded on Lieff Cabraser a request for a supplemental submission concerning "the circumstances of the monies paid to attorney Damon Chargois in the State Street case for his role as a referring attorney and the implications of that payment and circumstances in addressing the charge of Judge Wolf in paragraph 2 of his March 8, 2017 Order."[234] The date for responding to this request was extended to November 3, 2017 to accommodate the completion of the deposition schedule.

In its November 3, 2017 Response, Lieff Cabraser again, with reference to the firm's interrogatory responses, internal documents, and deposition testimony, advised the Special Master that the firm understood Chargois to be local Arkansas counsel who played an important role in the State Street Action, a role with which the firm was generally familiar from prior experience, including in the BNY Mellon Action (on which Lieff Cabraser was lead counsel).[235] Lieff Cabraser also reminded the Special Master that it did not learn that Chargois had not served

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[231] *Id.*
[232] *Id.*
[233] Ex. 139 to Report at 95-97.
[234] Ex. K to Fineman Declaration.
[235] Ex. L to Fineman Declaration.

as local counsel, had performed no work in the State Street Action, and was not known to the client representative for ATRS until those facts came out during the depositions in September and October 2017.[236] Finally, the firm stated that at no time did Lieff Cabraser agree to "conceal" the existence of Chargois from anyone, including the Court, class members, or ERISA Counsel, either before or after the November 2016 final approval hearing.[237]

d. Expert Testimony.

On February 23, 2018 Lieff Cabraser, along with the other Plaintiffs' Counsel, received an Ethical Report for Special Master Gerald E. Rosen, prepared by Professor Gillers ("Gillers Report I").[238] In his Report I, Gillers concluded that the "Chargois Arrangement," defined by Gillers (and the Special Master) as Labaton's agreement to pay Chargois up to 20% of any attorneys' fees received by Labaton in any litigation involving an institutional investor for whom Chargois had facilitated the introduction, including ATRS, without regard to substantive work performed in a particular case, was "unethical payment for the recommendation of a client, not a valid division of [a] fee agreement."[239] Gillers went on to opine that even if the "Chargois Arrangement" could be deemed a valid division of a fee agreement, and not an improper payment for recommending a client, Labaton, Thornton and Lieff Cabraser were ethically

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[236] *Id.*

[237] *Id.*; *see also* Ex. 41 to Report at 104-105, 115-117, 119-120, 140-141. In his Executive Summary, the Special Master states, without citation to the record, that, "the Customer Class Counsel specifically agreed that the Court not be told of the allocation of fees, which meant that the Court would not be told of the Chargois arrangement,…." Executive Summary at 26. To be sure, there is no agreement, email, or any other document or testimony, in which Lieff Cabraser "specifically agreed that the Court need not be told of the allocation of fees," or that Chargois would be receiving a fee.

[238] Ex. 232 to Report.

[239] *Id.* at 33 and 58.

obligated to disclose the Arrangement to the Court and to the class under Massachusetts ethical rules.[240]

However, when confronted at his March 20 and 21, 2018 deposition with the fact that Lieff Cabraser did not know of the Chargois Arrangement until recently (*see* discussion *supra* at 49-53), Gillers recanted his opinion that Lieff Cabraser had violated any ethical rules.[241] Indeed, in his Supplemental Ethical Report for Special Master Gerald E. Rosen, dated March 8, 2018 ("Gillers Report II"), Gillers eliminated all reference to Lieff Cabraser having violated any ethical rules as to any matter under consideration by the Special Master, including concerning Chargois or the Chargois Arrangement.[242]

In response to Gillers Report I, on March 26, 2018, Lieff Cabraser offered expert reports from Professor Rubenstein and an experienced Boston, Massachusetts based attorney, Timothy Dacey, in support of the firm's position that it violated no legal or ethical rules in connection with the Chargois payment or the Chargois Arrangement.[243] In the Expert Report of William B. Rubenstein ("Rubenstein Report"), Rubenstein expressed three primary opinions: (1) Rules 23 and 54 of the Federal Rules do not require disclosure of fee allocation agreements absence judicial order, courts rarely order disclosure or involve themselves in fee allocation, and the Court in this case issued no such order; (2) Professor Gillers's attempts to advocate around the text of Rules 23 and 54 are not supported by the law; and (3) Rule 23 does not require disclosure of fee allocation agreements in the class notice.[244]

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[240] *Id.* at 66, et seq.

[241] Ex. 253 to Report at 219-222, 239-240, and 248-254.

[242] Ex. 233 to Report.

[243] Exs. 234 and 254 to Report.

[244] Ex. 234 to Report. Professor Rubenstein's extensive experience and qualifications as one of the nation's leading experts in complex class action practice are set forth in Ex. H to the

Lieff Cabraser's other expert, Dacey, is a longtime Boston trial lawyer and expert on Massachusetts ethical rules.[245] In the Expert Report of Timothy Dacey ("Dacey Report"), Dacey concluded that, based on the factual record described above, "Lieff Cabraser attorneys did not violate the Massachusetts Rules of Professional Conduct."[246] According to Dacey, to violate the duties of candor imposed by the Massachusetts ethical rules, "a lawyer must have actual knowledge that his or her statements are false or misleading. Based on the facts as I understand them, the lawyers at Lieff Cabraser lacked the requisite state of mind to establish a violation of these Rules."[247]

Between March 20 and April 20, 2018, nine expert witnesses proffered by the parties, including Gillers, Rubenstein and Dacey, were deposed.[248] Rubenstein and Dacey were deposed on April 9, 2018.[249] Their testimony was in all material respects consistent with their expert reports.[250]

e. April 5, 2018 Submission.

On March 25, 2018, the Special Master requested from Lieff Cabraser "any evidence… identif[ied] in the record, or evidence… not currently in the record" relating to Lieff Cabraser's "state of mind" as to the issue of [Chargois's] role in the State Street litigation prior to

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Fineman Declaration at 3-7, and A1-A18. Rubenstein is the author of the definitive text on class action practice, *Newberg on Class Actions* (5th ed.)(2015).

[245] Dacey, who has practiced for 48 years at the Boston firms of Hill & Barlow, LLP and Goulston & Storrs, P.C., has been a member of the Committee on Professional Ethics of the Massachusetts Bar Association since 1984 and Vice-Chair of the Committee since 1991. In addition, since 2012, Dacey has been a member of the Massachusetts Advisory Committee on the Rules of Professional Conduct, and a lecturer at Harvard Law School where he teaches a course that focuses on the rules of professional conduct. Ex. 244 to Report.

[246] *Id.* at 18.

[247] *Id.* at 1.

[248] *See* Appendix C.

[249] Exs. 235 and 237 to Report.

[250] Exs. 234, 235, 237 and 244 to Report.

September 7, 2017.[251] Even though the record was already full of evidence of the firm's "state of mind" regarding Chargois, on April 5, 2018, Lieff Cabraser submitted a Response to the Special Master's March 25 request.[252] That Response included specific references to the deposition testimony of Lieff and Chiplock concerning their understanding that Chargois was local Arkansas counsel for Labaton and ATRS; that Chargois had played an important role in the litigation; that they assumed his role as local counsel was comparable to the role played by local counsel in the BNY Mellon Action; and, that there was nothing unreasonable or unusual about local counsel receiving approximately 5% of an aggregate fee in a large financial fraud case.[253] Along with the Response were original declarations from Chiplock and Lieff again confirming their, and the firm's, understanding of Chargois' role in the State Street Action.[254]

5. The Final Hearing Before the Special Master.

On April 13, 2018, at the JAMS office in Boston, the Special Master conducted a full-day hearing and oral argument concerning his investigation ("Final Hearing").[255] Lieff Cabraser's presentation at the final hearing was consistent with the facts set forth in this Response and Objections.[256]

During the hearing, the Special Master inquired of Lieff Cabraser's Heimann whether the firm wished for the Master to recommend "remedial action" in the nature of payment (or repayment) from Labaton and/or Thornton to Lieff Cabraser because the firm was not fully and

[251] Ex. M to Fineman Declaration.
[252] Ex. N to Fineman Declaration.
[253] *Id*.
[254] *Id.*
[255] Ex. 162 to Report.
[256] *Id.* at 219-307.

accurately apprised of the Chargois Arrangement by its colleagues.[257] Heimann responded that although the firm was "not happy that we weren't fully informed in real-time about the Chargois [Arrangement] and that we ended up paying a very large sum of money to him that we probably would have had some serious questions about had we been fully informed," in light of the firms' longstanding "good relationship" with Labaton and Thornton, and because Lieff Cabraser did not agree with the apparent position of the Special Master regarding Labaton's failure to disclose the payment to Chargois to the Court or the class, the firm declined to request such payment (or repayment).[258]

I. The Special Master's Report And Findings Relevant and Specific To Lieff Cabraser.

On May 14, 2018, the Special Master filed under seal and served on Plaintiffs' Counsel, including Lieff Cabraser, a 54 page Executive Summary, and a 377 page Report. After hearing from the parties on proposed redactions to the Report, the Court put the Executive Summary and Report in the public docket on June 28, 2018.[259]

The Special Master's key findings in the Report relevant or specific to Lieff Cabraser are as follows:

- *The Special Master acknowledges the risks, difficulties and challenges of the State Street Action, the skill and dedication of Plaintiffs' Counsel, and the outstanding accomplishment of the settlement:*

> After much work, dedication and exceptional effort in the discovery and mediation process, the parties ultimately reached a $300 million settlement. Given the risks, complexities and legal challenges inherent in the litigation, it must be said that the $300 million settlement, procured by

[257] *Id.* at 271-272.

[258] *Id*. at 272-274.

[259] ECF No. 357 and 357-1.

> skilled and dedicated plaintiffs' counsel, was an excellent result for the class.[260]
>
> * * *
>
> By all accounts, the class settlement provided an excellent result for the class members and was a product of the highly dedicated and professionally skilled work of the class'[s] law firms, a view with which the Special Master fully agrees.[261]

- *The Special Master finds the fee awarded to Plaintiffs' Counsel was appropriate based on the work performed and the result achieved:*

> The Court approved the settlement on November 2, 2016. Of the $300 million, plaintiffs' counsel were awarded $74,541,250.00 in attorneys' fees and $1,257,699.94 for expenses. By itself, this attorney fee award was not disproportionate or unsupportable when measured against the positive result for the class and the attorneys' effort and skill that was required to achieve it. Indeed, all other things being equal, the attorneys' fee award was fair, reasonable and deserved.[262]

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

> The lodestar reports of Plaintiffs' Counsel charged partners at hourly rates ranging from $535 to $1000, and associates at hourly rates of $325 to $725 [footnote omitted]. As discussed below, we conclude that these rates are commensurate with partner and associate rates charged and approved in similarly complex class actions, and therefore are reasonable.[263]
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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

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[260] Executive Summary at 3, Report at 6.

[261] Executive Summary at 7, Report at 125; *see also*, Report at 151-156 (discussing the complexity and challenges plaintiffs' counsel faced and the experience required to successfully assert the FX trading claims alleged in the State Street Action).

[262] Executive Summary at 3, Report at 6.

[263] Report at 164 and 176.

includes the hours and rates for the excellent work performed by the staff attorneys employed by Labaton and Lieff.[264]

* * *

The fact that they were designated as "staff attorneys" or that they were tasked with "document review" should not indicate the work they did was routine or "paralegal" in nature. Both the work they performed and their professional qualifications and experience established them as more akin to lower-level and mid-level associates.[265]

* * *

The staff attorneys at the Labaton and Lieff firms did much more than "low-level" document review. The staff attorneys not only did first-level document review; they also digested complex information and prepared very detailed, substantive legal memoranda on issues that Customer Class Counsel wanted to explore in depositions once witnesses were identified and also on areas that would require follow-up discovery and document discovery if the mediation were to end without a resolution.[266]

* * *

Contrary to the picture painted in the *Boston Globe* article, with the exception of Michael Bradley, whose work is discussed below, these staff attorneys did much more than "low level" document review. As noted, they all were attorneys with years of experience, and the majority of them had specialized knowledge or skills in FX/securities areas. A number of them had worked on BONY Mellon which raised similar issues to those in the *State Street* case. They all made substantive contributions to the case. They did not simply do first-level document review; they also digested complex information and prepared topical memoranda and witness memoranda for depositions – the same kind of work done by associates at large firms. Rather than referring to them as staff attorneys, it would be more accurate to refer to them as "non-partnership-track" attorneys.[267]

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

[264] Executive Summary at 21-22 and 49-50, Report at 365-366.

[265] Report at 70-71.

[266] Report at 72.

[267] Executive Summary at 22, Report at 176-177.

> long as the rate at which the attorney is billed is reasonable and commensurate with experience and the value of the work performed.[268]
>
> * * *
>
> The Special Master concludes the staff attorney billing rates in the lodestar fee petition are generally reasonable given that the staff attorneys were responsible for some 70% of the work billed on the case. These rates are particularly reasonable when compared to the relatively low number of hours billed by associates for the three Customer Class law firms (less than 2% of the total time billed). This can be attributed to the fact that the staff attorneys effectively did the work of lower- to mid-level associates. Thus, for purposes of the analysis here, the Special Master views the staff attorney work as associate-level work.[269]

- *The Special Master finds contemporaneous time records of Lieff Cabraser's attorneys, including its staff attorneys, to be sufficiently and reliably detailed:*

> Lieff used a comparable electronic time keeping system to maintain accurate and contemporaneous time records for its attorneys.[270]
>
> * * *
>
> As described below, based on our review of the individual as well as firm-wide time entries recorded in this case, the time records produced by the firms participating in the *State Street* case sufficiently and reliably detail the firms' substantive, legal contributions to that case.[271]
>
> * * *
>
> Aside from the reasonableness of the aggregate tally, we conclude that the hours presented on the Fee Petition are reasonable for three additional reasons. First, the firms appropriately staffed the case, assigning lawyers to specific tasks commensurate with their experience and capabilities with a sensitivity to the costs ultimately passed on to the client, the class, through the common fund. Thus, the hours expended by each individual attorney accurately reflect the nature of the work assigned to him or her. Second, the narratives in the time records themselves capture the precise nature of these substantive contributions in detailed – and in some

[268] Report at 177.

[269] Report at 180.

[270] Report at 203.

[271] Report at 209.

> instances highly detailed – descriptions of the legal work performed within the individual records.[272]
>
> * * *
>
> Billing entries of Lieff attorneys, moreover, sufficiently conveyed the nature of the work – whether emails, meetings, drafting or reviewing – along with the salient details, such as with whom and the basic substance of each task.[273]
>
> * * *
>
> While we recognize the danger that Lieff, as Co-Lead Counsel in the *BONY Mellon* case, could include hours in the *State Street* lodestar expended in litigating the *BONY Mellon* case or other FX matters, we conclude that Lieff did not do so here. All the hours submitted by Lieff in its *State Street* hours bear, directly or indirectly, on the legal issues presented in the *State Street* case.[274]

- *The Special Master finds Plaintiffs' Counsel's aggregate lodestar multiplier of 1.8 to be "certainly within the reasonable range" for purposes of a lodestar cross-check:*

> In performing a lodestar cross-check on a proposed percentage-of-fund fee award, a lodestar multiplier is used. A lodestar multiplier is determined by dividing the proposed percentage-of-fund award by the total lodestar [citation omitted]. In the instant matter, plaintiffs' counsel's combined lodestar was $41,323,895.75. Dividing the proposed fee of 25% of the total fund, $300,000,000.00, by the lodestar yields a multiplier of 1.8.
>
> A 1.8 multiplier is certainly within the reasonable range [citing cases that supported multipliers of 2.02, 3.0, 1.987, 2.7, 3.5 and up to 4.0].[275]

- *The Special Master concludes that Lieff Cabraser's double-counting was "inadvertent," and that Lieff Cabraser's conduct was a lesser part of the cause of the investigation:*

> Each of the three firms bears different degrees of responsibility for the double-counting and, accordingly, the firms' respective roles are addressed *seriatim* here.
>
> Lieff… has acknowledged that it made a mistake in claiming the hours of the staff attorneys and agency attorneys loaned to Thornton on its lodestar.

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[272] Report at 210.

[273] Report at 211.

[274] Report at 212.

[275] Report at 245-246.

> Contemporaneous evidence also indicates that Lieff anticipated that [certain of] its staff attorneys would be included on Thornton's petition. Notwithstanding this error, Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting. Lieff had, early in this litigation, agreed to the "loaning" of [certain of] its staff attorneys and agency attorneys to Thornton as a means of sharing the costs and risks of employing these attorneys and the litigation as a whole. While the agreement to "loan" the staff and agency attorneys to Thornton was, perhaps, an ill-considered judgment since the cost-sharing of this case could have been achieved in other ways, it cannot be said that the agreement to share costs through this mechanism was a significant cause of the double-counting. Thus, while Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent.[276]

- *The Special Master recommends that Lieff Cabraser "disgorge" one-third of the total double-counted staff attorney lodestar and that the money be "returned" to the class:*

> All three customer class firms will share responsibility. The remedy for this is the disgorgement in equal amounts of the entire $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.[277]

- *The Special Master recommends that the time of Lieff Cabraser's staff attorneys paid by an agency be treated as a cost item, instead of including that time in the firm's aggregate lodestar:*

> The law firms should not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract attorneys should be reimbursed to the law firms as an expense, and the firms compensated for that expense dollar-for-dollar.[278]

- *The Special Master recommends that Lieff Cabraser "disgorge" the difference between (a) the total of the firm's "agency" attorneys' lodestar, times 1.8, and (b) $50 per hour for the agency lawyers' time:*

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

[277] Executive Summary at 49, Report at 364. Lieff Cabraser's objection to this recommendation by the Special Master is presented *infra* at 67-77.

[278] Executive Summary at 22-23 and 50, Report at 367; *see also*, Report at 181-189. Lieff Cabraser's objection to this recommendation by the Special Master is presented *infra* at 77-90.

> The seven contract attorneys, all retained by Lieff, recorded 2,833.5[279] hours in this role at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged and returned to the class. The Customer Class Counsel is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable more rate of $50/hour. The Special Master recommends the difference between these two figures also be awarded to the class.[280]

- *The Special Master finds that Lieff Cabraser was not aware of the Chargois Arrangement, and justifiably believed Chargois to be Labaton's local counsel, and therefore bears no responsibility for the Chargois episode and recommends the firm be relieved from any further responsibility relating to Chargois under of the claw-back agreement:*

> Labaton even failed to fully inform its Customer Class co-counsel [including Lieff Cabraser], who were sharing equally in the $4.1 million payment to Chargois, of Chargois' actual role (or lack of a role) in the *State Street* case.[281]
>
> * * *
>
> Lieff and Thornton were not privy to the origins of the Chargois Arrangement or the details of Labaton's obligation to pay Chargois in all cases in which ATRS was a co-lead counsel.[282]
>
> * * *
>
> Beyond this, when [Labaton] sought to have Lieff and Thornton share in the obligation to Chargois by splitting equally the $4.1 million payment to him, they told them only a portion of the story, leading them to believe that Chargois was local counsel and performing work of value in the case.[283]

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[279] As noted above, this correct number would appear to be 2899.2.

[280] Report at 367-368. A similar recommendation is contained in the Special Master's Executive Summary, but certain of the dollar figures cited there are different than those cited in the Report and are incorrect. Executive Summary at 50. Lieff Cabraser's objection to this recommendation by the Special Master is presented *infra* at 90-96.

[281] Executive Summary at 26.

[282] Report at 106, 287-289, 301-302.

[283] Report at 331; *see also* Report at 350-351; Report at 109-113 (summarizing Lieff Cabraser's lack of knowledge of the Chargois Arrangement, and its justifiable belief that Chargois was serving at local Arkansas counsel for Labaton on behalf of ATRS).

* * *

> On the one hand, Lieff agreed to share in the Chargois payment and at least knew about Chargois, albeit not the full state of affairs. On the other hand, the Special Master believes that Lieff was misled into agreeing to share in the Chargois payment. Ordinarily, some recompense would be in order for this. However, at oral argument, Lieff's counsel (and the firms' General Counsel), Richard Heimann, when asked what if any relief he was seeking, indicated he was not looking for any repayment…. In view of all these factors, the Special Master believes that the fairest result for the Lieff firm would be for it to be relieved of its obligations to Labaton under the claw-back letter as to Chargois, but no more.[284]

- *The Special Master concludes that even after his recommended monetary "remedies" are imposed on Lieff Cabraser, the firm will still have received as a fee its base lodestar plus a significant multiplier*:

> [E]ven after the imposition of the monetary remedies recommended here… Lieff… will still be left with not only their base lodestar claim, but a substantial multiplier. The Special Master calculates that even after the allocation all monetary amounts, and the cost of the investigation, the Customer Class Firms will still receive its [sic] base lodestar plus a significant multiplier.[285]

J. The Actual and Potential Costs To Lieff Cabraser Of The Special Master's Investigation.

Consistent with the firm's fee interest in the State Street Action relative to the other Customer Class Counsel, Lieff Cabraser has borne 24% of the direct costs of the Special Master's investigation. *See* discussion *supra* at 41. In other words, Customer Class Counsel have paid a total of $3,800,000 to fund the Special Master's investigation ($500,000 of which has been paid for future work, if any, by the Special Master and his counsel and/or advisors), and Lieff Cabraser's 24% share of that total paid is $912,000.

In addition to the amount of money it has paid to finance the Special Master's investigation, Lieff Cabraser has also incurred an additional $428,715 in costs to represent and

[284] Report at 352. Lieff Cabraser's response to this recommendation by the Special Master is presented *infra* at 96-98.

[285] Report at 376. Lieff Cabraser's objection to this finding by the Special Master is presented *supra* at 6, *infra* at 64-66, and 99.

defend itself during the investigation. This figure includes the costs of three expert reports from Rubenstein; one expert report from Dacey; frequent air travel from San Francisco to New York and Boston for Heimann, and his attendant accommodation expenses; travel from New York to Boston and related accommodation expenses for Chiplock; travel from San Francisco to New York of five Lieff Cabraser staff attorneys (for their depositions), along with related hotel expenses; and miscellaneous other related litigation costs.[286]

Lieff Cabraser's representation of itself during the Special Master's investigation has involved a substantial amount of time from firm partners Heimann, Fineman and Chiplock, along with additional time from Lieff Cabraser support staff. The aggregate lodestar devoted to the Special Master's investigation, from February 6, 2017 through the date of this Response and Objections, is $1,963,110 (calculated at 2018 hourly rates).[287] Therefore, the total cost to the firm resulting from the Master's investigation (to date) is $3.30 million.

In addition to that extraordinary figure, the Special Master now recommends that Lieff Cabraser "disgorge" from its fee award an additional $3,593,765, reflecting (i) an equal share of Customer Class Counsel's aggregate inadvertently double-counted lodestar ($1,352,667), plus (ii) the difference between (a) the lodestar attributed (for cross-check purposes) to Lieff Cabraser's "agency" staff attorneys, plus a 1.8 multiplier on that lodestar, and (b) $50 per hour for each hour[288] worked by those "agency" attorneys, or $2,241,098.40.

As noted above, the firm received $15,116,965.50 in attorneys' fees (reflecting its 24% interest in fees allocated to Customer Class Counsel and 20.3% of the total fee awarded to Plaintiffs' Counsel). *See* discussion *supra* at 41. Based on its corrected lodestar figures (i.e.,

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[286] *See* Exhibit O to Fineman Declaration.

[287] *See* Fineman Declaration at ¶ 18.

[288] Again, as noted above, the firm uses the correct contract attorney hourly total of 2899.2 for this calculation.

subtracting $868,417.00 in inadvertently double-counted staff attorney lodestar, resulting in a total lodestar of $8,932,070.50), Lieff Cabraser's *corrected* effective multiplier on its individual fee was 1.69 – substantially less than the aggregate multiplier averaged across all counsel, and indeed less than the 1.8 aggregate lodestar multiplier that the Court *originally found to be reasonable*. *See* discussion *supra* at 35.

When subtracting from the firm's fee award the $912,000.00 it has paid to date toward the Special Master's investigation, the firm's award is reduced to $14,204,965.50, resulting in a lowered effective multiplier of just 1.59 on the firm's corrected lodestar. And after deducting from the firm's fee award the additional costs and lodestar the firm has spent on the investigation, Lieff Cabraser's effective fee award is reduced to $11,813,140.50, for a reduced multiplier of just 1.32. If, after all of that, the Special Master's recommendations for the "disgorgement" of $3,593,765 of Lieff Cabraser's fees is also implemented, the firm's fee award would be further reduced to $8,219,375.50, for an end multiplier of *0.92* – i.e., a *negative multiplier*, meaning that Lieff Cabraser would not even be recovering what it has put into the litigation.[289]

As argued below, the financial impact on Lieff Cabraser of the Special Master's recommendations is entirely unjust in light of the factual record, the Special Master's actual substantive findings, and the application of controlling legal principles.

[289] According to the firm's calculations, Lieff Cabraser would be alone, among all of the firms involved in the litigation, in obtaining a negative effective multiplier if the Special Master's recommendations were fully adopted. On the other end of the spectrum, one of the ERISA Counsel (Zuckerman Spaeder) would obtain an effective individual multiplier of more than 3.0 if the Special Master's recommendations were fully adopted.

III. ARGUMENT IN SUPPORT OF LIEFF CABRASER'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT.

A. The Court Must Review Objections To The Special Master's Findings, Conclusions, And Recommendations *De Novo*.

The Special Master was appointed pursuant to Rule 53 of the Federal Rules. Under Rule 53(f)(3) and (4), a court must decide *de novo* all objections to findings of fact and/or conclusions of law made or recommended by a master. Accordingly, this Court will review objections to the Special Master's findings, conclusions and recommendations *de novo*.[290] Based on an independent review of the factual record and controlling case law, the Court should sustain Lieff Cabraser's following objections to the Special Master's findings, conclusions, and recommendations.

B. Lieff Cabraser Should Not Be Required To Disgorge Any Portion Of The Firm's Inadvertently Double-Counted Lodestar.

The Special Master recommends that Customer Class Counsel, including Lieff Cabraser, disgorge and "return" to the class in equal amounts the $4,058,000 in double-counted staff attorney time.[291] Lieff Cabraser objects to this recommendation by the Special Master, and urges the Court to reject it, for the following reasons: (1) the double-counting of certain staff attorney time was inadvertent; (2) the Special Master's recommendation miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (3) the inadvertent double-counting caused no harm to the class; and, (4) Customer Class Counsel, including Lieff Cabraser, has already been penalized for the double-counting.

[290] Ex. 163 to Report, ECF No. 173, at 12 (this Court stating that it will review *de novo* any recommended findings of facts and conclusions of law as to which Plaintiffs' Counsel object).

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

1. The Double-Counting of Certain Staff Attorney Time Was Inadvertent.

As the Special Master notes, the "hot button issue" that triggered the Special Master's investigation was the discovery of the double-counting of certain staff attorney lodestar.[292] Indeed, a substantial portion of the pre-Chargois investigation by the Special Master addressed the double-counting issue. *See* discussion *supra* at 43-49. After they explained the accidental nature of the double-counting in numerous interrogatory responses, through thousands of pages of produced internal documents, and in informal interviews and sworn depositions, the Special Master agreed with Customer Class Counsel, including Lieff Cabraser, that the double-counting was "inadvertent."[293]

2. The Special Master's Recommendation Miscomprehends or Ignores the Limited "Cross-Check" Purpose of the Submission and Use of Lodestar in this Action.

Despite the inadvertence of the double-counting, the Special Master recommends that Customer Class Counsel "return the $4,058,000 in double-counted time to the class."[294] As explained below, there is no "time" or lodestar to "return" to the class. Plaintiffs' Counsel, including Lieff Cabraser, were not paid by the class on an hourly basis, and did not somehow charge for work that was not performed. Rather, Plaintiffs' Counsel were compensated on a percentage-of-the-fund basis with Counsel's lodestar submitted solely for cross-check purposes. The Special Master's proposed "remedy" belies either a miscomprehension or a disregard of the purpose of the use of lodestar in the State Street Action.

As the Court ruled, and as the Special Master acknowledges, Plaintiffs' Counsel's fees in the Action were awarded on a percentage-of-the-fund basis, with a lodestar cross-check. *See*

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[292] Report at 219.

[293] Executive Summary at 14-15, Report at 363.

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

discussion *supra* at 34-36, 57-61. The Court ruled that a percentage-of-the-fund fee of approximately 25% was consistent with First Circuit authority and the Court's own practices in large complex cases. *See* discussion *supra* at 34-36. The Special Master acknowledges the propriety of a 25% contingent fee, subject to a lodestar cross-check, and acknowledges the reasonableness of the aggregate fee award to Plaintiffs' Counsel. *See* discussion *supra* at 57-61.

Plaintiffs' Counsel did not seek, and the Court did not award Counsel's fees, based on the very different lodestar-multiplier method. *See* Declaration of William B. Rubenstein in Support of Lieff Cabraser Heimann & Bernstein, LLP's Responses and Objections to the Special Master's Report and Recommendations, dated June 20, 2018 and filed herewith ("Rubenstein Declaration II"), at 18 ("The Special Master's Report errs in recommending these remedies as it confused the nature of a lodestar cross-check, applied in this case, with a lodestar-based fee, not at issue here."); *see also* Rubenstein Declaration I at 7-12[295] and Rubenstein Declaration II at 19-20 (describing the difference between the percentage method and the lodestar method of awarding attorney's fees in class actions).

The purpose of a lodestar cross-check against a percentage-of-the-fund fee request is clear – a lodestar cross-check is performed solely for the purpose of determining that a percentage-of-the-fee award is reasonable and not excessive. *See e.g.*, *In re Tyco Intern. Ltd. Multidistrict Litigation*, 535 F.Supp.2d 249, 270 (D.N.H. 2007) (lodestar cross-check used to determine whether the percentage of the fund fee award is "reasonable," and whether the "fee award appropriately reflects the degree of time and effort expended by the attorneys"); *In re Citigroup, Inc. Securities Litigation*, 965 F.Supp.2d 369, 388 (S.D.N.Y. 2013) ("Part of the reasonableness inquiry is a comparison of the lodestar to the fees awarded pursuant to the

[295] Ex. H to Fineman Declaration.

percentage of the fund method [as a cross-check]"); *see also* Rubenstein Declaration I at 10 ("[U]sing a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall")[296]; Rubenstein Declaration II at 19 ("Since the early 1990s, most courts have used the percentage method in large common fund cases like this one, although about half the courts that do so ensure that the percentage that is awarded is not too great by 'cross-checking' it against counsel's lodestar").

Unlike the level of detail required to support a lodestar-based fee, however, a lodestar cross-check is more summary in nature. *See e.g., Tyco*, 535 F.Supp.2d at 273 ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306 (3rd Cir. 2005), as amended (Feb. 25, 2005))); *New England Carpenters Health Benefits Fund v. First DataBank, Inc.*, No. 05-CIV-11148 (PBS), 2009 WL 3418628, at *1 (D.Mass. October 20, 2009) (determining that lodestar is enough of a cross-check on the percentage method; a full audit of all attorneys' fees and costs is too "cumbersome, time-consuming and resource intensive"); William B. Rubenstein, Newberg on Class Actions (5th ed.) (2015) at §15:86 (collecting cases, including from the First Circuit, for the summary nature of the lodestar cross-check).

In the State Street Action, Plaintiffs' Counsel submitted lodestar reports for the purpose of allowing the Court to conduct a lodestar cross-check against a percentage-of-the-fee award. *See* discussion *supra* at 32-34. The combined lodestar submitted by Plaintiffs' Counsel in connection with their fee application was $41,323,895.75 based on 86,113.70 hours worked. *See Id*. In cross-checking Plaintiffs' Counsel's aggregate lodestar against an approximately 25% contingent fee of $74,541,250.00, the Court found, and the Special Master later agreed, that the

[296] Ex. H to Fineman Declaration.

aggregate multiplier of 1.8 was well within the range of what is reasonable under applicable legal authority. *See* discussion *supra* at 34-36, 57-61.

In the November 10, 2016 Goldsmith Letter, Customer Class Counsel acknowledged the inadvertent double-counting error and advised the Court that approximately $4.06 million of lodestar should be removed from the aggregate lodestar the Court used to perform a cross-check against the 25% percentage-of-the-fund fee award. *See* discussion *supra* at 39. The aggregate corrected lodestar figure was accurately reported in the Goldsmith Letter, and is the number that has been adopted by the Special Master in his Report. *See* discussion *supra* at 39, 48. In the Goldsmith Letter and throughout the investigation, Customer Class Counsel has pointed out to the Special Master that: removing the double-counted lodestar from the aggregate lodestar of $41,323,895.75, results in a corrected aggregate lodestar of $37,265,241.25; that applying the corrected lodestar as a cross-check against the aggregate fee awarded ($74,541,250) results in a 2.0 multiplier; and, that such a multiplier, used for lodestar cross-check purposes, is reasonable under controlling legal authority. *See* discussion *supra* at 41-49, 64-66.

In his Report, the Special Master found the aggregate lodestar multiplier of 1.8 (the lodestar multiplier based on the original fee submissions) to be "certainly within the reasonable range," and cited as support for that statement cases that applied multipliers of 2.02, 3.0, 1.987, 2.7, 3.5 and up to 4.0. *See* discussion *supra* at 61. The Special Master does not attempt to explain why a 1.8 multiplier is clearly reasonable, but a 2.0 multiplier is not. That is because he cannot.

Controlling case law clearly supports multipliers of 2.0 or more as well within the range of reasonableness for lodestar cross-check purposes. *See* Ex. 110 to Report, ECF No. 103-1, at 24-25 (collecting and reporting to the Court First Circuit "megafund" settlements in which

lodestar multipliers in a range of 2.7 to 8.3 were approved for cross-check purposes); Rubenstein Declaration I at 30 ("Quantitatively, a 2 multiplier is consistent with multipliers that courts have previously approved in similar circumstances"), and 33 ("Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion [that a 2.0 multiplier is appropriate], as the change in the proposed multiplier is simply from 1.8 to 2.")[297]; Rubenstein Declaration II at 19-20 ("[C]orrecting the double-counting issue by reducing counsels' lodestar adjusted their multiplier from 1.8 to 2.01, which in the context of this case was insignificant.").

The Special Master cites no case law, or any other legal principle, to support his proposed remedy that Customer Class Counsel, including Lieff Cabraser, "return" the amount of the inadvertently double-counted lodestar to the class. That is because none exists. Indeed, as Professor Rubenstein observes: "In a case where a court employs the percentage method to determine class counsels' fee, and used the lodestar only for cross-check purposes, the reduction of an hour of time recalibrates the lodestar multiplier and requires further analysis of whether that lower amount can continue to sustain the requested percentage award. But it does not require the 'repayment' of that hour of time since counsel was never 'paid' for that hour of time; counsel were paid a percentage of the recovery." *See* Rubenstein Declaration II at 20-21 (also citing "[numerous] legal decisions [that] have understood this distinction, after adjusting the lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remained reasonable).

Given the purpose of the consideration of lodestar for cross-check purposes, and in light of the inadvertent nature of Customer Class Counsel's double-counting of certain staff attorney time, the proper way to address the double-counting issue is simply to remove the double-

[297] Ex. H to Fineman Declaration.

counted lodestar from the aggregate amount of lodestar used in the cross-check of the 25% percentage-of-the-recovery fee. The Court can then determine whether or not the resulting aggregate multiplier is appropriate. Lieff Cabraser submits that it is, particularly in view of the fact that its *individual* corrected multiplier – 1.69 – is lower even than the original, uncorrected 1.8 aggregate multiplier that both the Court and the Special Master found to be reasonable (and, as explained *supra* at 64-66, the firm's post-investigation multiplier is substantially lower still).

3. In Recommending "Return" of the Double-Counted Lodestar to the Class, the Special Master Identifies No Harm to the Class that Justifies Such a "Remedy".

Both the Court and the Special Master have found that the $300 million settlement Plaintiffs' Counsel achieved on behalf of the class was an "excellent result," particularly in light of the uniquely difficult risks and challenges presented by the novel legal theories advanced by Plaintiffs' Counsel, and given the skill and resources of State Street's attorneys. *See* discussion *supra* at 34-36, 57-61. The class therefore received exactly what it was notified it would receive, and what it unanimously agreed to. The Special Master recognizes that the class received significant economic benefits as a consequence of the "highly dedicated and professionally skilled work of the class' law firms." *See* discussion *supra* at 57-61. Prior to final approval, class members were informed of the financial benefits they would receive from the settlement, and were told that class counsel would seek a fee up to approximately 25% of the amount recovered. *See* discussion *supra* at 32. Not a single member of the highly sophisticated class of institutional investors opted out of the certified settlement class or objected to the settlement or to the proposed fee award. *See* discussion *supra* at 34-36.

Based on Plaintiffs' Counsel's accomplishment for the benefit of the class, and applying applicable First Circuit authority, the Court awarded approximately 25% of the recovery as fees.

See discussion *supra* at 34-36. Having nothing whatsoever to do with the quality of Plaintiffs' Counsel's lawyering or the results achieved for the class, Customer Class Counsel accidentally, inadvertently, without intention, double-counted a small portion (9.8%) of the aggregate lodestar submitted to the Court as part of the lodestar cross-check exercise. The prompt correction of that error resulted in the lodestar multiplier increasing from 1.8 to 2.0 – well within the range of reasonableness measured against the 25% percentage-of-the-recovery fee awarded to Counsel.

Under these facts – and these are *the* facts – the class has suffered *no* harm as a consequence of the inadvertent double-counting, and has received substantial benefits as a result of the risks taken and the legal skills applied by their attorneys. The Special Master identifies no harm suffered by the class as a consequence of the double-counting that justifies his unnecessary recommended "remedy."

4. Customer Class Counsel, Including Lieff Cabraser, Has Already Suffered Financially as a Consequence of the Inadvertent Double-Counting.

The Special Master states that "Lieff bears some responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation,…"[298] Indeed, Customer Class Counsel, including Lieff Cabraser, has already suffered a meaningful financial burden as a consequence of their inadvertent double-counting of certain staff attorney lodestar by paying for the "attendant cost of the Special Master's investigation." *See* discussion *supra*, at 64-66. It would be entirely unjust for the Court to require Customer Class Counsel, including Lieff Cabraser, to pay more than they already have for the inadvertently double-counted lodestar.

[298] *See* Executive Summary at 15.

C. In The Event The Court Requires Lieff Cabraser To Disgorge Any Portion Of The Firm's Inadvertently Double-Counted Lodestar, That Disgorgement Should Be Commensurate With The Firm's "Relative" Role In The Double-Counting.

As stated above, Lieff Cabraser objects to the Special Master's recommendation that Lieff Cabraser disgorge any portion of its inadvertently double-counted lodestar. Such an outcome is not supported by the law or the facts. However, in the event the Court overrules Lieff Cabraser's objection, the firm further objects to the Special Master's recommendation that the appropriate remedy is "disgorgement by all three firms in equal amounts" of the $4,058,000 in double-counted time. Lieff Cabraser objects to the recommendation that it should pay one-third of that amount, $1,352,667, because such an outcome is inconsistent with the factual record and the Special Master's own substantive findings.

To the extent the Court entertains the Special Master's recommendation that Lieff Cabraser should disgorge some portion of that lodestar, the following facts must be recognized:

- Lieff Cabraser received 24% of the fee award allocated to Customer Class Counsel and has paid 24% of the court-ordered costs for the Special Master's investigation ($912,000 of $3.8 million). *See* discussion *supra* at 64-66;
- the portion of the double-counted lodestar actually attributable to Lieff Cabraser was $868,417, or just 21% of the total double-counted lodestar (*see* discussion *supra* at 3, 38, 64-66); and,
- the portion of the double-counted lodestar attributable to Lieff Cabraser ($868,417), is only 2% of the total aggregate lodestar originally submitted to the Court (*see* discussion *supra* at 64-66).

Based just on these basic facts, Lieff Cabraser should not be obliged to disgorge 33-1/3% of the inadvertently double-counted time. Rather, given the relatively modest amount of its double-counted lodestar, it should have to pay substantially less than that, subject to further reduction based on the Special Master's factual findings, described below.

The Special Master's recommendation that Lieff Cabraser disgorge an equal amount of the double-counted lodestar is inconsistent with the relevant findings in his Report. The Special Master describes the "relative responsibility" of Lieff Cabraser, Thornton and Labaton for the double-counting, pointing out that "each of the three Customer Class law firms bears widely varying degrees of responsibility," and "[e]ach of the three firms bears different degrees of responsibility for the double-counting."[299] The Special Master finds that "Lieff's responsibility for the actual double-counting is somewhat mitigated because it never saw the lodestar reports of Thornton or Labaton in order to be able to compare, and possibly catch, the double-counting."[300] The Special Master also acknowledges that "it cannot be said that the agreement to share costs" through the sharing of certain staff attorneys with Thornton was a "significant cause of the double-counting."[301] The Special Master concludes that "while Lieff bears *some* responsibility for the double-counting misstatements, and thereby the attendant cost of the Special Master's investigation, its conduct was inadvertent." (Emphasis added.)[302]

The Special Master goes on to compare Lieff Cabraser's relatively minor (i.e., "some") share of responsibility for the double-counting with Thornton's "significant responsibility for the double-counting"[303] and Labaton's "ultimate responsibility" for the same.[304] Despite weighing the relative roles of the firms in the inadvertent double-counting and finding Lieff Cabraser the least responsible, the Special Master nevertheless, and inconsistently, recommends

[299] Executive Summary at 10, 13 and 14.
[300] Executive Summary 14.
[301] Executive Summary at 14-15.
[302] Executive Summary at 15 (emphasis added).
[303] Executive Summary at 15-18.
[304] Executive Summary at 18-19.

"disgorgement in equal amounts" of the double-counted lodestar.[305] The Special Master's recommendation that Lieff Cabraser disgorge an equal amount of the double-counted lodestar is fundamentally at odds with the Master's own findings and should be rejected.[306]

Based on the firm's limited financial stake in the State Street Action (24% among Customer Class Counsel and 20.3% among all Plaintiffs' Counsel), the modest dollar amount of Lieff Cabraser's inadvertent double-counting ($868,417), and given the Special Master's findings as to Lieff Cabraser's modest role in the double-counting, the firm submits that if the Court requires any disgorgement, it should be obliged to pay significantly less than an "equal share" of the total double-counted lodestar.

* * *

For the reasons stated above, Lieff Cabraser objects to the Special Master's recommendation that Lieff Cabraser disgorge any portion of the double-counted lodestar. Such an outcome is inconsistent with the purposes of the lodestar cross-check in a percentage-of-the-fee recovery context, the class has suffered no harm as a result of the accidental double-counting, and the firm has already spent substantial sums to fund the investigation.

D. Lieff Cabraser Should Not Retroactively Be Required To Treat the Firm's Staff Attorneys Compensated By An Agency As A "Cost" Instead Of Including Them In Its Lodestar As Part Of The Aggregate Lodestar Cross-Check.

After his exhaustive investigation, the Special Master finds that the staff attorneys who worked on the State Street Action were highly qualified and skilled attorneys who made meaningful and valuable contributions to the success of the State Street Action by providing

[305] Executive Summary at 59.

[306] The Special Master's description in the Report of the double-counting issues makes clear that Lieff Cabraser's responsibility for the double-counting was less significant than that of its colleagues. Report at 364.

quality legal services in the nature of complex document review and analysis, and the preparation of sophisticated memoranda. *See* discussion *supra* at 57-60. Finding that the staff attorneys performed at a level comparable to a junior to mid-level associate, the Special Master concludes that their hourly rates (mostly $415 per hour for Lieff Cabraser's staff attorneys) and hours worked were reasonable and appropriate. *See* discussion *supra* at 57-60.

Despite these entirely accurate findings, the Special Master carves out for separate treatment seven of Lieff Cabraser's staff attorneys who at one time or another during the State Street Action were paid by an agency, as opposed to the firm directly. Referring in the Report to the agency attorneys as "contract attorneys," the Special Master "recommends that law firms not be permitted to be compensated for these attorneys at market rates and no multiplier should be granted on their hours and rates (if a multiplier is granted). Rather, the costs of the contract [agency] attorneys should be reimbursed to law firms as an expense, and firms compensated for that expense dollar-for-dollar."[307]

Lieff Cabraser objects to this recommendation on the following grounds: (1) the case law does not support, and indeed flatly contradicts, the Special Master's recommendation that the time of the firm's contract/agency lawyers be treated as a cost; and (2) the "factual" distinctions the Special Master attempts to draw between the firm's staff attorneys on payroll and those paid by an agency do not support the Master's recommendation, and are at odds with a fair reading of the record. No matter what the Special Master's academic views are with respect to the treatment of contract/agency attorneys in the context of class action fee applications, those views should not displace the controlling law or the relevant facts.

[307] Executive Summary at 50, Report at 367.

1. The Case Law Does Not Support, and Indeed Contradicts, the Special Master's Recommendation The Time of the Firm's "Agency" Lawyers Be Treated as a Cost.

The Special Master states that "[w]hile legal and ethical rulings have not provided definitive guidance on this interesting issue, the better, more common-sensical view is that the costs of contract attorneys should be passed along as a reimbursable expense rather than as a marked-up profit center."[308] This statement is not accurate, and is contradicted by the very cases upon which the Special Master relies.

As Professor Rubenstein observes:

> Courts *have* provided definitive guidance: they are unanimously opposed to the Special Master's Report's approach. Numerous courts have explicitly rejected the argument that contract attorneys must be billed as a cost [footnote omitted] and many other courts – far too numerous to enumerate – have approved fee petitions that include contract attorneys in counsels' lodestar or lodestar cross-check submission. [Footnote omitted] By contrast, I am not aware of a single court in the United States that has ever held that contract attorneys must be billed to the client as a cost rather than included in the lodestar at an attorney rate. [Footnote omitted]

Rubenstein Declaration II at 12. *See also* Rubenstein, *Newberg on Class Actions* at §15:41 n.5 (listing cases rejecting the argument that contracts attorneys must be billed as a cost).

It is well-settled in the First Circuit that when calculating lodestar, the determination of reasonable rates "will vary depending on the nature of the work, the locality in which it is performed, the qualifications of the lawyers and other criteria." *Hutchinson ex rel. v. Patrick*, 636 F.3d 1, 16 (1st Cir. 2011). Most important in determining the reasonableness of hourly rates for lodestar purposes is the "market value of counsel's services." *U.S. v. One Star Class Sloop*, 546 F.3d 26, 40 (1st Cir. 2008); *see also*, *Hutchinson*, 636 F.3d at 16 ("[D]ata evidencing the prevailing market rate for counsel of comparable skill and experience provides helpful

[308] Report at 187.

guidance"); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 950-951, 955 (1st Cir. 1984) (reasonable fees are calculated according to the prevailing market rates in the relevant community for similar services by lawyers of comparable skill and experience). When setting forth these criteria, the First Circuit has never distinguished between different categories of lawyers, e.g., partners, associates, or staff or contract (agency) lawyers.

Although the First Circuit has not expressly addressed the issue, one district court case in the First Circuit has specifically rejected the argument that "contract" lawyers be treated as an expense instead of being included as part of lodestar. *Tyco*, 535 F.Supp.2d 249, involved a securities class action settlement in which the court used the percentage-of-the-fund method with a lodestar cross-check to evaluate the fee request. Objectors argued that contract attorneys should be treated as an expense rather than be included in the lodestar. *Id*. at 271-273. The court rejected that argument as meritless:

> The objection lacks merit. The lodestar calculation is intended not to reflect the costs incurred by the firm, but to approximate how much the firm would bill a paying client. An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney. It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar.

Id. at 272. [309] This decision from a different court in the First Circuit is directly contrary to the Special Master's recommendation.

A number of district courts from other circuits have expressly cited *Tyco* in rejecting the notion of treating contract attorneys as an expense. *See e.g., Carlson v. Xerox Corp.*, 596 F.Supp.2d 400, 409 (D. Conn. 2009) (citing *Tyco* in concluding the "objection unpersuasive",

[309] In fact, Lieff Cabraser has had individual bill-paying clients that have paid the hourly rates of firm staff attorneys who were paid by an agency. *See* Ex. A to Fineman Declaration at 56-59.

aff'd, 355 Fed.App. 523 (2d Cir.); *Charlebois v. Angels Baseball, LP*, 993 F.Supp.2d. 1109, 1124 (C.D.Cal. 2012) (citing *Tyco* in finding that the hours of contract attorneys "merit inclusion in the lodestar hours"); *In re Enron* Corp. Securities, Derivative and ERISA Litigation, 586 F.Supp.2d 732, 784-785 (S.D. Tex. 2008) (citing *Tyco* in concluding that "prevailing counsel can recover fees for [contract attorneys] services at market rates rather than at their cost to the firm"). *See also* Rubenstein Declaration II at 12, n. 52 (citing additional cases rejecting the argument that contract attorneys must be billed as a cost).

Moreover, and importantly, some decisions rejecting the argument that contract attorneys may only be billed as a cost expressly refer to the fact that class counsel retained the contract attorneys at issue from an agency. *See e.g.*, *Citigroup*, 965 F.Supp.2d at 394 (adjusting the hourly rates, but rejecting treating as a cost, "attorneys who are not permanent employees of the law firm, are hired largely from outside staffing agencies, are not listed on counsel's law firm website or resume, are paid by the hour, and are hired on a temporary basis to complete specific projects related to a particular action."); *In re AOL Time Warner Shareholder Derivative Litig.*, No. 02-CIV-6302 (CM), 2010 WL 363113 at *25 (S.D.N.Y. Feb. 1 , 2010) (rejecting an objector's argument that contract attorneys should be treated as an expense because the "firms seek a huge markup on the differential between their payment to the businesses referring the contract attorneys and the hourly rates sought" finding that the "contract attorneys here were not mere clerks, but exercised judgment typically reserved for lawyers, under the supervision of the firms' regular attorneys."). *See also* Rubenstein Declaration II at 12, n. 52 ("In other words, counsel's retention of contact attorneys from an outside agency does not distinguish this case from this vast body of pertinent authority.").

Despite the unequivocal holding of these cases – including the leading case from within the First Circuit – that the time of contract (agency) attorneys may be properly included in counsel's lodestar – the Special Master determines that "those decisions that find contract attorneys indistinguishable from off-track associates are not acceptable for purposes of this Report."[310] It is extraordinary that the Special Master would seek to impose a significant economic penalty on Lieff Cabraser by disregarding governing law and replacing it with his own personal views. Equally problematic is that the two cases relied upon by the Special Master for his novel position do not in fact support his approach. *See* Rubenstein Declaration II at 12-13 ("The Special Master's Report cites only two cases in support of its approach – *Dial* and *Meredith* [footnote omitted] – but when probed, neither actually supports that approach.").

In *Dial Corporation v. News Corporation*, 317 F.R.D. 426 (S.D.N.Y. 2016), lawyers for the plaintiffs *voluntarily* sought repayment for contract attorney time as a cost; the court did not require that they do so. *Id*. at 438. In *dicta,* the court in *Dial* expressed its appreciation for counsel's decision to treat the time of the contract lawyers in that case as an expense because it "save[d] the Court from having to 'determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary.'" *Id*. at 138 (quoting *Citigroup*, 965 F.Supp.2d at 394 (in which the court rejected the argument that contract attorneys should be treated as a cost)). The court in *Dial* thus acknowledged the prevailing law that contract attorney time may be included as part of lodestar. "What this means is that absent the lawyers' voluntary decision, the *Dial* Court would have treated these attorneys as lawyers, not as an expense." Rubenstein Declaration II at 13.

[310] Report at 184.

The other case relied upon by the Special Master is *Meredith Corp. v. SESAC, LLC*, 87 F.Supp.3d 650 (S.D.N.Y. 2015). In *Meredith*, a large corporate defense firm represented a plaintiff class in an antitrust action. The decision does not expressly address the lodestar/expense issue, but rather simply identifies contract attorney time as among the expenses for which plaintiff's counsel sought reimbursement. *Id.* at 671. "It [the law firm] too voluntarily sought reimbursement for contract attorneys as cost, [footnote omitted] but in doing so, it was careful to explain to the Court that this was a deviation from the firm's usual practice. [Footnote omitted.] What this means is that absent the lawyer's voluntary decision, the large corporate firm in *Meredith* would have treated these attorneys as lawyers, not as an expenses." Rubenstein Declaration II at 13-14, and n. 58. Neither *Dial* nor *Meredith* support the Special Master's recommendation that Lieff Cabraser's agency attorneys must be treated as a cost.

Although cases that have considered the issue have rejected the argument that contract attorneys (whether on a firm's payroll or hired through an agency) must be treated as a cost, some courts have determined that the market rates for contract attorneys should be lower than comparable full-time associates. For example, in *Citigroup*, 965 F.Supp.2d at 393-399, the court rejected the argument that contract attorneys hired from outside staffing agencies should be treated as a cost, but based on the facts before it, reduced the hourly rates used by class counsel for those attorneys for purposes of a lodestar cross-check. The court found class counsel's proposed blended hourly rate of $466 for the contract/agency attorneys in that case too high when compared with a $402 per hour rate for associates, given that the contract/agency attorneys provided their document review services *after* the settlement of the case was reached, and therefore reduced the contract/agency attorneys' rate to $200 per hour. *Id.*; *see also City of Potomac General Employees' Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276,

280 (S.D.N.Y. 2013) (acknowledging that "it is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm," but questioning the reasonableness of the hourly rates assigned to the contract attorneys in the case); *In re Petrobras Securities Litigation*, No. 14-CIV-9662 (JSR) (S.D.N.Y. June 25, 2018) at 32-35 (reducing the hourly rates of "staff and contract attorneys" of between $325 and $625 per hour by 20% in light of the "considerable time spent by these attorneys on low level document review").[311] *See also* Rubenstein Declaration II at 16 (noting that "some courts have treated the questions as one of degree not type, adjusting the pertinent hourly rate but rejecting the argument that the contract attorneys be passed through as a cost") and n. 69 (citing cases in which courts reduced contract attorney billing rates for lodestar cross-check purposes).

Finally, those courts that have considered the issue have rejected the argument made by the Special Master here that the lodestar of contract attorneys (in this case agency attorneys) should not be multiplied as part of a lodestar cross-check analysis. *See e.g., In re Citigroup*, 965 F.Supp.2d at 394-395 (rejecting the argument that a lodestar multiplier cannot be applied to contract attorneys' time); *AOL TimeWarner*, 2010 WL 363113 at * 26 (rejecting an objection to allowing a multiplier on contract attorney time, concluding: "It is with respect to risk, in particular, that the objection loses its allure. Counsel not only paid for the services of the contract lawyers, but also dedicated the time of their regular personnel to supervision. Because the risk is ultimately financial, counsel's recoupment risk in employing contract attorneys is no less uncertain than relating to the salaries paid to their regular employees"); *Carlson*, 596 F.Supp.2d at 409 (rejecting the argument that contract attorneys' time should not be subject to a multiplier); *In re Petrobras Securities Litigation* at 35-38 (including staff attorney and contract

[311] Ex. P to Fineman Declaration.

lawyer lodestar in awarding class counsel a multiplier).[312] *See also* Rubenstein Declaration II at 17 ("[C]ourts have explicitly rejected the argument that contract attorney time cannot be multiplied") and n. 71.

In disregarding the case law that allows multipliers on contract attorney time, the Special Master offers as a "final caution against allowing a market-rate mark up of contract attorneys," that when a multiplier is applied to market rates, "the actual realized rate on these contract attorneys can be twenty times as much as the firm actually paid the agency, or more."[313] The Special Master goes on to state, as an example, that "if a firm pays an agency $40/hour for a contract attorney but claims $400/hour for that contract attorney on its lodestar, and then obtains a 2.0 multiplier, the actual recovery rate for this contract attorney is $800/hour – or twenty times what the firm paid for the attorney."[314] With this arithmetic, the Special Master again misconceives or ignores the purpose of a lodestar cross-check.

The Court awarded Plaintiffs' Counsel 25% of the common fund. Plaintiffs' Counsel submitted their lodestar solely for cross-check, or verification, purposes. *See* discussion *supra* at 32-36. The aggregate lodestar submission showed that the 25% award was about twice Counsel's lodestar. *See Id.* This enabled the Court to decide whether that multiplier was appropriate under the circumstances. *See Id.* "The Court's conclusion that the 1.8 multiplier was justified did not mean that class counsel received $800/hour for contract attorneys. It meant that the 25% fee was justified." Rubenstein Declaration II at 17. Indeed, the class did not pay Plaintiffs' Counsel $400 per hour or $800 per hour for staff attorney time.

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[312] *Id*.

[313] Report at 188.

[314] *Id*.

2. The "Factual" Distinctions the Special Master Attempts to Draw Between the Firm's Staff Attorneys on Payroll and Those Paid By an Agency Do Not Support the Master's Recommendation.

The Special Master purports to distinguish between staff attorneys paid directly by the firm and those paid by an agency because: "the contract attorneys utilized in this case did not enjoy uninterrupted affiliation with the firm"; the firm did not offer "health insurance or provide other employment benefits" to agency attorneys; "the contract attorneys do not receive W-2s from the firm"; the firm's agency attorneys "did not bring with them the full panoply of federal and state employment law obligations that relate to employees of a business"; "Lieff did not face the same long-term financial obligations in securing contract attorneys as it did with its non-partnership-track staff attorneys"; and, "Lieff does not offer contract attorneys paid through an agency any additional monetary benefits".[315]

These distinctions between Lieff Cabraser's staff attorneys on payroll and those paid by an agency do not support the Special Master's recommendation that the time of the agency attorneys be treated as a cost for two reasons. First, there is no case law, and the Master cites none, for the proposition that these "distinguishing" facts, or facts like them, support treating a contract/agency attorney as a cost. *See* discussion *supra* at 79-85.

Second, a fair reading of the factual record concerning Lieff Cabraser's staff attorneys who worked on the State Street Action while paid by an agency highlights how insignificant, if not irrelevant, the Special Master's proposed factual distinctions actually are, and how they fail to justify his recommendation that the firm's agency lawyers be treated as a cost. These facts can be summarized as follows:

- The 18 Lieff Cabraser staff attorneys who worked on the State Street Action, including the seven who were at one time or for all times

[315] Report at 182-188.

employed by an agency, are described *supra* at 24-28, in Appendices A and B, and in Exhibit A to the Fineman Declaration.

- Throughout his Report, the Special Master recognizes the staff attorneys' stellar educational and professional backgrounds, and repeatedly praises the quality and value of their work in the State Street Action, without regard to which, if any of those staff attorneys, were paid by an agency. *See* discussion *supra* at 57-61.

- The Special Master concludes that the hourly rates for Lieff Cabraser's staff attorneys, mostly $415 per hour, were based on the nature and quality and the quality of their work, which the Master equates to that of a junior to mid-level associate, were therefore reasonable and appropriate. *See* discussion *supra* at 57-61.

- The Special Master concedes that there is no distinction between staff attorneys and agency attorneys as to the actual work performed for the benefit of the class – "[T]here is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary."[316]

- Four of Lieff Cabraser's staff attorneys – Bloomfield, Leggett, Nutting and Sturtevant – were compensated initially by an agency (which billed the firm directly for their services), but became payroll employees of the firm in January 2015, during the pendency of the State Street Action. Three of these attorneys – Bloomfield, Leggett and Nutting – put in substantial hours in both the BNY Mellon Action and the State Street Action. Leggett and Sturtevant performed their tasks on the State Street Action while working in Lieff Cabraser's San Francisco offices; Bloomfield and Nutting worked remotely in San Francisco. Leggett, Nutting and Sturtevent remain with the firm as full-time staff attorneys. *See* discussion *supra* at 24-28.

- Three of Lieff Cabraser's staff attorneys who worked on the State Street Action – Butman, McClelland, and Weiss – were compensated by an agency throughout their work on the Action. McClelland and Weiss both devoted substantial amount of time to the BNY Mellon Action. Weiss, working remotely, also recorded hundreds of hours in the State Street Action (including producing sophisticated issue memoranda) and continues to work for the firm on an agency basis. Butman and McClelland both worked in Lieff Cabraser's San Francisco office, but contributed only in modest hours to the State Street Action for the firm, 24 and 58, respectively (the bulk of McClelland's hours in the State Street Action were billed directly to Thornton and included in Thornton's lodestar). *See* discussion *supra* at 24-28.

[316] Report at 183.

- The firm incurs overhead expenses with respect to all of its staff attorneys, including its agency attorneys, including: the use of physical office space by Leggett, Sturtevant, Butman and McClelland; the use of information technology support for all seven, both in San Francisco and remotely; the use of firm administrative support (e.g., human resources on employment matters or dealing with an agency, accounting services, for payroll or interaction with an agency, and word processing for the submission of time records and the production of memoranda); assistance for all from the firm's litigation support department for training on Catalyst and as needed while performing their tasks; and, supervision of all by firm partners, senior associates and senior staff. *See* discussion *supra* at 12-13, 24-28.

- All attorneys that work for Lieff Cabraser, including those staff attorneys compensated by an agency, are covered by the firm's legal malpractice insurance policy. Of course, in the world of risk assessment, insurance companies focus on the nature of the work being performed and who it is being performed for, not on whether an attorney is receiving a W-2 or is temporary.

As these facts highlight, Lieff Cabraser's agency attorneys are "less distinct from full-time employees than the Report suggests." Rubenstein Declaration II at 14. Contrary to the Master's overbroad assumptions that the agency attorneys did not "enjoy uninterrupted affiliation with firm" and that the firm "did not face the same long-term financial obligations in securing contract attorneys as it did with its non-partnership-track staff attorneys," four of the firm's seven agency lawyers – Leggett, Nutting, Sturtevant and Weiss – began working for the firm between 2012 and 2014, and each remain with the firm today. *See* discussion *supra* at 24-28. And while it is true that the firm does not offer health insurance or certain other employment or monetary benefits to attorneys who are compensated by an agency, the firm offers a host of benefits and opportunities to agency attorneys, including, most obviously, actual employment and the resources to support that employment, and the chance to join Lieff Cabraser as payroll employees, as was the case with Bloomfield, Leggett, Nutting and Sturtevant. *See* discussion *supra* at 12-13, 24-28.

It is also true that not all federal and state employment laws that apply to the relationship between Lieff Cabraser and its employees apply to agency attorneys working under the firm's direction. Nevertheless, the firm expects its agency lawyers to abide by the firm's rules and practices, and agency attorneys are protected by state laws prohibiting harassment and discrimination in the workplace. The firm, through its human resources department, provides all personnel, whether employees of the firm, agency attorneys, or other contractors, with policies for behavioral conduct and on how to report misconduct of others.[317]

Finally, the Special Master's view that the differences he identifies between staff attorneys on the firm's payroll and those paid by an agency have any significance suggests an outdated view of the way the marketplace for legal services works today. As Rubenstein observes:

> [I]n today's current legal practice, firms have entered into far more flexible arrangements with associates and staff attorneys: for instance, many partnership-track attorneys work reduced hours (perhaps thereby removing themselves from certain benefits or legal requirements) and/or off-site or without permanent office space. To the best of my knowledge, private firms nonetheless continue to bill these attorneys at market rates, not as costs. Firms similarly bill summer law students – for whom they generally do not pay healthcare and retirement benefits – to their clients at market rates. These factual questions are complex and involve the court in inquiries irrelevant to the key concern – whether or not legal services are being provided to the client.

Rubenstein Declaration II at 15.

What matters here is not whether these seven attorneys performed their services while on the firm's payroll or being paid by an agency. What matters is the sophisticated nature and high quality of the services they rendered on behalf of the class. Nothing about their participation in the State Street Action warrants treating their time as a mere cost. *See Tyco*, 535 F.Supp.2d at

[317] Fineman Declaration at 26.

272 ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney [and] [i]t is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar.").

E. Even If The Court Agrees That The Firm's Agency Lawyers Should Be Treated Differently Than The Staff Attorneys On Firm Payroll For Purposes Of The Lodestar Cross-Check, The Special Master's Recommended Disgorgement Remedy Should Be Rejected.

There is no legal or factual basis for treating any of Lieff Cabraser's agency (contract) attorneys as a cost. *See* discussion *supra* at 77-90. If, however, the Court overrules that objection, Lieff Cabraser further objects to the Special Master's proposed "remedy" that:

> The seven contract attorneys, all retained by Lieff, recorded 2,833.5 hours in this role, at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged in return to the Class. The Customer Class is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the Class.[318]

Although made confusing by the last sentence, the firm understands the Special Master's recommendation to be that the firm should "disgorge" and "return" to the Class the difference between: a) the total of the firm's agency attorneys' lodestar, multiplied by 1.8; and b) $50 per hour for the agency lawyers' time. Assuming that is a correct reading of the recommendation, it would require that the firm pay $2,241,098.40 as a "remedy" for treating its agency attorneys as a cost ($1,325,5588 x 1.8 = $2,386,058, minus $144,960 (2899.2 hours x $50 per hour)).

[318] Report at 367-368. As noted above, the dollar figures and hours noted by the Special Master are misstated in the Executive Summary. Executive Summary at 50. And the hours are also misstated in the Report. We use the correct hourly total (2899.2) as the basis of the proposed cost reimbursement here.

Lieff Cabraser objects to this recommendation by the Special Master, and urges the Court to reject it, for the following reasons: (1) the Special Master's recommendation again miscomprehends or ignores the limited "cross-check" purpose for which lodestar was submitted and used in the State Street Action; (2) the inclusion of Lieff Cabraser's agency lawyers in the cross-check causes no harm to the class; and (3) penalizing Lieff Cabraser in a proposed amount of $2,241,098.40 for adhering to controlling legal principles and having committed no violation of law or ethics is blatantly unjust.

1. The Special Master's Recommendation Again Miscomprehends or Ignores the "Cross-Check" Purpose for Which Lodestar Was Submitted and Used in the State Street Action.

As in the manner in which the Special Master addressed the inadvertent double accounting, the Master has again erred in recommending a disgorgement remedy by miscomprehending or ignoring the "cross-check" purpose for which the firm's lodestar was submitted in the State Street Action. *See* discussion *supra* at 34-36, 57-61, 68-72. "The Special Master's Report errs in recommending these remedies as it confuses the nature of a lodestar cross-check, applied in this case with a lodestar-based fee, not at issue here." Rubenstein Declaration II at 18. Indeed, the Special Master's reference to the "total billings" for Lieff Cabraser's agency attorneys suggests confusion between lodestar being used for cross-check purposes and constituting an actual bill or charge to the Class. Similarly, a "multiplier of 1.8" was *not* added to the firm's agency attorneys' "hours and rates," as though Lieff Cabraser had separately charged the class a multiplier on their time. Rather, the Court compared the 25% fee award ($74,541,250) with the *aggregate* lodestar submitted by *all* Plaintiffs' Counsel ($41,323,895.75), and determined that the resulting 1.8 multiplier on that aggregate lodestar was reasonable. *See* discussion *supra* at 34-36.

Accounting for Lieff Cabraser's agency attorneys' lodestar in the context of a cross-check (the only context that matters here) means that even if the Court agrees with the Special Master that the agency attorneys' time should be treated as a cost, then the only plausible outcome is the removal of the agency lawyers' lodestar ($1,325,588) from the aggregate total lodestar, merely resulting in a higher lodestar multiplier. Rubenstein summarizes the circumstance as follows:

> Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, any error in their lodestar calculation does not mean that the fee awarded was necessarily an error: the lodestar is a means not an end. The critical question is the effect that the lodestar error had on the cross-check. Specifically, reducing class counsel's lodestar (by, for example, fixing the counting and/or removing the contract attorneys' time) will mean that the 25% fee award embodies a higher lodestar multiplier, which the Court will have to ensure is still reasonable.

Rubenstein Declaration II at 19.

This is the approach taken by those courts that have reduced the hourly rates of contract attorneys submitted for lodestar cross-check purposes. Courts do not order disgorgement of the delta between the submitted and the approved lodestar; rather, they simply remove the unapproved lodestar resulting in an adjustment to the multiplier used for cross-check purposes. *See*, *e.g.*, *CitiGroup*, 965 F.Supp.2d at 401 (concluding that a 3.9 multiplier, "the multiplier based on the reduced lodestars calculated by the Court," was "above the norm in securities class action settlements of similar size," settling on a percentage fee that yielded a 2.8 multiplier); *Carlson*, 596 F.Supp.2d at 409 ("[If] the charges for the contract attorneys' time were decreased, the multiplier in this case would still be a reasonable multiplier"); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, No. 07-CIV-5947 (JST), 2016 WL 4126533, at *8-9 (N.D.Cal. August 3, 2016) ("[E]ven if the Court were to reduce the plaintiffs' lodestar to reflect the contract attorneys' lower billing rates, the multiplier that would result would still be well within an

acceptable range… A lodestar reduction is unnecessary when the effect on the multiplier is not material.").

Here, if both the double counted and the agency attorney hours are removed from Plaintiffs' Counsel's aggregate lodestar, the 1.8 multiplier the Court approved becomes a 2.07 multiplier.[319] As explained above, and as acknowledged by the Special Master, a 2.07 multiplier would be well within a reasonable range for cases like the State Street Action. *See* discussion *supra* at 57-61. As Rubenstein explains it, "utilizing empirical evidence of court-approved multipliers—this difference in the context of this case is not significant." [footnote omitted]). "Put differently, given the remarkable success Class Counsel achieved for the Class—an accomplishment that the Special Master recognizes [footnote omitted]—a 25% fee award embodying a 2.07 multiplier is fully reasonable, indeed modest." Rubenstein Declaration II at 19-20.

Given the purpose of the submission of lodestar for cross-check purposes, if the Court follows the Special Master's recommendation to treat Lieff Cabraser's agency attorneys as a cost, the proper way to address the matter is to remove those attorneys' lodestar from the aggregate lodestar used in the cross-check of the 25% fee. *See* discussion *supra* at 68-74. The Court can then determine whether or not the resulting aggregate multiplier is appropriate. For the reasons stated above, Lieff Cabraser submits that it would be.

[319] The corrected aggregate lodestar, after deducting the inadvertently double accounted hours, is $37,265,241.25. If the Lieff Cabraser agency attorneys' lodestar ($1,325,588) is also removed, the total lodestar becomes $35,939,653.25, and the $74,541,250 percentage award translates into a multiplier of 2.07. *See* Rubenstein Declaration II at 19.

2. The Inclusion of Lieff Cabraser's Agency Lawyers in the Cross-Check Causes No Harm to the Class.

In attempting to justify his recommended "remedy" for the inclusion of Lieff Cabraser's agency attorneys' time in the aggregate lodestar for cross-check purposes, the Special Master asserts that in "class actions, this is charged against class funds. Quite simply, this is far too steep a price for class members to pay for what amounts to rented workers."[320] This position is, quite simply, baseless. As explained above, there is no case law support for this proposition, and Lieff Cabraser's staff attorneys who were paid one time or at all times by an agency were far more than "rented workers." *See* discussion *supra* at 24-28, 57-61. Moreover, the class has not in any way been harmed by the inclusion of the firm's agency attorneys in the lodestar for cross-check purposes.

As discussed above, both the Court and the Special Master found that the $300 million settlement in the State Street Action was an "excellent result," providing significant economic benefits for the class. *See* discussion *supra* at 34-36, 57-61. Class members were informed of those benefits in the class notice, and were advised that Plaintiffs' Counsel would seek a fee up to approximately 25% of the amount recovered. *See* discussion *supra* at 32. Not a single class member – sophisticated institutional investors – opted out or objected to the settlement. *See* discussion *supra* at 34-36.

Based on Plaintiffs' Counsel's impressive achievement for the class, and applying controlling legal principles, the Court awarded the requested fees (and reimbursement of the requested expenses). *See* discussion *supra* at 34-36. Lieff Cabraser did not bill or charge the class and the class did not pay the firm for the hours worked by agency attorneys on the State Street Action. And the firm certainly did not bill or charge the class and the class did not pay

[320] Report 188.

Lieff Cabraser an additional lodestar multiplier. As Rubenstein puts it, the "reduction of an hour or time recalibrates the lodestar multiplier," but it "does not require the 'repayment' of that hour of time since counsel was never 'paid' for that hour of time; counsel were paid a percentage of the recovery." Rubenstein Declaration II at 20.

In these circumstances, the Class has suffered *no* harm as a result of the inclusion of the lodestar of Lieff Cabraser attorneys who were paid by an agency. The aggregate lodestar used for cross-check purposes verified the reasonableness of the same percentage-based fee amount the class was informed of and did not object to, and was later approved by the Court. *See* discussion *supra* at 34-36. The Special Master identifies no harm suffered by the Class that justifies such an unnecessary "remedy."

3. Penalizing Lieff Cabraser for Adhering to Controlling Legal Principles and Having Committed No Violation of Law or Ethics is Unjust.

The Special Master proposes penalizing Lieff Cabraser $2,241,098 (separate from and in addition to any double-counting penalty) because Lieff Cabraser included the lodestar of its staff attorneys who are paid by an agency as part of Plaintiffs' Counsel's aggregate lodestar submitted to the Court for cross-check purposes. *See* discussion *supra* at 62-66, 90-92. The Special Master asks the Court to impose this "remedy" on the firm even though the firm acted in compliance with all controlling and relevant case law in accounting for the agency lawyers as it did, and even though the firm violated no legal or ethical rules, and even though the Special Master finds no difference in the academic or professional backgrounds of, or the quality or nature of the work performed, by those lawyers. *See* discussion *supra* at 57-61. Rather, the Special Master recommends that this Court assess the firm $2,241,098 because the Special Master does not like the state of the law and has a different view of how agency and contract lawyers should be treated in the context of class action fee applications. *See* discussion *supra* at 82. This is a

blatantly unfair and unjust basis upon which to extract such an extraordinary sum of money from the firm. The Special Master's recommendation should be rejected.[321]

F. Lieff Cabraser Should Be Reimbursed For The Amount Of Money It Has Spent Responding To The Chargois Investigation.

The Special Master finds that Lieff Cabraser was not aware of the Chargois Arrangement, and justifiably believed Chargois to be Labaton's local counsel, and therefore bears no responsibility for the non-disclosure of the Chargois Arrangement or Chargois' involvement (or lack thereof) in the State Street Action. *See* discussion *supra* at 63-64. That conclusion is in all respects consistent with the factual record. *See* discussion *supra* at 49-56. The firm therefore respectfully requests that the Court adopt the Special Master's exclusion of Lieff Cabraser from any responsibility relating to Chargois.[322]

Based on his findings that the firm "was misled into agreeing to share in the Chargois payment" (24% of 5.5% of the total fee award ($4,099,768.75)), the Special Master states that "[o]rdinarily some recompense would be in order for this."[323] The Special Master goes on to note, however, that when asked at the April 13, 2018 Final Hearing, "what if any relief" the firm was seeking for being misled, Lieff Cabraser's general counsel, Heimann, "indicated he was not looking for any repayment."[324] The Special Master concluded therefore that the "fairest result for the Lieff firm would be for it to be relieved of its obligations to Labaton under the claw-back

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[321] Of course, Lieff Cabraser's total lodestar, including that of its agency attorneys, benefited all Plaintiffs' Counsel, including ERISA Counsel, in that the Court's lodestar cross-check in support of the 25% fee award took into account all of the lodestar submitted. Therefore, any reduction in the fee award as a result of the removal of agency attorney lodestar (or double-counted lodestar) must apply to all Plaintiffs' Counsel.

[322] Although it is unnecessary to address in this Response and Objections, in the course of the investigation Lieff Cabraser has challenged the views of the Special Master and Gillers on the applicable "disclosure" rules. *See e.g.*, Ex. 234 to Report, Rubenstein Report; Ex. 244 to Report, Dacey Report; and, Rubenstein Declaration II at 2-9.

[323] Report at 352.

[324] *Id*.

letter as to Chargois, but no more."[325] Lieff Cabraser respectfully requests that the Court adopt the Special Master's recommendation that it be relieved of any further obligations to Labaton under the claw-back agreement as to any prior or future financial obligations relating to Chargois.

Although during the Final Hearing, Heimann, speaking for the firm, declined to seek reimbursement from Labaton and/or Thornton of the approximately $1 million the firm effectively contributed to Chargois' $4.1 million fee, and although Lieff Cabraser abides by that position now, the firm *does* seek reimbursement from Labaton and/or Thornton of the costs the firm has incurred in responding to the Chargois investigation, an exercise for which Lieff Cabraser is in no way responsible. The firm seeks repayment of the amount it has contributed to the Special Master's fees and expenses that are attributable to the Chargois investigation, as well as the amount of costs and lodestar expended by the firm in addressing the Special Master's Chargois-related inquiries.

The Chargois investigation has resulted in significant expenditures of time and expense by Lieff Cabraser. The firm was drawn into the Chargois phase of the investigation through no fault of its own. *See* discussion *supra* at 49-56, 63-64.[326] Under such circumstances, reimbursement to Lieff Cabraser is appropriate under Rule 53 and the discretion of the Court. *See* Rule 53(g)(3) of the Federal Rules ("The court must allocate payment among the parties after considering the nature and amount of the controversy, the parties' means, and the extent to which any party is more responsible than other parties for the reference to a master"); *Chevron*

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[325] *Id*.

[326] The Special Master recommends directing $3.4 million of the $4.1 million Chargois "remedy" to ERISA Counsel because "this investigation has resulted in great expenditures of time and expense to the ERISA firms that have been drawn into it through no fault of their own,…." Report at 369.

Corporation v. Donziger, 11-CIV-0691 (LAK), 2017 WL 6729360, *6 (S.D.N.Y. Dec. 8, 2017) (under Rule 53(g)(3) an "interim allocation may be amended to reflect a decision on the merits").

Because the firm does not at this time know how much of the $912,000 the firm has thus far contributed to the Special Master's fees and expenses is attributable to the Chargois investigation, Lieff Cabraser proposes that if the Court agrees that the firm should be reimbursed for the amount of money it has spent responding to the Chargois investigation, it also direct the Special Master to advise the firm of the total cost (either in aggregate dollars or on a percentage of the $3.8 million) has been spent on the Chargois investigation. The firm would then submit to the Court that information, along with details supporting the firm's out-of-pocket costs and lawyer time devoted to responding to the Chargois investigation as part of a specific request for reimbursement.

IV. CONCLUSION – The Financial Impact Of The Special Master's Disgorgement Recommendations On Lieff Cabraser Are Unjust And Entirely Disproportionate To The Firm's True Conduct And The Absence Of Harm It Has Caused To The Class.

The Special Master's Final Thoughts on Remedies in the conclusion of his Report underscores how unjust and entirely disproportionate the Special Master's recommended punitive monetary remedies are as to Lieff Cabraser. The Special Master claims that the "intent here has been to identify true and unmistakable professional misconduct, to remedy wrongs and to put the law firms and the class roughly in a position that is proportionate to the conduct and the harm."[327] Yet, the Special Master finds that Lieff Cabraser did not engage in *any* professional misconduct, let alone any "true and unmistakable" conduct. Further the Master concludes that the firm bears the least amount of responsibility for the accidental, inadvertent double-counting of the lodestar of four staff attorneys (an unintentional overstatement of

[327] Report at 376.

$868,417). For that honest mistake, which caused no harm to the class, the Special Master recommends that Lieff Cabraser "return" to the class $1,352,667. There is nothing proportionate about the Master's punitive recommendation in this regard.

Similarly, Lieff Cabraser has committed no "wrongs" that justify the Special Master's recommendation that Lieff Cabraser "return" $2,241,098 (the actual lodestar of $1,325,588 plus a punitive multiplier) to the class because the Master disagrees with the unequivocal and abundant case law that supports Lieff Cabraser including the lodestar of seven of its staff attorneys who were paid by an agency in the lodestar submitted for cross-check purposes. There is nothing proportionate about imposing a $2,241,098 penalty on Lieff Cabraser for the firm faithfully following the law and having caused no harm to the class by doing so.

Having found Lieff Cabraser engaged in no intentional or professional misconduct and violated no rule of law or ethics, the Special Master seeks to justify the imposition of millions of dollars of monetary forfeiture by claiming that "even after the allocation of all monetary amounts, and the cost of the investigation, [Lieff Cabraser] will still receive its base lodestar plus a significant multiplier."[328] Nothing could be further from the truth. In fact, if the Court accepts the Special Master's recommendation that the firm disgorge $3,593,765 – or approximately 24% of the $15,116,965.50 in fees the firm received – in addition to (a) the $912,000 the firm has already paid to fund its share of the Special Master's investigation, and, (b) the $2.39 million the firm has spent in time and costs responding to the investigation, the firm will receive *less* than its "base lodestar" and, in fact, a *negative* multiplier (0.92%) for its exemplary service to the class in

[328] Report at 376.

the State Street Action. There is nothing "proportionate" about the Master's recommendations concerning Lieff Cabraser's conduct in this case.

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Respectfully submitted,

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APPENDIX A

Arkansas Teacher Retirement System
v.
State Street Bank and Trust Company

United States District Court
District of Massachusetts
No. 11-cv-10230 MLW

Lieff Cabraser Heimann & Bernstein, LLP's State Street Action Staff Attorneys[1]

- **Tanya Ashur:** University of Illinois, Urbana, Illinois, B.A. 1997; Chicago-Kent College of Law, Chicago, Illinois, J.D. 2000. Admitted Illinois, 2000; California, 2002.

  Prior to working for Lieff Cabraser, Ms. Ashur worked as an associate for Deloitte & Touche, Adams Nye, and Gordon & Rees, all in San Francisco, California. Ms. Ashur had extensive document review and analysis experience in complex litigation matters for Latham Watkins, Orrick, Google, and Gibson Dunn.

  Ms. Ashur began working for Lieff Cabraser in 2013. From 2013 into 2015, Ms. Ashur worked extensively on the BONY Mellon Action (2,414.80 hours). In 2015, Ms. Ashur devoted 843.50 hours at $415 per hour to document review and analysis in the State Street Class Action. She worked in the firm's San Francisco office. Ms. Ashur is currently in her sixth year with the firm. Ms. Ashur was and is compensated directly by the firm.

- **Joshua Bloomfield:** University of Pennsylvania, Pennsylvania, Philadelphia, PA, B.A. 1996; UCLA School of Law, Los Angeles, CA, J.D. 2000. Admitted California, 2001.

  Mr. Bloomfield worked as an associate for Jeffer Mangels in Los Angeles, California and Holland & Knight in San Francisco, California, before starting his own civil and criminal litigation firm. Mr. Bloomfield had extensive document review and analysis experience in complex litigation matters for King & Spalding, Paul Hastings, Morrison Foerster, Gibson Dunn, Wilmer Hale, Orrick, Sidley Austin, Jones Day, DLA Piper, and Skadden.

[1] All of the information contained in this Appendix A about Lieff Cabraser's staff attorneys is found in Ex. A to the Fineman Declaration at 18-40, and in Ex. C to the Fineman Declaration in Response to Interrogatory Numbers 24 and 25.

Mr. Bloomfield began working for Lieff Cabraser in 2013. From 2013 into 2015, Mr. Bloomfield worked extensively on the BONY Mellon Action (2,183.00 hours). In 2013 and 2015, Mr. Bloomfield devoted 2,033.20 hours at $515 per hour to document review and analysis in the State Street Class Action. He worked remotely in San Francisco, California. Mr. Bloomfield left the firm in late 2015. From 2013 through 2014, Mr. Bloomfield was compensated by an agency (which billed the firm for his services). In 2015 Mr. Bloomfield was compensated directly by the firm.

- **Elizabeth Brehm:** Boston University, Boston, Mass, B.S. 2001; Hofstra University School of Law, Hempstead, NY, J.D., magna cum laude, 2008. Admitted New York, 2008.

  Prior to working for Lieff Cabraser, Ms. Brehm worked as an associate for Winston & Strawn and Kirby McInerney, both in New York, New York. During her time at Kirby – a leading plaintiff-side litigation firm – Ms. Brehm focused on antitrust, securities and financial fraud cases, and gained relevant experience with numerous document review projects in financial fraud cases.

  Ms. Brehm began working for Lieff Cabraser in 2013. From 2013 into early 2015, Ms. Brehm devoted 1,682.90 hours at $415 per hour to document review and analysis in the State Street Class Action. She worked remotely in New York, New York. Ms. Brehm left the firm in late 2015. Ms. Brehm was compensated directly by the firm.

- **Jade Butman:** Dartmouth College, Hanover, NH, B.A. 1992; University of Pittsburgh School of Law, Pittsburgh, PA, J.D. 1997. Admitted New Hampshire, 1997; New York, 1998; California, 2005.

  Prior to working for Lieff Cabraser, Ms. Butman worked as an associate for Constantine Cannon (antitrust) and Kaplan Landau (commercial litigation) in New York, New York, and for Keller Grover (consumer class cases) in San Francisco, California. Ms. Butman had additional extensive and relevant document review in complex litigation matters for Viacom in New York, and Robbins Geller and Berman DeValerio (plaintiff-side class action firms) in San Francisco, California.

  Ms. Butman worked for Lieff Cabraser in 2014 and 2015. In 2015, Ms. Butman devoted only 24.00 hours at $515 per hour to document review and analysis in the State Street Class Action. She worked in the firm's San Francisco office. Ms. Butman left the firm at the end of 2015. Ms. Butman was compensated by an agency (which billed the firm for her services).

- **James Gilyard:** San Francisco State University, San Francisco, California, B.A. 1999; University of San Francisco School of Law, San Francisco, California, J.D. 2002. Admitted California, 2002.

Prior to working for Lieff Cabraser, Mr. Gilyard worked as an associate for Robbins Geller (a plaintiff-side class action firm), in San Francisco, California, where, among other things, he gained extensive experience in document review and analysis. Mr. Gilyard had additional extensive document review and analysis experience in complex litigation matters for Bingham McCutchen, Morrison & Foerster, and Wilson Sonsini, among others.

Mr. Gilyard began working for Lieff Cabraser in 2013. From 2013 into 2015, Mr. Gilyard worked extensively on the BONY Mellon Action (2,614.50 hours). In 2015, Mr. Gilyard devoted 882 hours at $415 per hour to document review and analysis in the State Street Class Action. He worked in the firm's San Francisco office. Mr. Gilyard left Lieff Cabraser in late 2016. Mr. Gilyard was compensated directly by the firm.

- **Kelly Gralewski:** California State University, Chico, San Diego, California, B.S. and B.A. 1992; California Western School of Law, San Diego, California, J.D. 1997. Admitted California, 1998.

  Prior to working for Lieff Cabraser, Ms. Gralewski worked as an associate for Peterson & Price, a real estate, business law and dispute resolution firm in San Diego, California. While there, Ms. Gralewski gained experience in the review and analysis of corporate documents.

  Ms. Gralewski began working for Lieff Cabraser in 2009. Since then, and continuing to today, Ms. Gralewski has worked on a number of financial fraud cases at Lieff Cabraser. In 2012 and 2015, Ms. Gralewski worked on the BONY Mellon Action (301.50 hours). In 2013 and 2015, Ms. Gralewski devoted 1,478.90 hours at $415 per hour to document review and analysis in the State Street Class Action. She worked remotely in San Diego, California. Ms. Gralewski was and is compensated directly by the firm.

- **Christopher Jordan:** University of North Carolina, Chapel Hill, North Carolina, B.A. 2000; Stanford Law School, Stanford, California, J.D. 2004. Admitted California, 2011; Texas, 2012.

  Prior to working for Lieff Cabraser, Mr. Jordan worked extensively in the management, supervision of, and execution of large scale document review and analysis projects in complex litigation matters for Debevoise & Plimpton in New York and Troutman Sanders in Atlanta, Georgia.

  Mr. Jordan began working for Lieff Cabraser in 2012. In 2014 and 2015, Mr. Jordan worked extensively on the BONY Mellon Action (1,572.90). In 2015, Mr. Jordan devoted 539.90 hours at $415 per hour to document review and analysis in the State Street Class Action for Lieff Cabraser. He worked additional hours in the State Street Class Action that were attributed to Thornton. He worked remotely in Houston, Texas and Atlanta, Georgia. Mr. Jordan remains engaged

by Lieff Cabraser on document review and analysis projects. Mr. Jordan was and is compensated directly by the firm.

- **Jason Kim:** University of California at Davis, Davis, California, B.A. 2002; Thomas Jefferson School of Law, San Diego, California, J.D. 2009. Admitted California, 2009.

  Prior to working for Lieff Cabraser, Mr. Kim worked as an associate for the full service litigation firm, Renchner Law Group in San Francisco, California, before starting his own civil litigation law firm in Santa Clara, California. Mr. Kim had extensive document review and analysis experience in complex litigation matters for McDermott Will & Emory, Quinn Emmanuel, and Crowell Moring.

  Mr. Kim began working for Lieff Cabraser in 2011. From 2013 into 2015, Mr. Kim worked extensively on the BONY Mellon Action (2,659.00). In 2015, Mr. Kim devoted 904 hours at $415 per hour to document review and analysis in the State Street Class Action. He worked in the firm's San Francisco office. Mr. Kim is currently engaged by Lieff Cabraser on document review and analysis projects. Mr. Kim was and is paid directly by the firm.

- **James Leggett:** University of California, Davis, Davis, California, B.A. 2004; Santa Clara University School of Law, Santa Clara, California, J.D., cum laude, Order of the Coif, 2012. Admitted California, 2012.

  Prior to law school, Mr. Leggett worked as a private banker at UMB Bank in Denver, Colorado for almost four years. Immediately after law school, Mr. Leggett performed document review and analysis in financial fraud and employment cases at the plaintiff-side litigation firm Schneider Wallace in San Francisco, California.

  Mr. Leggett began working for Lieff Cabraser in 2013. From 2013 into 2015, Mr. Leggett worked extensively on the BONY Mellon Action (2,476.20 hours). In 2015, Mr. Leggett devoted 893 hours at $415 per hour to document review and analysis in the State Street Class Action. He worked in the firm's San Francisco office. Mr. Leggett is currently engaged by Lieff Cabraser on document review and analysis projects. In 2013 and into 2015 Mr. Leggett was compensated by an agency (which billed the firm for his services). Since the end of January 2015, Mr. Leggett has been compensated directly by the firm.

- **Coleen Liebmann:** University of the Pacific, B.A. 1992; University of San Francisco School of Law, San Francisco, California, J.D. 2003. Admitted California, 2006.

  Prior to working for Lieff Cabraser, Ms. Liebmann had more than 11 years of experience in document and privilege review and analysis in complex litigation matters for a number of the country's most prestigious law firms, including Williams & Connolly, Latham & Watkins, DLA Piper, Quinn Emmanuel,

Morrison Foerster, Perkins Coie, Wilmer Hale, O'Melveny & Myers, Jones Day, and Farella Braun & Martel.

Ms. Liebmann began working for Lieff Cabraser in 2014. In 2015, Ms. Liebmann devoted only 24 hours at $415 per hour to document review and analysis in the State Street Class Action. She worked in the firm's San Francisco office. Ms. Liebmann remains engaged by Lieff Cabraser on document review and analysis projects. Ms. Liebmann was and is compensated directly by the firm.

- **Andrew McClelland:** University of California, Davis, Davis, California, B.A. 2002; University of the Pacific, McGeorge School of Law, Sacramento, CA, J.D., Order of the Coif, 2008. Admitted California, 2008.

  Prior to working for Lieff Cabraser, Mr. McClelland worked as an associate for the construction defect litigation firm, Boornazian, Jensen & Garthe in Oakland, California, and as an associate for a similar firm, Lorber Greenfield & Polito, in San Francisco, California. At both firms, Mr. McClelland had extensive document review and analysis experience. In addition, Mr. McClelland conducted document review and analysis in complex litigation matters for Bingham and Smith Lillis Pitha, in San Francisco, California.

  Mr. McClelland began working for Lieff Cabraser in 2013. From 2013 into 2015, Mr. McClelland worked extensively on the BONY Mellon Action (1,799.00 hours). In 2015, Mr. McClelland devoted 58 hours at $415 per hour to document review and analysis in the State Street Class Action attributable to Lieff Cabraser. He worked additional hours in the State Street Class Action that were attributed to Thornton. He worked in the firm's San Francisco office. Mr. McClelland left Lieff Cabraser in 2015. Mr. McClelland was compensated by an agency (which billed the firm or Thornton for his services).

- **Scott Miloro:** Cornell University, Ithaca, New York, B.S. 1994; State University of New York at Buffalo, Buffalo, New York, M.S. 1996; Cardozo School of Law, New York, New York, J.D. 2006. Admitted New York, 2006; United States Patent and Trademark Office, 2006.

  Prior to working for Lieff Cabraser Mr. Miloro spent more than three years as an associate at the intellectual property firm of Ohlandt, Greely, Ruggiero & Perle in Stamford, Connecticut. In that capacity, Mr. Miloro gained extensive experience in reviewing and analyzing complex technical documents.

  Mr. Miloro began working for Lieff Cabraser in 2011. From 2012 into 2015, Mr. Miloro worked extensively on the BONY Mellon Action (3,146.80). In 2015, Mr. Miloro devoted 658.80 hours at $415 per hour to document review and analysis in the State Street Class Action. He worked in the firm's New York office. Mr. Miloro remains engaged by Lieff Cabraser on document review and analysis projects. Mr. Miloro was and is paid directly by the firm.

- **Leah Nutting:** University of California Berkeley, Berkeley, California, B.A. 1999; Harvard Law School, Cambridge, Massachusetts, J.D. 2002. Admitted California, 2002.

  Prior to working for Lieff Cabraser, Ms. Nutting was an associate in the securities litigation group at Clifford Chance, and then in the general litigation group at Orrick, both in San Francisco, California. During her four years at those two firms, Ms. Nutting had extensive experience in investigating complex financial fraud matters, including experience in document review and analysis. Ms. Nutting also engaged in extensive document review in complex litigation matters for Kilpatrick Townsend, Bloomberg, and Morrison Foerster.

  Ms. Nutting began working for Lieff Cabraser in 2012. From 2012 into 2015, Ms. Nutting worked extensively on the BONY Mellon Action (3,128.40 hours). In 2013 and 2015, Ms. Nutting devoted 1,940.10 hours at $415 per hour to document review and analysis in the State Street Class Action. She worked remotely in San Francisco, California. Ms. Nutting is currently engaged by Lieff Cabraser on document review and analysis projects. Through early 2016, Mr. Nutting was compensated by an agency (which billed the firm for her services). Since early 2015, Ms. Nutting has been paid directly by the firm.

- **Marissa Oh:** Rice University, Houston, Texas, B.A. 1999; Stanford Law School, Stanford, California, J.D. 2004. Admitted California, 2004.

  Prior to working for Lieff Cabraser, Ms. Oh (formerly Marissa Lackey) was an associate at Orrick in San Francisco, California, where she gained extensive experience in financial fraud litigation and where her responsibilities included coordination and supervision of document reviews. Ms. Oh also has extensive document review and analysis experience in complex litigation matters at various top tier law firms, including Keker & Van Nest and Morrison Foerster in San Francisco, California.

  Ms. Oh began working for Lieff Cabraser in 2013. From 2013 into 2015, Ms. Oh worked extensively on the BONY Mellon Action (2,575.70 hours). In 2015, Ms. Oh devoted 800.30 hours at $515 per hour to document review and analysis in the State Street Class Action. She worked in the firm's San Francisco office. Ms. Oh remains engaged by Lieff Cabraser on document review and analysis projects. Ms. Oh was and is compensated directly by the firm.

- **Peter Roos:** University of Limburg, Maastricht, The Netherlands, J.D. 1989; University of San Francisco School of Law, L.L.M. 2001. Admitted The Netherlands, 1989; California, 2002.

  Prior to working for Lieff Cabraser, for more than 18 years, Mr. Roos was an associate and then a partner at Baker & McKenzie in Amsterdam, The Netherlands, and in Palo Alto, California. During those years, Mr. Roos gained extensive experience in financial and corporate transactions and documentation.

In more recent years, Mr. Roos engaged in extensive document review and analysis in complex litigation matters for such major American law firms as Jeffer Mangels, Gibson Dunn, Morrison Foerster, Paul Hastings, and Hopkins & Carley, among others.

Mr. Roos began working for Lieff Cabraser in 2013. In 2015, Mr. Roos devoted 780 hours at $415 per hour to document review and analysis in the State Street Class Action. He worked in the firm's San Francisco office. Mr. Roos remains engaged by Lieff Cabraser on document review and analysis projects. Mr. Roos was and is compensated directly by the firm.

- **Ryan Sturtevant:** University of California, Santa Barbara, Santa Barbara, California, B.A. 2001; University of California, Santa Barbara, Santa Barbara, California, M.A. 2003; University of California, Hastings College of the Law, San Francisco, California, J.D. 2005. Admitted California, 2006.

  Prior to working for Lieff Cabraser, Mr. Sturtevant gained extensive experience in document review and analysis in complex litigation matters for a number of major American law firms, including Bingham, Cooley, Morrison Foerster, Wilson Sonsini, O'Melveny & Myers, and Jones Day. In particular, Mr. Sturtevant gained experience in securities and financial fraud class actions.

  Mr. Sturtevant began working for Lieff Cabraser in 2013. In 2015, Mr. Sturtevant devoted 796 hours at $415 per hour to document review and analysis in the State Street Class Action. He worked in the firm's San Francisco office. Mr. Sturtevant is currently engaged by Lieff Cabraser on document review and analysis projects. Until early 2015, Mr. Sturtevant was compensated by an agency (which billed the firm for his services). From the end of January to this day Mr. Sturtevant has been paid directly by the firm.

- **Virginia Weiss:** University of Northern Iowa, B.A. 2004; University of Kansas School of Law, J.D. 2007. Admitted Minnesota, 2007; California, 2010.

  Prior to working for Lieff Cabraser, Ms. Weiss dedicated more than 15 years to document review and analysis in complex litigation matters for numerous law firms and organizations, including Epstein Becker and Crowell and Moring, in San Francisco, California.

  Ms. Weiss began working for Lieff Cabraser in 2014. In 2014 and into 2015, Ms. Weiss worked extensively on the BONY Mellon Action ((1,445.80 hours). In 2015, Ms. Weiss devoted 473.50 hours at $415 per hour to document review and analysis in the State Street Class Action for Lieff Cabraser. She spent additional time on the case in 2015 which was paid for by the Thornton firm. She worked remotely in Rochester, Minnesota and Sacramento, California. Ms. Weiss continues to work on document review and analysis projects for Lieff Cabraser. Ms. Weiss was and is compensated by an agency (which bills the firm for her services).

- **Jonathan Zaul:** University of California, Berkeley, Berkeley, California, B.A. 2004; University of San Francisco School of Law, San Francisco, California, J.D. 2009. Admitted California, 2009.

  Following law school and a judicial clerkship, Mr. Zaul opened his own transactional and civil litigation law firm where he served as the principal.

  Mr. Zaul began working for Lieff Cabraser in 2012. From 2013 into 2015, Mr. Zaul worked extensively on the BONY Mellon Action (2,197.90. In 2015, Mr. Zaul devoted 495.20 hours at $415 per hour to document review and analysis in the State Street Class Action for Lieff Cabraser. Mr. Zaul worked additional hours on the State Street Class Action that were attributed to Thornton. He worked remotely in San Francisco, California. Mr. Zaul is currently engaged by Lieff Cabraser on document review and analysis projects. Mr. Zaul was and is compensated directly by the firm.

APPENDIX B

Arkansas Teacher Retirement System
v.
State Street Bank and Trust Company

United States District Court
District of Massachusetts
No. 11-cv-10230 MLW

Lieff Cabraser Heimann & Bernstein, LLP's State Street Action Staff Attorneys[1]

Name	Undergrad	Law School	Grad. Year	Years in Practice as of 2016 (following first bar admission)	Tenure with Lieff Cabraser	Billing Rate in 2016	Hours Worked on BONY Mellon	Hours Worked on State Street	LCHB Payroll or Agency	Worked in LCHB Office or Remotely in 2013-15
Tanya Ashur	University of Illinois	Chicago-Kent College of Law	2000	17+	2013 – present	$415	2,414.50	843.50	Payroll	Office (SF)
Joshua Bloomfield	University Pennsylvania	UCLA School of Law	2000	16+	2013 - 2015	$515	2,183.00	2,033.20	Agency; Payroll (Jan. 2015)	Remote (SF)
Elizabeth Brehm	Boston University	Hofstra University School of Law	2008	9+	2013 – 2015	$415	None	1,682.90	Payroll	Remote (NY)

[1] All of the information contained in this Appendix A about Lieff Cabraser's staff attorneys is found in Ex. A to the Fineman Declaration at 18-40, and in Ex. C to the Fineman Declaration in Response to Interrogatory Numbers 24 and 25.

Name	Undergrad	Law School	Grad. Year	Years in Practice as of 2016 (following first bar admission)	Tenure with Lieff Cabraser	Billing Rate in 2016	Hours Worked on BONY Mellon	Hours Worked on State Street	LCHB Payroll or Agency	Worked in LCHB Office or Remotely in 2013-15
Jade Butman	Dartmouth College	University of Pittsburgh School of Law	1997	20+	2014 – 2015	$515	None	24.00	Agency	Office (SF)
James Gilyrad	San Francisco State University	University of San Francisco School of Law	2002	15+	2013 – 2016	$415	2,614.50	882.00	Payroll	Office (SF)
Kelly Gralewski	California State University, Chico	California Western School of Law	1997	19+	2009 – present	$415	301.50	1,475.90	Payroll	Remote (San Diego, CA)
Christopher Jordan	University of North Carolina	Stanford Law School	2004	6+	2012 – present	$415	1,572.90	539.90	Payroll	Remote (Houston, TX and Atlanta, GA)
Jason Kim	University of California, Davis	Thomas Jefferson School of Law	2009	8+	2016 – present	$415	2,659.00	904.00	Payroll	Office (SF)
James Leggett	University of California, Davis	Santa Clara University School of Law	2012	5+	2013 – present	$415	2,476.20	893.00	Agency; Payroll (Jan. 2015)	Office (SF)

Name	Undergrad	Law School	Grad. Year	Years in Practice as of 2016 (following first bar admission)	Tenure with Lieff Cabraser	Billing Rate in 2016	Hours Worked on BONY Mellon	Hours Worked on State Street	LCHB Payroll or Agency	Worked in LCHB Office or Remotely in 2013-15
Coleen Liebmann	University of the Pacific	University of San Francisco School of Law	2003	11+	2014 – present	$415	None	24.00	Payroll	Office (SF)
Andrew McClelland	University of California, Davis	McGeorge School of Law	2008	9+	2013 – 2015	$415	1,799.00	58.00	Agency	Office (SF)
Scott Miloro	Cornell University	Cardozo School of Law	2006	11+	2011 – present	$415	3,146.80	658.80	Payroll	Office (NY)
Leah Nutting	University of California, Berkeley	Harvard Law School	2002	15+	2012 – present	$415	3,128.40	1,940.10	Agency; Payroll (Jan. 2015)	Remote (SF)
Marissa Oh	Rice University	Stanford Law School	2004	17+	2013 – present	$515	2,576.70	800.30	Payroll	Office (SF)
Peter Roos		University of Limburg J.D. University of San Francisco School of Law L.L.M.	1989 2002	27+ (15+ in the U.S.)	2013 – present	$415	None	780.00	Payroll	Office (SF)
Ryan Sturtevant	University of California, Santa Barbara	University of California, Hastings College of the Law	2005	11+	2012 – present	$415	None	796.00	Agency; Payroll (Jan. 2015)	Office (SF)

Name	Undergrad	Law School	Grad. Year	Years in Practice as of 2016 (following first bar admission)	Tenure with Lieff Cabraser	Billing Rate in 2016	Hours Worked on BONY Mellon	Hours Worked on State Street	LCHB Payroll or Agency	Worked in LCHB Office or Remotely in 2013-15
Virginia Weiss	University of Northern Iowa	University of Kansas School of Law	2007	10+	2014 – present	$415	1,445.80	473.50	Agency	Remote (Rochester, MN and Sacramento, CA)
Jonathan Zaul	University of California, Berkeley	University of San Francisco School of Law	2009	8+	2012 – present	$415	2,197.90	495.20	Payroll	Remote (SF)

APPENDIX C

Arkansas Teacher Retirement System
v.
State Street Bank and Trust Company

United States District Court
District of Massachusetts
No. 11-cv-10230 MLW

Special Master Investigation – Deponents List

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
Labaton	Alpers, David	6/5/17	62	70 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Bolano, Maritza	6/5/17	32	45 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Greene, Tryphena	6/5/17	30	32 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Thornton	Hoffman, E.	6/5/17	120	148 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Kussin, Todd	6/5/17	77	78 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Orji, Comfort	6/5/17	22	27 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Ashur, T.	6/6/17	48	65 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Fineman, S.	6/6/17	105	113 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Gralewski, K.	6/6/17	22	27 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
LCHB	Jordan, C.	6/6/17	39	52 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Oh, M.	6/6/17	38	44 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Zaul, J.	6/6/17	37	51 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Belfi, E.	6/14/17	70	77 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Hopkins, G.	6/14/17	119	126 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Politano, R.	6/14/17	67	63 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Sucharow, L.	6/14/17	73	78 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Zeiss, N.	6/14/17	87	103 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Chiplock, D.	6/16/17	226	274 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
LCHB	Dugar, K.	6/16/17	115	116 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Rogers, M.	6/16/17	103	95 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Thornton	Bradley, G.	6/19/17	92	105 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Thornton	Bradley, M.	6/19/17	68	81 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Thornton	Lesser, M.	6/19/17	84	106 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Thornton	Thornton, M.	6/19/17	101	173 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
ERISA	Kober, Alan	7/6/17	35	55 minutes	In Person: Hylenski, McEvoy, Sinnott, Toothman Note- At the outset, Sinnott said that Rosen would be joining the deposition, but Rosen's appearance is not noted in the record.
ERISA	Kravitz, Carl	7/6/17	128	212 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Sarko, Lynn	7/6/17	120	166 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Strangeland, James	7/6/17	25	41 minutes	In Person: Hylenski, McEvoy, Sinnott, Toothman
ERISA	Wallace, Janet	7/6/17	19	27 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Axelrod, Jonathon	7/7/17	56	80 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Brickman, Michael	7/7/17	63	97 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Cohn, Michael	7/7/17	29	42 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Henriquez, Arnold	7/7/17	24	24 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	McTigue, Brian	7/7/17	104	153 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
ERISA	Taylor, William	7/7/17	20	22 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Goldberg, Howard	7/17/17	63	64 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Goldsmith, David	7/17/17	177	300 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
LCHB	Heimann, R.	7/17/17	112	135 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Johnson, James	7/17/17	57	62 minutes	In Person: Hylenski, McEvoy, Rosen, Sinnott, Toothman
Labaton	Sucharow, L.	9/1/17	117	148 minutes	In Person: Kelly, McEvoy, Rosen, Sinnott Phone: Hylenski, Toothman
Thornton	Thornton, M.	9/1/17	160	227 minutes	In Person: Kelly, McEvoy, Rosen, Sinnott Phone: Toothman
Labaton	Belfi, E.	9/5/17	124	201 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman
Labaton	Hopkins, G.	9/5/17	107	126 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman
LCHB	Chiplock, D.	9/8/17	146	183 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman
ERISA	McTigue, Brian	9/8/17	42	57 minutes	In Person: Rosen, Sinnott Phone: Hylenski, Toothman
ERISA	Sarko, Lynn	9/8/17	130	198 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman
ERISA	Kravitz, Carl	9/11/17	115	159 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman
LCHB	Lieff, R.	9/11/17	107	164 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
Labaton	Politano, R.	9/11/17	24	29 minutes	In Person: Kelly, Rosen, Sinnott Phone: Hylenski, Toothman
Thornton	Bradley, G.	9/14/17	164	196 minutes	In Person: Kelly, Rosen, Sinnott, Phone: Hylenski, McEvoy, Toothman
Labaton	Zeiss, N.	9/14/17	159	243 minutes	In Person: Kelly, Rosen, Sinnott, Phone: Hylenski, McEvoy, Toothman
Labaton	Goldsmith, David	9/20/17	259	419 minutes	In Person: Kelly, Rosen, Sinnott, Phone: Hylenski, McEvoy, Toothman
Labaton	Chargois, D.	10/2/17	322	465 minutes	In Person: Kelly, McEvoy, Mulcahy, Rosen, Sinnott Phone: Hylenski
Labaton	Keller, C.	10/13/17	263	343 minutes	In Person: Kelly, Mulcahy, Rosen, Sinnott Phone: McEvoy
Labaton	Keller, C.	10/25/17	292	428 minutes	In Person: Hylenski, Kelly, Mulcahy, Rosen, Sinnott
Experts	Gillers	3/20/18	363	567 minutes	In Person: Gillers, Lee, McEvoy, Rosen, Sinnott Phone: Hylenski
Experts	Gillers	3/21/18	70	100 minutes	In Person: Gillers, McEvoy, Rosen, Sinnott Phone: Hylenski

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
Experts	Sarrouf	3/21/18	156	234 minutes	In Person: Gillers, McEvoy, Rosen, Sinnott Phone: Hylenski
Experts	Sarrouf	3/24/18	179	200 minutes	In Person: McEvoy, Rosen, Sinnott Phone: Gillers
Experts	Joy, P.	4/3/18	184	246 minutes	In Person: Gillers, Hylenski, McEvoy, Rosen, Sinnott
Experts	Wendel	4/3/18	207	252 minutes	In Person: Gillers, Hylenski, McEvoy, Rosen, Sinnott
Experts	Green	4/4/18	173	234 minutes	In Person: Gillers, McEvoy, Rosen, Sinnott Phone: Hylenski
Experts	Lieberman	4/4/18	128	155 minutes	In Person: Gillers, McEvoy, Rosen, Sinnott Phone: Hylenski
Experts	Dacey	4/9/18	86	126 minutes	In Person: Gillers, McEvoy, Rosen, Sinnott Phone: Hylenski
Experts	Vairo, Georgene	4/10/18	110	158 minutes	In Person: McEvoy, Rosen, Sinnott Phone: Gillers
Experts	Rubenstein	4/9/18	217	340 minutes	In Person: Gillers, McEvoy, Rosen, Sinnott Phone: Hylenski
		Total Pages/Minutes	**7,273** pages	**9,827** minutes	

Firm Name/Other	Deponent's Name	Date(s) Deposed	# of Pages of Testimony	Total Deposition Time	Special Master Personnel in Attendance
				163.78 hours	

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

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

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. In the spring of 2017, the law firm Lieff Cabraser Heimann & Bernstein, LLP ("LCHB") retained me to provide my expert opinion on several aspects of these proceedings. Since that time:

- I submitted an initial declaration, dated July 31, 2017, that addressed, among other issues, the proper manner for billing non-partnership track attorneys and the relevance, for lodestar cross-check purposes, of the inadvertent double counting of staff or contract attorney lodestar.[1]

- I submitted a report, dated March 26, 2018, as a rebuttal witness, that responded to the class action aspects of Professor Stephen Gillers's February 23, 2018 expert report.[2]

- I sat for a deposition by the Special Master and his Counsel for about six hours on April 9, 2018.

The Special Master's Report[3] failed to include or address my July 31, 2017 Fee Declaration, but referenced and discussed my March 26, 2018 Rebuttal Report and April 9, 2018 deposition testimony at some length. I submit this Declaration (1) to respond to the characterizations of my testimony in the Special Master's Report, particularly as to counsel's responsibilities under Rule 23(e)(3) (Part I, *infra*); (2) to address what I believe are errors in the treatment of contract attorneys in the Special Master's Report (Part II, *infra*); and (3) to address what I regard as the

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[1] Expert Declaration of William B. Rubenstein (July 31, 2017) (hereafter "Rubenstein Fee Declaration"). Because, as noted below, the Special Master did not include this document in the record of the case, I have attached it hereto as Exhibit A. The Court will note that it contains a fuller exposition of my credentials (¶¶2–7), disclosure of my prior relationships to the firms in the case (¶8), and a full copy of my c.v. (Exhibit A).

[2] Expert Report of William B. Rubenstein (Mar. 26, 2018) (hereafter "Rubenstein Rebuttal Report").

[3] Special Master's Report and Recommendations (May 14, 2018) (hereafter "Special Master's Report").

Special Master's Report's failure to properly acknowledge the distinction between a lodestar cross-check submission and a lodestar-based fee request, an error that resulted in the illogical recommendation that LCHB "repay" more than $2 million in "lodestar" to the class (Part III, *infra*).[4]

I.
The Special Master's Report and Executive Summary Misstate and Misapply the Law Regarding Agreements Made in Connection with Class Action Settlement Proposals and Erroneously Characterize My Testimony in Several Other Respects

2. On February 23, 2018, Professor Stephen Gillers filed a report herein discussing, *inter alia*, the application of Rule 23's fee provisions – Rule 23(h) and cross-referenced Rule 54 – to the facts of this case.[5]

3. On March 26, 2018, in partial response to the Gillers Report, LCHB submitted a report entitled, "Expert Report of William B. Rubenstein." The first paragraph explained that this was my expert opinion "in response to the class action aspects of Professor Stephen Gillers's Ethical Report for Special Master Gerald E. Rosen."[6] The content emphasized that Rule 23(h), cross-referencing Rule 54(b), requires the disclosure of fee agreements only upon court order.

4. On April 9, 2018, the Special Master and his Counsel, with Professor Gillers

[4] These responses to the Special Master's Report apply as well to the corresponding sections of the Report's Executive Summary.

[5] Professor Stephen Gillers, Ethical Report for Special Master Gerald E. Rosen 66–71 (Feb. 23, 2018) (hereafter "Gillers Report").

[6] Rubenstein Rebuttal Report at ¶ 1.

seated next to them, deposed me – as a rebuttal witness[7] – for nearly six hours about the opinions expressed in the Rubenstein Rebuttal Report.

5. On May 8, 2018, Professor Gillers filed a supplemental report in which he explicitly renounced his reliance on Rule 23(h)/Rule 54[8] and reported that he accepted my interpretation of these provisions.[9]

6. On May 19, 2018, the Special Master filed his report with the Court. In that Report, he too accepts my interpretation of Rule 23(h)/Rule 54, writing:

> Although Professor Rubenstein is in agreement with the Special Master and advocates that, in the interest of transparency, fee allocation agreements should be made known to the class, *see* Rubenstein, *5 Newberg on Class Actions*, at § 15:12, ***as nothing in Rule 23 requires disclosure of fee agreements absent a court order***, the Special Master cannot conclude with certainty that as a matter of law the nondisclosure of the Chargois Agreement in the Notice provided to the class members violated any Rule of Civil Procedure.[10]

7. Despite the broad language of the underscored passage above, elsewhere in his Report the Special Master newly relies on the settlement – not fee – provision of Rule 23, contained in Rule 23(e), to argue that Lead Counsel should have disclosed its financial commitment to Damon Chargois to the Court in conjunction with submitting the settlement for

[7] Rubenstein Dep. at 35:10–12 ("THE WITNESS: All right. So I'm here as a rebuttal witness, and I haven't prepared -- THE SPECIAL MASTER: I understand."); *see also id.* at 150:13–14 ("I'm here as a rebuttal witness . . . .").

[8] Supplemental Ethical Report for Special Master Gerald E. Rosen at 78 ("I do not rely on Rules 23 and 54 for my opinion.") (hereafter "Supplemental Gillers Report").

[9] *Id.* at 92 ("Professor Rubenstein testified that his opinion was limited to duties under Rules 23 and 54. Rubenstein 4/9/18 Dep., p. 198: 21-24. He offered no opinion on duties that have their source elsewhere. I accept Professor Rubenstein's interpretation of the Rules of Civil Procedure.").

[10] Special Master's Report at 280 (emphasis added).

approval.[11] In doing so, the Special Master's Report explicitly states that it is relying upon the interpretation of that provision I provide in the class action treatise that I author (*Newberg on Class Actions*).[12] I cited and discussed this section in my report rebutting Professor Gillers's Report,[13] and, although the Special Master and his Counsel read from this short section at my deposition,[14] neither asked me about their proposed interpretation of Rule 23(e)(3). Accordingly, I have not had the opportunity to review and respond to it. I write now to do so and to ensure that my views are properly set forth in the record.

8. Rule 23(e)(3) states that "parties seeking approval [of a class action settlement] must file a statement identifying any agreement made in connection with the proposal."[15] In the *Newberg* Treatise (a) I first report that courts have not applied this provision to fee allocation agreements;[16] and (b) I then argue that they should consider doing so because "some agreements among counsel would impact settlement *terms* and hence should be disclosed to the class."[17] In the *Newberg* Treatise, I provide as an example a situation whereby "one set of counsel's fee

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[11] *Id*. at 305–09.

[12] *Id.* (discussing William B. Rubenstein, 5 *Newberg on Class Actions* § 15:12 (5th ed.)) (hereafter "Rubenstein, *Newberg on Class Actions*").

[13] Rubenstein Rebuttal Report at 4 & n.6; *see also id.* at 7 & n.20; *id.* at 29 & n.94; *id.* at 30 & n.100.

[14] *See, e.g.*, Rubenstein Dep. at 53:19–54:19.

[15] Fed. R. Civ. P. 23(e)(3).

[16] Rubenstein, 5 *Newberg on Class Actions, supra* note 12, at § 15:12 ("Courts generally do not read Rule 23(e)'s disclosure requirement as requiring disclosure of fee agreements among counsel on the ground that such agreements do not necessarily affect the class's interests.") (citing *Hartless v. Clorox Co*., 273 F.R.D. 630, 646 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) ("The allocation of . . . fees amongst class counsel does not affect the monetary benefit to class members.")).

[17] *Id.* (emphasis added).

allocation was capped at a certain amount, [such] that counsel would have less interest in pushing further on behalf of the class once her cap was met."[18]

9. The Special Master's Report embraces my approach and, applying it, concludes (a) that Rule 23(e)(3) should legally govern Lead Counsel's actions in 2016[19] and (b) that the Rule factually applies to Lead Counsel's "pre-existing agreement to pay Chargois."[20]

10. The Report's application of Rule 23(e)(3) to the facts of this case embodies what I see as three separate errors, two of law, one of fact:

- *Not Law*. No court has ever read Rule 23(e)(3) to apply to fee allocation agreements, to the best of my knowledge. In the *Newberg* Treatise I cite the only reported case that I found on the topic, a case holding that the provision did ***not*** entail disclosure of the fee allocation agreements.[21] The Special Master's Report cites to no authority other than my Treatise section referencing this single case that does not support its reading of the law.

- *Not Appropriate Legal Standard*. No court or other authority has ever articulated the standard that the Special Master's Report utilizes in applying Rule 23(e)(3). In the *Newberg* Treatise, I argue that 23(e)(3)'s requirement that counsel disclose *settlement*-related agreements should be read to apply to *fee* agreements that "***impact settlement terms***."[22] I adopted that language from the Advisory Committee Notes, which state that Rule 23(e)(3) is meant to apply to agreements that, "although seemingly separate, may have influenced ***the terms of the settlement*** by trading away possible advantages for the class in return for advantages for others."[23] The *Manual for Complex Litigation* similarly states that: "The spirit of Rule 23(e)(2) is to compel identification of any agreement or

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[18] *Id*.

[19] Special Master's Report at 306–09. Lead Counsel submitted the proposed settlement agreement for preliminary judicial approval on July 26, 2016. ECF No. 91.

[20] Special Master's Report at 309.

[21] *Id*. (discussing *Hartless v. Clorox Co*., 273 F.R.D. 630, 646 (S.D. Cal. 2011), aff'd in part, 473 Fed. Appx. 716 (9th Cir. 2012) ("The allocation of … fees amongst class counsel does not affect the monetary benefit to class members.")).

[22] Rubenstein, 5 *Newberg on Class Actions, supra* note 12, at § 15:12 (emphasis added).

[23] Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2003 amendment (emphasis added).

understanding that might have affected the interests of class members by altering what they may be receiving or foregoing. Side agreements might indicate, for example, that ***the settlement is not reasonable*** because they may reveal additional funds that might have been paid to the class that are instead paid to selected claimants or their attorneys."[24] The Special Master's Report employs a standard (using quotation marks) that Rule 23(e)(3) applies where an agreement "allocates money that the class members may have received elsewhere."[25] Although the source of the quoted language is not provided, it appears to come from the *Hartless* case, which explicitly held that Rule 23(e)(3) does not apply to fee allocation agreements.[26] Moreover, the Report's standard is completely untethered from any connection to the ***settlement terms***, which is the subject of Rule 23(e)(3), and it is therefore so overbroad that it lacks meaning. All attorneys' fees in a common fund case come out of the class's recovery and are monies that "could otherwise be allocated to the class members." The purpose of Rule 23(e)(3) is to identify the sub-set of fee agreements that may have impacted the ***settlement's terms***, such as the agreements in the *Agent Orange* case that created conflicts between class counsel and the class.

- *Absence of supporting facts*. Because I advocate for application of Rule 23(e)(3)'s disclosure requirement to situations where fee agreements have impacted ***settlement terms***, at my deposition I repeatedly, and at length, testified that, to me, the key question about the Chargois Arrangement was whether it had in fact impacted the class's interests.[27] I suggested that the fact-finder consider

[24] Federal Judicial Center, *Manual for Complex Litigation, Fourth* § 21.631 (2004).

[25] Special Master's Report at 308; *see also id.* at 356. The Report elsewhere employs a similar locution without quotation marks. *Id*. at 278, 307, 355.

[26] The *Hartless* court wrote: "As explained in the Manual of Complex Litigation, [Rule 23(e)(3)] requires disclosure of agreements that may affect the interests of the class members *by allocating money that they may have received elsewhere*. . . ." *Hartless*, 273 F.R.D. at 646 (emphasis added). But in applying that language, *Hartless* held that Rule 23(e)(3) did ***not*** apply to fee allocation agreements because "[t]he allocation of [aggregate] fees amongst class counsel does not affect the monetary benefit to class members." *Id.*

[27] The following six passages are exemplary:

Rubenstein Dep. at 53:10–13 ("[F]ee agreements should be disclosed in part to make sure that the class hasn't been harmed by some agreements that have been made with respect to fees.").

Id. at 58:13–14 (characterizing the "class' interest" as "the most important thing at the end of the day").

Id. at 75:21–76:5 ("[W]hen you discovered the Chargois payment, I think you did discover something about the allocation. I nonetheless, like you, asked myself do I think this harmed the

such questions as (a) whether the Chargois Arrangement impacted the manner in which the lawyers litigated and settled the class's claims; (b) whether the Chargois Arrangement impacted the level of fees that the lawyers sought to impose on the class; and (c) whether the Arrangement embodied an inherent conflict of interest between counsel and the class,[28] as in the *Agent Orange* case upon which Professor Gillers extensively relied.[29] Subsequently, (a) the Special Master's Report characterized the class's relief in this case as "an excellent result;"[30] (b) the Special Master's Report concluded that the attorney's 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;"[31] and (c) Professor Gillers concluded that "the particular fee agreement in *Agent Orange* created potential conflicts that the Chargois Arrangement did not."[32] The Special Master's Report nonetheless concludes that Rule 23(e)(3) compelled Lead Counsel to disclose the allocation of fees to Damon Chargois because that money could have gone to the class.[33] This is neither an application of Rule 23(e)(3)'s settlement-impact standard nor a finding of fact (nothing in the

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class in the way the second circuit asked in the Agent Orange case. Were the fee agreements such that it changed the mechanics of the litigation in ways that upset the class' interests?").

Id. at 77:18–23 ("The reason to disclose the fees is to make sure the class' interests weren't undercut in any way by the agreements that were made. And so the transparency and disclosure is a means to an end, and the end is making sure the class' interests weren't sold out in some ways.").

Id. at 181:23–182:4 ("[W]hen I look at the allocation from your point of view, the questions I'd ask – which I said earlier – are did the Chargois Arrangement – did the allocational arrangements pervert the incentives in representing the class.").

Id at 184:19–23 ("[W]hen I'm reverse engineering looking back from the end of the case, the questions I ask are similar to what I see the second circuit asking in Agent Orange. Did this pervert the incentives of the lawyers to the detriment of the class?").

[28] *See id.* at 55:10–58:14; *id* at 75:20–76:11; *id.* at 99:13–100:22; *id.* at 181:23–182:7; *id.* at 182:18–184:9; *id.* at 184:19–185:6.

[29] *See, e.g.*, Gillers Report at 69 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 216, 223 (2nd Cir. 1987)).

[30] Special Master's Report at 6.

[31] *Id*.

[32] *See* Gillers Supplemental Report at 82 n.87 ("I also agree that the particular fee agreement in *Agent Orange* created potential conflicts that the Chargois Arrangement did not.").

[33] Special Master's Report at 309 ("Here we have an *un*disclosed agreement to pay $4.1 million out of the settlement funds -- ***funds that could otherwise be allocated to the class members*** -- to an attorney who did no work on the case whatsoever.") (emphasis added); *id.* at 356 (same).

record is cited in support of it). Most notably, the Special Master's Report does not even stand behind it: remedially, the Report proposes to make Lead Counsel pay an amount equal to more than 80% of the Chargois money ***to other lawyers*** and only $700,000 – or less than one quarter of one percent of the $300 million settlement – to the class.

11. In sum, Rule 23(e)(3) leaves to class counsel the decision whether to disclose agreements "made in connection with the [settlement] proposal" to the Court. Here, the Special Master's Report concludes that Lead Counsel derogated its duties because it did not interpret that provision (a) in a way no court has ever before interpreted it (b) according to a standard unmoored from the Rule's purpose (c) on a factual record lacking any evidence that the payment impacted the settlement's terms (d) in a circumstance where the class's interest in the payment was, according to the Report's own conclusions, equivalent to about 0.23% of the settlement's value.

12. At several places, the Special Master's Report characterizes my testimony in more specific ways that I think bear correction:

- The Special Master's Report states that I find the rule requiring a Court to order disclosure of fee agreements to be "peculiarly written,"[34] but that was not my testimony. I testified that Rule 23(h)(2) could not be more clearly written.[35] I used the word "peculiar" in refer to the *notice* provisions of Rule 23.[36] I did so because there are two notice provisions (one for settlements, one for fees) that utilize different linguistic formulations: Rule 23(e)(1) states, as to settlements, that, "The court must direct notice in a reasonable manner to all class members

[34] *Id.* at 278 ("Although he admits that Rule 23 is 'peculiarly written,' relying on the plain language of Rule 23(h)(2)(B)(iv), Professor Rubenstein -- as he does with the duty to disclose to the Court itself -- contends that Labaton was under no duty to disclose the Chargois Arrangement to the class absent an order from the Court directing it to do so.") (footnote omitted).

[35] Rubenstein Rebuttal Report at 26 ("[T]he rule structure could not be clearer in setting forth precisely what a court needs to do should it desire to review underlying fee agreements: ask.").

[36] Rubenstein Dep. at 119:7–10 ("Rule 23 is actually peculiarly written, and it's different than the phrasing of who has the duty to give notice, whether it's the Court or the lawyers.").

who would be bound by the proposal,"[37] while Rule 23(h)(1), regarding fees, states, in a passive voice without reference to who shoulders this obligation, "Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner."[38]

- I testified that Rule 23(h)(2) places the burden on the Court to order the parties to disclose fee allocation agreements. The Special Master's Report states that I "conceded this is a lot to ask of the judge," and quotes a lengthy passage of my deposition in support of that statement.[39] In that passage, I testified that asking a court to be a fiduciary for absent class members is a heavy burden. By contrast, my testimony is clear that the more specific responsibility explicitly delegated to a court by Rule 23(h)(2) – to ask counsel to disclose fee agreements – is not difficult at all. In my Rebuttal Report I stated: "Absent Professor Gillers's tortured approach, it is really not much of an imposition for a court to ask, 'How are the fees being allocated?' as Rule 54(d)(2) proposes."[40]

- While I reported that Rule 23(h)(2) requires a Court to ask counsel to disclose fee agreements, the Special Master's Report states (several times) that I "place the entire blame for the nondisclosure of the Chargois payment in this case upon the Court."[41] I never once use the word "blame" in my Rebuttal Report or deposition. I do believe that the goal of transparency would have been served had the Court asked counsel to disclose their fee agreements. Thus, if the Court concludes that the absence of transparency caused harm to the class members, it is my testimony that such harm might have been avoided had the Court required disclosure of all fee agreements.

II.

The Special Master's Report Misreports and Misapplies the Law Regarding Contract Attorneys

13. In my July 31, 2017 Fee Declaration I (a) labeled so-called "staff attorneys" or "contract attorneys" as "non-partnership track attorneys" and opined that those employed in this case (b) were skilled attorneys (c) assigned billing rates comparable with those approved by

[37] Fed. R. Civ. P. 23(e)(1).

[38] Fed. R. Civ. P. 23(h)(1).

[39] Special Master's Report at 279–80.

[40] Rubenstein Rebuttal Report at 12.

[41] Special Master's Report at 306; *id.* at 355.

courts in a comparison set of other class action cases and (d) appropriately treated as attorneys in a lodestar cross-check submission, rather than as expense.[42]

14. With one important caveat noted in the succeeding paragraph, the Special Master's Report concurs with all four of these conclusions, stating (a) that "[r]ather than referring to them as staff attorneys, it would be more accurate to refer to them as 'non-partnership-track' attorneys;"[43] (b) that "these staff attorneys did much more than 'low-level' document review;"[44] (c) that the "staff attorney billing rates in the lodestar fee petition are generally reasonable;"[45] and (d) that "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."[46]

15. The only exception to the Special Master's Report's full adherence to the position I articulated in my Fee Declaration is that it distinguishes between non-partnership *staff* attorneys and non-partnership *contract* attorneys, enabling the former to be treated as attorneys but the latter only as costs.[47] The Special Master's Report concedes that there was no distinction

[42] Rubenstein Fee Declaration at ¶¶ 34-38.

[43] Special Master's Report at 177.

[44] *Id.* at 177–78.

[45] *Id.* at 180.

[46] *Id.* at 177; *see also id.* at 182 ("[T]here is nothing disingenuous about billing clients at market rates for work performed by attorneys, whether traditional or non-partnership-track. That one attorney is on a partnership track while another is not is, in this context, a distinction without a difference. Quite simply, similar work justifies similar rates.") (citation omitted).

[47] *Id.* at 181–88. To respond to the Special Master's Report's distinction between these two types of lawyers, I employ its usage of the term "contract attorney" to apply to attorneys who perform the same work as "staff attorneys" but who are employed through agencies rather than directly by a law firm. *Id*. at 181 ("Included within the staff attorneys listed on Lieff's and

between staff attorneys and contract attorneys as to the work performed – each provided the same valuable service to the class.[48] As such, there is no obvious reason to distinguish their billing rates for lodestar cross-check purposes, much less to bill the former as attorneys and the latter as costs. The Special Master's Report premises its approach on its factual assumption that firms face *categorically* different costs in compensating the two types of lawyers and on its legal conclusion that a firm's entitlement to attorney's fees should turn on that distinction. The Report's approach embodies at least five errors of law and fact:

- *Not Law*. The Special Master's Report states that "legal and ethical rulings have not provided definitive guidance on [the] interesting issue . . . of whether contract attorneys should be passed along as a reimbursable expense rather than as a marked-up profit center."[49] That statement is inaccurate. Courts *have* provided definitive guidance: they are unanimously opposed to the Special Master's Report's approach. Numerous courts have explicitly rejected the argument that contract attorneys must be billed as a cost[50] and many other courts – far too

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Thornton's lodestar reports were four 'contract' attorneys who were hired by Lieff through one or more outside staffing agencies.").

[48] *Id.* at 183 ("[T]here is no intent to pass judgment on the merits of the work performed by those contract attorneys or their professional qualifications. Quite the contrary.").

[49] *Id.* at 187.

[50] *See* Rubenstein, *Newberg on Class Actions*, *supra* note 12, at § 15:41 n.5 (listing six exemplary cases); *see also City of Pontiac Gen. Employees' Ret. Sys. v. Lockheed Martin Corp*., 954 F. Supp. 2d 276, 280 (S.D.N.Y. 2013) ("[I]t is beyond cavil that law firms may charge more for contract attorneys' services than these services directly cost the law firm . . . ."); *In re Apollo Grp. Inc. Sec. Litig*., No. CV 04-2147-PHX-JAT, 2012 WL 1378677, at *7 n.2 (D. Ariz. Apr. 20, 2012) (rejecting an objection to the inclusion of contract attorneys in a lodestar cross-check and stating that "Class Counsel may recover fees paid to contract attorneys"); *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246, 264–65 (E.D. Va. 2009) (rejecting an objector's argument that contract attorneys should not be included in a lodestar for cross-check purposes and stating that "the Court has absolutely no trouble finding that the contract attorneys should be billed at market versus cost. They are part of the team brought in to benefit the class. Their contributions are of a similar nature to the attorneys who are in the firms retained by plaintiffs, and they should be compensated in that manner."); *cf. In re Gen. Motors ERISA Litig.*, No. 05-71085, 2008 WL 11399729, at *2 (E.D. Mich. Sept. 15, 2008) (reporting that court had previously rejected objectors' argument "that Class Counsel's use of contract attorneys was somehow improper, and, as a result, their hours should be excluded under the lodestar cross-check").

numerous to enumerate – have approved fee petitions that include contract attorneys in counsel's lodestar or lodestar cross-check submission.[51] 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 the attorney's market rate.[52] The Special Master's Report cites only two cases in support of its approach – *Dial* and *Meredith*[53] – but when probed, neither actually supports that approach. In *Dial*, the lawyers voluntarily sought repayment for contract attorney time as a cost; the court did not require that they do so. In applauding the lawyers for doing so, the Court noted that this choice had relieved the Court of having to ascertain a proper billing rate for these attorneys.[54] What this means is that absent the lawyers' voluntary decision, the *Dial* Court would have treated these attorneys as lawyers, not as an expense. In *Meredith*, a large New York law firm (Weil, Gotshal & Manges LLP) represented the plaintiff class in an antitrust action. It too voluntarily sought reimbursement

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A number of these decisions rejecting the argument that contract attorneys may only be billed at cost explicitly reference the fact that class counsel retained the contract attorneys at issue from an agency, *e.g., In re Citigroup Inc. Sec. Litig*., 965 F. Supp. 2d 369, 394 (S.D.N.Y. 2013); *In re AOL Time Warner S'holder Derivative Litig*., No. 02 CIV. 6302 (CM), 2010 WL 363113, at *25 (S.D.N.Y. Feb. 1, 2010), while in many of the other cases that fact was made known to, or was likely known by, the court. In other words, counsel's retention of contract attorneys from an outside agency does not distinguish this case from this vast body of pertinent authority.

[51] *See, e.g.*, Rubenstein Fee Declaration at Ex. F (analyzing court-approved billing rates for contract attorneys in a dozen cases decided in two year period).

[52] To confirm the accuracy of this statement, my research assistants and I read through several hundred state and federal cases that are identified through Westlaw searches for the term "contract attorney!" in class action and non-class action fee petitions. We found none that require counsel to treat contract attorneys as an expense.

In the *Newberg* Treatise, I note that several courts have limited attorney's fees generally (not contract attorneys specifically) to costs in fee-shifting cases where the relevant fee statute utilizes cost-like language. Rubenstein, *Newberg on Class Actions*, *supra* note 12, at § 15:41 & n.4 ("[S]ome courts have suggested that when a statute provides for recovery of 'actual' expenses or expenses 'incurred,' attorneys should bill based on their actual rates, rather than the market rates."). This statutory limitation is not relevant in common fund fee cases decided under common law principles, such as this case.

[53] Special Master's Report at 187–88 (citing *Meredith Corp. v. SESAC, LLC*, 87 F. Supp. 3d 650, 671 (S.D.N.Y. 2015); *Dial Corp. v. News Corp*., 317 F.R.D. 426, 437 (S.D.N.Y. 2016)).

[54] *Dial*, 317 F.R.D. at 438 ("[T]his Court appreciates Counsel's decision to treat these contractor fees as an expense. It saves the Court from having to determine a correct spread between the contract attorney's cost and his or her hourly rate and his or her salary.").

for contract attorneys at cost,[55] but in doing so, it was careful to explain to the Court that this was a deviation from the firm's usual practice.[56] What this means is that absent the lawyers' voluntary decision, the large corporate firm in *Meredith* would have treated these attorneys as lawyers, not as an expense. Accordingly, *Meredith* actually provides a data point showing that in the private market Weil Gotshal serves, contract attorneys are normally charged as lawyers, not costs, to paying clients.

- *Not Appropriate Legal Standard.* Courts have never premised the right to attorney's fees on the level of an attorney's employment benefits and it would be bad public policy to begin to do so, particularly in the context of an informal lodestar cross-check.[57] Such an approach would involve courts in innumerable line-drawing questions – How many benefits are enough? Which ones? Why those? – all about employment indicia that are irrelevant. These indicia are irrelevant because it is not the presence or absence of employment benefits that

[55] The firm attributed the limitation to, *inter alia,* the non-profit nature of its named plaintiff in the case and to the plaintiff's concurrent agreement to pay it "additional compensation" upon a favorable settlement, which turned out to be $1 million over and above the fees billed to the class. *See* Declaration of R. Bruce Rich in Support of Class Counsel's Motion for Award of Attorney's Fees and Expenses, ECF No. 209 at ¶¶ 4–6, *Meredith Corp. v. SESAC, LLC*, Case No. 1:09-cv-09177-PAE (S.D.N.Y. filed November 20, 2014).

[56] *See* Memorandum of Law in Support of Class Counsel's Motion for Award of Attorney's Fees and Expenses, ECF No. 208 at 14 & n.11, *Meredith Corp. v. SESAC, LLC*, Case No. 1:09-cv-09177-PAE (S.D.N.Y. filed November 20, 2014) (noting that "[b]ased on the normal rates that Class Counsel would have charged absent the fee accommodations made to the [lead plaintiff]" its lodestar would have been $17.4 million, but with the "fee accommodations" it was $11.8 million, and describing one of four fee accommodations as the fact that "the lodestar does not include the time of third-party contract attorneys performing document review analysis for discovery under the supervision of Class Counsel," thus implying that absent this accommodation, the firm would have "normally" included contract attorney time in normal bill to client) (citing *In re Citigroup Inc. Sec. Litig*., 965 F. Supp. 2d 369, 394-95 (S.D.N.Y. 2013) (courts "regularly appl[y] a lodestar multiplier to contract attorneys' hours") (citing *Carlson v. Xerox Corp*., 596 F. Supp. 2d 400, 409 (D. Conn. 2009), *aff 'd*, 355 F. Appx. 523 (2d Cir. Dec. 9, 2009))).

[57] As I noted in my Fee Declaration, "Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See* [Rubenstein, *Newberg on Class Actions, supra* note 12, at § 15:86 n.13] (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3d Cir. 2005), as amended, (Feb. 25, 2005))))." Rubenstein Fee Declaration at 10 n.12.

makes a lawyer a lawyer: it is the work that is being performed.[58] Here, there is no question that the contract attorneys provided meaningful legal services to the class.

- *Modest – and Irrelevant – Factual Distinction.* Contract attorneys may be less distinct from full-time employees than the Report suggests. A firm may well house contract attorneys on-site during the duration of their work, hence paying (often expensive) real estate overhead – and related workplace benefits such as on-site food – for such lawyers. The law may require firms to provide overtime pay[59] and unemployment benefits[60] to contract attorneys, and of course firms must abide by federal and local laws prohibiting discrimination in retaining and working with contract attorneys.[61] Moreover, as contract attorneys likely form an attorney-client relationship with the underlying client,[62] the firm's retention of them may just as likely impact malpractice insurance costs. Contract attorneys are a good data point in support of the adage that there is no such thing as a free lunch. Conversely, in today's current legal practice, firms have entered into far more flexible arrangements with associates and staff attorneys: for instance, partnership track attorneys often work reduced hours (perhaps thereby removing themselves from certain benefits or legal requirements) and/or work off-site or without permanent office space. To the best of my knowledge, private firms

[58] *In re Tyco*, 535 F. Supp. 2d at 272 ("An attorney, regardless of whether she is an associate with steady employment or a contract attorney whose job ends upon completion of a particular document review project, is still an attorney. It is therefore appropriate to bill a contract attorney's time at market rates and count these time charges toward the lodestar."); *Andrews v. Lawrence Livermore Nat. Sec., LLC*, No. C 11-3930 CW, 2012 WL 160117, at *2 (N.D. Cal. Jan. 18, 2012) ("Defendants provide no authority for the proposition that, for purposes of determining reasonable hourly rates, an attorney's status as a contract attorney, as opposed to his or her employment as an associate, is a proper substitute for evaluating an attorney's actual experience or skills.").

[59] *See, e.g.*, *Henig v. Quinn Emanuel Urquhart & Sullivan, LLP*, 151 F. Supp. 3d 460, 471 (S.D.N.Y. 2015) (rejecting argument that contract attorney was entitled to overtime pay pursuant to Fair Labor Standards Act and particular state labor law based on facts of case).

[60] *See, e.g.*, *In re Singhal*, 128 A.D.3d 1308 (N.Y. App. Div. 2015) (requiring class action firm to pay unemployment benefits for contract attorney).

[61] *See, e.g.*, *Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, LLP*, 915 F. Supp. 2d 498 (S.D.N.Y. 2013) (rejecting contract attorney's race discrimination case based on facts of case).

[62] *Abrams v. Se. Mun. Bonds Inc*., 138 F. App'x 88, 98 (10th Cir. 2005) ("The general rule is that a temporary or contract lawyer 'who performs legal services for or on behalf of clients of the firm is subject to duties to the firm's clients similar to those of lawyers generally, such as those of competence and diligence . . . and confidentiality. . . .'") (quoting Restatement (Third) of the Law Governing Lawyers § 9, comment g (2000)).

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 health care and retirement benefits – to their clients at market rates. These factual questions are complex and involve a court in inquiries irrelevant to the key concern – whether or not legal services are being provided to the client.

- *Modest – and Irrelevant – Financial Distinction.* Contract attorneys may be less costly than full-time employees, but in a more modest (and irrelevant) manner than the Report suggests.[63] The Special Master's Report states that "the vast majority of the ***staff*** attorneys were paid in the range of $40-$60 an hour, plus benefits,"[64] while it further found that "a firm . . . pays only a modest hourly fee for ***contract*** attorneys, sometimes less than $50 per hour."[65] In other words, the rates appear completely indistinguishable, but for the benefits. The Department of Labor reports that, with employment benefits, an employer pays an employee about 1.5 times the employee's base salary.[66] That means that the $50/hour ***staff*** attorney costs the firm about $75/hour, while the $50/hour ***contract*** attorney costs the firm, say, $55/hour[67] for the reasons outlined in the prior bullet point. It is not immediately obvious what the major distinction is between two employees doing the same work, one at $55/hour and the other at $75/hour, that requires the former to be charged as a cost while the latter is charged at a lawyer's market rate. It cannot be the pure number alone: the Supreme Court has long held that paralegals may be billed to a client as legal professionals at their market rate and

[63] Special Master's Report at 185 ("While an inherent markup on attorneys' fees may apply to non-partnership track attorneys who are employees of a firm, such a markup *grossly distorts* the financial burdens of hiring true 'temporary' or contract attorneys.") (emphasis added); *see also id.* at 184 ("Given the *considerable* economic benefits realized by those firms that hire contract attorneys in a large class action case, such as *State Street*, law firms that realize such a benefit should distinguish the costs of contract attorneys from those of staff attorneys who perform the same or similar work on a matter when seeking reimbursement of fees and expenses.") (emphasis added).

[64] *Id.* at 177 (emphasis added).

[65] *Id.* at 187 (emphasis added).

[66] *See* U.S. Department of Labor, Bureau of Labor Statistics, *Employer Costs for Employee Compensation – March 2018*, available at https://www.bls.gov/news.release/pdf/ecec.pdf (reporting that wages and salaries averaged $24.77 per hour worked, while benefits averaged $11.55, for an average employee compensation of $36.32; meaning that the full package ($36.32) was 1.4663 times the wages ($24.77)).

[67] The $55/hour estimate is less than 1.1111 times the $50/cost, or about ¼ of the (1.4663) markup of the staff attorney.

need not simply be passed on as costs,[68] yet, paralegal hourly rates are, of course, lower than those of contract attorneys. For this reason, those courts that have expressed concerns about class counsel's handling of contract attorneys have treated the question as of one of degree not type, adjusting the pertinent hourly rate but rejecting the argument that the contract attorneys be passed through as a cost.[69]

- *Distinct from Multiplier Analysis.* The Special Master's Report misconceives the purpose of a lodestar cross-check submission in arguing that "if a firm pays an agency $40/hour for a contract attorney but claims $400/hour for that contract attorney on its lodestar, and then obtains a 2.0 multiplier, the actual recovery rate for this contract attorney is $800/hour -- or twenty times what the firm paid for the attorney."[70] The Court in this case awarded class counsel 25% of the common fund; counsel's lodestar was submitted solely for cross-check, or verification purposes, and showed that the 25% award was about twice counsel's lodestar. This enabled the Court to ascertain whether a 1.8 multiplier was appropriate given the risks counsel took and the rewards it obtained for the class. The Court's conclusion that the 1.8 multiplier was justified did not mean that class counsel

[68] *Missouri v. Jenkins by Agyei*, 491 U.S. 274, 285–87 (1989) (holding that the primary federal fee-shifting statute enables recovery for paralegal time at market rates because when "the prevailing practice in a given community [is] to bill paralegal time separately at market rates," a reasonable attorney's fee should include compensation for those hours at those market rates).

[69] *See, e.g.*, *In re Polyurethane Foam Antitrust Litig.,* 168 F. Supp. 3d 985, 1013 (N.D. Ohio 2016) (accepting the argument that contract attorneys could be billed as lawyers, rather than cost, but reducing their billing rate); *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp*., 318 F.R.D. 19, 27 (S.D.N.Y. 2016) (expressing concern about contract attorney rates and concluding that "[c]onsidering all the circumstances, the simplest resolution is to reduce the lodestar multiplier from 1.5 to 1.2"); *In re Citigroup Inc. Sec. Litig.,* 965 F. Supp. 2d at, 394–95 (rejecting the argument that contract attorneys should be treated as cost but reducing their hourly rate to $200 for lodestar cross-check purposes); *City of Pontiac,* 954 F. Supp. 2d at 280 (rejecting an argument that contract attorneys should be treated as cost but reducing the total fee award based in part on the argument that a private client would have negotiated a lower billing rate for contract attorneys); *In re UnitedHealth Grp. Inc. PSLRA Litig*., 643 F. Supp. 2d 1094, 1105 (D. Minn. 2009) (rejecting objections to the use of contract lawyers but applying a reduced rate to their work for lodestar cross-check purposes)*In re Polaroid*, No. 03 CIV. 8335 (WHP), 2007 WL 2116398, at *3 (S.D.N.Y. July 19, 2007) (approving lodestar multiplier computed after adjusting contract attorney rates to paralegal levels). *Cf. In re Beacon Assocs. Litig*., No. 09 CIV. 3907 CM, 2013 WL 2450960, at *18–19 (S.D.N.Y. May 9, 2013) (noting that, while low-cost contract attorneys should perform document review, their pay should not be marked up "ten times," but declining to reduce rates counsel employed in lodestar cross-check because it would be "unfair to impose such a rule *ex post facto*").

[70] Special Master's Report at 188.

> received $800/hour for contract attorneys. It meant that the 25% fee was justified. The two parts of the lodestar cross-check analysis are independent of one another: the first aims to ascertain the proper lodestar so as to gauge the extent to which the proposed percentage award embodies a multiplier, and the second aims to assess whether that particular multiplier is appropriate in the circumstances of the given case. Understanding this distinction, courts have explicitly rejected the argument that contract attorney time cannot be multiplied.[71]

16. In sum, it is my expert opinion that (a) no court has ever required class counsel to bill contract attorneys at cost rather than as lawyers; (b) it would be bad public policy to premise the right to an attorney's fee on the indicia of the employment relationship rather than on the services being provided to the client; this is especially true in that the (c) factual and (d) financial distinctions between the contract and non-contract attorneys are differences in degree, not differences in kind; and (e) treating contract attorneys as lawyers does not produce a windfall for class counsel so long as the multiplier is consistent with the normal range of multipliers.

III.
The Special Master's Report Miscomprehends the Nature of a Lodestar Cross-Check and Errantly Proposes That LCHB "Repay" Monies They Were Never "Paid"

17. The Special Master's Report identifies two issues with the lodestar cross-check submission – the double-counting issue and the contract attorney issue – and for each it

[71] *See, e.g.*, *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d at 394 ("[Objector] contends (1) that the contract attorneys should be treated as a litigation cost and not included in the lodestar at all, and (2) that, if included, a lodestar multiplier cannot be applied to their work because to do so permits too high a markup. Neither argument prevails."); *Carlson v. Xerox Corp.*, 596 F. Supp. 2d 400, 409 (D. Conn. 2009), judgment aff'd, 355 Fed. Appx. 523 (2d Cir. 2009) ("[T]he court concludes that it is not objectionable per se in this case to apply a multiplier to a lodestar that includes work performed by contract attorneys, even though the profit margin for the firms employing them was greater than the profit margin the firms would have had for work done by full-time employees."); *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288(DLC), 2004 WL 2591402, at *21 (S.D.N.Y. Nov. 12, 2004) (rejecting objector's argument that "no multiplier is appropriate for certain work such as document review work done by contract attorneys").

recommends "disgorgement" of the amounts at issue: $4,058,000 for the double-counting[72] and $2,244,383 for the contract attorneys.[73] The Special Master's Report errs in recommending these remedies as it confuses the nature of a lodestar cross-check, applied in this case, with a lodestar based fee, not at issue here.

18. As I explained in my Fee Declaration,[74] and at my deposition,[75] courts employ one of two methods in awarding fees in class action lawsuits: a percentage method or a lodestar method. According to the former, counsel are awarded some portion of the class's recovery; according to the latter, counsel are paid for their time, with a court assessing the number of hours they worked and the rates attributable to those hours. Since the early 1990s, most courts have used the percentage method in large common fund cases like this one, although about half the courts that do so ensure that the percentage that is awarded is not too great by "cross-checking" it

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[72] *Id.* at 364 ("The remedy for this is the disgorgement by all three firms in equal amounts of the entire approximately $4,058,000 in double-counted time. It is recommended that this entire amount be returned to the class.").

[73] *Id.* at 367–68 ("The seven contract attorneys, all retained by Lieff, recorded 2833.5 hours in this role, at rates varying between $415 and $515. The total billings for contract attorneys was approximately $1.3 million ($1,325,588). In addition, a multiplier of 1.8 was added to their hours and rates, yielding a total award of $2.4 million ($2,386,058) for the time of the contract attorneys. This amount should be disgorged and returned to the class. The Customer Class is, however, entitled to claim the contract attorneys as an expense calculated at a more reasonable rate of $50/hour. The Special Master recommends that the difference between these two figures also be awarded to the class.").

I literally do not know what this passage means. It appears to intend to require payment of $2,386,058 to the class, but then to permit the class to be taxed $141,675 (or 2833.5 hours x $50 hour) as an expense, meaning the disgorgement would be $2,244,383 (or $2,386,058 less $141,675). But it concludes that this difference should "*also* be awarded *to the* class," *id.* at 368 (emphasis added), without it being at all clear what the "also" means. Regardless, as explained in the text, the whole approach is so erroneous these calculations are immaterial.

[74] Rubenstein Fee Declaration at ¶¶ 12–18.

[75] *See, e.g.,* Rubenstein Dep. at 188:22–194:7.

against counsel's lodestar. The lodestar cross-check enables a court to see how the percentage method's award compares to the time counsel have worked on the case, with a percentage award above the lodestar said to embody a positive multiplier and one below embodying a negative multiplier.

19. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, any error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar is a means not an end. The critical question is the effect that the lodestar error had on the cross-check. Specifically, reducing class counsel's lodestar (by, for example, fixing the double-counting and or removing the contract attorneys' time) will mean that the 25% fee award embodies a higher lodestar multiplier, which the Court will have to ensure is still reasonable. As I noted in my initial Declaration, correcting the double-counting issue by reducing counsel's lodestar adjusted their multiplier from 1.8 to 2.01, which in the context of this case was insignificant.[76] Here, if both the double-counted and the contract attorney hours are removed from counsel's lodestar, the 1.8 multiplier that the Court approved now becomes a 2.07 multiplier.[77] For the reasons I discussed at length in my Fee Declaration – utilizing empirical evidence of court-approved multipliers – this difference in the context of this case is not significant.[78] Put differently, given the remarkable success that Class Counsel achieved for the class – an accomplishment that the

[76] Rubenstein Fee Declaration at ¶18, ¶¶39–45.

[77] Counsel originally reported a $41.32 million total lodestar and then reported that deducting the double-counted hours resulting in a total lodestar of $37,265,241.25. ECF No. 116 at 3. If the contract attorney lodestar ($1,325,588) is further removed, the total lodestar becomes $35,939,653.25, and the $74,541,250 percentage award thus embodies a multiplier of 2.07.

[78] Rubenstein Fee Declaration at ¶18, ¶¶39-45.

Special Master recognizes[79] – a 25% fee award embodying a 2.07 multiplier is fully reasonable, indeed modest.

20. In suggesting that the lodestar errors be "disgorged" the Special Master's Report confuses information supplied for verification purposes with information supplied for payment purposes. In a case where a court employs the lodestar method to determine class counsel's fee, class counsel's submission of an hour of work at $500 means, if the court approves, that she will be paid $500 for that hour of work. If for some reason that hour is later disallowed, the $500 might properly be remanded. In a case where a court employs the percentage method to determine class counsel's 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. Numerous legal decisions have understood this distinction and, after adjusting a lodestar used for cross-check purposes downward, simply re-assessed whether the resulting higher multiplier remained reasonable.[80]

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[79] Special Master's Report at 6 (characterizing the class's recovery as "an excellent result").

[80] *See, e.g.*, *In re Polyurethane Foam Antitrust Litig.,* 168 F. Supp. 3d at 1013 (reducing lodestar in cross-check in part because of a contract attorney rate and then reassessing the appropriateness of the new multiplier); *In re: Cathode Ray Tube (CRT) Antitrust Litig*., No. 1917, 2016 WL 4126533, at *9 (N.D. Cal. Aug. 3, 2016) ("[E]ven if the Court were to reduce the Plaintiffs' lodestar to reflect the contract attorneys' lower billing rates, the multiplier that would result would still be well within an acceptable range. . . . A lodestar reduction is unnecessary when the effect on the multiplier is not material."); *In re Citigroup Inc. Bond Litig*., 988 F. Supp. 2d 371, 378 (S.D.N.Y. 2013) ("If the Court reduces the blended hourly rate for staff attorneys to $300—a rate that appears to be either appropriate or slightly high—the modified lodestar is approximately $73.5 million. Such a reduction would make the multiplier closer to 1.59. Assuming even a blended hourly rate for staff attorneys of $250—perhaps somewhat on the low end—the result is a modified lodestar of approximately $65 million and a multiplier of nearly 1.8. All of these

21. Given that the lodestar was submitted for cross-check purposes, there is simply no logic in the Special Master's Report's suggestion that class counsel "disgorge" roughly $4 million for the double-counting issue or that LCHB "disgorge" roughly $2.2 million for the contract attorney issue.

* * *

22. The Special Master's Report states that its intent "has been to identify true and unmistakable professional misconduct."[81] It is my testimony that this mark has not been met as to three pertinent findings: (1) that Rule 23(e)(3) required counsel to disclose the Chargois Arrangement upon submission of the settlement proposal; (2) that contract attorneys must be billed as costs not as lawyers in the lodestar cross-check submission; and (3) that counsel must "disgorge" monies when a court adjusts rates or hours in a lodestar cross-check submission. No law supports any of these three conclusions.

June 20, 2018 William B. Rubenstein

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figures are within the range of reasonableness. The lodestar cross-check has therefore performed its function, satisfying the Court that an award of 16%—which it has already determined represents a reasonable percentage of the settlement fund—adequately compensates plaintiffs' counsel for their time and effort based on estimations of reasonable market rates and factoring in an appropriate multiplier."); *Carlson*, 596 F. Supp. 2d at 409 ("[I]f the charges for the contract attorney time were decreased, the multiplier in this case would still be a reasonable multiplier."); *In re Royal Dutch/Shell Transp. Sec. Litig.*, No. CIV.A. 04-374 JAP, 2008 WL 9447623, at *32 (D.N.J. Dec. 9, 2008) ("Even if Lead Counsel reduces plaintiffs' counsel's total lodestar by $7,287,396.25 (the lodestar of the discovery attorneys employed by Lead Counsel)—from $56,891,317.50 to $49,603,921.25—that reduction increases the multiplier only from 1.002 (based upon the total fee of $57 million) to 1.15, an immaterial difference.").

[81] *Id.* at 376 ("[T]he Special Master would point out that the intent here has been to identify true and unmistakable professional misconduct . . . .").

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. The law firm Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") has retained me to provide my expert opinion on several aspects of the fee petition that Counsel[1] submitted in this matter in September 2016, as corrected for the subsequently-found accounting errors. After setting forth my qualifications to serve as an expert and disclosing my prior relationship to this case and these firms (Part I, *infra*),[2] I provide the Special Master with empirical data and policy analysis to support the following four opinions relevant to analysis of the reasonableness of Counsel's 2016 fee request:

- ***Counsel's fee approach is the most widely used.*** (Part II, *infra*). Counsel's fee petition employed a percentage approach, provided the Court with information about their lodestar for cross-check purposes, and addressed a series of factors that courts have deemed relevant to the reasonableness inquiry. The percentage approach with a lodestar cross-check is the approach that courts most frequently use to assess the reasonableness of fee requests in common fund class action cases. It improves on the percentage approach standing alone (which could lead to a windfall for counsel) by making a rough comparison of the fee sought to

[1] Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow") filed the fee petition for all the firms in the case. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 102) at 2. In the accompanying brief, Lead Counsel specifies that, in addition to its firm, the term "Plaintiffs' Counsel" encompassed five other firms. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) at 8 n.2. The total lodestar in the case, however, encompasses work from three additional firms, or nine in all. *See* Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, Ex. 24 (ECF No. 104-24) at 2 (Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards). This Declaration uses the term "Counsel" as a short-hand reference to all of these firms.

[2] I typically provide a short synopsis of the litigation in my expert reports, but given the post-hoc nature of this report, I have not done so here.

counsel's time in the case. Simultaneously, it improves on the lodestar approach standing alone (which could bog the court down in review of counsel's time records) by enabling a check on the percentage approach without requiring an extensive audit of counsel's hours and rates.

- ***Counsel's billing rates were reasonable.*** (Part III, *infra*). Counsel's fee petition supplied the Court with billing rates for all professional time-keepers. Three sets of comparison data support the conclusion that the rates employed were reasonable: *first*, the rates are consistent with rates that courts in this community have awarded in approving class action fee petitions in recent years; *second*, Counsel's rates fall far below the court-approved rates charged by large corporate firms in bankruptcy cases in this market; and *third,* the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in this community and in $100-$500 million cases throughout the country.

- ***Counsel appropriately billed non-partnership-track attorneys at market rates and the billing rates employed were reasonable.*** (Part IV, *infra*). Counsel employed non-partnership track attorneys to perform work such as document review and analysis. An empirical analysis of 12 recent cases in which courts have approved fee petitions containing rates for "contract" or "staff" attorneys shows that Counsel's rates for these non-partnership track attorneys are unexceptional: Counsel's blended rate is within pennies of the comparison set's average rate. Public policy also supports Counsel's billing of these non-partnership track attorneys at market rates, not cost, as empirical evidence shows that these attorneys were well-qualified for the legal work that they undertook and as billing at market rates is consistent with how law firms in the private market bill such attorneys, complies with the ABA's suggested ethical approach, and provides the right incentives for plaintiff firms.

- ***Counsel's fee was reasonable, as evidenced by the modest size of the lodestar multiplier***. (Part V, *infra*). The Court-awarded fee embodied a lodestar multiplier (based on Counsel's corrected lodestar) of 2.01. Three sets of data support the reasonableness of a fee that is roughly 2 times greater than Counsel's lodestar: it is below the mean for settlements of this size reported in the leading empirical analyses of class action fee awards, it is below the mean of a comparison group of $100-$500 million settlements, and it is fully consistent with the Court's characterization of the risks Counsel shouldered and the results that they achieved for the class herein.

I am aware of the fact that the fee petition in this case initially contained errors with regard to the lodestar cross-check information submitted to the Court. While those accounting errors were of

course unfortunate, their impact on the lodestar cross-check submission was relatively negligible and did not undermine the reasonableness of the fee Counsel proposed.

I.
BACKGROUND AND QUALIFICATIONS[3]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*, and as of this summer, I have re-written from scratch the entire 10-volume treatise. In 2015, I wrote and published a 600-page volume (volume 5) of the Treatise on attorney's fees, costs, and incentive awards; this volume has already been cited in

[3] My full c.v. is attached as Exhibit A.

numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For this and the past seven years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the

2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 70 cases and as an expert consultant in about another 25 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal. *See In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom. Berman DeValerio v. Olinsky*, 673 F. App'x 87 (2d Cir. 2016).

8. My past work encompasses prior *expert witness* work for and against a number of firms involved in this matter and current and past *legal work* on behalf of the Thornton Law Firm LLP (the "Thornton Fim"), including on an issue at the inception of this case. Specifically, in 2011, the Thornton Firm retained me to advise it on the representation of the class in this matter and the separate representation of the *qui tam* relators in actions against State Street and I worked with the firm in that capacity between February 24, 2011 and June 6, 2011. I am also currently assisting the Thornton Firm in a different complex litigation context, again on issues arising out of the representation of multiple parties that are un-related to the billing issues before the Special Master. Until Lieff Cabraser contacted me in March 2017 about the present retention, I had no other involvement in (or even knowledge of the progress of) this fee-related matter. The Thornton Firm has informed me that it has no objection to my appearing as an expert witness on the fee-related issues presently before the Special Master. I similarly believe that my duties to the Thornton Firm arising out of the unrelated 2011work on this case and my present work on an unrelated collateral matter do not interfere with my ability to provide my own independent expert opinions on the present fee-related matter, but I make this disclosure so that the Special Master has full information. Finally, as is more readily evident from the cases listed on my resume, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback LLP ("Keller Rohrback") have each previously retained me as an expert witness in class action cases. I have also been retained as an expert witness by parties adverse to the Lieff Cabraser firm, or to Plaintiffs' Steering Committees on which it served, or to its clients in about five cases and I worked as court-appointed counsel against a group of plaintiffs' firms, including Lieff Cabraser, arguing for affirmance of a reduced fee award in the Second Circuit, as referenced in the prior paragraph.

9. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

11. Additionally, my research assistants, under my direction, have compiled four sets of data relevant to my analysis and ultimate opinions:

- a data set of 20 cases reflecting billing rates that judges in the District of Massachusetts – and in Massachusetts state courts – have approved in ruling on class action fee requests in the past dozen years (Exhibit C);
- a data set of six fee petitions containing 169 rates utilized by corporate firms in bankruptcy cases that Massachusetts bankruptcy courts have approved in recent years (Exhibit D);
- a data set of 20 class action settlements with aggregate settlement values of $100-$500 million (Exhibit E);
- a data set of 12 class action cases in which courts throughout the country have approved fee petitions that contain billing rates for "contract lawyers" or "staff attorneys" in recent years (Exhibit F).

II.
COUNSEL'S FEE APPROACH IS THE MOST WIDELY USED APPROACH TO FEES IN COMMON FUND CLASS ACITONS

12. Counsel sought a fee of approximately $74.5 million (ECF No. 102 at 2) and they demonstrated the reasonableness of that request according to a percentage approach (with

multiple factors) and a lodestar cross-check. (ECF No. 103-1). Empirical evidence shows that this is the most common approach courts take to fees.[4]

13. Specifically, the most fine-grained data of fee awards demonstrates that courts use a pure lodestar approach in 9.6% of cases, a pure percentage approach in 37.8% of cases, and a mix of the two (typically, a percentage approach with a lodestar cross-check) in 42.8% of cases, with another 9.8% of cases employing some other method or not specifying which method.[5]

14. I explain in the *Newberg* treatise how these current practices developed.[6] After adoption of the current class action rule in 1966, courts tended to employ a percentage approach to fees, but a 1973 decision of the Third Circuit endorsed an hourly approach, labeling it the

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[4] It is also consistent with the law in the First Circuit. In reporting on First Circuit law in the *Newberg* treatise, I wrote:

1. *Percentage or lodestar fee method.* The First Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.
2. *Reasonableness review criteria.* The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis. District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits and at other times have employed the Seventh Circuit's market mimicking approach.
3. *Lodestar cross-check.* The First Circuit has held that a lodestar cross-check is entirely discretionary.

5 William B. Rubenstein, Newberg on Class Actions § 15:96 (5th ed.) (2015) (footnotes omitted) (hereafter *Newberg on Class Actions*).

[5] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010) (hereafter "Eisenberg and Miller II")).

[6] 5 *Newberg on Class Actions, supra* note 4, at § 15:64.

"lodestar" method,[7] and many courts began to utilize that method. In response to concerns engendered by the lodestar method, the Third Circuit convened a Task Force consisting of a cross-section of lawyers, judges, and scholars, all with expertise in the area of class action attorney's fees, to develop – in a neutral, non-investigatory setting – a set of best practices.[8] The Task Force concluded that a (negotiated) percentage method was the preferable approach for fee awards in common fund cases and many courts subsequently moved toward a percentage approach to awarding fees in common fund cases. By 2004, the *Manual for Complex Litigation* stated that "[a]fter a period of experimentation with the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."[9] Yet, since the *Manual* made that statement, empirical evidence demonstrates that courts have moved to something of a hybrid: a percentage approach with a lodestar cross-check. Thus, in cases from 1993–2002, 56.4% of courts used the pure percentage, while in cases from 2003–2008 cases, only 37.8% did.[10] This is about a one-third decrease in the use of the pure percentage approach. The big gain was in courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% of cases to 42.8% of cases.

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[7] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168-69 (3d Cir. 1973).

[8] For a description of the Task Force's membership and methodology, see Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 253-54 (1985).

[9] Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 14.121 (2004) (citations omitted).

[10] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Eisenberg and Miller II, supra note 5, and Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 52 (2004) (hereafter "Eisenberg and Miller I")).

15. This approach is favored because it improves on either approach standing alone.[11] The percentage approach without a lodestar cross-check could lead to counsel securing a windfall. A lodestar approach standing alone could engross the court in an unnecessary audit of counsel's hours and rates, as the entire fee turns on the specific time billed. By contrast, using a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall.[12] A review of counsel's lodestar is appropriate, but over-emphasis on it – especially in a case of this magnitude, involving so many lawyers throughout the country – could bog the court down in unnecessary detail.

16. In a recent case in the California Supreme Court, I submitted my own *amicus* brief advocating for the Court to encourage the use of a lodestar cross-check. The Court embraced my brief, writing the following:

> The utility of a lodestar cross-check has been questioned on the ground it tends to reintroduce the drawbacks the 1985 Task Force Report identified in primary use of the lodestar method, especially the undue consumption of judicial resources and the creation of an incentive to prolong the litigation. We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases.
>
> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree

[11] For a defense of the lodestar cross-check method, and a discussion of the points in this paragraph, see 5 *Newberg on Class Actions, supra* note 4, at § 15:86.

[12] Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See id.* at n.13 (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005))).

> of time and effort expended by the attorneys." 5 Newberg on Class Actions, supra, § 15:86, p. 331. . . The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation.
>
> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply. (5 Newberg on Class Actions, supra, § 15:86, pp. 332–333. . .). A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.[13]

17. In sum, the percentage approach with a lodestar cross-check is, empirically speaking, the fee method courts utilize most often in common fund cases, and they do so for sound policy reasons. The approach Counsel took in its fee petition in this case was therefore fully consistent with normal practice in common fund class actions.

18. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, the error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar was a means not an end. The critical question is the effect that the lodestar error had on the cross-check. As Counsel reported in correcting it, the lodestar error meant that their multiplier in the case was approximately 2 rather than 1.8 (ECF No. 116 at 3). As I discuss below, utilizing empirical

[13] *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 687-88 (Cal. 2016) (some citations omitted).

evidence of multipliers, this difference in the context of this case was not significant (Part V, *infra*). This is not, of course, to excuse the mistake. It is, rather, to place the mistake in its proper context.

III.
COUNSEL'S BILLING RATES WERE REASONABLE

19. To investigate the reasonableness of Counsel's billing rates, I utilize empirical evidence to generate three independent comparison sets:

- I compare the hourly rates for each timekeeper in this case to hourly rates that courts in this District (and in Massachusetts state court) have awarded in approving class action fee petitions in recent years.

- I compare the hourly rates for each timekeeper in this case to the hourly rates that defense firms charge for similar work in this market, as evidenced by rates Massachusetts bankruptcy courts have approved in recent years.

- I compare the blended billing rate for this case to the blended billing rate of other class action cases in this District and to other class action cases involving $100-$500 million settlement funds.

20. I have chosen to compare Counsel's billing rates to rates other class action (and bankruptcy) courts have approved because it is my expert opinion that such court-sanctioned rates provide the best comparison group. The primary reason they are the best comparable evidence is that class action attorneys make a living getting paid by their clients through court-approved fee petitions;[14] thus the "market" rates for their services are generally the rates that

[14] Given this fact, I found unambiguous the statements in this case's fee declarations that the "hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." *E.g.*, Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15 at ¶ 7 (Sept. 15, 2016). I read "regular rates charged" as meaning that these were rates submitted in class action fee petitions, a reading confirmed by the succeeding clause's statement that the rates had been "accepted [by courts] in other complex class actions."

courts approve for their services.[15] Other ways of assessing the reasonableness of the hourly rates in cross-check submissions include the following:

- Occasionally, lawyers will submit, and courts rely on, affidavits from other lawyers in the community about prevailing rates.[16] Such affidavits have the benefit of being sworn to under penalty of perjury, and therefore likely provide accurate reporting on the rates included in them, but they may not represent a fair cross-section of evidence given the manner in which they are produced.[17]

- Occasionally lawyers will present evidence collected from surveys such as the *National Law Journal* survey. A few courts have deemed survey evidence sufficient for lodestar cross-check purposes because the cross-check "does not involve bean counting or mathematical precision."[18] Nonetheless, survey evidence is notoriously unreliable for multiple reasons: (a) the survey drafters can skew answers – even inadvertently – simply in the way questions are drafted; (b) results are often reported by attorney type (junior associate, senior partner, etc.) and with bands of rates so that tailored comparisons are impossible; (c) survey respondents, unlike lawyers filing fee petitions, do not sign survey responses under the penalty of perjury; and (d) most problematically, surveys embody a selection bias in that they may neither be sent to nor responded to by an appropriate comparison group; this is particularly a problem in that (e) the nature, legitimacy, and transparency of the organization undertaking the survey – and the context in which the survey is taken – will have a significant effect

[15] For this reason, the Second and Ninth Circuit have criticized the Seventh Circuit's belief that there is some other market approach to class action attorney's fees. *See* 5 *Newberg on Class Actions*, *supra* note 4, at § 15:79 ("'[T]o the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.'") (quoting *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049–50 (9th Cir. 2002)).

[16] *See, e.g., Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) ("[E]vidence of prevailing market rates may include affidavits from other area attorneys.").

[17] *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012) (finding declarations from other attorneys unhelpful for being too general); *Wilhelm v. TLC Lawn Care, Inc*., No. CIV. A. 07-2465-KHV, 2009 WL 57133, at *5 (D. Kan. Jan. 8, 2009) (agreeing with defendant's contention that "the affidavits of other plaintiffs' attorneys should be disregarded because they are self-serving" and "contradict plaintiffs' other evidence").

[18] *In re Schering-Plough Corp*., No. CV 08-397 (DMC)(JAD), 2013 WL 12174570, at *28 n. 27 (D.N.J. Aug. 28, 2013), report and recommendation adopted sub nom. *In re Schering-Plough Corp. Enhance Sec. Litig*., No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013).

on who responds to the survey and how. Accordingly, courts are often quite skeptical of such evidence.[19]

- Occasionally courts rely on something called the *Laffey* Matrix[20] – particularly in fee-shifting cases in the District of Columbia – but this is a disfavored approach and one that I am quite critical of for a host of reasons.[21]

In short, as the goal of this endeavor is to ascertain proper billing rates for lawyers pursuing class action lawsuits, I agree with the many courts that have found that the best comparable evidence are rates that other courts have approved for class action work.[22]

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[19] *See In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06 C 7023, 2016 WL 4765679, at *14 (N.D. Ill. Sept. 13, 2016) (noting "skepticism" amongst courts about applying survey rates that fail to differentiate large and small firms); *Forkum v. Co-Operative Adjustment Bureau, Inc.*, No. C 13-0811 SBA, 2014 WL 3101784, at *4 (N.D. Cal. July 3, 2014) (finding a fee survey "largely unhelpful in determining the reasonable hourly rates for the attorneys that worked on this case" because it is "not [a] reliable measure[] of rates in [the court's District] because [it] provide[s] no data on the prevailing hourly rates charged in this District"); *Lorik v. Accounts Recovery Bureau, Inc.*, No. 1:13-CV-00314-SEB, 2014 WL 1256013, at *2–3 (S.D. Ind. Mar. 26, 2014) (criticizing the "fairly obvious facial weaknesses" in a fee survey, such as insufficient sample size, lack of detailed geographical differentiation, and response bias, and finding "[t]he customary and judicially preferred standard by which the reasonableness of hourly rates is measured ordinarily comes from [evidence of rates charges by] . . . other lawyers who regularly practice in a particular geographical area and who provide similar or comparable legal services"); *California Durham v. Cont'l Cent. Credit*, No. 07CV1763 BTM WMC, 2011 WL 6783193, at *2 n.1 (S.D. Cal. Dec. 27, 2011) (finding a fee survey "is of limited usefulness because [it] does not beak down the hourly rates by region within California").

[20] The matrix originated in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983).

[21] *See* 5 *Newberg on Class Actions*, supra note 4, at § 15:43.

[22] *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co.*, 436 F. App'x 496, 498–99 (6th Cir. 2011) (noting that courts should determine reasonable hourly rates by looking to, *inter alia*, the rates used in analogous cases); *Plyler v. Evatt*, 902 F.2d 273, 277 & n.2 (4th Cir. 1990) (noting courts should weigh a fee applicant's hourly rates against the prevailing market rates in the relevant community, which looks to, *inter alia*, "attorneys' fee awards in similar cases"); *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 262 (N.D. Cal. 2015) (noting evidence of prevailing market rates includes affidavits from area attorneys and "examples of rates awarded to counsel in previous cases"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (noting Fifth Circuit courts determine whether an hourly rate is reasonable by looking to affidavits from other attorneys in the community and "rates actually

Court-approved rates in Massachusetts class action cases

21. For purposes of this Declaration, I utilized a database of 481 fee rates contained in 20 class action fee petitions approved by federal and state courts in Massachusetts in recent years.[23] A list of these cases is attached as Exhibit C. For each timekeeper, my research assistants identified the timekeeper's initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. As the fee petition herein was submitted in 2016, we adjusted all hourly rates in prior cases to 2016 dollars using the U.S. Bureau of Labor CPI Inflation Calculator.[24] Once each timekeeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-

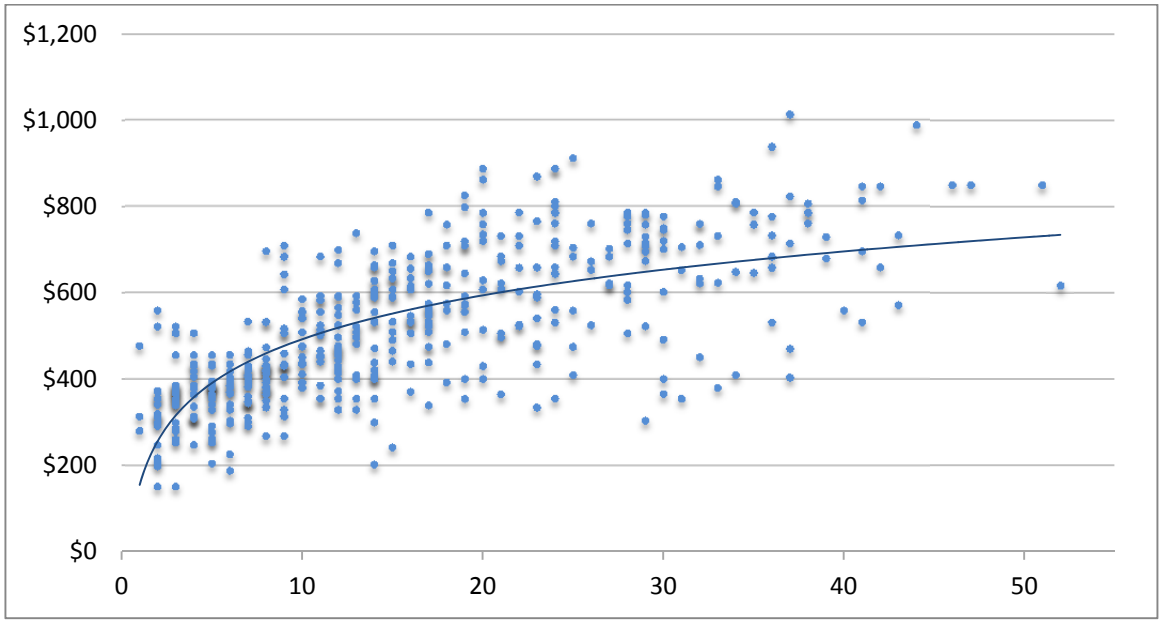
billed and paid in similar lawsuits"); *Faircloth v. Certified Fin. Inc*., No. CIV. A. 99-3097, 2001 WL 527489, at *10 (E.D. La. May 16, 2001) (looking to "decisions of other courts in this jurisdiction" to determine a proposed hourly rate was reasonable).

[23] I originally compiled this dataset for my 2016 work as an expert witness on attorney's fees in a case entitled, *Geanacopoulos v. Philip Morris USA Inc*., No. 98-6002-BLS1 (Mass. Super.). To do so, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study. In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, I coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, I utilized the lower rate in the data set. For purposes of this Declaration, my research assistants updated that dataset in two ways: we added the rates employed in that prior case as the court approved that fee petition and we searched for newer cases using the same criteria and identified one such case to add to the database.

[24] This calculator can be found at this hyperlink: http://data.bls.gov/cgi-bin/cpicalc.pl. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000.00 in January of 2015 was equivalent to $1,013.73 in January of 2016. Accordingly, we multiplied all 2015 rates by 1.01373 to adjust them to 2016 values.

axis representing the years since the timekeeper's admission to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



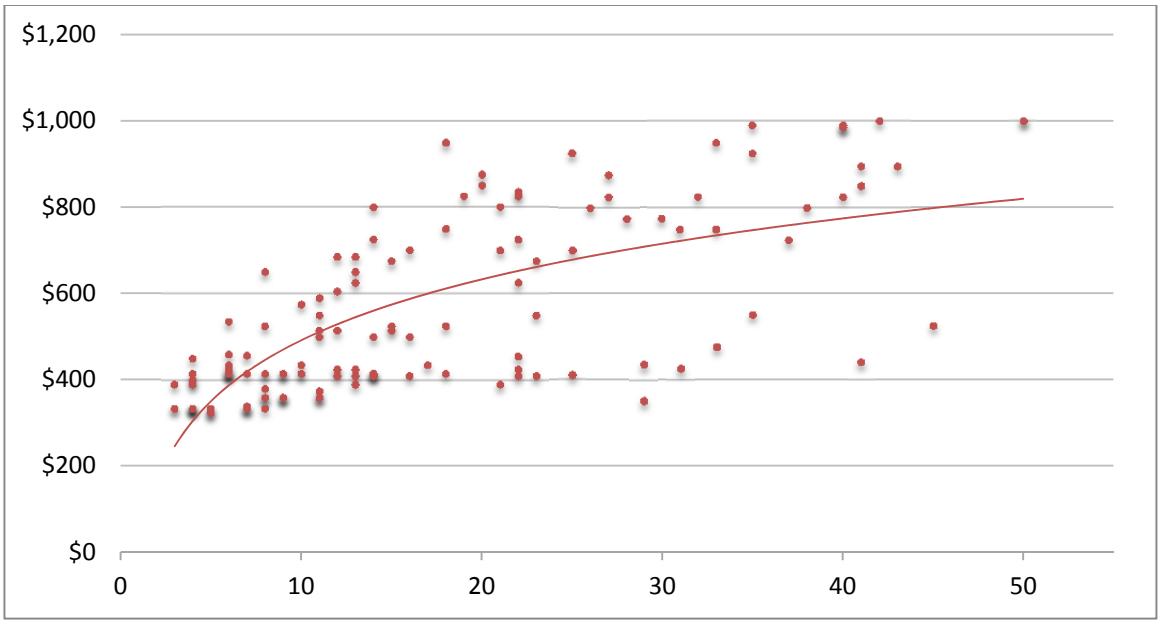
22. My research assistant next plotted the rates utilized by Counsel in this matter. Counsel supplied us with corrected lodestar data for three firms,[25] containing billing rates[26] for 103 lawyers. For the remaining six firms, we used the submissions they made at the time of the

[25] These are: Labaton Sucharow; Lieff Cabraser; and the Thornton Firm.

[26] Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Counsel, who had not been paid in the nearly six years that this case was pending, to use current hourly rates as an adjustment for the delay in payment.

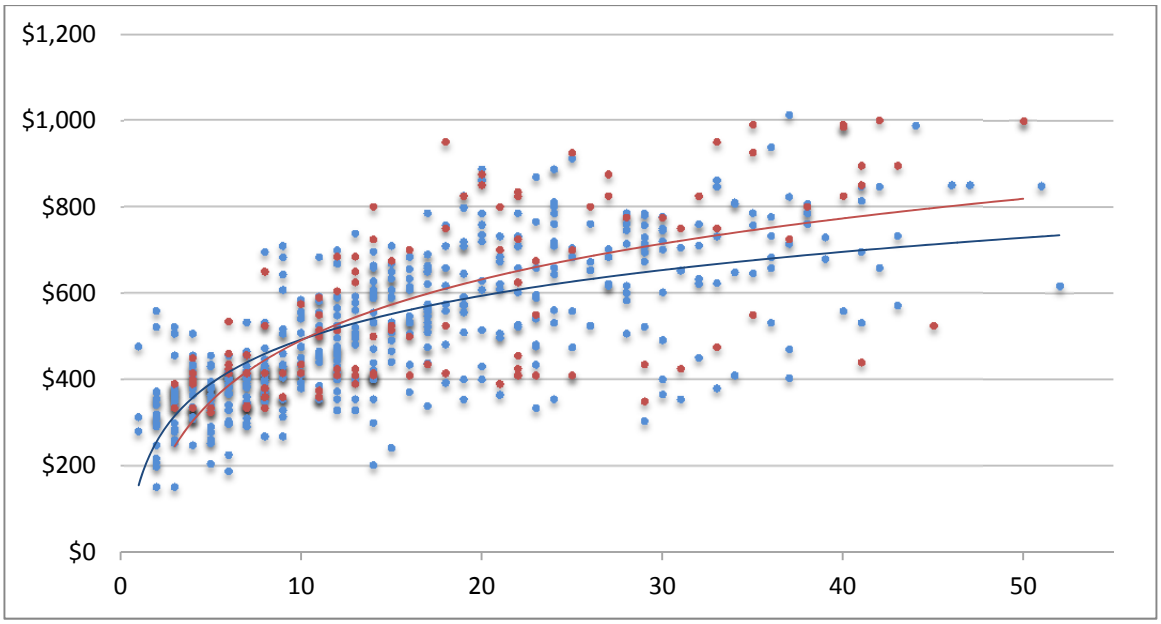
fee petition, which contained rates for 38 lawyers, bringing the total number in this data set to 141. After identifying the year of admission to the bar for each such timekeeper, we plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Counsel's billing rates, with the red logarithmic trend line sketching the trend of Counsel's rates across experience levels.

GRAPH 2
COUNSEL'S HOURLY RATES



23. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
COUNSEL'S HOURLY RATES COMPARED TO
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS
IN MASSACHUSETTS CLASS ACTIONS



24. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with fewer than about 11 years of experience, Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 76 of Counsel's 141 lawyers (53.9%) are below the Massachusetts trend line. When the differences between the trend lines are compared at all 141 points, Counsel's trend line is, on average, 1.01% above the trend line for rates in approved Massachusetts class action fee petitions. This means that Counsel's proposed rates are, across the board, virtually identical to the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

25. The portion of Counsel's trend line that is above the comparison trend line exceeds the comparison by an average of 6.32%. That Counsel's trend line across their senior lawyers in this case is roughly 6% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback are three of the leading class action firms in the United States, and the Thornton Firm is a premier firm in this market with a similar high profile throughout the country. The lawyers at these firms possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. As the comparison set picks up a range of approved class action cases in this community, it encompasses lawyers with far less expertise undertaking far more mundane matters. Indeed, *second*, one would expect higher than average billing rates in a case of this magnitude – a $300 million class action against one of the largest banks in the United States[27] and defended by one of the largest law firms in the United States.[28] Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 6% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

26. In comparing Counsel's rates to Boston rates, I have not adjusted the rates from the non-Boston firms in this case to Boston levels. I have not done so because this is a level of detail generally beyond what is undertaken for lodestar cross-check purposes.[29] In lodestar cross-check cases, courts occasionally cite the standard, borrowed from fee-shifting

[27] State Street Bank is #271 on the Fortune 500 in 2017. This data point is available at hyperlink: http://fortune.com/fortune500/state-street-corp/.

[28] Wilmer Hale is the 26th largest large firm by revenue in the United States. This data point is available at hyperlink: https://en.wikipedia.org/wiki/List_of_largest_law_firms_by_revenue.

[29] *See* note 12, *supra.*

jurisprudence, that rates should be "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[30] I am not aware of any appellate decisions mandating this approach for lodestar cross-check purposes in common fund cases, and it is a step rarely undertaken.[31] Nonetheless, if I were to do so, the rates for most timekeepers would decrease: application of a judicially-endorsed approach to adjusting lawyer rates by geographic market[32] would require decreasing the San Francisco rates (Lieff Cabraser) by 8.3%, the New York rates (Labaton Sucharow) by 3.4%, and the Washington, D.C. rates (McTigue Law LLP, Zuckerman Spaeder LLP, Beins Axelrod PC) by 0.3%, while increasing the

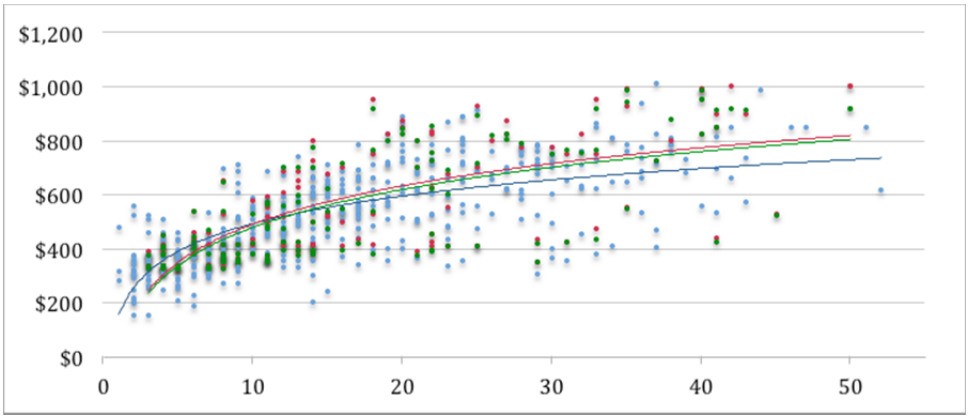
[30] *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) ("Part of the fees calculation is the selection of an appropriate hourly rate for each attorney. Rates should be 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984))).

[31] A search for the term "lodestar cross-check" in all federal cases returns 732 cases, while adding the phrase "and prevailing in the community for similar services" to the search returns a total of 51 cases. Of those 51 cases, only 11 involve a court holding that counsel should use local rates for purposes of a lodestar cross-check; nine of these 11 cases involve courts in the Eastern District of California insisting that lawyers from Los Angeles or San Francisco utilize Fresno rates. This means that outside of Fresno, a total of three of 732 reported cases (or .27%) in this search string insist upon geographic adjustment in the lodestar cross-check context (1.5% if Fresno is included). Even that miniscule percentage is likely exaggerated because there are thousands of lodestar cross-check decisions not reported on Westlaw and the reported cases likely select for aberrations of this type.

[32] I utilize the federal government's judicial differential methodology to adjust rates between different geographic markets, as set forth in *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). The federal government rates can be found at this hyperlink: http://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates. The federal government increases the base rate by 26.73% for the Boston market, by 31.22% for the New York market, by 38.17% for the San Francisco market, by 27.10% for the D.C. market, by 24.24% for the Seattle market, and by 15.65% for the North/South Carolina market. This means that a base hourly rate of, say, $350/hour would be worth $443.56 in Boston ($350 x 1.2673) and $459.27 in New York ($350 x 1.3122). Therefore, one would have to multiply New York billing rates by 0.96579 ($459.27 x 0.96579=$443.56) to bring them down to Boston levels. The same conclusion can be achieved by the formula: <1-(1.2673/1.3122)>. I apply this approach for each market.

Seattle (Keller Rohrback) and South Carolina (Richardson Patrick Westbrook & Brickman LLC) rates by 2.0% and 9.6%, respectively. In Graph 4, below, these new geographically-adjusted rates are added to the prior graph: the Massachusetts-approved rates remain in blue, Counsel's unadjusted rates remain in red, and Counsel's rates adjusted to the Boston market appear in Celtic green. There is also a new green trend line for the geographically adjusted rates, but overall the rates drop so slightly that it is difficult to see the deviation of the green line's adjusted rates from the red line's unadjusted rates.

GRAPH 4
COUNSEL'S HOURLY RATES ADJUSTED TO BOSTON MARKET COMPARED TO COUNSEL'S UNADJUSTED HOURLY RATES AND HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



Put most simply, adjusting for geography, Counsel's overall lodestar decreases by a total of 3.18%. While this means that Counsel's lodestar multiplier simultaneously increases, the increase is so small – from 2.01 to 2.07 – that the multiplier remains well within the range of reasonableness, as discussed below.[33] The small and immaterial effect of all this (geographic-

[33] *See* Part V, *infra.*

correction) work is precisely the reason that courts do not demand that it be undertaken in the cross-check setting.

27. In sum, the prior paragraphs demonstrate empirically that the rates that Counsel utilized in their lodestar cross-check submission in September 2016 were fully consistent with rates courts in Boston had explicitly or implicitly approved in awarding fees in class action cases.

Defense Firm Rates

28. Another relevant set of data concerning rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,"[34] is the set of rates charged by large corporate defense firms. It is these large corporate firms – like Wilmer Hale in this case – that defend significant class action cases like this one; these firms therefore provide the services most comparable to the services that the plaintiffs' lawyers provide in these cases, utilizing reasonably comparable skills and calling on reasonably comparable experience.[35] Since corporate firms typically have private fee arrangements with their clients, the most public – and reliable – evidence of the rates that these firms charge appears in fee petitions submitted by them in bankruptcy cases.[36] For purposes of this Declaration, I

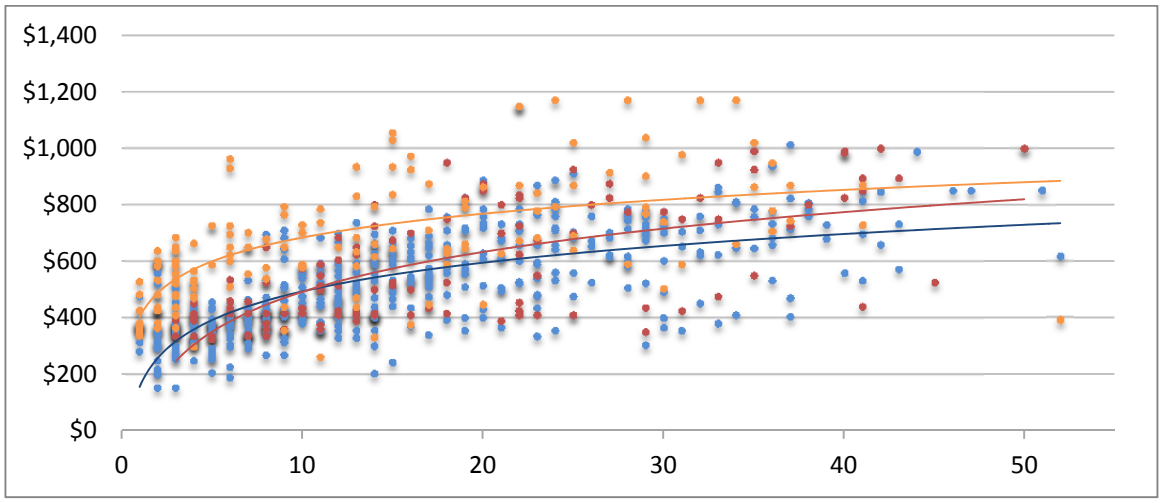
[34] *Martinez-Velez*, 506 F.3d at 47.

[35] There are of course some differences between plaintiff firms running large complex class actions and defendant firms defending such cases, but what is not different is that the two sets of firms are litigating the same cases against one another.

[36] I find these rates the most reliably comparable for four independent reasons. *First*, unlike rates reported in publications like the *National Law Journal*, these rates are provided lawyer-by-lawyer, not in ranges based on job types (like junior associates, or senior associates). *Second*, counsel seeking court approval for these rates swear to their accuracy. *Third*, in the bankruptcy context, the petitioning lawyers specifically represent that the rates they are using are the same rates that they use outside of the bankruptcy context. *See* 11 U.S.C. § 330(a)(3) (directing bankruptcy courts awarding attorneys' fees to take into account "all relevant factors, including . . . whether compensation is reasonable based on the customary compensation charged by

utilized a database of 169 fee rates contained in six fee petitions approved by bankruptcy courts in Massachusetts in five cases in recent years.[37] A list of those cases is attached as Exhibit D. Using orange dots and an orange logarithmic trend line, we plotted these rates (adjusted to 2016 dollars) onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Counsel's rates (in red). The results are reflected in Graph 5, below.

GRAPH 5
CORPORATE FIRM RATES COMPARED TO BOTH HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO COUNSEL'S HOURLY RATES



comparably skilled practitioners in cases other than cases under this title"). *Fourth*, the type of work – providing legal services to a group of absent creditors in a piece of complex litigation – is generally analogous to what class action attorneys do.

[37] My research assistants consulted Chambers and Partners rankings to create a list of leading corporate firms. They then searched for these firms by name on Westlaw, filtering for cases in Bankruptcy Courts in the District of Massachusetts after 2009. When one of the firms on the Chambers list was named as counsel for one of the parties in a Westlaw case, my research assistants searched PACER for a fee petition filed by that firm. Four cases yielded five usable fee petitions; a fifth case, the Houghton Mifflin Harcourt bankruptcy, was found by searching for large bankruptcies in Massachusetts. My research assistants utilized every petition they found meeting these criteria.

As is visually evident, judicially-approved defense firm rates are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than Counsel's rates herein. Indeed, when the differences between the trend lines are compared at all 141 points in Counsel's fee petition, the defense firm rates are, on average, 37.53% above the trend line for Counsel's rates.

Blended Rate

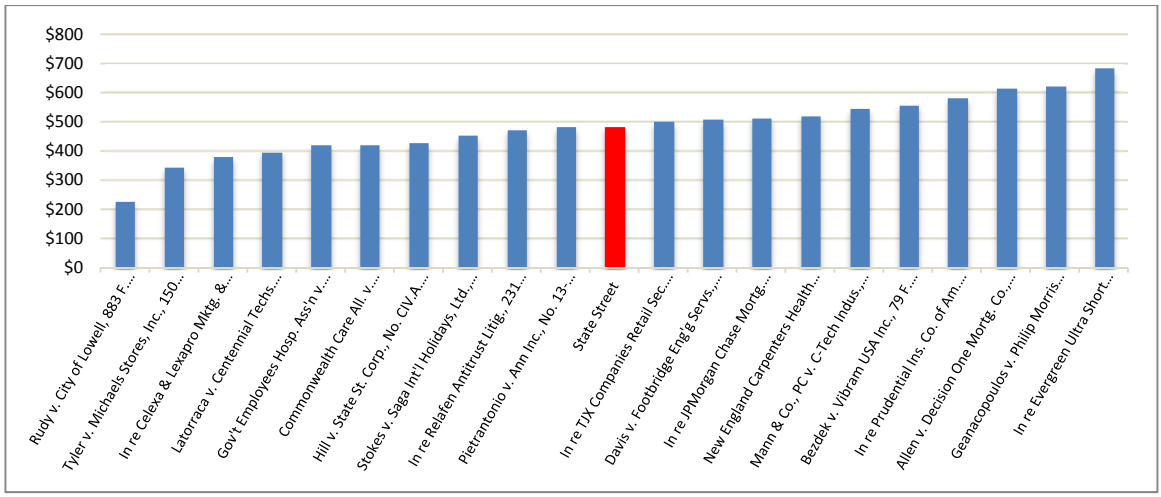
29. Counsel's blended billing rate[38] for the entire case – utilizing the corrected lodestars of the Labaton, Lieff Cabraser, and Thornton firms – is $484.70.[39] A quantitative analysis of this blended billing rate confirms its reasonableness.

30. To assess the reasonableness of the blended billing rate, I directed my research assistants to extract the blended billing rate from the 20 Massachusetts federal and state class action fee approvals that we had collected for this rate study. The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $227.51/hour to a high of $683.24/hour. The mean rate for these 20 cases is $484.05. The complete range of blended billing rates is reflected in Graph 6, below, with the blended billing rate in this case highlighted in red. As the Court can see, the blended billing rate in this case ($484.70) is just at the median of the graph and 65 cents, or 0.13%, above the mean, demonstrating its normalcy.

[38] A blended billing rate is captured by simply dividing the total lodestar by the total number of hours worked, thus providing the average hourly billing rate for the case across all timekeepers ranging from high-end partners to paralegals.

[39] If the rates are adjusted for geographic markets, *see supra* ¶ 26, the blended rate for this case falls to $469.29.

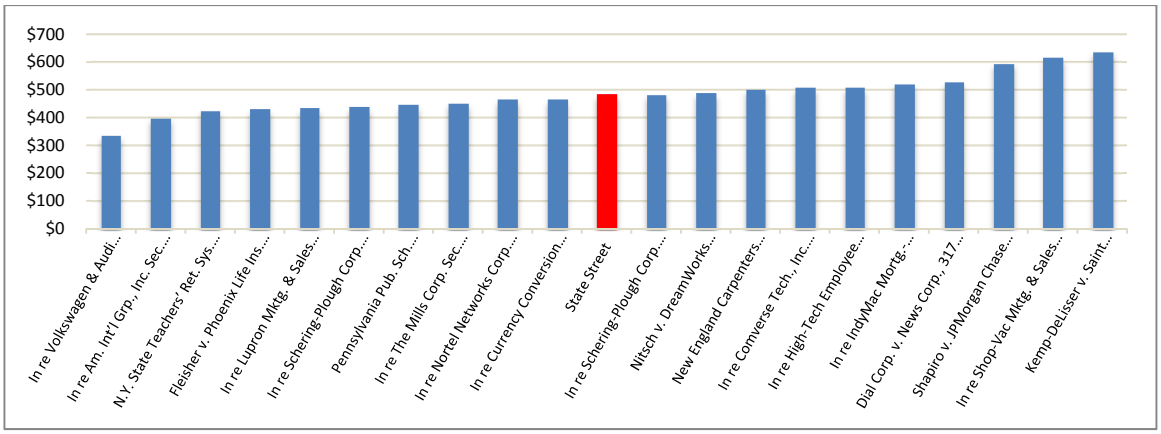
GRAPH 6
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN RECENT MASSACHUSETTS CLASS ACTION FEE APPROVALS



31. Because the blended billing rates in the Massachusetts cases tend to have emerged from smaller settlements (this is one of the largest settlements in Massachusetts history), I also compared the blended billing rate in this $300 million settlement to blended billing rates in 20 other settlements of comparable size ($100-$500 million). A list of those cases is attached as Exhibit E.[40] The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $338.07/hour to a high of $637.67/hour. The mean rate for these 20 cases is $484.67. The complete range of blended billing rates is reflected in Graph 7, below, with the blended billing rate in this case highlighted in red.

[40] My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar. Thus, they used search terms like "megafund" or "hundred million" to capture fund size and search terms like "lodestar" or "hours" to capture decisions that contained rate information. If the case had a fund of the right size, but the reported decision did not contain enough information about the fee petition, they tracked that down on PACER. No cases of the relevant size enabling reference to counsel's lodestar information were rejected.

GRAPH 7
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN $100-$500 MILLION CLASS ACTION SETTLEMENTS



As is visually evident, the blended billing rate in this case ($484.70) is in the middle of the pack – right at the median in the graph – and but three cents above the mean, demonstrating its normalcy.

32. The reasonableness of Counsel's blended billing rate supports several further conclusions. The blended billing rate reflects the distribution of time between partners, associates, and paralegals. If only partners did this work, the blended billing rate would be very high, whereas if only paralegals billed, the blended billing rate would be very low. The fact that the blended billing rate in this case is at or below average across two comparison sets means that Lead Counsel distributed work among partners, associates, non-partnership track attorneys, and paralegals in an appropriate fashion. Given the slightly above-average rates of the most senior attorneys in this case noted above, it is a sign of good leadership that Lead Counsel was able to bring the blended rate in at this mean.

33. In sum, three separate empirical analyses (one with two sub-parts) support the conclusion that Counsel's rates are entirely normal: they are consistent with the mean for rates approved by courts in awarding fees in class actions in this community; they are below the rates charged by the defendant's firm to its paying clients for similar work; and the blended rate is consistent with rates in this community and for comparably-sized settlements.

IV.
COUNSEL APPROPRIATELY BILLED NON-PARTNER TRACK ATTORNEYS AT MARKET RATES AND THE RATES EMPLOYED WERE REASONABLE

34. Counsel employed non-partnership track attorneys to undertake some aspects of the class's legal work, particularly the review of documents. I have reviewed the rates at which these non-partnership track attorneys are included in the lodestar for cross-check purposes and make three factual observations about those rates, two empirical, one policy-oriented.

35. *First,* these are skilled attorneys. They are referred to as "contract" or "staff" attorneys solely by virtue of the fact that they are not on a partnership track at the relevant law firms, but are hired on more of an ad hoc basis.[41] The fact that these lawyers are not on a partnership track, standing alone, says nothing about their qualifications or about the type of work that they undertook. For purposes of this report, I reviewed Lieff Cabraser's slide presentation to the Special Master, which, as the Court knows, reflects the backgrounds and experiences of many of the non-partnership track attorneys who worked on this case. It appeared clear to me that these attorneys were very well qualified: they typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often

[41] While different firms call these attorneys different names – e.g., "contract attorneys" or "staff attorneys" – the defining characteristic of them is that they are not on a partnership track. Commentators often make the incorrect assumption that these attorneys are necessarily "temps." Many are salaried employees of the firms and work at these firms over many years.

work on a non-partnership track as a personal choice about how they wish their careers to proceed, not because they are unqualified for partnership track jobs. Moreover, the firms have convincingly attested that these attorneys did meaningful work.

36. *Second*, the rates at which counsel included non-partnership track attorneys in their lodestar for cross-check purposes are consistent with 57 rates that courts have explicitly or implicitly affirmed in approving fee petitions in 12 class action cases decided since 2013.[42] A list of those cases is attached as Exhibit F. The rates in those cases ranged from $250.00 to $550.00, with a mean (in 2016 dollars) of $379.53.[43] The blended rate for non-partnership attorneys in this case was $379.31. Thus the rate in this case is 22 cents, or 0.06%, below the mean of the comparison group.[44] Put simply, the billing rate for non-partnership track attorneys in this case is entirely normal.

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[42] My research assistants compiled this list by searching for recent fee decisions involving staff or contract attorney rates, using a neutral search string in Westlaw. The search returned 29 cases. I read through all 29 cases. We then used the rates from any case with court-approved billing rates for contract or staff attorneys, accounting for experience, except for one case in which the contract attorneys simply staffed a calling center. This yielded 12 usable cases with 57 data points.

[43] Using a different data set, I recently reported a very similar numerical result in the Volkswagen "Clean Diesel" MDL. There, a set of 13 cases with 138 data points yielded an average contract attorney rate of $386.75 in 2017 dollars. *See* Declaration of William B. Rubenstein in Support of Plaintiffs' Motion for 3.0-Liter Attorneys' Fees and Costs at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case 3:15-md-02672-CRB (N.D. Cal.) (ECF No. 3396-2, Ex. B, filed June 30, 2017). Here, my 12 case data set's norm of $379.53 in 2016 dollars is the equivalent of $389.02 in 2017 dollars, which is virtually equivalent to the $386.75 I reported in VW (0.59% higher). Hence the two data sets reinforce one another.

[44] I removed Michael Bradley from this portion of my rate study since his hourly rate was set on a contingent basis, unlike the other non-partnership track attorneys. If he is included, the total for this case rises from $379.31 to $382.94, which is 0.90% above the mean of the comparison group.

37. *Third,*[45] the policy question of how to bill non-partnership track attorneys has arisen regularly in class suits as class counsel will often hire such lawyers to perform discrete functions in a particular case. Class counsel typically pay these attorneys at a lower hourly rate than the hourly rate they assign to them in the lodestar analysis in their fee petitions. To put numbers on this idea: the firms herein hired non-partnership track attorneys at rates ranging from $30 to $60/hour, then assigned these attorneys rates ranging from $335 to $440/hour[46] for purposes of the lodestar cross-check calculation based, for example, on the attorneys' number of years out of law school, their experience, and the type of work they performed. It is my expert opinion that several policy arguments support this approach:

- This is precisely the way in which firms bill legal services – including those of partners, associates, paralegals, and contract attorneys – to clients in the private market. For instance, a firm may pay a first-year associate a $150,000 annual salary and expect 2,000 hours of billable time in return. That means that the associate's salary breaks down to $75/hour. The associate likely costs the firm more than $75/hour because the firm has spent time recruiting and training the associate and because it pays for overhead, perhaps benefits, and other expenses associated with her work. Consequently, the associate who is receiving a $75/hour salary may actually cost the firm, say, $100/hour. But the firm then bills its clients, maybe, $375/hour for that associate's time, realizing a $275/hour, or 275%, profit for the associate's work. Regardless of the precise numbers that attach to the practice, the point is that law firms are in the business of making their partners a profit by having the partners bill the work done by their associates and paralegals to their clients at higher rates than they pay them. So long as a contract attorney is providing legal services to a client, a firm is entitled to bill her time to the client in the same manner.

- The ABA reached this conclusion nearly two decades ago, *see* ABA Formal Opinion 00-420, and I note as a matter of policy that courts have often cited to the ABA's guidance in concluding that class action firms "may charge a markup to cover overhead *and profit* if the contract attorney charges are billed as fees for legal services.[47] It makes sense that courts have so held because a contingent fee class action firm's lodestar operates in the same way as a private law firm's bill to its

[45] The language and citations in this and the following paragraphs are taken from 5 *Newberg on Class Actions*, supra note 4, at § 15:41.

[46] These ranges do not encompass Michael Bradley, as noted above. *See* note 44, *supra.*

[47] *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302(CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (emphasis added).

client: it embodies this basic profit for its partners and, in doing so, brings the lodestar in line with market rates.[48]

- Permitting class counsel to bill non-partnership track attorneys at market rates is cost-efficient: it encourages the firms to delegate work to attorneys who are likely billed at lower costs than are associates or partners. If class action firms could only bill non-partnership track attorneys at cost, they would likely transfer the work required to associates.

38. In sum, quantitative analysis of the rates paid non-partnership track attorneys shows that these rates are indistinguishable from the rates regularly approved by courts for such work and public policy strongly supports the manner in which Counsel billed non-partnership track attorneys.

V.
COUNSEL'S FEE WAS REASONABLE

39. Under the lodestar cross-check method, the measuring stick of the reasonableness of counsel's fee is the level of multiplier that it represents over the time they invested in the case. Counsel's fee embodied a lodestar multiplier of 2.01, or approximately 2.[49] Quantitatively, a 2

[48] The lodestar *multiplier* is meant to reward the class action firm over and above the market rate for undertaking a case on a contingency fee basis. Without such a multiplier, no firm would undertake contingent cases, as it would be far safer to simply reap the normal profit embodied in the lodestar but reflected, in a non-contingent case, in the bill to the client. *See, e.g.*, *Ketchum v. Moses* 17 P.3d 735, 742 (Cal. 2001) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (internal quotation marks and citations omitted)).

[49] This is the multiplier for the full fee award to all counsel in the case divided by the hours of all counsel in the case. As noted above, *see supra* ¶ 26, if all hourly rates are adjusted to Boston rates, the multiplier rises to 2.07.

multiplier is consistent with multipliers that courts have previously approved in similar circumstances.

40. Three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.42,[50] 1.65, [51] and 1.81,[52] while an older study found the mean multiplier to be 4.97.[53]

41. These studies also show that multipliers are higher in cases with larger returns, with the mean multipliers rising to 2.39 (in cases with recoveries over $44.6 million) in one study;[54] to 3.18 (in cases with recoveries over $175.5 million) in another study;[55] and to 4.5 (in cases with recoveries over $100 million) in a third study.[56]

42. In the set of 20 $100-$500 million settlements my research assistants assembled for purposes of this Declaration, the approved multipliers ranged from 0.92 to 8.3, with the average being 2.28. The 2.01 multiplier in this case is therefore 12% below the mean for

[50] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[51] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010).

[52] Eisenberg & Miller II, *supra* note 5, at 272.

[53] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 169 (2003) (hereafter "Logan").

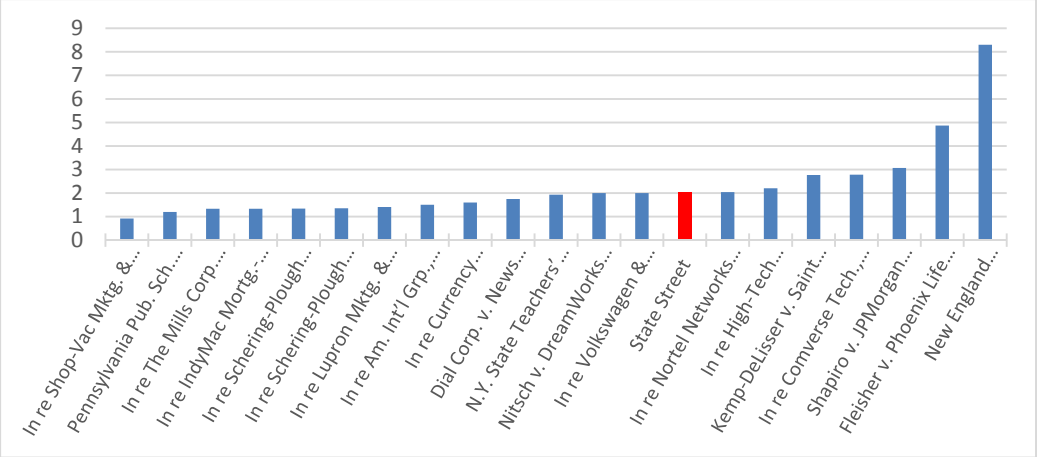
[54] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[55] Eisenberg & Miller II, *supra* note 5, at 274.

[56] Logan, *supra* note 53, at 167.

settlements of comparable size;[57] it appears a few cases higher than the median in Graph 8, below, but the only cases between this case and the median case have multiplier values of 2.0 rather than 2.01.

GRAPH 8
COURT-APPROVED MULTIPLIERS IN
$100-$500 MILLION-DOLLAR CASES



43. Beyond these bare statistics, case reports demonstrate that, in appropriate circumstances, courts have often approved percentage awards embodying lodestar multipliers far above the multiplier of 2 at issue here. In the leading Ninth Circuit opinion on point, for example, the Court established 25% as the benchmark percentage fee and approved a multiplier of 3.65, writing that this number "was within the range of multipliers applied in common fund cases"[58] and appending a list of such cases to its decision. Similarly, in Exhibit G, I provide a

[57] If Counsel's rates are adjusted to the Boston market and a 2.07 multiplier is employed, *see* ¶ 26, *supra,* that multiplier is 9.3% below the mean of the comparison set.

[58] *Vizcaino*, 290 F.3d at 1051; *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) ("A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–4.0. Given the complexity and duration of this litigation, the results obtained for the class, and the risk counsel faced in bringing the litigation, the Court finds the 2.83 multiplier appropriate." (citation omitted)).

list of 54 cases with multipliers over 3.5, 48 of which have multipliers of 4.00 or higher, and 31 of which have multipliers of 5.00 or higher. This list is not meant to be either exhaustive or representative of all multipliers. Rather, it demonstrates that courts approve percentage awards that embody multipliers well above the multiplier sought here in appropriate circumstances.

44. That such circumstances exist in this case is evident from this Court's conclusions at the fairness hearing:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.[59]

The Court's finding regarding the risks that Counsel took and the results that they achieved are precisely the factors that support a multiplied fee award.[60] Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion, as the change in the proposed multiplier is simply from 1.8 to 2.

45. In sum, the requested multiplier is therefore above the mean for *all* cases but below the mean for *large* cases, it falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past, and such circumstances existed in this case. As the purpose of the lodestar cross-check is to generate a multiplier enabling an assessment of

[59] Hearing Transcript, Nov. 2, 2016 (ECF No. 114) at 36.

[60] 5 *Newberg on Class Actions, supra* note 4, at § 15:87.

the reasonableness of the percentage award, a multiplier at this level fully supports the reasonableness of the fee the Court awarded Counsel in this matter.

* * *

46. I have testified that:

- Counsel's ***approach*** to its fee – presenting the Court with a requested percentage, providing information to enable a lodestar cross-check, and addressing a series of relevant factors – is the most common fee method and one normally used in large common fund cases like this one.

- Counsel's hourly ***billing rates*** are consistent with rates in class action cases in this community; lower than the rates charged by corporate firms in this market for similar work; and within pennies of the average blended hourly billing rates approved in other class action settlements in this community and in comparably-sized settlements.

- Counsel's approach to ***billing non-partnership track attorneys*** is consistent with prevailing law, policy, and ethical norms and the rates at which they bill these attorneys are fully consistent with the rates at which courts have approved contract and staff attorney work in other class action settlements.

- Counsel's ***multiplier*** of approximately 2 is below the mean for settlements of $100-$500 million and entirely reasonable given the unique risks that it shouldered and the superb results that it achieved for the class.

Executed this 31st day of July, 2017, in Los Angeles, California.

William B. Rubenstein

EXHIBIT A

PROFESSOR WILLIAM B. RUBENSTEIN

Harvard Law School - AR323
1545 Massachusetts Avenue
Cambridge, MA 02138

(617) 496-7320
rubenstein@law.harvard.edu

ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law — 2011-present
Professor of Law — 2007-2011
Bruce Bromley Visiting Professor of Law — 2006-2007
Visiting Professor of Law — 2003-2004, 2005-2006
Lecturer in Law — 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law — 2002-2007
Acting Professor of Law — 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law — 1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law — 1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor — Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel — 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk — 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern — Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

♢ *Author,* NEWBERG ON CLASS ACTIONS (sole author of Fourth Edition updates since 2008 and sole author of all content in the Fifth Edition)

♢ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010, 2011, 2012, 2013, 2014 (invited), 2015, 2016, 2017)

♢ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ *Amicus curiae, Amicus* brief filed in – and approvingly cited by – California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 376 P.3d 672, 687 (Cal. 2016))

♢ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

♢ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

♢ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

♢ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

♢ "*Expert's Corner*" (Monthly Column)*, Class Action Attorney Fee Digest,* 2007-2011

Expert Witness

♢ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

♢ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

♢ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

♢ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

♢ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

♢ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

♢ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

♢ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

♢ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

♢ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,

referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

♢ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

♢ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

♢ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

♢ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

♢ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

♢ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

◊ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

◊ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

◊ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

◊ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

◊ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

◊ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

◊ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

◊ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ (D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

◊ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

◊ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

◊ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal.

(2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*

Professional Responsibility Inquiries (2011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))

♢ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

♢ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

♢ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

♢ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage:" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

◊ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

♢ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

♢ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

♢ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

♢ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

♢ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

♢ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

♢ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

♢ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

♢ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

♢ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

♢ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

♢ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

♢ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

♢ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Attorney's Fees

♢ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases, relied on by the court in *Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016).

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.,* 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

♢ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

♢ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

♢ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

♢ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

♢ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

♢ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

♢ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
♢ *Play It Straight*, NEW YORK TIMES, October 16, 2004
♢ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
♢ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)
♢ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
♢ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

♢ Massachusetts (2008)
♢ California (2004)
♢ District of Columbia (1987) (inactive)
♢ Pennsylvania (1986) (inactive)

♢ U.S. Supreme Court (1993)

♢ U.S. Court of Appeals for the First Circuit (2010)
♢ U.S. Court of Appeals for the Second Circuit (2015)
♢ U.S. Court of Appeals for the Fifth Circuit (1989)
♢ U.S. Court of Appeals for the Ninth Circuit (2004)
♢ U.S. Court of Appeals for the Eleventh Circuit (1993)
♢ U.S. Court of Appeals for the D.C. Circuit (1993)

♢ U.S. District Courts for the Central District of California (2004)
♢ U.S. District Court for the District of the District of Columbia (1989)
♢ U.S. District Court for the District of Massachusetts (2010)
♢ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT B
Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

1. Class Action Complaint, ECF No. 1
2. Amended Class Action Complaint, ECF No. 10
3. Memorandum of Law in Support of Plaintiff's Assented-to Motion for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, ECF No. 8
4. Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 19
5. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, ECF No. 22
6. Reply Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 29
7. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, ECF No. 33
8. Stipulation and Joint Motion to Continue Stay, ECF No. 66
9. Stipulation and Joint Motion to Continue Stay, ECF No. 71
10. Stipulation and Joint Motion to Continue Stay, ECF No. 75
11. Stipulation and Agreement of Settlement, ECF No. 89
12. Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 91
13. Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 92
14. Exhibit A: Letter Dated March 18, 2011, ECF No. 92-1
15. Exhibit B: Labaton Sucharow Firm Resume, ECF No. 92-2
16. Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, ECF No. 97
17. Defendants' Memorandum in Support of Class Action Settlement, ECF No. 99
18. Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, ECF No. 100
19. Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses of Service Awards to Plaintiffs, ECF No. 102
20. [Proposed] Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 103-1
21. Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of

Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 104

22. Exhibit 1: Declaration of George Hopkins in Support of Final Approval of Class Settlement, Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Award to ARTRS, ECF No. 104-1
23. Exhibit 2: Letter Dates March 18, 2011, ECF No. 104-2
24. Exhibit 3: Motion to Dismiss, ECF No. 104-3
25. Exhibit 4: Lobby Conference Before Chief Judge Mark L. Wolf, ECF No. 104-4
26. Exhibit 5: Declaration of Jonathan B. Marks, ECF No. 104-5
27. Exhibit 15: Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15
28. Exhibit 16: Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-16
29. Exhibit 17: Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-17
30. Exhibit 18: Declaration of Lynn Sarko on Behalf of The Andover Companies Employee Savings and Profit Sharing Plan and James Pehoushek-Strangeland in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-18
31. Exhibit 19: Declaration of J. Brian McTigue in Support of Motion for Attorneys' fees, Reimbursement of Expenses, and Incentive Awards to Certain Class Representatives, ECF No. 104-19
32. Exhibit 20: Declaration of Carl S. Kravitz in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-20
33. Exhibit 21: Declaration of Catherine M. Campbell on Behalf of Feinberg, Campbell & Zack, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-21
34. Exhibit 22: Declaration of Jonathan G. Axelrod on Behalf of Beins, Axelrod, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-22
35. Exhibit 23: Declaration of Kimberly Keevers Palmer on Behalf of Richardson, Patrick, Westbrook & Brickman, LLC in Support of Lead Counsel's Motion for an Award of Attorneys' fees and Payment of Expenses, ECF No. 104-23
36. Exhibit 24: Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards, ECF No. 104-24
37. Exhibit 25: Rate Tables, ECF No. 104-25
38. Defendant's Statement of Reporting Status of Class Action Settlement, ECF No. 106
39. Reply Memorandum of Law in Further Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 108

40. Supplemental Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Settlement Class Members and Requests for Exclusion, ECF No. 109
41. Order and Final Judgment, ECF No. 110
42. Order Awarding Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 111
43. Order Approving Plan of Allocation, ECF No. 112
44. Hearing Transcript, ECF No. 114
45. Letter Dated November 10, 2016, ECF No. 116
46. Memorandum and Order, ECF No. 117
47. The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum in Support of Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as *Guardian ad Litem* for Class or *Amicus* in Front of Special Master, ECF No. 127
48. Memorandum of Lieff Cabraser Heimann & Bernstein, LLP Consenting to Appointment of Special Master, ECF No. 128
49. Memorandum of Labaton Sucharow LLP Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master, ECF No. 129
50. Order Regarding Class Notice, ECF No. 172
51. Memorandum and Order Regarding Appointment of Judge Rosen as Special Master, ECF No. 173
52. The Competitive Enterprise Institute's Center for Class Action Fairness's *Amicus* Response to Court's Order of February 6 – Leave to File granted March 8, 2017 (Dkt. 172), ECF No. 174
53. Memorandum and Order Regarding Class Notice, ECF No. 187
54. Memorandum and Order Regarding Motion for Relief from Fee Order, ECF No. 192
55. Special Master's Order Regarding the Law Firms' Objection to Retention of John W. Toothman as Advisor to Counsel to the Special Master, ECF No. 193
56. Objection of Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm LLP to Proposed Appointment of John W. Toothman as Expert in Proceeding Before the Special Master, ECF No. 194
57. Objection Plaintiffs' Law Firms' Objection to Special Master's Order Regarding Retention of John W. Toothman, ECF No. 199
58. Memorandum and Order Regarding Emergency Motion, ECF No. 200
59. Exhibit A: Notice of Proceedings that Could Result in an Additional Award to Class Members Who Have Claims, ECF No. 200-1
60. Exhibit B: Notice of Proceedings that Could Result in an Additional award to Class Members Who Have Claims, ECF No. 200-2
61. Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing and Emailing of Supplemental Notice to Settlement Class Members and/or Their Counsel, ECF No. 202
62. Order Regarding Email Addresses, ECF No. 203
63. Memorandum and Order – Toothman Order, ECF No. 204
64. Labaton Sucharow's Response to the Court's April 26, 2017 Order, ECF No. 205
65. Exhibit A: Declaration of Nicole M. Zeiss in Response to the Court's April 26, 2017 Order, ECF No. 205-1

66. Exhibit B: Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Response to the Court's April 26, 2017 Order, ECF No. 205-2
67. Memorandum and Order Regarding Special Master Billing Rate, ECF No. 206
68. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 1 Response
69. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017
70. Thornton Law Firm, LLP's June 1, 2017 Responses to Special master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
71. 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
72. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 9, 2017
73. Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
74. Lieff Cabraser Heimann & Bernstein LLP's Corrected Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Interrogatories Nos. 43 and 44
75. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response
76. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017
77. Thronton Law Firm, LLP's July 10, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories

EXHIBIT C

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT C
Massachusetts Cases Affirming Class Action Fee Awards

1. *Allen v. Decision One Mortg. Co., LLC*, No. CIV.A. 07-11669-GAO, 2010 WL 1930148 (D. Mass. May 12, 2010)
2. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324 (D. Mass.), aff'd, 809 F.3d 78 (1st Cir. 2015)
3. *Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013)
4. *Davis v. Footbridge Eng'g Servs., LLC*, No. 09CV11133-NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)
5. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536 (Mass. Super. Feb. 24, 2016)
6. *Gov't Employees Hosp. Ass'n v. Serono Int'l, S.A.*, 246 F.R.D. 93 (D. Mass. 2007)
7. *Hill v. State St. Corp.*, No. CIV.A. 09-12146-GAO, 2015 WL 127728 (D. Mass. Jan. 8, 2015), appeal dismissed, 794 F.3d 227 (1st Cir. 2015)
8. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464 (D. Mass. Sept. 8, 2014)
9. *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. CIV.A. 08-11064-NMG, 2012 WL 6184269 (D. Mass. Dec. 10, 2012)
10. *In re JPMorgan Chase Mortg. Modification Litig.*, 18 F. Supp. 3d 62 (D. Mass. 2014)
11. *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)
12. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005)
13. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395 (D. Mass. 2008)
14. *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25 (D. Mass. 2011)
15. *Mann & Co., PC v. C-Tech Indus., Inc.*, No. CIV.A.08-11312-RGS, 2010 WL 457572 (D. Mass. Feb. 5, 2010)
16. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)
17. *Pietrantonio v. Ann Inc.*, No. 13-CV-12721-RGS, 2014 WL 3973995 (D. Mass. Aug. 14, 2014)
18. *Rudy v. City of Lowell*, 883 F. Supp. 2d 324 (D. Mass. 2012)
19. *Stokes v. Saga Int'l Holidays, Ltd.*, 376 F. Supp. 2d 86 (D. Mass. 2005)
20. *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53 (D. Mass. 2015)

EXHIBIT D

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT D

Massachusetts Bankruptcy Cases Containing Corporate Firm Billing Rates

1. *In re Houghton Mifflin Harcourt Publishing Company*, 12-BK-15610 (Bankr. D. Mass. 2012), ECF. No. 168
2. *In re Lexington Jewelers Exch., Inc.*, No. 08-10042-WCH, 2013 WL 2338243 (Bankr. D. Mass. May 29, 2013), ECF No. 439-1
3. *In re McCabe Grp.*, 424 B.R. 1 (Bankr. D. Mass.), *aff'd in part, rev'd in part sub nom. McCabe v. Braunstein*, 439 B.R. 1 (D. Mass. 2010), ECF No. 404-8
4. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 485
5. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 487-6
6. *In re The Educ. Res. Inst., Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010), ECF No. 1196-1

EXHIBIT E

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT E
Class Actions Settlements with Funds of $100-$500 Million

1. *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016)
2. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015), ECF No. 310
3. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013), ECF No. 634-23
4. *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010)
5. *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009)
6. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)
7. *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015)
8. *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833 (D. Mass. Aug. 17, 2005)
9. *In re Nortel Networks Corp.*, No. 01-CV-1855(RMB), 2002 WL 1492116 (S.D.N.Y. Feb. 4, 2002), ECF No. 194
10. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Schering" settlement]
11. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Merck" settlement]
12. *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 2380, 2016 WL 7178421 (M.D. Pa. Dec. 9, 2016)
13. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009)
14. *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155 (D. Mass. 2015)
15. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016)
16. *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226 (E.D. Mich. 2016)
17. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009), ECF No. 769
18. *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161 (N.D. Cal. June 5, 2017)
19. *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 23 (S.D.N.Y. 2016)
20. *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014)

EXHIBIT F

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT F
Reported Class Action Fee Decisions
Containing Billing Rates for Contract or Staff Attorneys

1. *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016), *judgment entered*, No. SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), ECF No. 218-8
2. *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015), ECF No. 61-4
3. *In re Am. Apparel, Inc. S'holder Litig..*, No. CV1006352MMMJCGX, 2014 WL 10212865 (C.D. Cal. July 28, 2014), ECF No. 188-3
4. *In re Animation Workers Antitrust Litig.*, No. 14-CV-4062-LHK, 2016 WL 6663005 (N.D. Cal. Nov. 11, 2016), ECF Nos. 331-2, 331-3, 331-4
5. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015), ECF No. 1083-20
6. *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803 (N.D. Cal. Dec. 19, 2016), ECF No. 1963-1
7. *Long v. HSBC USA INC.*, No. 14 CIV. 6233 (HBP), 2016 WL 4764939 (S.D.N.Y. Sept. 13, 2016)
8. *McGreevy v. Life Alert Emergency Response, Inc.*, No. 14 CIV. 7457 (LGS), 2017 WL 1534452 (S.D.N.Y. Apr. 28, 2017)
9. *Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008 (S.D.N.Y. Sept. 30, 2015), ECF No. 52
10. *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289 (M.D.N.C. May 9, 2016), ECF No. 145-1
11. *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)
12. *St. Louis Police Ret. Sys. v. Severson*, No. 12-CV-5086 YGR, 2014 WL 3945655 (N.D. Cal. Aug. 11, 2014)

EXHIBIT G

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT G
List of Exemplary Cases With Multipliers Over 3.5

1. In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327 (Bankr. D. Md. 2000) (19.6 multiplier)

2. Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., NO. CIV.A. 03-457, 2005 WL 1213926, at *17-18 (E.D. Pa. May 19, 2005) (15.6 multiplier)

3. Kuhnlein v. Department of Revenue, 662 So.2d 309, 315 (Fla. 1995) (15 multiplier reduced to 5)

4. In re Doral Fin. Corp. Sec. Litig., No. 05-md-1706 (S. D. N.Y. July 17, 2007) (10.26 multiplier)

5. Weiss v. Mercedes-Benz, 899 F. Supp. 1297 (D. N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (9.3 multiplier)

6. Doty v. Costco Wholesale Corp., No. 05-3241 (C. D. Cal. May 14, 2007) (9 multiplier)

7. Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. 1998) (8.9 multiplier)

8. Cosgrove v. Sullivan, 759 F. Supp. 1667, 167 n.1 (S. D. N.Y. 1991) (8.74 multiplier)

9. New England Carpenters Health Benefits Fund v. First Databank, Inc., Civil Action No. 05-11148-PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (8.3 multiplier)

10. Newman v. Caribiner Int'l, Inc., No. 99 Civ. 2271 (S.D. N.Y. Oct. 19, 2001) (7.7 multiplier)

11. Hainey v. Parrott, No. 02-733 (S. D. Ohio Nov. 6, 2007) (7.47 effective multiplier)

12. In re Rite Aid Corp. Sec. Litigation, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier)

13. Steiner v. Amer. Broadcasting Co., Inc., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier)

14. In re UnitedHealth Group, Inc. PSLRA Litig., No. 06-1691 (D. Minn. Aug. 10, 2009) (6.49 multiplier)

15. The Music Force, LLC v. Viacom, Inc., No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier)

16. In re Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890 (1st Cir. 1985) (6 multiplier)

17. In re Cardinal Health Inc. Securities Litigations, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier)

18. In re Krispy Kreme Doughnuts, Inc. Sec. Litig., No. 04-416 (M.D. N.C. Feb. 15, 2007) (6 multiplier)

19. In re RJR Nabisco, Inc. Securities Litigation, No. 88 Civ. 7905(MBM), 1992 WL 210138, at *5-6 (S.D. N.Y. Aug. 14, 1992) (6 multiplier)

20. Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc., No. 03-2141 (D. S.C. Aug. 15, 2006) (6 multiplier)

21. In re Cardinal Health, Inc. Sec. Litig., No. 04-575, 2007 U.S. Dist. LEXIS 95127 (S. D. Ohio Dec. 31, 2007) (5.85 multiplier)

22. Dutton v. D&K Healthcare Res., Inc., No. 04-147 (E. D. Mo. June 5, 2007) (5.6 multiplier)

23. In re Charter Communications, Inc., Securities Litigation, No. MDL 1506, 2005 WL 4045741, at * 22 (E.D. Mo. June 30, 2005) (5.6 multiplier)

24. Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D. N.Y. 1997) (5.5 multiplier)

25. Warner v. Experian Info. Solutions, Inc., No. BC362599 (Cal. Super. Ct. Los Angeles Co. Feb. 26, 2009) (5.48 multiplier)

26. Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (5.3 multiplier)

27. Di Giacomo v. Plains All American Pipeline, No. Civ.A.H-99-4137, 2001 WL 34633373, * at 11-12 (S.D. Tex. Dec. 19, 2001) (5.3 multiplier)

28. Craft v. County of San Bernardino, 624 F. Supp. 2d 1113, 1123-25 (C.D. Cal. 2008) (5.2 multiplier)

29. In re Enron Corp. Securities, Derivative & ERISA Litigation, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) (5.2 multiplier)

30. In re Beverly Hills Fire Litig., 639 F. Supp. 915, 924 (E. D. Ky. 1986) (5 multiplier to attorney who performed the bulk of work on the case)

31. In re Fernald Litigation, No. C-1-85-149, 1989 WL 267038, at *4-5 (S.D. Ohio Sept. 29, 1989) (5 multiplier)

32. In re Cendant Corp. Securities Litigation, 404 F.3d 173, 183 (3d Cir. 2005) (multiplier in "mid-single digits")

33. In re United Rentals, Inc. Sec. Litig., No. 04-1615 (D. Conn. May 26, 2009) (4.79 multiplier)

34. Castillo v. General Motors Corp., No. 07-2142 (E. D. Cal. April 19, 2009) (4.77 multiplier)

35. Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718 (E. D. Pa. Aug. 14, 2006) (4.77 multiplier)

36. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (4.7 multiplier)

37. Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier)

38. Teeter v. NCR Corp., No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier)

39. Holleran v. Rita Medical Sys., Inc., No. RG06302394 (Cal. Super. Ct. Alameda Co. Aug. 1, 2007) (4.57 multiplier)

40. Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130, 1991 WL 275757 (S.D. N.Y. Dec. 19, 1991) (4.4 multiplier)

41. Agofonova v. Nobu Corp., No. 07-6926 (S. D. N.Y. Feb. 6, 2009) (4.34 multiplier)

42. Buccellato v. AT & T Operations, Inc., No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. Jun. 30, 2011) (4.3 multiplier)

43. In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 135 (D.N.J. 2002) (4.3 multiplier)

44. Shannon v. Hidalgo County Board of Comm'r, No. 08-369 (D. N.M. June 4, 2009) (4.2 multiplier)

45. Simmons v. Andarko Petroleum Corp., No. CJ-2004-57 (Okla. Dist. Ct. Caddo Co. Dec. 23, 2008) (4.17 multiplier)

46. In re OSI Pharm., Inc. Sec. Litig., No. 04-5505 (E.D. N.Y. Aug. 22, 2008) (4.11 multiplier)

47. Blackmoss Inv., Inc. v. Gravity Co., No. 05-4804 (S. D. N.Y. Nov. 20, 2007) (4.0 multiplier)

48. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2003) (4.0 multiplier)

49. In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (3.97 multiplier)

50. Karpus v. Borelli (In re Interpublic Secs. Litig.), No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D. N.Y. Oct. 26, 2004 (3.96 multiplier)

51. Vizcaino v. Microsoft Corp., 290 F.3d 1045, 1050-51 (9th Cir. 2002) (3.65 multiplier)

52. Donkerbrook v. Title Guar. Escrow Servs., Inc., No. 10-00616 LEK-RLP, 2011 WL 3649539, at *10 (D. Haw. Aug. 18, 2011) (3.6 multiplier)

53. Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 869 (E.D. La. 2007) (3.5 multiplier)

54. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (3.5 multiplier)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF STEVEN E. FINEMAN IN SUPPORT OF THE RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Steven E. Fineman declares and says:

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

A. Documents Cited in Lieff Cabraser's Response and Objections

2. Attached as Exhibit A is a copy of the April 5, 2017 Presentation made by Lieff Cabraser to the Special Master (LCHB 0000001-0067).

3. Attached as Exhibit B is a copy of Lieff Cabraser's Responses to Special Master Hon. Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017, dated July 10, 2017.

4. Attached hereto as Exhibit C is a copy of Special Master Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Lieff Cabraser Heimann & Bernstein, LLP, and Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Lieff Cabraser Heimann & Bernstein, LLP, dated May 18, 2017.

5. Attached as Exhibit D is a copy of Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents to Lieff Cabraser Heimann & Bernstein, LLP and Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Lieff Cabraser Heimann & Bernstein, LLP, as revised and annotated, dated May 23, 2017.

6. Attached as Exhibit E is a copy of Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents, dated May 21, 2017.

7. Attached as Exhibit F is a copy of the Special Master's July 5, 2017 Request for Supplemental Submission from Labaton Sucharow, LLP, Lieff Cabraser Heimann & Bernstein, LLP and Thornton Law Firm, LLP.

8. Attached as Exhibit G is a copy of the Consolidated Response by Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and Thornton Law Firm LLP to the Special Master's July 5, 2017 Request for Supplemental Submission, dated August 1, 2017.

9. Attached as Exhibit H is a copy of the Expert Declaration of William B. Rubenstein, dated July 31, 2017.

10. Attached as Exhibit I is a copy of Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Interrogatories Due on August 11, 2017, dated August 11, 2017.

11. Attached as Exhibit J is a copy of Lieff Cabraser Heimann & Bernstein, LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Request for the Production of Documents dated August 11, 2017.

12. Attached as Exhibit K is a copy of the Special Master's Request for Additional Supplemental Submission from Labaton Sucharow, LLP, Lieff Cabraser Heimann & Bernstein, LLP and Thornton Law Firm, LLP, dated September 7, 2017.

13. Attached as Exhibit L is a copy of the Response by Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's September 7, 2017 Request for Supplemental Submission, dated November 3, 2017.

14. Attached as Exhibit M is a copy of a March 25, 2018 email from William F. Sinnott to Richard M. Heimann concerning evidence of Lieff Cabraser's "state of mind" concerning Chargois.

15. Attached as Exhibit N is a copy of the Response by Lieff Cabraser Heimann & Bernstein, LLP to the March 25, 2018 request by the Special Master.

16. Attached as Exhibit P is Opinion and Order, dated June 25, 2018, in *In Re Petrobras Securities Litigation*, No. 14-CV-9662 (JSR).

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

17. The firm has spent $1,340,715.11 in out-of-pocket expenses in responding to the Special Master's investigation and Report to date, including its share of the Special Master's fees and expenses and the firm's expert witness and travel costs. Attached hereto as Exhibit O is a summary of those expenses.

18. As of June 26, 2018, Lieff Cabraser has spent $1,963,110 in lodestar (at the firm's 2018 rates) in responding to the Special Master's investigation and Report. I do not here attach a lodestar summary or the relevant time reports for those attorneys and staff who have represented the firm in this matter, but will do so upon request from the Court.

C. Relevant Facts About Lieff Cabraser's Practice

1. Lieff Cabraser's Complex Litigation Practice Involves Large Scale Document Review and Analysis.

19. Lieff Cabraser is a plaintiff-side litigation firm founded in 1972, based in San Francisco, California, with additional offices in New York, New York, Nashville, Tennessee, and Seattle, Washington. More than 100 attorneys, including partners, associates, and staff attorneys currently work for the firm. Lieff Cabraser engages in predominantly contingent fee practice for plaintiff classes, groups and individuals, on behalf of public and private institutional investors, small business, shareholders, consumers and employees. The firm also occasionally represents plaintiffs on an hourly basis.

20. Lieff Cabraser has litigated and resolved hundreds of class action lawsuits and

thousands of group and individual cases (many in the context of multi-district litigation ("MDL") proceedings), including in the fields of securities and financial fraud. Most of the firm's cases involve major corporate defendants (e.g., banks and other financial institutions, pharmaceutical and medical device companies, oil and energy companies, technology corporations, and consumer product manufacturers). These kinds of defendants are represented by the largest and most sophisticated law firms in the world. Most of the firm's large, complex cases involve production by defendants or enormous numbers of pages of documents (frequently in the millions).

21. Lieff Cabraser staffs its complex cases to maximize effectiveness and efficiency in light of the defendants' significant advantage in economic and personnel resources. The firm's complex cases are typically supervised by a senior partner, and staffed with an additional senior partner and one or more junior partners, and the appropriate number of associates, staff attorneys and litigation support personnel (e.g., paralegals, financial analysts, investigators, and the like). Investigations, pleadings, briefs, written discovery, depositions, court appearances, trial and settlement are handled by partners and associates depending on the level of experience required. Document review, analysis, issue memoranda and witness kits (for deposition and trial) are conducted and prepared by a combination of partners, associates, and staff attorneys.

2. Lieff Cabraser's General Use of Staff Attorneys.

22. Lieff Cabraser, like most plaintiff-side litigation firms that handle large, complex cases, uses staff attorneys to support the firm's organization, reading, coding and analysis of the vast number of documents produced in the cases. Lieff Cabraser staff attorneys support all aspects of the firm's complex cases by identifying documents and frequently drafting issue, witness and liability memoranda. The work product generated by the firm's staff attorneys is used, for example, in support of class certification, in preparation for the conduct of fact and

expert depositions, in opposition to motions for summary judgment, settlement negotiations, and in other pre-trial and trial proceedings.

23. The firm's staff attorneys come from solid to excellent law schools, generally have years of experience in civil litigation and in document review and analysis in complex cases. Many of the firm's staff attorneys are paid directly by the firm and receive benefits provided by the firm. Other firm staff attorneys work at the firm's direction, but are paid directly by agencies that bill the firm for those lawyers' services.

24. During and since the State Street Action, Lieff Cabraser has employed as many as 30 staff attorneys at one time who are paid directly by the firm. Given the number of large complex cases the firm handles at one time, Lieff Cabraser sometimes has need for attorney document review and analysis support beyond the firm's available staffing (for example, the firm may just need additional attorneys, or may require lawyers with specific subject experience or language expertise). When such a need arises, the firm seeks and receives resumes from "preferred" agencies; preferred because those agencies have long-standing relationships with the firm and understand the lawyer qualifications and experience the firm requires. Frequently, attorneys who start working for the firm while paid by an agency transition to direct employment by the firm.

25. Whether on Lieff Cabraser's payroll or paid via an agency, all firm staff attorneys have comparable educational backgrounds and work experiences, and all perform substantially the same document review and analysis functions. And, all utilize, to varying degrees, the firm's infrastructure and resources, including physical office space (for the majority working in firm offices instead of remotely); information technology support (both in the office and remotely); administrative support (e.g., human resources for employment matters and coordination with

agencies, accounting for payroll and interactions with agencies, and word processing for the submission of time records and the production of memoranda); assistance from the firm's litigation support department for training and database assistance; supervision from firm partners and senior associates; and, the cost to the firm for the staff attorneys' services. The firm's staff attorneys, both those on the firm's payroll and paid by an agency, are covered by the firm's legal malpractice insurance policies.

26. Not all federal and state employment laws that apply to the relationship between Lieff Cabraser and its employees apply to agency attorneys working under the firm's direction. Nevertheless, the firm expects its agency lawyers to abide by the firm's rules and practices, and agency attorneys are protected by state laws prohibiting harassment and discrimination in the workplace. The firm, through its human resources department, provides all personnel, whether employees of the firm, agency attorneys, or other contractors, with policies for behavioral conduct and on how to report misconduct of others.

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

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

paying clients who pay the firm's hourly rates.

28. All Lieff Cabraser hourly rates, including those for staff attorneys (whether employed directly by the firm or through an agency) are set based on the firm's understanding of the appropriate market rates for a lawyer's services, primarily in the San Francisco and New York market places. The firm's management evaluates and adjusts hourly rates on an annual basis, based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys. Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys (whether on the firm's payroll or employed through an agency), based on what the firm pays them (or for them).

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

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

Executed on this 29th day of June, 2018.

/s Steven E. Fineman

Steven E. Fineman
Lieff Cabraser Heimann & Bernstein, LLP
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EXHIBIT A
(REDACTED)

Lieff Cabraser Heimann & Bernstein
Attorneys at Law

Arkansas Teacher Retirement System

v

State Street Bank and Trust Company

United States District Court
District of Massachusetts
No. 11-cv-10230 MLW

Richard M. Heimann
Steven E. Fineman
Daniel P. Chiplock

PRESENTATION TO SPECIAL MASTER JUDGE ROSEN

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INTRODUCTION

- Richard M. Heimann – Lieff Cabraser's General Counsel and Chair of the firm's Securities and Financial Fraud Practice Group.
- Steven E. Fineman – Lieff Cabraser's Managing Partner and senior member of the firm's Securities and Financial Fraud Practice Group.
- Daniel P. Chiplock – Senior member of the firm's Securities and Financial Fraud Practice Group and day-to-day lead counsel on the *State Street* case.

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Overview of Presentation

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About Lieff Cabraser

- Plaintiffs-side litigation firm founded in 1972 and based in San Francisco, California.
- Predominantly contingency fee practice for plaintiff classes, groups and individuals (e.g., public and private institutional investors, small businesses, shareholders, consumers and employees).
- The firm occasionally represents plaintiffs on an hourly basis.
- More than 100 attorneys, including partners, associates and staff attorneys currently work for the firm, primarily in the San Francisco and New York marketplaces.

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About Lieff Cabraser (cont'd)

- The firm has litigated and resolved hundreds of class action lawsuits and thousands of group and individual cases.
- These kinds of cases involve major corporate defendants (e.g., banks and other financial institutions; pharmaceutical and medical device companies; oil and energy companies; technology corporations; and consumer product manufacturers).
- These kinds of defendants are represented by the largest and most sophisticated law firms in the world.

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How Lieff Cabraser Staffs Large Complex Cases

- Large complex cases are staffed to maximize effectiveness and efficiency in light of the defendants' advantages and resources.
- Complex cases are typically supervised by a senior partner, and staffed with an additional senior partner and one or more junior partners, the necessary number of associates, staff attorneys and litigation support personnel (e.g., paralegals, financial analysts, investigators, and the like).
- Investigations, pleadings, briefs, written discovery, depositions, court appearances, trial and settlement, are handled by partners and associates depending on the level of experience required.

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How Lieff Cabraser Staffs Large Complex Cases (cont'd)

- Document review, analysis, issue memoranda and witness kits (for deposition and trial) are conducted and prepared by a combination of junior partners, associates, and staff attorneys.

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How Lieff Cabraser Sets Hourly Rates, Including for Staff Attorneys

- All Lieff Cabraser hourly rates, including those for staff attorneys, are set based on the firm's understanding of the appropriate market rates for our lawyer's services, primarily in the San Francisco and New York marketplaces.
- The firm's managing partner, in consultation with the firm's executive committee, evaluates and adjusts hourly rates on an annual basis, based on the firm's historical rates at the time, publically available fee applications during the preceding year, developments in the case law during the preceding year, fee awards and hourly rates paid to the firm during the preceding year, and publically available salary surveys.

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How Lieff Cabraser Sets Hourly Rates, Including for Staff Attorneys (cont'd)

- Consistent with our experience and the applicable law, the firm does not set hourly rates for any attorney, including staff attorneys, based upon what the firm pays them. Again, rates are based on what are reasonable in the applicable marketplaces for our services.

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State Street Case

- Lieff Cabraser has been involved since 2008 in investigating and pursuing claims of alleged deceptive practices and overcharges by custodial banks related to foreign currency exchange ("FX") products and services.
- We were co-counsel of record in qui tam lawsuits originally filed under seal in California (the "California Action"), as well as other states, against State Street.
- The California Action was unsealed in October 2009 by the intervention of the Attorney General for the State of California.
- Before that point and afterwards, Lieff Cabraser investigated possible claims to be brought on a class basis for the benefit of custodial customers who would not otherwise benefit from any unsealed qui tam lawsuits.

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State Street Case (cont'd)

- Based on its institutional knowledge, Lieff Cabraser was associated in to the customer class lawsuit being investigated by Labaton Sucharow LLP ("Labaton") on behalf of ARTRS.
- Lieff Cabraser helped research and file the first class complaint (in early 2011) in this action, with particular responsibility for claims under M.G.L. ch. 93A.
- We also attended every mediation session with defendants and additional meetings with co-counsel throughout the life of the case, and helped review and analyze more than nine million pages of documents produced by State Street.

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BNYM FX Case

- Lieff Cabraser simultaneously served as co-lead counsel in the BNYM FX customer class litigation, and was one of three firms that led the entire MDL.
- The first BNYM class cases were filed in 2011, were MDL'd in 2012, and then intensively litigated until the close of fact discovery in January 2015.
- More than 120 total depositions were taken and defended, and over 29 million pages reviewed.
- Global settlement resulted in $504 million for benefit of BNYM customers, with $335 million attributed to resolution of the customer class cases.

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Resolution of *BNYM/State Street* Cases

- The Jan. 2015 close of fact discovery in BNYM FX led to intensive settlement discussions, leading to global agreement to settle that case by March 2015.
- The end of fact discovery in BNYM freed up time of more than a dozen Lieff Cabraser staff attorneys who had developed expertise in custodial FX issues to assist with completing the review and analysis of State Street documents.
- Settlement of BNYM case heightened pressure either for State Street case to be resolved or for the parties to proceed with class cert discovery and depositions.

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Resolution of *State Street* Case

- The parties agreed to extend the State Street mediation deadline from December 2014 to April 2015.
- The parties continued to mediate, understanding that further extensions likely would not be sought.
- As late as May 2015, State Street still had not presented a settlement number to Plaintiffs, who remained hard at work analyzing the documents produced in preparation for potential termination of the mediation without resolution.

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Resolution of *State Street* Case

- The parties in *State Street* reached agreement in principle to settle class case for $300 million on **June 30, 2015**.
- Document reviewers closed out assignments and memoranda they were in the middle of drafting, with such work concluded by early July 2015.
- The settlement term sheet was not executed until September 2015, during which time parties continued to negotiate potential plan of allocation (discussed with the Dept. of Labor ("DoL")).
- The settlement remained contingent on resolution of other government inquiries and satisfaction of DoL concerns regarding allocation.

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Resolution of *State Street* Case

- Almost nine months passed after the Term Sheet was executed in September 2015, while State Street negotiated resolutions with the Department of Justice and the SEC.
- The parties next appeared before Judge Wolf at a status conference in June 2016, at which they notified the Court of the pending class settlement and plans to submit it for preliminary approval.
- At that hearing, Judge Wolf opined both on the likely fairness of the settlement as well as the reasonableness of a 25% fee as a "starting point."

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Fee Application Process in *State Street*

- Labaton, as lead counsel, was responsible for gathering and reviewing all fee declarations and lodestar reports from co-counsel.
- Lieff Cabraser gathered its lodestar and expense reports in early September 2016, and sent its draft fee declaration to Labaton, who sent suggested edits to Lieff Cabraser. Among those edits were the suggestion to remove any timekeepers who billed less than 5 hours (which we did).

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Background of Lieff Cabraser Staff Attorneys Who Worked on *State Street*

- The Lieff Cabraser staff attorneys who worked on *State Street* had extensive document review and analysis experience at the time of their assignment to the case: Five had more than 15 years of experience; six had between 10 and 15 years of experience; and six more had between 5 and 10 years of experience.
- All of the Lieff Cabraser staff attorneys who worked on *State Street* had prior document review experience for Lieff Cabraser.
- Of the 18 Lieff Cabraser staff attorneys who worked on State Street, 13 also worked on the BNYM FX litigation (averaging nearly 2,200 hours each prior to Jan. 2015), where they developed expertise in FX pricing, trading timing and processes, the request for proposals ("RFP") process, and the manner in which custodial banks were alleged to have overcharged their customers on FX.

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Background of Lieff Cabraser Staff Attorneys Who Worked on *State Street (cont'd)*

- "Much of the necessary work involved in prosecuting the Customer Class Cases involved the review, analysis, and application of millions of pages of documents, from both Defendants and third parties. This was neither make-work, nor routine. Rather, it was important work that had to be performed under tight time constraints. It was entrusted primarily to attorneys experienced in document analysis in complex cases, who had proven themselves to Lead Class Counsel in other cases. These attorneys communicated daily with those responsible for briefing, depositions, and related deposition preparation, and this interaction made it possible to mine mountains of raw data, sifting the wheat from the chaff and identifying the critical facts within the tight deadlines set by this Court."
- *In re Bank of New York Mellon Corp. Forex Transactions Litigation*, No. 12-MD-2335 (LAK), S.D.N.Y., Declaration of John C. Coffee, Jr. in Support of Motion for Final Approval of Settlement and an Award of Attorneys' Fees and Service Awards, and Reimbursement of Litigation Expenses filed 8/17/15.

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Background of Lieff Cabraser Staff Attorneys Who Worked on *State Street (cont'd)*

- Of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, none were "temporary" employees. Each had a history with the firm working on multiple Lieff Cabraser cases. Indeed, of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, 13 continue to this day to work on document review and analysis projects for the firm.
- Set forth on the pages that follow is biographical information about each of the Lieff Cabraser staff attorneys who worked on *State Street*.

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Name	Undergrad	Law School	Grad. Year	Years in Practice (following first bar admission)	Billing Rate	Rate Equivalency	Worked on BONY Mellon
Tanya Ashur	University of Illinois	Chicago-Kent College of Law	2000	17+	$415	4th year associate	Yes
Joshua Bloomfield	University Pennsylvania	UCLA School of Law	2000	16+	$515	Class of 2008	Yes
Elizabeth Brehm	Boston University	Hofstra University School of Law	2008	9+	$415	4th year associate	No
Jade Butman	Dartmouth College	University of Pittsburgh School of Law	1997	20+	$515	Class of 2008	No
James Gilyrad	San Francisco State University	University of San Francisco School of Law	2002	15+	$415	4th year associate	Yes
Kelly Gralewski	California State University, Chico	California Western School of Law	1997	19+	$415	4th year associate	Yes
Christopher Jordan	University of North Carolina	Stanford Law School	2004	6+	$415	4th year associate	Yes
Jason Kim	University of California, Davis	Thomas Jefferson School of Law	2009	8+	$415	4th year associate	Yes
James Leggett	University of California, Davis	Santa Clara University School of Law	2012	5+	$415	4th year associate	Yes

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Name	Undergrad	Law School	Grad. Year	Years in Practice (following first bar admission)	Billing Rate	Rate Equivalency	Worked on BONY Mellon
Coleen Liebmann	University of the Pacific	University of San Francisco School of Law	2003	11+	$415	4th year associate	No
Andrew McClelland	University of California, Davis	McGeorge School of Law	2008	9+	$415	4th year associate	Yes
Scott Miloro	Cornell University	Cardozo School of Law	2006	11+	$415	4th year associate	Yes
Leah Nutting	University of California, Berkeley	Harvard Law School	2002	15+	$415	4th year associate	Yes
Marissa Oh	Rice University	Stanford Law School	2004	17+	$515	Class of 2008	Yes
Peter Roos		University of Limburg J.D. University of San Francisco School of Law L.L.M.	1989 2002	27+ (15+ in the U.S.)	$415	4th year associate	No
Ryan Sturtevant	University of California, Santa Barbara	University of California, Hastings College of the Law	2005	11+	$415	4th year associate	No
Virginia Weiss	University of Northern Iowa	University of Kansas School of Law	2007	10+	$415	4th year associate	Yes
Jonathan Zaul	University of California, Berkeley	University of San Francisco School of Law	2009	8+	$415	4th year associate	Yes

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TANYA ASHUR

EDUCATION – University of Illinois, Urbana, Illinois, B.A. 1997; Chicago-Kent College of Law, Chicago, Illinois, J.D. 2000.

ADMITTED TO PRACTICE – Illinois Bar, 2000; California Bar, 2002.

WORK EXPERIENCE SUMMARY – Ms. Ashur worked as an associate for Deloitte & Touche, Adams Nye, and Gordon & Rees, all in San Francisco, California. Prior to working for Lieff Cabraser, Ms. Ashur had extensive document review and analysis experience in complex litigation matters for Lathman Watkins, Orrick, Google, Fujitsu, and Gibson Dunn.

LIEFF CABRASER WORK HISTORY – Ms. Ashur began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Ms. Ashur worked extensively on the BONY Mellon Forex Litigation. In 2015, Ms. Ashur devoted 843.5 hours to document review and analysis in the State Street Forex Litigation. Ms. Ashur is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Ashur's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Ashur is an experienced attorney, with more than 17 years in practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JOSHUA BLOOMFIELD

EDUCATION – University of Pennsylvania, Pennsylvania, Philadelphia, PA, B.A. 1996; UCLA School of Law, Los Angeles, CA, J.D. 2000.

ADMITTED TO PRACTICE - California Bar, 2001.

WORK EXPERIENCE SUMMARY – Mr. Bloomfield worked as an associate for Jeffer Mangels in Los Angeles, California and Holland & Knight in San Francisco, California, before starting his own civil and criminal litigation firm. Prior to working for Lieff Cabraser, Mr. Bloomfield had extensive document review and analysis experience in complex litigation matters for King & Spalding, Paul Hastings, Morrison Foerster, Gibson Dunn, Wilmer Hale, Orrick, Sidley Austin, Jones Day, DLA Piper, and Skadden.

LIEFF CABRASER WORK HISTORY – Mr. Bloomfield began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. Bloomfield worked extensively on the BONY Mellon Forex Litigation. In 2013 and 2015, Mr. Bloomfield devoted 2,033.20 hours to document review and analysis in the State Street Forex Litigation. Mr. Bloomfield left the firm in 2015.

Mr. Bloomfield's time in the State Street Forex Litigation was calculated at $515 per hour. That was the hourly rate of the class of 2008 in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Bloomfield is an experienced attorney, with more than 16 years of practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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ELIZABETH BREHM

EDUCATION – Boston University, Boston, Mass, B.S. 2001; Hofstra University School of Law, Hempstead, NY, J.D., magna cum laude, 2008.

ADMITTED TO PRACTICE – New York Bar, 2008.

WORK EXPERIENCE SUMMARY – Ms. Brehm worked as an associate for Winston & Strawn and Kirby McInerney, both in New York, New York. During her time at Kirby – a leading plaintiff-side litigation firm – Ms. Brehm focused on antitrust, securities and financial fraud cases, and gained experience with numerous document review projects.

LIEFF CABRASER WORK HISTORY – Ms. Brehm began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into early 2015, Ms. Brehm devoted 1,682.90 hours to document review and analysis in the State Street Forex Litigation. Ms. Brehm left the firm in 2015.

Ms. Brehm's time in the State Street Forex Litigation was calculated at $415 per hour. That was comparable to the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Brehm is an experienced attorney, with more than nine years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. Her work was particularly valuable in State Street as she had developed expertise in evaluating documents in financial fraud cases at the Kirby firm.

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JADE BUTMAN

EDUCATION – Dartmouth College, Hanover, NH, B.A. 1992; University of Pittsburgh School of Law, Pittsburgh, PA, J.D. 1997.

ADMITTED TO PRACTICE – New Hampshire, 1997; New York, 1998; California, 2005.

WORK EXPERIENCE SUMMARY – Ms. Butman worked as an associate for Constantine Cannon (antitrust) and Kaplan Landau (commercial litigation) in New York, New York, and for Keller Grover (consumer class cases) in San Francisco, California. At each firm, Ms. Butman was involved in document review and analysis. Prior to joining Lieff Cabraser, Ms. Butman had additional extensive document review in complex litigation matters for Viacom in New York, and Robbins Geller and Berman DeValerio (plaintiff-side class action firms) in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Ms. Butman worked for Lieff Cabraser in 2014 and 2015 as a document review attorney. In 2015, Ms. Butman devoted 24.00 hours to document review and analysis in the State Street Forex Litigation. Ms. Butman left the firm at the end of 2015.

Ms. Butman's time in the State Street Forex Litigation was calculated at $515 per hour. That was the hourly rate of the class of 2008 in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Butman is an experienced attorney, with more than 20 years of practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. Her work was particularly valuable in State Street as she had developed expertise in evaluating documents in complex cases or as associate at several plaintiff-side firms.

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JAMES GILYARD

EDUCATION – San Francisco State University, San Francisco, California, B.A. 1999; University of San Francisco School of Law, San Francisco, California, J.D. 2002.

ADMITTED TO PRACTICE – California Bar, 2002.

WORK EXPERIENCE SUMMARY – Mr. Gilyard worked as an associate for Robbins Geller (plaintiff-side class action firm), in San Francisco, California, where, among other things, he gained extensive experience in document review and analysis. Prior to working for Lieff Cabraser, Mr. Gilyard had additional extensive document review and analysis experience in complex litigation matters for Bingham McCutchen, Morrison & Foerster, and Wilson Sonsini, among others.

LIEFF CABRASER WORK HISTORY – Mr. Gilyard began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. Gilyard worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Gilyard devoted 882 hours to document review and analysis in the State Street Forex Litigation. Mr. Gilyard left Lieff Cabraser in late 2016.

Mr. Gilyard's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Gilyard is an experienced attorney, with more than 15 years of practice, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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KELLY GRALEWSKI

EDUCATION – California State University, Chico, San Diego, California, B.S. and B.A. 1992; California Western School of Law, San Diego, California, J.D. 1997.

ADMITTED TO PRACTICE – California Bar, 1998

WORK EXPERIENCE SUMMARY – Ms. Gralewski worked as an associate for Peterson & Price, a real estate, business law and dispute resolution firm in San Diego, California. While there, Ms. Gralewski gained experience in the review and analysis of corporate documents

LIEFF CABRASER WORK HISTORY – Ms. Gralewski began working for Lieff Cabraser in 2009 as a document review attorney. Since then, and continuing to today, Ms. Gralewski worked on a number of financial fraud cases at Lieff Cabraser. In 2012 and 2015, Ms. Gralewski worked on the BONY Mellon Forex Litigation. In 2013 and 2015, Ms. Gralewski devoted 1,478.90 hours to document review and analysis in the State Street Forex Litigation.

Ms. Gralewski's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Gralewski has been a California lawyer since 1998, with more than nine years of experience in reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases at Lieff Cabraser. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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CHRISTOPHER JORDAN

EDUCATION – University of North Carolina, Chapel Hill, North Carolina, B.A. 2000; Stanford Law School, Stanford, California, J.D. 2004.

ADMITTED TO PRACTICE – California Bar, 2011; Texas Bar, 2012.

WORK EXPERIENCE SUMMARY – Mr. Jordan worked extensively in the management, supervision of, and execution of large scale document review and analysis projects in complex litigation matters for Debevoise & Plimpton in New York, Dynegye and Synergy in Houston, Texas, and Troutman Sanders in Atlanta, Georgia.

LIEFF CABRASER WORK HISTORY – Mr. Jordan began working for Lieff Cabraser in 2012 as a document review attorney. In 2014 and 2015, Mr. Jordan worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Jordan devoted 539.90 hours to document review and analysis in the State Street Forex Litigation attributable to Lieff Cabraser. Mr. Jordan is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Jordan's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Jordan has more than six years of experience reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JASON KIM

EDUCATION – University of California at Davis, Davis, California, B.A. 2002; Thomas Jefferson School of Law, San Diego, California, J.D. 2009.

ADMITTED TO PRACTICE – California Bar, 2009.

WORK EXPERIENCE SUMMARY – Mr. Kim worked as an associate for the full service litigation firm, Renchner Law Group in San Francisco, California, before starting his own civil litigation law firm in Santa Clara, California. Prior to working for Lieff Cabraser, Mr. Kim had extensive document review and analysis experience in complex litigation matters for McDermott Will & Emory, Quinn Emmanuel, and Crowell Moring.

LIEFF CABRASER WORK HISTORY – Mr. Kim began working for Lieff Cabraser in 2011 as a document review attorney. From 2013 into 2015, Mr. Kim worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Kim devoted 904 hours to document review and analysis in the State Street Forex Litigation. Mr. Kim is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Kim's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Kim is an experienced attorney, with more than eight years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JAMES LEGGETT

EDUCATION – University of California, Davis, Davis, California, B.A. 2004; Santa Clara University School of Law, Santa Clara, California, J.D., cum laude, Order of the Coif, 2012.

ADMITTED TO PRACTICE – California Bar, 2012.

WORK EXPERIENCE SUMMARY – Prior to law school, Mr. Leggett worked as a private banker at UMB Bank in Denver, Colorado for almost four years. Immediately after law school, Mr. Leggett performed document review and analysis in financial fraud and employment cases at the plaintiff-side litigation firm Schneider Wallace in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Mr. Leggett began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. Leggett worked on the BONY Mellon Forex Litigation. In 2015, Mr. Leggett devoted 893 hours to document review and analysis in the State Street Forex Litigation. In 2016, Mr. Leggett is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Leggett's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Leggett has spent more than four years at Lieff Cabraser reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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COLEEN LIEBMANN

EDUCATION – University of the Pacific, B.A. 1992; University of San Francisco School of Law, San Francisco, California, J.D. 2003.

ADMITTED TO PRACTICE – California Bar, 2006.

WORK EXPERIENCE SUMMARY – Ms. Liebmann has more than 11 years of experience in document and privilege review and analysis in complex litigation matters for a number of the country's most prestigious law firms, including Williams & Connolly, Latham & Watkins, DLA Piper, Quinn Emmanuel, Morrison Foerster, Perkins Coie, Wilmer Hale, O'Melveny & Myers, Jones Day, and Farella Braun & Martel, among others.

LIEFF CABRASER WORK HISTORY – Ms. Liebmann began working for Lieff Cabraser in 2014 as a document review attorney. In 2015, Ms. Liebmann devoted 24 hours to document review and analysis in the State Street Forex Litigation. Ms. Liebmann is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Liebmann's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Liebmann is an experienced document review attorney, with more than 11 years reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms.

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ANDREW McCLELLAND

EDUCATION – University of California, Davis, Davis, California, B.A. 2002; University of the Pacific, McGeorge School of Law, Sacramento, CA, J.D., Order of the Coif, 2008.

ADMITTED TO PRACTICE – California Bar, 2008.

WORK EXPERIENCE SUMMARY – Mr. McClelland worked as an associate for the construction defect litigation firm, Boornazian, Jensen & Garthe in Oakland, California, and as an associate for a similar firm, Lorber Greenfield & Polito, in San Francisco, California. At both firms, Mr. McClelland had extensive document review and analysis experience. In addition, Mr. McClelland has conducted document review and analysis in complex litigation matters for Bingham and Smith Lillis Pitha, in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Mr. McClelland began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Mr. McClelland worked extensively on the BONY Mellon Forex Litigation. In early 2015, Mr. McClelland devoted 58 hours to document review and analysis in the State Street Forex Litigation. In February and March 2015, Mr. McClelland devoted additional time to the State Street matter, while housed in LCHB's offices, but was paid for that time by the Thornton firm. Mr. McClelland left Lieff Cabraser in early 2015 to pursue a different legal job.

Mr. McClelland's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. McClelland is an experienced attorney, with more than nine years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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SCOTT MILORO

EDUCATION – Cornell University, Ithaca, New York, B.S. 1994; State University of New York at Buffalo, Buffalo, New York, M.S. 1996; Cardozo School of Law, New York, New York, J.D. 2006.

ADMITTED TO PRACTICE – New York Bar, 2006; United States Patent and Trademark Office, 2006.

WORK EXPERIENCE SUMMARY – After law school, Mr. Miloro spent more than three years as an associate at the intellectual property firm of Ohlandt, Greely, Ruggiero & Perle in Stamford, Connecticut. In that capacity, Mr. Miloro gained extensive experience in reviewing and analyzing complex technical documents.

LIEFF CABRASER WORK HISTORY – Mr. Miloro began working for Lieff Cabraser in 2011 as a document review attorney. From 2012 into 2015, Mr. Miloro worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Miloro devoted 658.80 hours to document review and analysis in the State Street Forex Litigation. Mr. Miloro is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Miloro's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Miloro is an experienced attorney, with more than 11 years of experience, including more than five years at Lieff Cabraser, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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LEAH NUTTING

EDUCATION – University of California Berkeley, Berkeley, California, B.A. 1999; Harvard Law School, Cambridge, Massachusetts, J.D. 2002.

ADMITTED TO PRACTICE – California Bar, 2002.

WORK EXPERIENCE SUMMARY – Ms. Nutting was an associate in the securities litigation group at Clifford Chance, and then in the general litigation group at Orrick, both in San Francisco, California. During her four years at those two firms, Ms. Nutting had extensive experience in investigating complex financial fraud matters, including experience in document review and analysis. Ms. Nutting also has engaged in extensive document review in complex litigation matters for Kilpatrick Townsend, Bloomberg, and Morrison Foerster.

LIEFF CABRASER WORK HISTORY – Ms. Nutting began working for Lieff Cabraser in 2012 as a document review attorney. From 2012 into 2015, Ms. Nutting worked extensively on the BONY Mellon Forex Litigation. In 2013 and 2015, Ms. Nutting devoted 1,940.10 hours to document review and analysis in the State Street Forex Litigation. Ms. Nutting is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Nutting's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rates of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Nutting is an experienced attorney, with more than 15 years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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MARISSA OH

EDUCATION – Rice University, Houston, Texas, B.A. 1999; Stanford Law School, Stanford, California, J.D. 2004.

ADMITTED TO PRACTICE – California Bar, 2004.

WORK EXPERIENCE SUMMARY – Ms. Oh (formerly Marissa Lackey) was an associate at Orrick in San Francisco, California, where she gained extensive experience in financial fraud litigation and where her responsibilities included coordination and supervision of document reviews. Ms. Oh also has extensive document review and analysis experience in complex litigation matters at various top tier law firms, including Keker & Van Nest and Morrison Foerster in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Ms. Oh began working for Lieff Cabraser in 2013 as a document review attorney. From 2013 into 2015, Ms. Oh worked extensively on the BONY Mellon Forex Litigation. In 2015, Ms. Oh devoted 800.30 hours to document review and analysis in the State Street Forex Litigation. Ms. Oh is currently engaged by Lieff Cabraser on document review and analysis projects.

Ms. Oh's time in the State Street Forex Litigation was calculated at $515 per hour. That was the hourly rates of the class of 2008 working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Oh is an experienced attorney, with more than 17 years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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PETER ROOS

EDUCATION – University of Limburg, Maastricht, The Netherlands, J.D. 1989; University of San Francisco School of Law, L.L.M. 2001.

ADMITTED TO PRACTICE – The Netherlands, 1989; California Bar, 2002.

WORK EXPERIENCE SUMMARY – For more than 18 years, Mr. Roos was an associate and then a partner at Baker & McKenzie in Amsterdam, The Netherlands, and in Palo Alto, California. During those years, Mr. Roos gained extensive experience in financial and corporate transactions and documentation. In more recent years, Mr. Roos has engaged in extensive document review and analysis in complex litigation matters for such major American law firms as Jeffer Mangels, Gibson Dunn, Morrison Foerster, Paul Hastings, and Hopkins & Carley, among others.

LIEFF CABRASER WORK HISTORY – Mr. Roos began working for Lieff Cabraser in 2013 as a document review attorney. In 2015, Mr. Roos devoted 780 hours to document review and analysis in the State Street Forex Litigation. Mr. Roos is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Roos's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rates of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Roos is an experienced attorney, with more than 27 years of experience as a corporate partner in an international law firm and then reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms.

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RYAN STURTEVANT

EDUCATION – University of California, Santa Barbara, Santa Barbara, California, B.A. 2001; University of California, Santa Barbara, Santa Barbara, California, M.A. 2003; University of California, Hastings College of the Law, San Francisco, California, J.D. 2005.

ADMITTED TO PRACTICE – California Bar, 2006.

WORK EXPERIENCE SUMMARY – Mr. Sturtevant has gained extensive experience in document review and analysis in complex litigation matters for a number of major American law firms, including Bingham, Cooley, Morrison Foerster, Wilson Sonsini, O'Melveny & Myers, and Jones Day. In particular, Mr. Sturtevant gained experience in securities and financial fraud class actions.

LIEFF CABRASER WORK HISTORY – Mr. Sturtevant began working for Lieff Cabraser in 2013 as a document review attorney. In 2015, Mr. Sturtevant devoted 796 hours to document review and analysis in the State Street Forex Litigation. Mr. Sturtevant is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Sturtevant's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Sturtevant is an experienced attorney, with more than 11 years of experience reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms.

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VIRGINIA WEISS

EDUCATION – University of Northern Iowa, B.A. 2004; University of Kansas School of Law, J.D. 2007.

ADMITTED TO PRACTICE – Minnesota Bar, 2007; California Bar, 2010.

WORK EXPERIENCE SUMMARY – Ms. Weiss has dedicated more than 15 years to document review and analysis in complex litigation matters for numerous law firms and organizations, including Epstein Becker and Crowell and Moring, in San Francisco, California.

LIEFF CABRASER WORK HISTORY – Ms. Weiss began working for Lieff Cabraser in 2014 as a document review attorney in complex financial fraud matters. In 2014 and into 2015, Ms. Weiss worked extensively on the BONY Mellon Forex Litigation. In 2015, Ms. Weiss devoted 473.50 hours to document review and analysis in the State Street Forex Litigation for Lieff Cabraser. She spent additional time on the case in 2015 which was paid by the Thornton firm. Ms. Weiss continues to work on document review and analysis projects for Lieff Cabraser.

Ms. Weiss's time in the State Street Forex Litigation was calculated at $415 per hour That was the hourly rates of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Ms. Weiss is an experienced attorney, with more than 10 years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for major American law firms. Her work was particularly valuable in State Street as she had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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JONATHAN ZAUL

EDUCATION – University of California, Berkeley, Berkeley, California, B.A. 2004; University of San Francisco School of Law, San Francisco, California, J.D. 2009.

ADMITTED TO PRACTICE – California Bar, 2009.

WORK EXPERIENCE SUMMARY – Following law school and a judicial clerkship, Mr. Zaul opened his own transactional and civil litigation law firm where he served as the principal.

LIEFF CABRASER WORK HISTORY – Mr. Zaul began working for Lieff Cabraser in 2012 as a document review attorney. From 2013 into 2015, Mr. Zaul worked extensively on the BONY Mellon Forex Litigation. In 2015, Mr. Zaul devoted 495.20 hours to document review and analysis in the State Street Forex Litigation attributable to Lieff Cabraser. Mr. Zaul is currently engaged by Lieff Cabraser on document review and analysis projects.

Mr. Zaul's time in the State Street Forex Litigation was calculated at $415 per hour. That was the hourly rate of fourth year associates working in the firm's New York and San Francisco offices in 2016.

OBSERVATIONS – Mr. Zaul is an experienced attorney, with more than eight years of experience, much of it reviewing and analyzing documents and generating fact and witness-specific memoranda in complex cases for Lieff Cabraser. His work was particularly valuable in State Street as he had developed expertise in evaluating comparable documents in the BONY Mellon Forex Litigation.

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Role of Lieff Cabraser Staff Attorneys in *State Street*

- Shared issue coding and secondary review and analysis of over 9 million pages of documents.
- Initial document production was made in January 2013.
- Second production (more than doubling the total volume) was made in December 2013.
- Reviewers tagged documents using more than 30 different issue/doc type codes and six levels of usefulness/relevance.
- Initial coding of documents largely completed by mid-April 2015, after which LCHB reviewers were tasked with preparing detailed memoranda on 18 (out of more than 50) selected themes, issues or witnesses to be further developed in depositions and follow-up discovery. Each memo contained hyperlinks to supporting documents from State Street's production, with some memos accordingly exceeding 100 pages.

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Role of Lieff Cabraser Staff Attorneys in *State Street*

- Roughly 37% of Lieff Cabraser's total Staff Attorney lodestar and hours can be attributed to researching and creating issue-specific memoranda (with hyperlinks to supportive documents from State Street's production) created between April and July 2015.

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State Street Document Review Protocol

Field Name/Sub-Type	Issues
CheckBox or Radio Button	Preferential FX Pricing
CheckBox or Radio Button	Best Execution
CheckBox or Radio Button	Custodial fees
CheckBox or Radio Button	Bonus
CheckBox or Radio Button	Disclosure of FX Practice
CheckBox or Radio Button	ERISA Obligations
CheckBox or Radio Button	FX Policies
CheckBox or Radio Button	ERISA Customers
CheckBox or Radio Button	FX Profits/Revenues
CheckBox or Radio Button	Govt Invest
CheckBox or Radio Button	Mkting of Cust/FX Serv
CheckBox or Radio Button	Negotiated FX Pricing
CheckBox or Radio Button	Netting
CheckBox or Radio Button	SI Costs
CheckBox or Radio Button	SI FX Pricing
CheckBox or Radio Button	Spreads – Neg – SI
CheckBox or Radio Button	Welcome Pkge
CheckBox or Radio Button	Public Pension Funds
CheckBox or Radio Button	Non-Pension Customers
CheckBox or Radio Button	Damages
Field Name/Sub-Type	**Document Types**
CheckBox or Radio Button	Articles/FX Comments
CheckBox or Radio Button	Cust Agr
CheckBox or Radio Button	Cust FX Inquiries
CheckBox or Radio Button	IM Guides
CheckBox or Radio Button	Org Chart
CheckBox or Radio Button	RFP/RFI Response
CheckBox or Radio Button	Data Files
CheckBox or Radio Button	Presentations

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State Street Document Review Protocol (cont'd)

Field Name/Sub-Type	Issues
Field Name/Sub-Type	**Rating**
CheckBox or Radio Button	Hot
CheckBox or Radio Button	Highly Relevant
CheckBox or Radio Button	Relevant
CheckBox or Radio Button	Irrelevant
CheckBox or Radio Button	Dupe
CheckBox or Radio Button	Contra
Field Name/Sub-Type	**Document Problems**
CheckBox or Radio Button	Redacted
CheckBox or Radio Button	Other Viewing Problem
CheckBox or Radio Button	Foreign Language
CheckBox or Radio Button	Follow-Up
CheckBox or Radio Button	Incomplete
CheckBox or Radio Button	Get Native
Field Name/Sub-Type	**Key Witnesses**
Text Box	
Field Name/Sub-Type	**Attorney Notes**
Text Box	

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State Street Document Review Protocol

Document Review Coding Fields Quick Reference Guide

Issue Code	Description
Articles/FX Comments	Please use this issue code to identify articles or industry reports or commentary, both internal and external to State Street, regarding FX transactions generally and State Street's FX services specifically.
Preferential FX Pricing	Certain State Street custodial clients may have been preferred customers and thus able to negotiate more favorable FX trading terms not offered to State Street's general custodial public. Please use this issue code to identify documents that evidence, even in general terms, any such preferential arrangement and indicate in attorney notes the name of the preferred client..
Best Execution	State Street promised their customers "best execution" which was understood to mean that State Street would obtain the best possible FX price in any FX transaction for their customers. State Street now contends that such an understanding is not consistent with their internal understanding of the term "best execution." This issue code is therefore important and should be used to identify documents where "best execution" is mentioned and especially any client communications where State Street promises to obtain "best execution" as well as documents where the term is generally discussed, described or in any way defined.
Custodial fees	Please use this issue code to identify documents addressing annual "flat" fees for custodial services or fees for "ancillary" services.
Bonus	Please use this issue code to identify documents that address, discuss or otherwise concern the fact that State Street employee bonuses are tied to profits obtained through the provision of FX services.
Cust Agr	Please use this issue code to identify custodial agreements between State Street and its customers. Please also identify the customer in the Attorney Notes section of documents tagged with this issue code.
Customer FX Inquiries	Please use this issue code to identify documents, particularly correspondence, between State Street and its customers regarding inquiries into State Street's FX services. In other words, documents that address, discuss or otherwise concern customer inquiries related to State Street's FX services. Please also identify the name of the customer either making or related to the inquiry at issue in the Attorney Notes section of documents tagged with this issue code.

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State Street Document Review Protocol

Document Review Coding Fields Quick Reference Guide (cont'd)

Issue Code	Description
Disclosure of FX Practice	Please use this issue code to identify documents that disclose or appear to purport to disclose to customers how State Street processes or will process FX trades.
FX Policies	Please use this issue code to identify internal State Street FX policy documents or descriptions as well as documents that address or in any way concern State Street's internal FX policies.
ERISA Customers	Please use this issue code to flag documents relating specifically to ERISA fund customers
FX Profits/Revenues	Please use this issue code to describe State Street FX profit/revenue charts or spreadsheets as well as documents that address or in any way concern profits/revenues earned by State Street from FX services.
Govt Invest	Please use this issue code to identify documents that concern government investigation into State Street, particularly investigation related to its FX services.
IM Guides	Investment Manager Guides that were distributed to IM's for various custodial clients typically included representations about State Street's FX services along the lines of FX trades being "based on market rates at the time of execution," etc. Please use this issue code to identify all such IM Guides.
Mkting of Cust/FX Serv	Please use this issue code to identify State Street marketing materials or similar documents that discuss or otherwise concern State Street's marketing of its FX services.
Negotiated FX Pricing	Please use this issue code to identify documents that discuss or in any way concern pricing offered by State Street for its negotiated or direct FX transactions.
Netting	Refers to a process State Street claims to have followed whereby buys and sells for all of their custodial clients were "netted" each day in order to obtain "best pricing" for their clients. Evidence appears to indicate they didn't really do this, at least not in the manner they claim.
Org Chart	Please use this issue code to identify internal State Street organizational charts or documents that discuss or otherwise concern the internal organizational structure of State Street, particularly as it relates to FX services.
RFP/RFI Response	State Street would often make representations about its FX services in RFP/RFI responses. Please use this issue code to identify responses or references to responses by State Street to any Requests for Proposal or Requests for Information submitted by any current or potential custodial clients. Please also identify the client that submitted the RFP/RFI in the Attorney Notes section of any documents tagged with this issue code.

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State Street Document Review Protocol

Document Review Coding Fields Quick Reference Guide (cont'd)

Issue Code	Description
SI Costs	Certain State Street custodial clients utilized standing instructions for FX trades. Please use this issue code to identify documents that evidence costs incurred by customers using standing instructions and/or costs incurred by State Street for standing instruction services.
SI FX Pricing	Please use this issue code to identify any documents that discuss or in any way concern pricing offered by State Street for its SI (standing instruction) or indirect FX transactions.
Spreads – Neg – SI	Spreads for those FX trades governed by standing instructions (indirect trades) were typically higher than spreads for negotiated FX trades (direct trades). Please use this issue code to identify documents that concern, even generally, the difference in the amount of profit State Street earned on FX trades subject to standing instructions vs. negotiated FX trades.
Welcome Pkge	Please use this issue code to identify State Street documents, either internal or for distribution to its current or potential clients, that provides a description of its FX services, i.e., this is who we are and what we do.
Public Pension Funds	Please use this issue code to flag documents relating specifically to Public Pension fund customers
Non-Pension Customers	Please use this issue code to flag documents relating specifically to any non-pension customers, such as investment banks.

We'll also want boxes people can check indicating problems with the documents, such as "Redacted," "Other Viewing Problem," "Foreign Language" or "Follow-Up."

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Hourly Rates Applied to Lieff Cabraser Staff Attorneys in *State Street*

- The hourly rates applied to Lieff Cabraser staff attorneys in *State Street*, as reported to the Court with the firm's fee application, were the current billing rates applicable at the time of the fee application in 2016, except for personnel no longer employed by the firm, in which case the hourly rate of that person in his or her final year of employment was applied.
- Of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, the 2016 rate for 15 of them was $415 per hour. That was the billable rate of Lieff Cabraser's fourth year associates.
- Of the 18 Lieff Cabraser staff attorneys who worked on *State Street*, the 2016 rate for 3 of them was $515 per hour. That was the same rate applicable to attorneys in our class of 2008.

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Coordination of Staff Attorneys With Labaton and Thornton Firms

- By January 2015, more than half of the documents produced by State Street remained to be coded.
- Global settlement in BNYM FX for $714 million and the attendant publicity it created made for an inflection point in the State Street mediation, wherein the parties needed to push forward and prepare to proceed quickly to class certification discovery and depositions should resolution not be achieved. The parties agreed that mediation should/would not extend past mid-2015.
- Class counsel ramped up their document review accordingly in order to prepare detailed liability memos and to receive new documents.

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Coordination of Staff Attorneys With Labaton and Thornton Firms (cont'd)

- Lieff Cabraser agreed to share or host up to 6 staff attorneys that were partially or fully paid for by Thornton between February and June 2015. This arrangement was made due to Thornton's limited physical facilities, so that Thornton could bear a roughly equal share of the cost of document review.
- Four of these staff attorneys (Andrew McClelland, Virginia Weiss, Christopher Jordan, and Jonathan Zaul) worked for both Lieff Cabraser and Thornton in 2015. All four of these attorneys had worked extensively for Lieff Cabraser before, including in BNYM, and three of them are still working with us.
- Two of these staff attorneys (Ann Ten Eyck and Rachel Wintterle) were hired by Lieff Cabraser through an agency, which was paid directly by Thornton, and did not have a prior relationship with Lieff Cabraser.

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Lieff Cabraser's Hourly Duplication Mistake Explained

- Of the four staff attorneys who split time between Lieff Cabraser and Thornton, two of them (McClelland and Weiss) did not show duplicative time in class counsel's reports. In other words, their reported hours—for both Lieff Cabraser and Thornton—were correct.
- Two others (Jordan and Zaul) did have time that was inadvertently duplicated in Lieff Cabraser's and Thornton's reports. This was because the time they spent reviewing documents assigned to Thornton folders from 2/9/15 – 4/14/15 was mistakenly not removed from Lieff Cabraser's timekeeping records after our Accounting Department invoiced and received payment for those hours from Thornton.
- This was an inadvertent bookkeeping error.

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Lieff Cabraser's Hourly Duplication Mistake Explained (cont'd)

- The two other staff attorneys (Ten Eyck and Wintterle) whose time was incorrectly included in Lieff Cabraser's lodestar report were hired by an agency that was paid directly by Thornton. Accordingly, they should not have been entering any work/time summaries into our system.
- However, they did so throughout the three to four months they worked at Lieff Cabraser (March – June 2015), by emailing their time summaries directly to our Word Processing department (consistent with typical staff attorney practice), unbeknownst to the attorneys and staff overseeing the case. This was an inadvertent oversight in their training in San Francisco.

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Lieff Cabraser's Hourly Duplication Mistake Explained (cont'd)

- To review, there were no hourly duplication errors for 16 staff attorneys listed in Lieff Cabraser's initial lodestar declaration with the Court. The inadvertent duplication errors were limited to 4 staff attorneys, as described above.
- The corrections to Lieff Cabraser's lodestar reports result in 1,761.8 fewer attorney hours than initially reported, for a new attorney/staff total of 18,696.70 hours for Lieff Cabraser (not including timekeepers who worked less than 5 hours).
- This equates to an 8.6% inadvertent initial overstatement of hours for Lieff Cabraser.

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Lieff Cabraser's Fee and Corrected Lodestar

- Lieff Cabraser's share of the awarded attorney's fee was $15,116,965.50.
- Using Lieff Cabraser's corrected lodestar total of $8,932,070.50 (applying 2016 rates), the corrected lodestar multiplier for Lieff Cabraser is ***1.69***.
- This is ***less*** than the 1.8 multiplier the Court initially approved on November 2, 2016, and is at the low end of lodestar multipliers typically approved in the context of a lodestar cross-check, particularly in the First Circuit.

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Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients

- Although Lieff Cabraser is normally compensated for legal services on a contingent fee basis, the firm does occasionally represent plaintiffs on an hourly basis. In the following examples, the firm was paid staff attorney applicable hourly rates.

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Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients

- In [redacted], paid the firm monthly, including nearly 5,000 hours of staff attorney-document review time, at hourly rates ranging from $375 to $435 per hour, in 2015, for a total of over $1.8 million (or, 52% of the total fees paid in the case, $3,437,310).

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Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients (cont'd)

- In [redacted], paid us monthly, including for three staff attorneys who conducted document review and analysis. Between February and July 2012, those three LCHB staff attorneys were billed out and paid at rates between $375 and $460 per hour.

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Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients (cont'd)

- In [redacted]. That assignment in 2014 and 2015 was undertaken on an hourly basis and we were paid $400 per hour for the time of two staff attorneys who performed document review and analysis for the client (and who also worked extensively on *State Street*).

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Hourly Rates of Lieff Cabraser Staff Attorneys Paid By Clients (cont'd)

- In [redacted] two Merrill Lynch mutual funds, paid the firm on an hourly basis, including the hourly rates of two staff attorneys for document review and analysis at rates between $275 and $315 per hour in 2003.

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards

- Most fee awards in the firm's class action cases have been awarded on a percentage of the recovery basis. However, in recent years some courts have conducted a "lodestar cross-check" to determine that the percentage of the recovery award is not excessive. And, in rare cases, courts have determined our class action fees on a lodestar basis. In both the lodestar cross-check and lodestar fee award contexts, Lieff Cabraser staff attorneys' hourly rates are routinely included and approved in class action fee awards. Below are some recent examples:

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *In re New York Mellon Corp. Forex Transactions Litigation*, 12-md-2335 LAK (S.D.N.Y.) – Over 28,000 hours of staff attorney time at roughly the same hourly rates applied in *State Street* were included as part of the lodestar cross-check conducted by Judge Kaplan in approving class counsel's requested attorneys' fees. At the final fairness and attorney fee hearing, Judge Kaplan of the Southern District of New York said, in part:

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

"This was an outrageous wrong committed by the Bank of New York Mellon, and plaintiffs' counsel deserve a world of credit for taking it on, for running the risk, for financing it and doing a great job. I accept the lodestar. I accept as fair, reasonable and accurate everything that went into it."

In re Bank of New York Mellon Corp. Forex Transactions Litigation, No. 12-MD-2335 (LAK), S.D.N.Y.

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- Staff Attorney lodestar constituted approximately 45% of the total lodestar recorded in the BNYM litigation, across all firms.
- By comparison, Staff Attorney lodestar constituted just over 50% of the total lodestar recorded in the State Street litigation.

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Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *Allagas, et al. v. BP Solar International, Inc., et al.*, 3:14-cv-00560-SI (N.D. Ca.) – In 2016, Judge Illston of the Northern District of California approved a percentage of the recovery fee for Lieff Cabraser and co-class counsel but also conducted a lodestar cross-check. Judge Illston concluded that the firm's "hourly rates, used to calculate the lodestar here, are in line with prevailing rates in this District and have recently been approved by federal and state courts." In *BP Solar*, specifically, Judge Illston's lodestar cross-check included two Lieff Cabraser staff attorneys billed at $415 per hour, the same as most of the staff attorneys in *State Street*.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *In re High Tech Employee Antitrust Litigation*, No. 11-cv-02509-LHK (N.D. Ca.) – In this complex antitrust class action in 2015, Judge Koh of the Northern District of California ordered Lieff Cabraser and their co-lead counsel attorneys' fees based on the lodestar methodology. Judge Koh found:

> Having reviewed the billing rates for the attorneys, paralegals, litigation support staff at each of the firms representing Plaintiffs in this case [including co-lead counsel Lieff Cabraser], the Court finds these rates are reasonable in light of prevailing market rates in this district and that counsel for Plaintiffs have submitted adequate documentation justifying those rates.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- Judge Koh further found in *High Tech* that the "billing rates submitted vary appropriately based on experience," and found that the "billing rates for non-partner attorneys, including senior counsel, counsel, senior associates, associates and staff attorneys, range from about $310 to $800, with most under $500." (Emphasis added.)
- In this case, Lieff Cabraser's lodestar submission included a number of staff attorneys whose hourly rates are consistent with the rates submitted in *State Street* a year later.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Lieff Cabraser Staff Attorneys' Hourly Rates Are Routinely Included and Approved in Class Action Fee Awards (cont'd)

- *In re TFT-LCD (Flat Panel) Antitrust Litigation*, MDL 3:07-md-1827 SI (N.D. Ca.) – In 2011, Judge Illston approved a percentage of the fee recovery for Lieff Cabraser and their co-lead counsel "and confirmed" the fee by a lodestar cross-check. Included in Lieff Cabraser's lodestar submission was the time of several staff attorneys whose rates ranged from $385 to $475 per hour in 2011 when the fee submission was made.

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES DUE ON JULY 10, 2017

In accordance with the Federal Rules of Civil Procedure, Lieff Cabraser Heimann & Bernstein, LLP ("LCHB" or the "Firm") hereby responds to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories (the "Interrogatories"), propounded on LCHB on May 18, 2017, as revised on May 23, 2017, and due on July 10, 2017.

GENERAL OBJECTIONS

LCHB makes the following general objections, which are incorporated by reference into each Interrogatory response, whether or not a specific further objection is made with respect to a specific Interrogatory. Each Interrogatory response incorporates, is subject to and does not waive the general objections.

1. LCHB objects to the Interrogatories and Instructions to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or that otherwise is privileged, protected or exempt from discovery.

2. LCHB objects to the Interrogatories and Instructions to the extent they purport to impose obligations that differ from or exceed those imposed by the Federal Rules of Civil Procedure, particularly Rule 33, and by any court decisions interpreting those Rules.

3. LCHB objects to the Interrogatories and Instructions to the extent they seek information beyond the scope of, or not relevant to, the Courts' February 6, 2017 Memorandum and Order in the above-referenced cases.

4. In responding to the Interrogatories, LCHB has made reasonable efforts to respond based on its understanding and interpretation of each Interrogatory. If the Special Master subsequently asserts a reasonable interpretation of an Interrogatory which differs from that of LCHB, LCHB reserves the right to supplement its responses.

5. LCHB will make all reasonable efforts to respond to the Interrogatories on or before the dates specified in the Special Master's May 23, 2017 revised Interrogatories. LCHB, however, reserves the right to supplement its responses should it require additional time, and/or should responsive information be discovered following the designated dates for the responses.

6. LCHB objects to Definition No. 1 and Instruction B, to the extent they seek Interrogatory responses from any source other than the Law Firm, its partners, associates, of counsel, employees and contractors. LCHB has no "affiliates," and no "agents" or "representatives" that are or would be in the possession of responsive information.

RESPONSES TO THE INTERROGATORIES

INTERROGATORY NO. 10:

Describe the frequency and nature of communications with the Plaintiffs' Law Firms over the course of the Litigation. Please specify the attorneys with whom you dealt.

RESPONSE TO INTERROGATORY NO. 10:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Daniel Chiplock was the principal attorney on the Litigation for LCHB. Mr. Chiplock was in regular contact with attorneys at Labaton and Thornton throughout the life of the case. These communications were predominantly by email and averaged several per week, with increased frequency (at times numerous emails per day) around mediation dates, hearings, and filing deadlines. Counsel at Plaintiffs' Law Firms also spoke by phone, with somewhat lesser frequency. Counsel also had a number of in-person conferences and strategy sessions amongst themselves, separate from the approximately 15 mediation sessions. Mr. Chiplock chiefly

communicated with Lawrence Sucharow, David Goldsmith, and Michael Rogers at Labaton; and Michael Thornton, Garrett Bradley, Michael Lesser, and Evan Hoffman at Thornton. Robert L. Lieff of LCHB participated in most if not all of the in-person conferences and mediation sessions, as well as many of the group telephone calls, but had less involvement in the day-to-day email communications between and among Plaintiffs' Law Firms.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 11:

Describe the role of the U.S. Department of Labor, including any field divisions or offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission, in the SST Litigation.

RESPONSE TO INTERROGATORY NO. 11:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

No government agency or department played a role in the investigation or filing of the claims asserted by Plaintiffs' Law Firms in the SST Litigation. Nor did any government agency or department participate in the briefing of State Street's motion to dismiss the claims asserted in the SST Litigation, in any discovery or document review in the Litigation, or in any of the numerous mediation sessions or calls with counsel for State Street in the SST Litigation, save for the final mediation session (which the U.S. Department of Labor ("DOL") attended, seated in a separate conference room). During the life of the SST Litigation, Mr. Chiplock recalls just one

or two in-person meetings with staff from the U.S. Attorney's Office in Boston (who never directly participated in the SST Litigation, including any mediation session), and perhaps several brief phone calls with attorneys from that office. Mr. Chiplock does not recall having any direct contact with the U.S. Securities and Exchange Commission (the "SEC") concerning the SST Litigation. Attorneys from Labaton or Thornton may have communicated with the SEC by telephone a small number of times. Over the course of the mediation in the SST Litigation, State Street's counsel did report the fact that State Street was separately negotiating with the SEC.

The DOL, for its part, did not take an active role in the litigation or negotiation of a settlement in principle in the SST Litigation, apart from its presence (in a separate conference room) at the final mediation session in late June 2015. The DOL became more engaged with Plaintiffs' Law Firms, and in the process of finalizing the settlement, after the settlement in principle had been reached in late June 2015. After that date, Plaintiffs' Law Firms, State Street, and the DOL discussed and negotiated a plan of allocation of the proceeds from the SST Litigation that would satisfy the DOL's desire to see that ERISA plan-customers of State Street were fairly compensated (in the DOL's view) as part of any global civil resolution of claims either asserted or contemplated against State Street. The DOL continued to communicate with both State Street and Plaintiffs' Law Firms after the formal stipulation of settlement was signed in order to further fine-tune the settlement plan of allocation, in particular the manner in which Group Trusts were to be handled as part of the settlement claims process.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 13:

Describe the frequency and nature of communications with ERISA counsel over the course of the Litigation. Please specify the attorneys with whom you dealt.

RESPONSE TO INTERROGATORY NO. 13:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

Communications with ERISA counsel throughout the SST Litigation were far less frequent than they were with counsel from the other Plaintiffs' Law Firms, particularly prior to 2013. Once ERISA counsel were fully involved and engaged with the mediation process in the SST Litigation, communications (primarily by email, but also by telephone) were more frequent, though still less common than those between and among the Plaintiffs' Law Firms, and tended to focus predominantly on issues, strategy, and logistics surrounding the mediation sessions themselves. After the agreement in principle to resolve the SST Litigation was reached, the Firm's contacts with ERISA counsel principally related to the settlement's plan of allocation and satisfying the concerns of the DOL. The principal ERISA counsel with whom LCHB dealt were Lynn Sarko (of Keller Rohrback LLP) and Carl Kravitz (of Zuckerman Spaeder LLP). Brian McTigue of McTigue Law LLP also attended most mediation sessions, was copied on group emails as a general matter, and attended some plaintiffs-only calls, but did not contribute in the manner that Messrs. Sarko and Kravitz did with respect to global mediation strategy and liaising with the DOL on issues of concern to the DOL.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 14:

Explain the Law Firm's litigation strategy in pursuing the claims raised in the SST Litigation, including the strategy employed in mediation. Identify and describe all events that impacted or caused the Firm to change that strategy.

RESPONSE TO INTERROGATORY NO. 14:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. Subject to and without waiving those objections, LCHB responds as follows:

LCHB's chief litigation strategy was to pursue claims that afforded the broadest possible relief to the affected proposed class, and which stood the greatest chance of being certified for class treatment. Together with co-counsel, we accordingly researched and drafted claims (such as M.G.L. Ch. 93A ("Chapter 93A") and breach of fiduciary duty) that satisfied these aims. One of LCHB's chief contributions to the litigation was introducing the concept of pleading Chapter 93A claims in the complaints, as well as drafting the sections of the opposition to State Street's motion to dismiss addressing those particular claims. Throughout the mediation, LCHB also gave presentations to the mediator, co-counsel, and State Street concerning the strengths of Plaintiff's Chapter 93A claims, in particular, and their likelihood of being certified. Together with co-counsel, LCHB pushed for State Street's production of documents to be reviewed during the mediation so that active and informed litigation could resume promptly should the mediation

be terminated. LCHB in particular promoted and pushed for the production of the *Hill* documents, which was at first strongly resisted by State Street.

Plaintiffs' Law Firms reviewed the documents produced by State Street, and also requested and received numerical data from State Street including FX trading volumes divided into different categories or "buckets" of State Street customers (such as public pension funds, ERISA plans, and registered investment companies ("RICs")) throughout the alleged class period, in addition to effective "spreads" that State Street charged on different types of FX trades (such as automatic income repatriation (or "AIR") and securities settlement trades (known as "SSH")).

In early 2015, fact discovery in a closely-analogous FX lawsuit against State Street's principal custodial competitor, BNY Mellon, came to a close. This freed the time of roughly a dozen experienced Staff Attorneys at LCHB who had spent roughly 2 years (and over 2,200 hours, on average) developing expertise in custodial FX issues. These Staff Attorneys were immediately put to work helping to complete the document review in the SST Litigation. The BNY Mellon litigation settled shortly thereafter, for $335 million (specifically attributed to the private class litigation) and $504 million in total recovery for BNY Mellon customers (which included settlements with the New York Attorney General and the DOL). The settlement of the BNY Mellon litigation, which had been closely watched by State Street, created additional urgency to see whether the mediation in the SST Litigation would finally result in a resolution of acceptable value to the proposed class of State Street customers, or whether the parties needed to terminate the mediation (which had already been extended several times) and proceed to the next phase of discovery (including depositions and possible third party subpoenas). The parties sought a modest extension of time to roughly April 2015 continue mediating. Given the

intensification of discussions, the parties continued mediating slightly beyond that date and reached an agreement in principle (contingent on State Street's resolution of potential claims by the DOJ and SEC) by the end of June 2015.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 15:

Explain any tensions and/or adversarial positions assumed between the ERISA counsel, on the one hand, and the Plaintiffs' Law Firms, on the other, including differences in litigation strategy, legal theories, damages, and/or theories of liability asserted during the SST Litigation.

RESPONSE TO INTERROGATORY NO. 15:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. Subject to and without waiving those objections, LCHB responds as follows:

LCHB can recall no actual "adversarial positions" assumed between Plaintiffs' Law Firms and ERISA counsel during the SST Litigation, and by at least 2014 (continuing through 2015) can recall a healthy working relationship with Messrs. Sarko and Kravitz, in particular, in devising and implementing a global mediation and possible settlement strategy. Mr. Chiplock can recall being concerned after the ARTRS action had successfully overcome a motion to dismiss, and before the ERISA actions had been tested by a motion to dismiss, that ERISA potentially could be held to pre-empt non-ERISA claims that otherwise may have benefited ERISA clients, and that the mere presence of ERISA claims (even for a relatively small

percentage of the affected class) could be used as an argument by State Street to divide the class and reduce the class' overall recovery irrespective of the success of Plaintiff's Chapter 93A and common law claims up to that point. In the early days of the mediation (late 2012 and possibly into 2013), there may have been some concern whether the overarching and first-filed class suit brought by the Plaintiffs' Law Firms was in conflict with the later-filed ERISA actions (which of necessity only could benefit a relatively small percentage of the affected class) for this reason. Before much time had passed, however, and certainly for the bulk of the life-span of the mediation, Plaintiffs' Law Firms and ERISA counsel (particularly Messrs. Sarko and Kravitz) were jointly attending the same mediation sessions with the mediator (Jonathan Marks) and strategizing together over common liability issues as well as how to try to achieve a global resolution that would satisfy all interested parties, including the DOL.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 16:

Explain how the adversarial positions described above impacted or did not impact the Law Firm's strategy, including its discovery, mediation, and/or the settlement of the SST Litigation.

RESPONSE TO INTERROGATORY NO. 16:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad, lacks foundation, and seeks information that is not relevant to the subject matter of this proceeding. LCHB further objects to this Interrogatory to the extent it seeks attorney work product. Subject to and without waiving those objections, LCHB responds as follows:

The Firm's overall strategy, along with that of the other Plaintiffs' Law Firms, remained constant throughout the SST Litigation, which was to maximize the recovery to the class as a whole while taking into account the risk of litigation and the eventual possibility of an adverse judgment or denial of class certification. By the time the agreement in principle was reached to settle the SST Litigation, the Firm was prepared to accept (as was similarly accepted in the BNY Mellon settlement) that ERISA plans who were members of the class justifiably could be afforded a slight premium in their shares of the overall recovery given the separate litigation threat posed by the DOL and the potentially greater ease with which ERISA claims could be certified for class treatment (assuming such claims got past a motion to dismiss, which never technically happened in either the SST Litigation or in BNY Mellon). Accordingly, the Firm participated in discussions with Plaintiffs' Law Firms, ERISA counsel, and the DOL to construct the settlement plan of allocation in a manner that would afford participating ERISA plans a modest premium in their recoveries.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 24:

Please list the full name of each Staff Attorney who worked on the SST Litigation/ Document Review. Please include for each Staff Attorney: his/her employment classification (full-time/part-time employee or independent contractor); how long he or she worked (has worked) at the Firm; the name/description of any other cases to which he or she was assigned during the pendency of SST Litigation/Document Review; whether he/she was allocated to Thornton for any portion of the SST Litigation; any prior experience in securities class action

litigations, foreign-exchange trading and/or mismanagement of custodial funds; the physical location where the work was performed; and the hourly rate charged in the Fee Petition.

RESPONSE TO INTERROGATORY NO. 24:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. Most of the information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The LCHB Staff Attorneys who worked on the SST Litigation/Document Review were Tanya Ashur, Joshua Bloomfield, Elizabeth Brehm, Jade Butman, James Gilyard, Kelly Gralewski, Christopher Jordan, Jason Kim, James Leggett, Colleen Liebmann, Andrew McClelland, Scott Miloro, Leah Nutting, Marissa Oh (Lackey), Peter Roos, Ryan Sturtevant, Virginia Weiss, and Jonathan Zaul. The hourly rate listed in the Fee Petition for all of these Staff Attorneys was $415, except for Joshua Bloomfield, Jade Butman, and Marissa Oh, whose listed hourly rate was $515.

Two other Staff Attorneys – Rachel Wintterle and Ann Ten Eyck – worked in LCHB's San Francisco offices alongside LCHB Staff Attorneys, were supervised in the same manner, and were assigned similar work as the other Staff Attorneys, but were contracted and paid for by Thornton through an outside agency, and thus are not included in the definition of "LCHB Staff Attorneys" for this Response. They were inadvertently and erroneously included in LCHB's lodestar calculation for reasons previously and elsewhere explained in these Responses.

The following LCHB Staff Attorneys were payroll employees paid directly by LCHB for the duration of the SST Litigation: Tanya Ashur, Elizabeth Brehm, James Gilyard, Kelly

Gralewski, Jason Kim, Christopher Jordan, Coleen Liebmann, Scott Miloro, Marissa Oh, Peter Roos, and Jonathan Zaul.

The following LCHB Staff Attorneys were payroll employees paid through an outside agency for the duration of the SST Litigation: Jade Butman (24 hours total), Andrew McClelland (58 hours total), and Virginia Weiss (473.50 hours total).

The following Staff Attorneys were, at different times during the SST Litigation, either paid directly by LCHB or paid through an outside agency, as follows:

Joshua Bloomfield: Paid via agency in 2013, paid directly by LCHB in 2015.

Leah Nutting: Paid via agency in 2013, paid directly by LCHB in 2015.

James Leggett: Paid via agency from 1/21/15—1/25/15, paid directly by LCHB as of 1/26/15.

Ryan Sturtevant: Paid via agency from 1/20/15—1/27/15, paid directly by LCHB as of 1/28/15.

The LCHB Staff Attorneys who did at least some work allocated to Thornton during the life of the SST Litigation were Chris Jordan, Andrew McClelland, Virginia Weiss, and Jonathan Zaul.

The following LCHB Staff Attorneys physically worked on the SST Litigation/Document Review in LCHB's San Francisco offices: Tanya Ashur, Jade Butman, James Gilyard, Jason Kim, James Leggett, Coleen Liebmann, Andrew McClelland, Marissa Oh, Peter Roos, and Ryan Sturtevant.

Scott Miloro physically worked in LCHB's New York offices.

The following LCHB Staff Attorneys worked remotely on the SST Litigation/Document Review (remote work locations are in parentheses): Joshua Bloomfield (San Francisco, CA),

Elizabeth Brehm (Shoreham, NY), Kelly Gralewski (San Diego, CA), Chris Jordan (Houston, TX and Atlanta, GA), Leah Nutting (San Francisco, CA), Virginia Weiss (Rochester, MN and Sacramento/Roseville, CA), and Jonathan Zaul (San Francisco, CA).

The following LCHB Staff Attorneys are still employed by or performing work for LCHB (total number of years worked for LCHB, with any gaps in employment excluded, are indicated in parentheses): Tanya Ashur (3.5 years), Kelly Gralewski (8.5 years), Chris Jordan (4.5 years), Jason Kim (5.5 years), James Leggett (3.5 years), Coleen Liebmann (2.5 years), Scott Miloro (5.5 years), Leah Nutting (4.5 years), Marissa Oh (3.5 years), Peter Roos (4.5 years), Ryan Sturtevant (3 years), Virginia Weiss (2.5 years), and Jonathan Zaul (4.5 years).

The following LCHB Staff Attorneys are no longer employed by or performing work for LCHB (number of years at LCHB is indicated in parentheses): Joshua Bloomfield (2 years), Elizabeth Brehm (2 years), Jade Butman (1 year), James Gilyard (2.5 years), and Andrew McClelland (1.5 years).

The following LCHB Staff Attorneys worked at least part-time on the SST Litigation/Document Review in 2013-2014, with any other LCHB cases to which they were assigned during that time-period indicated in parentheses: Joshua Bloomfield (BNY Mellon, British Airways Fuel Surcharge); Elizabeth Brehm; Kelly Gralewski (BNY Mellon, Microsoft-Canada, Florida Tobacco); Scott Miloro (BNY Mellon, Copytele, Siskin Patent, ING Direct Flat Fee, Multaq Qui Tam, Takata, Merck/Vioxx Securities Litigation, NYSCRF-Pratcher); and Leah Nutting (BNY Mellon).[1]

[1] For purposes of this Response, "BNY Mellon" refers to *In re Bank of New York Mellon Corp. Foreign Exchange Transactions Litigation*, MDL No. 2335 (LAK) (S.D.N.Y.); "British Airways Fuel Surcharge" refers to *Dover v. British Airways*, Case No. 1:12-cv-05567 (E.D.N.Y.); "Microsoft-Canada" refers to *Pro-Sys Consultants and Neil Godfrey v. Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE*, Case No. LO43175 (Vancouver Registry); "Florida Tobacco" refers to *In re Engle Cases*, No. 3:09-cv-10000-J-32 JBT (M.D. Fl.); "Copytele" refers to *In the Matter of the Arbitration between CopyTele and AU Optronics*, Case No. 50 117 T

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The following LCHB Staff Attorneys worked on the SST Litigation/Document Review from January through June 2015, with any other LCHB cases on which they performed work (even if only a handful of hours) during that time-period indicated in parentheses: Tanya Ashur (BNY Mellon), Joshua Bloomfield (British Airways Fuel Surcharge), Elizabeth Brehm, James Gilyard (BNY Mellon), Chris Jordan (BNY Mellon), Jason Kim (BNY Mellon), James Leggett (BNY Mellon), Coleen Liebmann (Hong Leong Finance Limited, Merck/Vioxx Securities Litigation, Schwab), Scott Miloro (BNY Mellon, Multaq Qui Tam, Takata, Merck/Vioxx), Leah Nutting (BNY Mellon), Marissa Oh (BNY Mellon), Peter Roos (Nike Copyright, Apple Unlimited 3G, Benicar, Takata, Celera, Schwab), Ryan Sturtevant (Celera, Hong Leong Finance, Schwab), Virginia Weiss (BNY Mellon), and Jonathan Zaul (BNY Mellon, Photographer Copyright Class Actions).

The following Staff Attorneys put in more limited hours in 2015 on the SST Litigation/Document Review, with any other LCHB cases on which they performed work during that time-period indicated in parentheses: Jade Butman (Hong Leong Finance Limited,

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009883 13 (Internat'l Centre for Dispute Resolution); "ING Direct Flat Fee" refers to *ING Bank Rate Renew Cases*, Case No. 11-154-LPS (D. Del.); "Multaq Qui Tam" refers to *U.S. ex rel. Abbate v. Sanofi-Aventis, et al.*, Case No. 2 :15-cv-01510-SRC (D. N.J.); "Takata" refers to *In re Takata Airbag Litigation*, MDL No. 2599 (S.D. Fl.); "Merck/Vioxx Securities Litigation" refers collectively to *Honeywell International Inc. Defined Contribution Plans Master Savings Trust. v. Merck & Co.*, No. 14-cv 2523-SRC-CLW (S.D.N.Y.), *Janus Balanced Fund v. Merck & Co.*, No. 14-cv-3019-SRC-CLW (S.D.N.Y.), *Lord Abbett Affiliated Fund v. Merck & Co.*, No. 14-cv-2027-SRC-CLW (S.D.N.Y.), and *Nuveen Dividend Value Fund (f/k/a Nuveen Equity Income Fund), on its own behalf and as successor in interest to Nuveen Large Cap Value Fund (f/k/a First American Large Cap Value Fund) v. Merck & Co.*, No. 14-cv-1709-SRC-CLW (S.D.N.Y.); "NYSCRF-Pratcher" refers to *Richardson v. Pratcher*, No. 12-cv-08451-JGK (S.D.N.Y.); "Hong Leong Finance Limited" refers to *Hong Leong Finance Limited (Singapore) v. Morgan Stanley, et al.*, No. 653894/2013 (Sup. Ct. N.Y.); "Nike Copyright" refers to *Rentmeester v. Nike, Inc.*, D.C. No. 3:15-cv-00113-MO (D. Or.); "Apple Unlimited 3G" refers to *In Re Apple and AT&T iPad Unlimited Data Plan Litigation*, No. 5:10-cv-02553 RMW (N.D. Ca.); "Benicar" refers to *Benicar Litigation*, MDL No. 2606 (D. N.J.); "Celera" refers to *Biotechnology Value Fund, L.P. v. Celera Corp.*, 3:13-cv-03248-WHA (N.D. Cal.); "Schwab" refers collectively to *The Charles Schwab Corp. v. BNP Paribas Sec. Corp.*, No. CGC-10-501610 (Cal. Super. Ct.); *The Charles Schwab Corp. v. J.P. Morgan Sec., Inc.*, No. CGC-10-503206 (Cal. Super. Ct.); *The Charles Schwab Corp. v. J.P. Morgan Sec., Inc.*, No. CGC-10-503207 (Cal. Super. Ct.); and *The Charles Schwab Corp. v. Banc of America Sec. LLC*, No. CGC-10-501151 (Cal. Super. Ct.); and "Photographer Copyright Class Actions" refers to *Dennis Kunkel Microscopy, Inc. et al. v. John Wiley & Sons, Inc.*, C.A. No. 15-00094 (JLL) (JAD) (D. N.J.). "Siskin Patent" was a possible patent infringement investigation that did not result in a filed case.

Merck/Vioxx Securities Litigation, Schwab), Elizabeth Brehm, and Andrew McClelland (BNY Mellon).

The majority of LCHB's Staff Attorneys had substantial experience working on cases involving foreign-exchange trading and mismanagement of custodial funds by virtue of their work on the BNY Mellon litigation. The number of hours worked by each of the following Staff Attorneys in the BNY Mellon litigation, as recorded in the fee petition submitted by LCHB in that litigation (and previously produced to the Special Master), is indicated in parentheses: Tanya Ashur (2,414.50 hours), Joshua Bloomfield (2,183.00 hours), James Gilyard (2,614.50 hours), Kelly Gralewski (301.50 hours), Christopher Jordan (1,572.90 hours), Jason Kim (2,659.00 hours), James Leggett (2,476.20 hours), Andrew McClelland (1,799.00 hours), Scott Miloro (3,146.80 hours), Leah Nutting (3,128.40 hours), Marissa Oh (Lackey) (2,575.70 hours), Virginia Weiss (1,445.80 hours), and Jonathan Zaul (2,197.90 hours).

Of the few LCHB Staff Attorneys who did not work on the BNY Mellon litigation, Jade Butman, Coleen Liebmann, Peter Roos, and Ryan Sturtevant otherwise had experience working on securities/financial fraud matters at the Firm, including the Hong Leong Finance Limited, Merck/Vioxx Securities Litigation, Schwab, and Celera matters listed above.[2]

Elizabeth Brehm was the only LCHB Staff Attorney who did not work on any other LCHB cases apart from the SST Litigation. Prior to working for LCHB, however, Ms. Brehm

[2] In the Hong Leong Finance Limited case, LCHB represented a Singaporean bank in a lawsuit against Morgan Stanley to recover losses stemming from a failed complex financial investment product that was created by Morgan Stanley and distributed to the Singaporean bank's clients. In the Merck/Vioxx Securities Litigation, LCHB represented a number of mutual funds managed by major investment advisors against Merck for losses sustained in the clients' holdings of Merck stock stemming from Merck's alleged misrepresentations concerning the safety of the painkiller drug Vioxx. In the Schwab cases, LCHB represented Charles Schwab in four separate individual securities actions against certain issuers and sellers of mortgage-backed securities ("MBS") for materially misrepresenting the quality of the loans underlying the securities in violation of California state law. In Celera, LCHB represented a group of affiliated funds investing in biotechnology companies in a securities fraud action arising from misconduct in connection with Quest Diagnostics Inc.'s 2011 acquisition of Celera Corporation.

specialized in securities/financial fraud and antitrust cases while an associate at another plaintiffs' class action firm (Kirby McInerney LLP).

Daniel P. Chiplock, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner, have knowledge of the information provided in this Response.

INTERROGATORY NO. 25:

For each of the Staff Attorneys listed above, please describe all compensation paid to the Staff Attorney and the total number of hours recorded for work on the SST Litigation/Document Review.

RESPONSE TO INTERROGATORY NO. 25:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. The information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The hours worked by and compensation paid to the LCHB Staff Attorneys for the SST Litigation are as follows: Tanya Ashur (843.50 hours, $33,740.00), Joshua Bloomfield (2,033.20 hours, $98,328.00), Elizabeth Brehm (1,682.90 hours, $75,747.38), Jade Butman (24.00 hours, $1,194.00), James Gilyard (882.00 hours, $35,280.00), Kelly Gralewski (1,478.90 hours, $67,650.50), Christopher Jordan (539.90 hours, $24,295.50), Jason Kim (904.00 hours, $37,968.00), James Leggett (893.00 hours, $35,810.00), Colleen Liebmann (24.00 hours, $1,008.00), Andrew McClelland (58.00 hours, $3,040.36), Scott Miloro (658.80 hours, $29,855.30), Leah Nutting (1,940.10 hours, $115,861.25), Marissa Oh (Lackey) (800.30 hours, $32,012.00), Peter Roos (780.00 hours, $39,230.00), Ryan Sturtevant (796.00 hours,

$21,307.50), Virginia Weiss (473.50 hours, $21,307.50), and Jonathan Zaul (495.20 hours, $24,760.00).

Daniel P. Chiplock, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner, have knowledge of the information provided in this Response.

INTERROGATORY NO. 31:

Describe the Firm's understanding of how fees, costs and/or expenses associated with performance of discovery in the SST Document Review would be shared among the Firm, the Plaintiffs' Law Firms, and/or the ERISA firms, including but not limited to who would be responsible for; compensating Staff Attorneys for hours worked; hosting Catalyst and/or other electronic database(s); compiling "hot docs" and other documents relative to the liability and/or damages theories; and/or other expenses associated with the SST Document Review.

RESPONSE TO INTERROGATORY NO. 31:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. Most of the information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds as follows:

The Firm understood throughout the SST Litigation that Plaintiffs' Law Firms would share, as equally as possible, the costs and expenses of litigation, mediation and discovery (including but not limited to maintaining the Catalyst document database). After the ERISA lawsuits were filed and folded into the mediation, the Plaintiffs' Law Firms and ERISA counsel memorialized an agreement whereby 9% of any collective fee award would be paid to ERISA counsel. ERISA counsel thereafter bore roughly 9% of the joint costs of the mediation from that

point on, although to the best of the Firm's recollection ERISA counsel did not share in the cost of maintaining the Catalyst document repository, and did not jointly participate with Plaintiffs' Law Firms in any document review.

LCHB hosted the Catalyst document database, which was chiefly administered by Kirti Dugar in our San Francisco office. Document reviewers employed by all three Plaintiffs' Law Firms jointly shared responsibility for reviewing and coding "hot documents" and analyzing documents relative to the liability and/or damages theories in the SST Litigation. LCHB understood that it was responsible for compensating the bulk of the Staff Attorneys working in its San Francisco office and/or under LCHB's supervision for most of the life of the SST Litigation, with Thornton bearing financial responsibility for a relative small handful of Staff Attorneys strictly during the first half of 2015, as described below.

During at least some portion of the first half of 2015, Thornton paid an outside agency directly for the services of Andrew McClelland, Ann Ten Eyck, Virginia Weiss, and Rachel Wintterle. Each of these attorneys worked physically in LCHB's San Francisco offices, except for Ms. Weiss, who worked remotely.

For roughly a 9-week period between February and April 2015, Thornton paid LCHB directly for the work performed by Staff Attorneys Christopher Jordan and Jonathan Zaul, both of whom worked remotely. For all other time periods, LCHB compensated Messrs. Jordan and Zaul for any work they performed, without reimbursement from Thornton or any other firm.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 32:

For each of the categories listed above, explain the Firm's understanding of how those fees, costs and/or expenses would be reported to the Court in the event of a successful verdict and/or settlement.

RESPONSE TO INTERROGATORY NO. 32:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague. Subject to and without waiving those objections, LCHB responds as follows:

In the event of a successful verdict or settlement, the Firm's understanding was that the costs and expenses it had advanced during the litigation would be reported and broken out by category as they were in Exhibit B to the Firm's Fee Petition (e.g., Litigation Fund Contribution, Mediation Expenses, etc.). With respect to Staff Attorneys, the Firm's understanding was that for purposes of any lodestar crosscheck, the Plaintiffs' Law Firms would include in their time reports any attorney hours for which they had specifically borne the financial obligation and the accompanying risk of non-payment. In this manner, the same Staff Attorney name could appear on more than one Plaintiffs' Law Firm's time report, since the financial responsibility for those particular Staff Attorneys shifted between firms during the litigation (in 2015 only, at least as far as LCHB is concerned).

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 46:

Please describe any previous matters, whether based on a contingency, hourly, or other fee arrangement, in which the Film engaged in a fee dispute with a client or class representative

prior to the conclusion of the representation. For each such matter, explain how that fee dispute was resolved and any hourly rate/quantum meruit applied for work performed.

RESPONSE TO INTERROGATORY NO. 46:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds this it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

LCHB can recall no previous matter in which the Firm "engaged" in a "fee dispute" with a client in a litigation, mediation or arbitration context. LCHB can recall no previous class action in which the Firm had a dispute with a client/class representative about LCHB's requested or awarded attorneys' fee. LCHB can recall no "hourly" representation in which the Firm had a dispute with a client about LCHB's attorneys' fees. Though not strictly speaking "fee disputes," in numerous individual contingent fee representations in personal injury/mass tort cases over the Firm's 45 plus years, LCHB has voluntarily reduced its fees (by lowering its contractual contingent percentage of the recovery), either at the unique request of a client, or in order to facilitate a group or "global" settlement.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 49:

Please list all of the Firm's hourly rates charged to hourly clients for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY NO. 49:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. The information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds by referring the Special Master to LCHB documents, Bates Nos. LCHB-0053423—LCHB-0053479, in addition to LCHB-0053253—LCHB-0053257; LCHB-0053277; LCHB-0053341; LCHB-0053332; LCHB-0053262—LCHB-0053265 and LCHB-0053290.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 50:

Please list all of the Firm's hourly rates charged to non-hourly clients (whether in class action or other contingency-fee litigation) for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY NO. 50:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. The information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds by referring the Special Master to LCHB documents, Bates Nos. LCHB-0053423—LCHB-0053479.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 51:

Please list all of the hourly rates charged or associated with any matters in which the Firm has acted as local counsel for each of the years 2010-2016. For each attorney, please list the relative experience level.

RESPONSE TO INTERROGATORY NO. 51:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including document requests. The information sought by this Interrogatory can be found in LCHB's document productions. Subject to and without waiving those objections, LCHB responds by referring the Special Master to LCHB documents, Bates Nos. LCHB-0053423—LCHB-0053479.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 52:

Please identify the Firm's managing partner for each of the years from 2010 to present, and list all members of the Firm's Executive Committee and describe their respective roles in determining annual rates.

RESPONSE TO INTERROGATORY NO. 52:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is burdensome and partly duplicative of other discovery directed to LCHB, including prior Interrogatories. Subject to and without waiving those objections, LCHB responds as follows:

Steven E. Fineman has been the Firm's Managing Partner for the years 2010 to the present. The following current and former LCHB Partners served on the Executive Committee during the years 2010 to the present: Elizabeth J. Cabraser, Richard M. Heimann, William Bernstein (now, Of Counsel), Steven E. Fineman, Joseph R. Saveri (former Partner), Robert J. Nelson, Kelly M. Dermody, Jonathan D. Selbin, Michael W. Sobol, and David S. Stellings. The roles of the Firm's Managing Partner and Executive Committee members in "determining hourly rates" are described in LCHB's Response to Interrogatory No. 47, and in the deposition testimony of Steven E. Fineman.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 54:

Identify and describe all instances in which the Firm has billed an attorney at a lesser or higher rate than the annual rate determined by the Managing Partner, in conjunction with the Executive Committee, for a particular year and explain why that decision was made.

RESPONSE TO INTERROGATORY NO. 54:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is overbroad and seeks information that is not relevant to this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

LCHB can recall no instance in which the Firm billed an attorney at a higher rate than those set for particular year. In certain hourly rate representations, LCHB agreed to "discount" its customary hourly rates at the client's request (usually a standard 10% discount). Such arrangements are included in LCHB's July 10, 2017 document production. In certain contingent fee agreements with public pension fund clients, the Firm's hourly rates (for lodestar cross check

and multiplier purposes) are set by the fund at rates lower than LCHB's customary hourly rates. As stated elsewhere in its discovery responses, the vast majority of the Firm's compensation comes from contingent fee, percentage of the recovery, agreements and awards unrelated to the Firm's hourly rates.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

INTERROGATORY NO. 55:

Describe in detail the process for finalizing the term sheet and Final Settlement in the SST Litigation, including the role of the U.S. Department of Labor, U.S. Attorney's Office, U.S. Department of Justice and/or the U.S. Securities and Exchange Commission in the negotiations.

RESPONSE TO INTERROGATORY NO. 55:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

The SEC, U.S. Department of Justice ("DOJ"), and U.S. Attorney's Office played no role in finalizing the term sheet and Final Settlement in the SST Litigation. Those agencies and departments resolved their own investigations of State Street via separate settlements with State Street, albeit their settlements are contingent on the Settlement in the SST Litigation (including payments to class members) being seen through to its conclusion.

The term sheet was negotiated by Plaintiffs' Law Firms, ERISA Counsel and counsel for State Street between June 30 and September 11, 2015. The DOL became involved during this timeframe in negotiating, along with the foregoing parties, the portion of the class settlement

funds ($60 million, minus up to $10.9 million in attorneys' fees) that would be payable to ERISA plans for the DOL to be satisfied that it need not pursue separate claims against State Street. This was memorialized in the term sheet that was executed on or about September 11, 2015.

Documentation concerning the Final Settlement in the SST Litigation (including forms of notice to the class) was drafted and finalized over the succeeding months by Plaintiffs' Law Firms, ERISA counsel, and counsel for State Street, while State Street separately worked to finalize its agreements with the DOJ, DOL, and SEC. The Final Settlement in the SST Litigation was executed on or about July 26, 2016.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 61:

Describe how the Law Firm and/or the Plaintiffs' Law Firms arrived at a total fee percentage roughly equal to 25% of the final Fee Award. Please explain whether the Firm prepared its Lodestar calculation to achieve a 25% award of the total settlement amount.

RESPONSE TO INTERROGATORY NO. 61:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague, overbroad, lacks foundation, and is argumentative. Subject to and without waving those objections, LCHB responds as follows:

The Plaintiffs' Law Firms requested a Fee Award for all counsel (including ERISA counsel) of roughly 25% of the total Settlement fund of $300 million (the "Settlement Fund") based on their understanding of the typical percentage contingent fees awarded in complex class cases such as the SST Litigation and supported under applicable authority in the First Circuit (as discussed in Plaintiff's fee brief, ECF No. 103-1). This understanding was bolstered by the

Court's comments in a status conference before the fee request was actually made. At that conference (on June 23, 2016), the Court stated that a 25% fee percentage was "great" and was the level at which the Court "start[ed] ordinarily," and expressed satisfaction that counsel would not be requesting more. In no way did the Firm "prepare . . . its Lodestar calculation to achieve a 25% award of the total settlement amount." The Firm's lodestar was compiled and reported to the Court solely for "cross-check" purposes in order to assist the Court in determining, as is typical wherever a "cross-check" is employed, whether a 25% fee for all counsel constituted an unjustifiable "windfall" in light of the work performed and risk undertaken.

LCHB was ultimately paid 24% of the total fee that was awarded to all counsel, or $15,116,965.50 (along with $ 271,944.53 in reimbursement for the costs it had advanced in the SST Litigation). This individual payment to LCHB, which translates to just under a 1.69 "multiplier" based on LCHB's individual corrected lodestar of $8,961,570.50 (using 2016 rates), was agreed to between and among Plaintiffs' Law Firms before the combined fee request was made in September 2016. It bears noting that LCHB was paid a smaller share of the total Fee Award than either Labaton (who was Lead Counsel and had the client relationship with ARTRS) or Thornton (who was Liaison Counsel), and thus benefited from the smallest individual lodestar multiplier of the three Plaintiffs' Law Firms. It further bears noting that LCHB's corrected individual multiplier of 1.69 is not only less than the collective corrected lodestar multiplier of 2.0 that was reported for all counsel in the November 10, 2016 letter to the Court, but also less than the collective lodestar multiplier of 1.8 that was originally deemed reasonable by the Court in the Fee Award before the inadvertent duplication of some Staff Attorney hours was even discovered and corrected.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 65:

Identify, in detail, each error in your Fee Petition, and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s).

RESPONSE TO INTERROGATORY NO. 65:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad. LCHB further objects to this Interrogatory on the grounds that it is burdensome and duplicative of other discovery directed to LCHB, including prior Interrogatories and the Deposition of Daniel P. Chiplock. Subject to and without waiving those objections, LCHB responds as follows:

For its Response, LCHB refers to and incorporates its prior Responses to Interrogatory Nos. 39, 40, 66-69, 72, and 73. In further response, LCHB states that 327 hours for Staff Attorney Jonathan Zaul and 359.5 hours for Christopher Jordan that were worked over a roughly 9-week period between February and April 2015 were erroneously included in LCHB's Fee Petition notwithstanding the fact that LCHB invoiced and received payment from Thornton for these specific hours of Messrs. Zaul and Jordan's employment. LCHB attributes this error to its inadvertent failure to remove from its timekeeping records, after preparing its invoice(s), any hours worked by these two attorneys for which LCHB was ultimately reimbursed by Thornton.

LCHB also erroneously included in its Fee Petition 490.7 hours for Ann Ten Eyck and 580.6 hours for Rachel Wintterle that were worked during the 3 ½ month period from March through June 2015 even though Ms. Ten Eyck and Ms. Wintterle were employed by an outside

agency that was paid directly by Thornton. LCHB attributes this error to the fact that Ms. Ten Eyck and Ms. Wintterle erroneously (and unbeknownst to the supervising LCHB attorneys on the case, as well as Mr. Dugar) submitted their contemporaneous time records to LCHB's Accounting Department in San Francisco (where they physically worked) while also (correctly) reporting their time to both their employing agency and to Thornton.

Shortly after these bookkeeping errors were discovered on November 9, 2016, Mr. Chiplock instructed LCHB's Accounting Department to remove all of the erroneously recorded hours that in fact had been Thornton's financial responsibility from LCHB's timekeeping records. LCHB helped draft the corrective letter that was submitted to the Court on November 10, 2016, and also prepared a proposed corrected Fee Petition to be filed in case the Court requested it.

In making its corrections, LCHB consulted and relied upon correspondence between and among its own staff and attorneys as well as those at Thornton during the early to mid-2015 timeframe, in addition to Thornton's Fee Petition.

Daniel P. Chiplock, LCHB Partner, has the most knowledge of the information provided in this Response.

INTERROGATORY NO. 75:

Identify and describe the steps taken by the Firm to identify documents responsive to the corresponding Requests for Production of Documents served by the Special Master including, without limitation, the name and title of those involved, the process undertaken, the database and documents searched, and the parameters of any electronic search including date range, timekeepers and search terms.

RESPONSE TO INTERROGATORY NO. 75:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is vague and overbroad. Subject to and without waiving those objections, LCHB responds as follows:

To identify documents responsive to the corresponding Requests for Production of Documents served by the Special Master (the "Document Requests"), Adam McRen of LCHB's HelpDesk (at Steven Fineman's instruction) ran a query for all emails that listed Dan Chiplock, Nick Diamand, or Kirti Dugar as the recipient (directly or as a copy or blind copy) or sender, and any of the names listed below as the recipient (directly or as a copy or blind copy) or sender, and where the words "State Street", "STT", "SS", "document", "contract", "contract lawyers", "review", "reviewers", "staff attorney", "billable", "rates" or "hours" appeared in the subject line or the body of the email, for the time period, January 1, 2010 – December 31, 2016:

Michael Lesser (mlesser@tenlaw.com)

Evan Hoffman (ehoffman@tenlaw.com)

Garrett Bradley (gbradley@tenlaw.com)

Michael Thornton (mthornton@tenlaw.com)

Robert Lieff (rlieff@lchb.com)

Eric Belfi (ebelfi@labaton.com)

Michael Rogers (mrogers@labaton.com)

David Goldsmith (dgoldsmith@labaton.com)

Lawrence Sucharow (lsucharow@labaton.com)

Mr. McRen also retrieved all emails by and between Messrs. Chiplock, Diamand, and Dugar, and any of the LCHB Staff Attorneys (Tanya Ashur, Joshua Bloomfield, Elizabeth

Brehm, Jade Butman, James Gilyard, Kelly Gralewski, Christopher Jordan, Jason Kim, James Leggett, Coleen Lieberman, Andrew McClelland, Scott Miloro, Leah Nutting, Marissa Oh, Peter Roos, Ryan Sturtevant, Virginia Weiss and Jonathan Zaul), applying the same search terms and time period as above.

The foregoing emails were reviewed for relevance and responsiveness to the Document Requests. Separately, Mr. Dugar and Mr. Chiplock also searched their individual email archives for emails specifically responsive to the Document Requests, to the extent they may not have been captured by the search parameters described above. Mr. Dugar specifically searched for any responsive communications with any Staff Attorneys, including Ms. Ten Eyck and Ms. Wintterle.

In addition, at Mr. Fineman's direction, the Firm's records and files were searched for responsive operational and accounting documents and emails.

Daniel P. Chiplock, LCHB Partner, Kirti Dugar, LCHB Litigation Support Manager, and Steven E. Fineman, LCHB Managing Partner, have knowledge of the information provided in this Response.

INTERROGATORY NO. 76:

Identify with specificity sufficient to constitute a valid response to a request for production of documents, any documents identified by you as responsive to the Special Master's Request for Production of Documents but withheld from production to the Special Master on grounds of any evidentiary or other privilege or otherwise including (a) the type of document; (b) its date if any; (c) any identifying marks such as bates stamp or other numeric designation; (d) the reason you withheld it from production; and (e) the current location of the document. To the extent any such Document or other responsive document has been destroyed, identify (a) the

type of document; (b) its date, if any; (c) the date of its destruction; (d) the circumstance thereof; and (e) the persons involved therein. For each such person, please provide their name, current or prior title or position with the Law Firm, the date, if any, of termination of employment with the Law Firm and the reason therefor, and the last known residential and business address.

RESPONSE TO INTERROGATORY NO. 76:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it can identify no such documents.

Daniel P. Chiplock, LCHB Partner, and Steven E. Fineman, LCHB Managing Partner, have knowledge of the information provided in this Response.

INTERROGATORY NO. 77:

Identify the timekeeping, accounting, and billing software systems utilized by the Law Firm to record and bill attorney time charges, costs and expenses associated with legal and other services rendered by the Law Firm in connection with the SST Litigation and the persons within the Law Firm with the most knowledge and responsibility for the system and operation.

RESPONSE TO INTERROGATORY NO. 77:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds as follows:

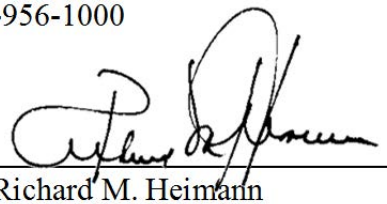
During all relevant times, LCHB has used Thomson Reuters Elite "Timekeeping, Accounting and Billing Software Systems" "to record and bill attorney time, charges, costs and expenses associated with legal… services rendered by the Law Firm…." *See* www.elite.com. The persons within LCHB most knowledgeable and with responsibility for the Elite system are Jim Fanucchi in the firm's Accounting Department and Scott Hedrick in the firm's Information Technology Department.

Steven E. Fineman, LCHB Managing Partner, has knowledge of the information provided in this Response.

Dated: July 10, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: 

Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

EXHIBIT C

DONOGHUE BARRETT & SINGAL

May 18, 2017

Via Email and First-Class Mail

Richard M. Heimann, Esq.
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111

Re: Special Master's First Set of Interrogatories and Requests for Production to Lieff Cabraser Heimann & Bernstein, LLP

Arkansas Teacher Retirement System, et al v. State Street Corporation, et al., C.A. No. 1:11-cv-10230-MLW;

Dear Mr. Heimann:

Please find enclosed *Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories and First Set of Requests for Production to Lieff Cabraser Heimann & Bernstein, LLP*, propounded pursuant to Rule 53 of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order. All documents and/or responses produced in response to the enclosed written requests shall be subject to the *Limited Protective Order of the Special Master* entered on March 29, 2017, and produced on a rolling basis, but in no event later than June 1, 2017.

I understand that several of the requests for documents may seek information, in whole or in part, that Lieff has previously provided to me, on behalf of the Special Master, in response to our preliminary document requests. In each such instance, please identify the Bates numbers, date of production, and general description of all documents, and indicate the specific request or interrogatory to which they are responsive. Such information need not be produced again.

Furthermore, should Lieff object to one or more of the requests and/or interrogatories, for any reason, including but not limited to objections relating to scope, privilege, or technical barriers to production, Lieff should immediately raise its objection(s) in a letter addressed to me and Judge Rosen explaining the specific nature of the objection and identifying all corresponding requests and/or interrogatories.

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F 617.720.5092
www.dbslawfirm.com

DONOGHUE BARRETT & SINGAL

Notwithstanding any objections properly asserted, Lieff should respond fully to all other requests at the earliest possible occasion, and in no event later than June 1, 2017. To the greatest extent possible, all documents must be ***in electronically-readable format***.

Please contact me should you have any questions.

Very truly yours,

William F. Sinnott
Counsel to the Special Master

Encs.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS TO LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Pursuant to Rule 53(c) of the Federal Rules and the Court's March 8, 2017 Order (pp. 3-4), Special Master Honorable Gerald E. Rosen (Retired), by his undersigned counsel, hereby requests that Lieff Cabraser Heimann & Bernstein, LLP produce the documents described below for inspection and copying at the offices of Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, Massachusetts 02108, within fourteen (14) days from the date of service hereof.

DEFINITIONS

1. The terms "you", "your", "the Firm", and "the Law Firm" refer to Lieff Cabraser Heimann & Bernstein, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

2. The term "Thornton" refers to Thornton Law Firm, LLP, formerly known as Thornton & Naumes, LLP, and all employees, agents, counsels, attorneys, and representatives.

3. The term "Labaton" or "Labaton Sucharow" refers to Labaton Sucharow LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

4. The term "Plaintiffs' Law Firms" refers to Labaton Lieff, and/or Thornton, and their respective employees, contractors, affiliates, agents, counsels, and representatives, collectively and/or individually.

5. The term "ERISA firms" or "ERISA counsel" refers to Brian McTigue and/or the McTigue Law Firm, the Law Offices of Keller Rohrback, LLP, Zuckerman Spaeder, LLP, Beins Alexrod, P.C., and any firms retained by one or more of the above, and all employees, agents, counsels, attorneys, and representatives.

6. The term "ARTRS" refers to the Arkansas Teacher Retirement System and/or its Executive Director, George Hopkins, Esq.

7. The term "State Street Litigation", "SST Litigation" or "Litigation" refers to *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

8. The term "State Street Document Review", "SST Document Review" or "Document Review" refers to the Law Firm's review of hard copy and electronic documents produced as part of discovery in *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

9. The term "State Street" refers to State Street Bank and Trust Company and/or State Street Global Markets, defendants in the SST Litigation.

10. The term "settlement in principle" refers to the settlement agreement reached in substance between counsel by and through mediation.

11. The term "Court" refers to the United States District Court for the District of Massachusetts.

12. The term "Fee Petition" or "Fee Application" refers to the *Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* (Docket #104), and Exhibits 1-32 attached thereto, filed with the Court in the State Street Litigation. In particular, "Fee Petition" in conjunction with one or more of the individual firms, refers to the respective Exhibit (and exhibits attached thereto) in which an individual law firm sought approval for payment of its respective fee and expenses

incurred in the SST Litigation, including all declarations, affidavits, and/or the Lodestar reports filed therewith.

13. The term "Motion for Attorneys' Fees" refers to Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses, including the Memorandum in Support and exhibits, filed with the Court on or about September 15, 2016 and October 21, 2016, respectively (Docket #102, 108).

14. The term "Final Settlement" refers to the Stipulation and Agreement of Settlement dated July 26, 2016 (Docket #89).

15. The term "Fee Award" refers to a certain award of attorneys' fees of $74,541,250.00 and expenses and costs of $1,257,697.94, as approved by the Court in the Lawsuit by Order dated November 2, 2016.

16. The term "November 10, 2016 Letter" refers to the letter from David Goldsmith to Judge Wolf dated November 10, 2016 (Exhibit A to Docket #117), advising the Court of inadvertent errors in the Fee Petitions and Fee Order.

17. The term "December 17, 2016 Article" refers to the Boston Globe article entitled *Critics hit law firms' bills after class-action lawsuits*, published on or about December 17, 2016.

18. The term "hourly rates charged" refers to the hourly billing rates corresponding to work of an individual attorney or staff member of the firm, appearing on a fee petition submitted to the Court or otherwise charged to a client for work performed on a legal matter, including the rates listed on the Fee Petitions submitted in the SST Litigation.

19. The term "Staff Attorneys" refers to licensed attorneys working on a part-time or full-time basis for the Law Firm, but who are not deemed "associates" or otherwise on a traditional partnership track.

20. The term "hourly clients" refers to all past, present, and prospective clients who agree to pay and/or are charged for legal services rendered on an hourly basis, notwithstanding the actual amount paid or collected.

21. The term "non-hourly clients" refers to all past, present, and prospective clients who do not pay for legal services on an hourly rate, such as clients paying a flat fee, retained through a contingency arrangement and/or class action litigation, or other non-hourly fee structure, notwithstanding the actual amount paid or collected.

22. Any word written in the singular also includes the plural and vice-versa.

23. In case of doubt as to the scope of a clause including "and," "or," "any," "all," "each," or "every," the intended meaning is inclusive rather than exclusive.

24. The term "any" and the term "all" are intended to mean "any and all."

25. As used herein, the term "or" and the term "and" shall mean "and/or" and vice-versa.

26. As used herein, the terms "relating to" or "referring to" or "concerning" or "constituting" or the like mean and include all documents that in any manner or form are relevant in any way to or bear upon the subject matter in question, including, without limitation, all documents which contain, record, reflect, summarize, evaluate, comment upon, transmit, refer to, or discuss that subject matter or that in any manner state the background of, or were the basis or bases for, or that record, evaluate comment upon, or were referred to, relied upon, utilized, generated, transmitted, or received in arriving at, your conclusions, opinions, estimates, calculations, positions, decisions, beliefs, assertions or allegations, that undermine, contradict, or conflict with your conclusions, opinions, calculations, estimates, positions, beliefs, assertions, or allegations, concerning the subject matter in question.

27. The term "date" means the exact day, month, and year, if ascertainable, or the best approximation thereof if not.

28. The term "communication" as used herein includes, without limitation, the following: conversations, telephone conversations, e-mails, text messages, social media communications, and other electronic transmissions of any kind, statements, discussions, debates, arguments, disclosures, interviews, consultation and every other manner of oral utterance, correspondence, or electronic or written transmittals of information or messages of any kind.

29. The term "document" shall mean those things described in Rule 34(a) of the Federal Rules of Civil Procedure. The terms "document" and "documents" are used herein in the broadest possible sense and mean written, typed, printed, recorded or graphic matter, however produced or reproduced of any kind and description, and whether an original, master, duplicate or copy, including, but not limited to, e-mails, papers, notes, accounts, books, advertisements, letters, memoranda, notes of conversations, contracts, agreements, drawings, telegrams, tape recordings, communications (as defined in paragraph 28 hereof), including inter-office and intra-office memoranda reports, studies, working papers, corporate records, minutes of meetings, notebooks, bank deposit slips, bank checks, canceled checks, diaries, diary entries, appointment books, desk calendars, photographs, transcriptions or sound recordings or any type of personal or telephone conversations or negotiations, meetings or conferences, or things similar to any of the foregoing, and to include any data, information or statistics contained within any data storage modules, tapes, discs or other memory device, or other information retrievable from storage systems, including but not limited to, computer-generated reports and printouts. If any document has been prepared in multiple copies which are not identical, each modified copy or

non-identical copy is a separate "document." The word "document" also includes data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices in a reasonably usable form.

30. The term "draft" shall mean any earlier, preliminary, preparatory, proposed, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft or final document and whether or not the terms of the draft are the same or different from the terms of the final document.

INSTRUCTIONS

A. Unless otherwise specified, these requests seek documents for the period from January 1, 2010 until the present.

B. This document request ("Request") requires you to produce all documents called for herein that were created or originated by you, or that came into your possession, custody or control, from all files or other sources that contain responsive documents, wherever located and whether active, in storage, or otherwise.

C. This Request shall be deemed to include any document now or at any time in your possession, custody, or control. A document is deemed to be in your possession, custody, or control if it is in your physical custody, or if it is in the physical custody of any other person and you: (i) own such document in whole or in part; (ii) have a right, by contract, statute, or otherwise, to use, inspect, examine, or copy such document on any terms; (iii) have an understanding, express or implied, that you may use, inspect, examine, or copy such document on any terms; or (iv) as a practical matter, have been able to use, inspect, examine, or copy such document when you sought to do so. If any requested document was, but no longer is, in your control, state the disposition of each such document.

D. The obligation to produce the documents specified below is of a continuing nature; your production is to be supplemented if at any time you acquire possession, custody, or control of any additional responsive documents, or otherwise discover additional responsive documents, between the time of initial production and conclusion of the investigation, to the fullest extent required by the Federal Rules of Civil Procedure, the March 8, 2017 Court order, and the Local Rules of this Court.

E. Where only a portion of a document relates or refers to the subject indicated, the entire document is to be produced nevertheless, along with all attachments, appendices and exhibits.

F. Each document produced in response to the Requests below should be clearly categorized to indicate which Request(s) it is responsive to.

G. If any document or portion thereof is withheld under a claim of privilege, you shall produce so much of the document as is not subject to the possible claim of privilege, and shall furnish a statement, signed by an attorney representing you, which identifies each document or portion thereof for which a privilege is claimed, including the following information:

(i) The date of the document;

(ii) The name and title of the person who sent, authored, prepared, signed, or originated the document, or of the person who knows about the information contained therein;

(iii) The name and title of the recipient of the document;

(iv) All persons to whom copies of the document were furnished, along with such persons' job titles or positions;

(v) A brief description of the subject matter or nature of the document sufficient to assess whether the assertion of privilege is valid;

(vi) The specific basis upon which the privilege is claimed;

(vii) With respect to any claim of privilege relating to an attorney, or action or advice or work product of an attorney, the identity of the attorney involved; and

(viii) The paragraphs of this request to which such document responds.

H. All documents shall be produced as they are kept in the ordinary course of business and in their original file folders with any identifying labels, file markings, or similar identifying features. If there are no documents responsive to a category specified below, you shall so state in a writing produced at the time and place that documents are demanded to be produced by this request.

I. Documents created or stored electronically must be produced in their original electronic format, and not printed to paper or PDF. All electronically stored information ("ESI") shall be produced in electronic form (the "production set"). Each document will have its own unique identifier ("Bates number"), which must be consistently formatted across the production, comprising of an alpha prefix and a fixed length number of digits (e.g., "PREFIX0000001"). The production set shall consist of, and meet, the following specifications:

1. Image Files. All ESI will be rendered to single-page, black and white, Group IV *tagged image file* (".tif" or ".tiff") images with a resolution of 300 dpi, the file name for each page is named after its corresponding Bates number. Records in which a color copy is necessary to interpret the document (e.g., photographs, presentations, AUTOCAD, etc.) will be rendered to higher resolution, single-page *joint photographic experts group* (".jpg" or ".jpeg") format. Endorsements must follow these guidelines:

    a. Bates numbers must be stamped on the lower right hand corner of all images.

    b. Confidentiality must be stamped on the lower left hand corner of all images.

    c. Other pertinent language may be stamped on the bottom center, or top of the images, as deemed necessary.

2. Load Files. All ESI must be produced with appropriate data load files, denoting logical document boundaries. The following files should be included within each production set.

    a. A Concordance delimited ASCII text file (".dat").

i. The .dat file will contain metadata from the original native documents, wherein the header row (*i.e.*, the first line) of the .dat file must identify the metadata fields.

ii. The .dat file must be delimited with the standard Concordance delimiters (the use of commas and quotes as delimiters is not acceptable):

ASCII 020 [¶] for the comma character;
ASCII 254 [þ] for the quote character; and
ASCII 174 [®] for new line.

iii. All attachments, or *child* records, should sequentially follow the *parent* record.

iv. The following fields and metadata will be produced:

Beginning Bates; Ending Bates; Beginning Bates Attachment; Ending Bates Attachment; Custodian; File Name; From; Recipient; CC; BCC; Subject; Date Sent; Time Sent; Last Modified Date; Last Modified Time; Author; Title; Date Created; Time Created; Document Extension; Page Count; MD5Hash; Text Path; and Native File Path.

b. Image cross-reference files, *Opticon* image file (".opt") and *IPRO View Load* file (".lfp"), which link images to the database and identifies appropriate document breaks.

J. If any document requested herein has been lost, discarded, or destroyed, that document so lost, discarded, or destroyed shall be identified in writing (produced at the time and place that documents are demanded to be produced by this request) as completely as possible, together with the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.

DOCUMENTS REQUESTED

1. The Catalyst and Relativity document databases created or used in the SST Litigation, as annotated, compiled and used in the course of the litigation and/or document review, including instructions, software, and anything else necessary to access and analyze the data therein.

2. All so-called "hot docs," as understood or identified by the Law Firm, and any other documents or information identified during the SST Litigation bearing on the material issues in the Litigation, including but not limited to liability and damages.

3. All engagement letters, fee agreements, retention letters, and/or other documents referring to, relating to, or evidencing terms of the Law Firm's participation in the SST Litigation and/or representation of class representatives.

4. All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of hourly clients, from 2008 to the present.

5. All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of non-hourly clients, from 2008 to the present.

6. All documents and/or communications relating to how the Law Firm records, accounts for and/or seeks reimbursement for hours billed by Staff Attorneys in other class action or contingency cases, including the hourly rates the Law Firm would charge if successful, from 2010 to the present.

7. Copies of all billing rate tables, spreadsheets, fee binders, or other collection of the Law Firm's annual billing rates, from 2010 to the present.

8. All minutes, notes, recordings, memoranda or other documents relating to or created by the Law Firm's Managing Partner or Executive Committee during meetings to determine annual billing rates, from 2008 to the present.

9. All documents and/or communications between and among the Firm's Managing Partner and the Firm's Executive Committee relating to review and adjustment of annual billing rates, from 2008 to the present.

10. All documents and/or communications relating to the Law Firm's internal classification of costs and expenses, including but not limited to any ethical, legal, or factual opinions solicited by the firm by third parties regarding the classification of Staff Attorneys as fees vs. expenses.

11. A complete set of time records for all attorneys, including Staff Attorneys, and other Law Firm staff who worked on or contributed to the SST Litigation, including but not limited to hand-written time sheets/ledgers, emails, electronic entries, pre-bills, and/or client bills, including the hourly rate billed and/or corresponding to the hours recorded.

12. All documents referring to, relating to, evidencing or constituting the basis for and amounts of any costs and expenses billed, incurred or charged by the Law Firm for legal or other services rendered in connection with the SST Litigation including but not limited to documents pertaining to the terms under which Staff Attorneys and/or third parties provided services to the Law Firm in the Lawsuit.

13. All documents and/or communications relating to or evidencing the Law Firm's use of Catalyst in connection with the SST Document Review, including all records of time spent in the Catalyst database, costs incurred, and coding of electronic documents.

14. All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm attorneys and non-legal staff assigned to or who contributed to the SST Litigation, for work performed on the Litigation.

15. All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm's Staff Attorneys assigned to or who contributed to the SST Litigation, for work performed on the Litigation.

16. All documents referring to, relating to, evidencing or constituting discussions between the Law Firm and the Plaintiffs' Law Firms relating to sharing costs and/or expenses of the SST Document Review/SST Litigation, including but not limited to sharing the cost of Staff Attorneys, hosting costs for Catalyst database, and other expenses associated with conducting voluminous document review.

17. All agreements, contracts, and/or memorialization of an arrangement to allocate and/or share the cost of certain of the Law Firm's Staff Attorneys to Thornton, including the compensation, reimbursement, and/or invoicing of costs associated with the same.

18. All documents referring to, relating to, evidencing or constituting discussions with Thornton regarding Thornton's plan or intention to include Staff Attorney time as part of Thornton's Fee Petition and/or Lodestar calculation.

19. All expert reports, factual or legal opinions, or other work product solicited from a third-party by the Law Firm in connection with factual and/or legal issues arising in the SST Litigation, including but not limited to the foreign-exchange market, foreign-exchange trading practices, and custodial management of retirement funds.

20. 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.

21. All documents and/or communications relating to discussions between and among the Plaintiffs' Law Firms and ARTRS/George Hopkins regarding the substantive allegations and progress of the SST litigation, including but not limited to the filing of the complaint/amended complaint, court orders, mediation, and/or the agreement to settlement in principle.

22. All documents and/or communications with ARTRS/George Hopkins regarding the Final Settlement, including but not limited to the fairness of the total award for the class, payment of service award, and the Fee Award, including any allocation of those fees among counsel.

23. Current CVs or resumes for all Staff Attorneys who worked on or contributed to the SST Litigation/Document Review.

24. All written guidance, training manuals, policies/procedures, search criteria, other documents provided to the Firm's Staff Attorneys relating to the SST Document Review, including but not limited to materials related to use of Catalyst database.

25. All other documents relating to the SST Litigation, other than those responsive to Request No. 24 above, that the Law Firm provided to its Staff Attorneys, including but not limited to case pleadings, mediation reports, legal memoranda.

26. All written work product produced by Staff Attorneys assigned to the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries.

27. A complete copy of the binder(s) containing discursive memoranda pertaining to the SST Litigation/SST Document Review, including all attachments.

28. All presentations, memoranda, or other submissions, including potential exhibits, any plaintiffs' counsel prepared for or submitted to the mediator, including all exhibits thereto.

29. All communications between the Law Firm and counsel for State Street relating to the SST Litigation, including but not limited to document productions, mediations, and settlement.

30. All communications with the U.S. Department of Labor, including all local field offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission relating to the SST Litigation.

31. All documents and/or communications relating to the selection and staffing of Staff Attorneys on the SST Litigation/SST Document Review.

32. All documents and/or communications relating to the allocation of certain Staff Attorneys to Thornton under the cost-sharing agreement entered into by the Firm in or about 2014 or 2015.

33. All documents relating to, referring to or evidencing a secondary review or quality control process of the SST Document Review performed by the Law Firm.

34. All documents and/or communications between and among the Law Firm and its accounting and/or billing personnel relating to the accounting for, recording, and/or invoicing of Staff Attorneys for whom Thornton had agreed to share the costs.

35. All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from the Fee Petition of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs.

36. All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from the Fee Petition of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs in other class action or litigation matters.

37. All invoices, requests for payment, and/or similar documents sent to or requested by Thornton pursuant to the cost-sharing agreement between the Firm and Thornton to share the costs of certain Staff Attorneys, including all emails or other communications related to the same.

38. All documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records.

39. All documents, other than those requested in Request No. 38 above, reviewed or considered by the Law Firm in calculating the Firm's Lodestar calculation.

40. All documents relating to, referring to, or constituting the Law Firm's Fee Petition, including all drafts, spreadsheets, outlines, notes, emails.

41. All documents relating to, referring to, or constituting the Motion for Attorneys' Fees, including all drafts, spreadsheets, outlines, notes, emails.

42. All documents relied upon by the Law Firm in preparing and filing the Motion for Attorneys' Fees.

43. All communications between and among the Law Firm, the Plaintiffs' Law Firms, and the ERISA firms, relating to preparation of the Motion for Attorneys' Fees and/or the Fee Petitions filed in the SST Litigation.

44. All documents and/or communications relating to the discovery of billing errors disclosed in the November 10, 2016 Letter filed with the Court, including but not limited to communications between and among you, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms.

45. All documents, including notes, outline, drafts and exhibits, explaining or attempting to correct any part of the Fee Petition(s).

46. All documents illustrating, demonstrating, or establishing any errors you or anyone identified in any part of the Fee Petition(s).

47. All documents relating to, referring to, evidencing, or constituting the November 10, 2016 Letter, including all drafts, outlines, notes, and communications relating to the filing of that correspondence.

48. All documents and/or communications relating to, referring to or evidencing corrective actions or subsequent review taken by the Law Firm after discovery of the billing errors disclosed in the November 10, 2016 Letter.

49. All documents and/or communications relating to the December 17, 2016 Article, including but not limited to communications between and among the Law Firm, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms.

50. All documents relating to Michael Bradley's involvement in the SST Litigation/SST Document Review, including but not limited to communications with Mr. Bradley and all documents relating to or referring to an agreement between Mr. Bradley and Thornton to participate in the SST Document Review.

51. All documents relating to, referring to or evidencing payments made to Michael Bradley in connection with his work on the SST Litigation/SST Document Review.

52. All written work product produced by Michael Bradley as part of his involvement in the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries.

53. All documents you may contend support your Fee Petition for reimbursement of fees and/or expenses, which you have not produced thus far.

Date: May 18, 2017

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his Attorneys,

William F. Sinnott (BBO #547423)
Elizabeth J. McEvoy 9BBO #683191)
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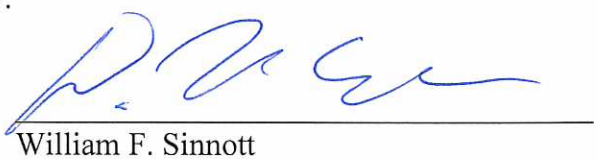
emcevoy@dbslawfirm.com

CERTIFICATE OF SERVICE

I, William F. Sinnott, hereby certify that I have caused a copy of the foregoing document to be served upon Richard M. Heimann, Esquire, Lieff Cabraser Heimann & Bernstein, LLP, 275 Battery Street, 29th Floor, San Francisco, CA 94111, by electronic mail and first class mail, postage prepaid, this 18th day of May, 2017.



William F. Sinnott

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES TO LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order (pp. 3-4), Special Master Honorable Gerald E. Rosen's (Retired), by his undersigned counsel, hereby propounds the following Interrogatories upon Lieff Cabraser Heimann & Bernstein, LLP. The Special Master requests that Lieff Cabraser Heimann & Bernstein, LLP answer the Interrogatories herein under oath and provide responses within fourteen (14) days from the date of service hereof, to: William F. Sinnott, Esq., Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, Massachusetts 02108.

DEFINITIONS

1. The term "you", "your", "the Firm", and "the Law Firm" refer to Lieff Cabraser Heimann & Bernstein, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

2. The term "Thornton" refers to Thornton Law Firm, LLP, formerly known as Thornton & Naumes, LLP, and all employees, agents, counsels, attorneys, and representatives.

3. The term "Labaton" or "Labaton Sucharow" refers to Labaton Sucharow LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

4. The term "Plaintiffs' Law Firms" refers to Labaton, Lieff, and/or Thornton, and their respective employees, contractors, affiliates, agents, counsels, and representatives, collectively and/or individually.

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6. The term "ARTRS" refers to the Arkansas Teacher Retirement System and/or its Executive Director, George Hopkins, Esq.

7. The term "State Street Litigation", "SST Litigation" or "Litigation" refers to *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

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9. The term "State Street" refers to State Street Bank and Trust Company and/or State Street Global Markets, defendants in the SST Litigation.

10. The term "settlement in principle" refers to the settlement agreement reached in substance between counsel by and through mediation.

11. The term "Court" refers to the United States District Court for the District of Massachusetts.

12. The term "California Action" refers to the qui tam lawsuit(s) originally filed under seal in California and other states against State Street that was unsealed on or about October 20, 2009 by the intervention of the Attorney General for the State of California.

13. The term "BNY Mellon Action" refers to the investigation and prosecution of the multidistrict litigation entitled *In re Bank of New York Mellon Corp.* and related actions, including but not limited to Civil Action 12-MD-02335 filed in the United States District Court for the Southern District of New York.

14. The term "Fee Petition" or "Fee Application" refers to the *Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and*

Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (Docket #104), and Exhibits 1-32 attached hereto, filed with the Court in the State Street Litigation. In particular, "Fee Petition" in conjunction with one or more of the individual firms, refers to the respective Exhibit (and exhibits attached thereto) in which an individual law firm sought approval for payment of its respective fee and expenses incurred in the SST Litigation, including all declarations, affidavits, and/or the Lodestar reports filed therewith.

15. The term "Motion for Attorneys' Fees" refers to Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses, including the Memorandum in Support and exhibits, filed with the Court on or about September 15, 2016 and October 21, 2016, respectively (Docket #102, 108).

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to the Court or otherwise charged to a client for work performed on a legal matter, including the rates listed on the Fee Petitions submitted in the SST Litigation.

21. The term "Staff Attorneys" refers to licensed attorneys working on a part-time or full-time basis for the Law Firm, but who are not deemed "associates" or otherwise on a traditional partnership track.

22. The term "hourly clients" refers to all past, present, and prospective clients who agree to pay and/or are charged for legal services rendered on an hourly basis, notwithstanding the actual amount paid or collected.

23. The term "non-hourly clients" refers to all past, present, and prospective clients who do not pay for legal services on an hourly rate, such as clients paying a flat fee, retained through a contingency arrangement and/or class action litigation, or other non-hourly fee structure, notwithstanding the actual amount paid or collected.

24. Any word written in the singular also includes the plural and vice-versa.

25. In case of doubt as to the scope of a clause including "and," "or," "any," "all," "each," or "every," the intended meaning is inclusive rather than exclusive.

26. The term "any" and the term "all" are intended to mean "any and all."

27. As used herein, the term "or" and the term "and" shall mean "and/or" and vice-versa.

28. As used herein, the terms "relating to" or "referring to" or "concerning" or "constituting" or the like mean and include all documents that in any manner or form are relevant in any way to or bear upon the subject matter in question, including, without limitation, all documents which contain, record, reflect, summarize, evaluate, comment upon, transmit, refer to, or discuss that subject matter or that in any manner state the background of, or were the basis or bases for, or that record, evaluate comment upon, or were referred to, relied upon, utilized,

generated, transmitted, or received in arriving at, your conclusions, opinions, estimates, calculations, positions, decisions, beliefs, assertions or allegations, that undermine, contradict, or conflict with your conclusions, opinions, calculations, estimates, positions, beliefs, assertions, or allegations, concerning the subject matter in question.

29. The term "date" means the exact day, month, and year, if ascertainable, or the best approximation thereof if not.

30. The term "communication" as used herein includes, without limitation, the following: conversations, telephone conversations, e-mails, text messages, social media communications, and other electronic transmissions of any kind, statements, discussions, debates, arguments, disclosures, interviews, consultation and every other manner of oral utterance, correspondence, or electronic or written transmittals of information or messages of any kind.

31. The term "document" shall mean those things described in Rule 34(a) of the Federal Rules of Civil Procedure. The terms "document" and "documents" are used herein in the broadest possible sense and mean written, typed, printed, recorded or graphic matter, however produced or reproduced of any kind and description, and whether an original, master, duplicate or copy, including, but not limited to, e-mails, papers, notes, accounts, books, advertisements, letters, memoranda, notes of conversations, contracts, agreements, drawings, telegrams, tape recordings, communications (as defined in paragraph 30 hereof), including inter-office and intra-office memoranda reports, studies, working papers, corporate records, minutes of meetings, notebooks, bank deposit slips, bank checks, canceled checks, diaries, diary entries, appointment books, desk calendars, photographs, transcriptions or sound recordings or any type of personal or telephone conversations or negotiations, meetings or conferences, or things similar to any of the foregoing, and to include any data, information or statistics contained

within any data storage modules, tapes, discs or other memory device, or other information retrievable from storage systems, including but not limited to, computer-generated reports and printouts. If any document has been prepared in multiple copies which are not identical, each modified copy or non-identical copy is a separate "document." The word "document" also includes data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices in a reasonably usable form.

32. The term "draft" shall mean any earlier, preliminary, preparatory, proposed, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft or final document and whether or not the terms of the draft are the same or different from the terms of the final document.

INSTRUCTIONS

A. Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order (pp. 3-4), you are required to answer the following Interrogatories under oath and within 14 days, or within the time otherwise required by Court order.

B. For each of the Interrogatories listed below, please include the full name(s) of all persons from the Law Firm (attorneys, staff, agents, consultants, or affiliates) who have knowledge of the information provided.

C. These Interrogatories are deemed to be continuing and to require supplemental responses, if you obtain additional, contradictory, or different information. Such supplemental answers shall be filed promptly upon the discovery by you of such supplemental information. Each Interrogatory is to be answered separately and as completely as possible. The fact that an investigation is continuing and discovery is not complete shall not be used as a reason for failure to answer any Interrogatory as fully as possible.

D. If you refuse to answer any Interrogatory or any part thereof on the grounds of privilege, please identify the claimed privilege (i.e., attorney-client) and the nature of any information you refuse to disclose, referring specifically to the Interrogatory or any part thereof to which the claimed privilege applies, the form in which said information exists, and the grounds for the claimed privilege.

E. If the answer to all or any part of an Interrogatory is not presently known by or available to you, include a statement to that effect, specifying the portion of the Interrogatory which cannot be completely answered.

INTERROGATORIES

1. Describe each of the Law Firm's practice area(s), including areas of specialty, special services offered, the total number of attorneys and staff, and a brief description of any representative matters.

2. Identify all other class actions or other litigations in which the Firm has been or is currently engaged in relating to the foreign-exchange market, mismanagement of retirement funds, and/or any other subject matter overlapping the allegations in the SST Litigation. Please include all such matters on which the Firm has worked, as counsel of record or otherwise, the complete case caption, the docket number, and the outcome.

3. Describe in detail the Firm's involvement in the California Action and in the BNY Mellon Action and how that involvement assisted the Firm in the SST Litigation.

4. Identify all other class actions or other litigation in which the Firm was engaged during the pendency of the SST Litigation. For each action:

   a. Please identify the timekeepers who worked on the matter and provide their hourly rate(s);

b. Please provide the detailed, itemized hourly billing entries for each timekeeper.

5. Explain how and when the Law Firm became involved in the SST Litigation, including any conversations between and among the Firm and ARTRS, the Plaintiffs' Law Firms, and/or the ERISA firms.

6. Describe the role played by the Law Firm in filing the substantive claims alleged in the SST Litigation, including the filing of the Complaint (Docket #1) and/or the Amended Complaint (Docket #10), a description of any legal or factual research performed, consultations with State Street, legal drafting and/or review of pleadings.

7. Summarize the factual basis for State Street's liability and your/plaintiffs' contention that State Street was legally liable for damages to the class members.

8. Describe the Firm's theory of damages, including an estimate of total damages to the customer and/or ERISA classes, whether this theory changed throughout the course of the SST Litigation, and if so, what factors affected the Firm's theory and total calculation of estimated damages.

9. Identify and describe all risk factors you considered prior to getting involved in the SST Litigation, including any "bad facts," meritorious defenses and/or unsettled legal issues, or other circumstances that affected the potential outcome and total damages recoverable in the case.

10. Describe the frequency and nature of communications with the Plaintiffs' Law Firms over the course of the Litigation. Please specify the attorneys with whom you dealt and the basic substance of those conversations.

11. Describe the role of the U.S. Department of Labor, including any field divisions or offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission, in the SST Litigation and the basic substance of the Law Firm's communications with each agency through the course of the Litigation.

12. Explain the role played by ARTRS and/or George Hopkins in the SST Litigation, including Mr. Hopkins' substantive contributions to the pleadings and/or case strategy, and what, if any, role he had in the negotiation and mediation of the Final Settlement.

13. Describe the frequency and nature of communications with ERISA counsel over the course of the Litigation. Please specify the attorneys with whom you dealt and the basic substance of those conversations.

14. Explain the Law Firm's litigation strategy in pursuing the claims raised in the SST Litigation, including the strategy employed in mediation. Identify and describe all events that impacted or caused the Firm to change that strategy.

15. Explain any tensions and/or adversarial positions assumed between the ERISA counsel, on the one hand, and the Plaintiffs' Law Firms, on the other, including differences in litigation strategy, legal theories, damages, and/or theories of liability asserted during the SST Litigation.

16. Explain how the adversarial positions described above impacted or did not impact the Law Firm's strategy, including its discovery, mediation, and/or the settlement of the SST Litigation.

17. Describe in detail all agreements between the Firm/Plaintiffs' Law Firms, on the one hand, and the ERISA firms, on the other, to allocate to the ERISA firms a fixed percentage of the total Fee Award rendered by the Court in the SST Litigation. As to any agreement that did not represent the final agreement for allocation of the Fee Award, explain the reason for modifying a previous agreement, including all persons involved in these discussions and their affiliation/firm.

18. Describe in detail the nature and the scope of the SST Document Review, including the total number of pages and/or size of the productions, the nature and date of each document production(s) received from State Street, all other document production(s) received in

connection with the Litigation, and a general description of the information contained in each production.

19. Describe in detail how the Law Firm conducted the SST Document Review, including how it selected and/or staffed Staff Attorneys, a description of all training binders/protocols or search terms used for Document Review, and a brief description of the tasks assigned to Staff Attorneys and any other individuals who participated, and how those tasks furthered the Firm's overall litigation strategy.

20. Describe how the Law Firm utilized the Catalyst database, including all persons who had access to the database, any electronic and/or technical training provided to those individuals, and a description of the information maintained in the Catalyst database during the course of the SST Document Review.

21. Describe in detail all documents destroyed and/or deleted from the Catalyst database, including the date, and explain why each document was deleted/destroyed.

22. Identify and describe any training the Firm provided to Staff Attorneys relating to the substantive allegations in the SST Litigation/SST Document Review, including addressing all legal issues, key witnesses, theories of liability, damages, and critical topics raised in the case.

23. Please list all class actions or other litigations in the past five years in which the Firm has assigned Staff Attorneys to work on the matter. For each matter, please list the full case caption, the docket number, the outcome of the case, and the hourly rates charged, if any, for each Staff Attorney who worked on the matter, and the nature of the work performed by the assigned Staff Attorneys.

24. Please list the full name of each Staff Attorney who worked on the SST Litigation/Document Review. Please include for each Staff Attorney: his/her employment classification (full-time/part-time employee or independent contractor); how long he or she

worked (has worked) at the Firm; the name/description of any other cases to which he or she was assigned during the pendency of SST Litigation/Document Review; whether he/she was allocated to Thornton for any portion of the SST Litigation; any prior experience in securities class action litigations, foreign-exchange trading and/or mismanagement of custodial funds; the physical location where the work was performed; and the hourly rate charged in the Fee Petition.

25. For each of the Staff Attorneys listed above, please describe all compensation paid to the Staff Attorney and the total number of hours recorded for work on the SST Litigation/Document Review.

26. Identify any other individuals who worked on the SST Document review who were not Staff Attorneys and explain their affiliation with the Law Firm, their employment status, and how they were compensated for their time.

27. Explain how Staff Attorneys working on the SST Litigation recorded, including through handwritten and/or interim measures, and subsequently reported their time to the Firm and what, if any, steps were taken by the Firm to review or scrutinize those hours.

28. Explain how the Firm supervised and/or performed quality control of the work performed by the Staff Attorneys and others who participated in the SST Document Review, including the name, title, and tasks performed by any supervising individual.

29. Explain in detail the job responsibilities and tasks performed by the Staff Attorneys assigned to the SST Document Review, including those Staff Attorneys allocated to Thornton, including but not limited to, coding, deposition preparation, creation of witness kits and similar work.

30. Describe the process for assigning and reviewing factual, legal, and/or discursive memoranda prepared by Staff Attorneys, including how such memoranda were relevant to, used as part of the SST Litigation, and/or shared among counsel.

31. Describe the Firm's understanding of how fees, costs and/or expenses associated with performance of discovery in the SST Document Review would be shared among the Firm, the Plaintiffs' Law Firms, and/or the ERISA firms, including but not limited to who would be responsible for: compensating Staff Attorneys for hours worked; hosting Catalyst and/or other electronic database(s); compiling "hot docs" and other documents relative to the liability and/or damages theories; and/or other expenses associated with the SST Document Review.

32. For each of the categories listed above, explain the Firm's understanding of how those fees, costs and/or expenses would be reported to the Court in the event of a successful verdict and/or settlement.

33. Explain the origin of the cost-sharing agreement with Thornton through which the Firm agreed to allocate the costs associated with a certain number of Staff Attorneys to Thornton, including the names and descriptions of all other matters in which the Firm entered into a similar arrangement (whether or not documented) to share costs with other firms, prior to or after the SST Litigation.

34. Describe the Firm's understanding, in or about early 2015, as to how Thornton would account for the allocation/sharing of costs for certain of the Firm's Staff Attorneys in its Fee Petition, including the Firm's understanding as to which firm was responsible for reporting the total number of hours worked by those Staff Attorneys on its Fee Petition and/or Lodestar calculation.

35. Please state whether the Firm's understanding of how Thornton would account for the sharing of Staff Attorney costs has changed since 2015, and if so, when, and explain what prompted that change.

36. Explain the Firm's current understanding of the all cost-sharing agreements (formal or informal) between the Law Firm and Thornton to allocate and/or share costs for

certain of the Firm's Staff Attorneys assigned to work on the SST Litigation.

37. Explain what knowledge, if any, the Firm had about the existence of a cost-sharing agreement(s) (formal or informal) between Labaton and Thornton to allocate and/or share costs for certain of Labaton's Staff Attorneys assigned to work on the SST Litigation.

38. Describe in detail the process through which the Law Firm invoiced or otherwise sought reimbursement from Thornton for costs of those Staff Attorneys allocated to Thornton as part of the SST Litigation/Document Review.

39. Explain the Firm's process for removing time reported by Staff Attorneys allocated to Thornton for whom Thornton reimbursed the Firm, from the Firm's Fee Petition, including the role of the Firm's Accounting Department, and explain why time reported by Christopher Jordan and Jonathan Zaul for reviewing Thornton folders 2/9/15 to 4/14/15 was not removed from the Firm's timekeeping records.

40. Explain the Firm's process for removing time reported by Staff Attorneys allocated to Thornton for whom Thornton paid directly through a third-party staffing agency from the Firm's Fee Petition, including the role of the Firm's Accounting Department, and explain why time reported by Staff Attorneys Ann Ten Eyck and Rachel Wintterle for work performed from March through June 2015, was not removed from the Firm's timekeeping records.

41. Identify and describe all communications between the Law Firm and Thornton relating to the firms' cost-sharing agreement to share the costs of certain Staff Attorneys, including discussions regarding how those costs would be incorporated into the firms' respective Fee Petitions.

42. Identify and describe all communications between and among the Firm, Labaton, and Thornton relating to cost-sharing agreement(s) between any of the firms, including

discussions regarding how those costs would be incorporated into the firms' respective Fee Petitions.

43. Describe what knowledge, if any, the Firm had in early 2015 about Michael Bradley's involvement in the SST Litigation, including any knowledge of Thornton's agreement to pay Mr. Bradley an agreed-upon rate of $500/hour.

44. Identify and describe all communications relating to Michael Bradley's participation in the SST Litigation/SST Document Review from 2010 through November 2016, including relating to compensation or an hourly billing rate that Thornton would charge for Mr. Bradley's time spent on the matter.

45. Explain how the Firm supervised and/or performed quality control of the work performed by Michael Bradley in the SST Document Review, including the name, title, and nature of any supervising individual.

46. Please describe any previous matters, whether based on a contingency, hourly, or other fee arrangement, in which the Firm engaged in a fee dispute with a client or class representative prior to the conclusion of the representation. For each such matter, explain how that fee dispute was resolved and any hourly rate/quantum meruit applied for work performed.

47. Explain how the Law Firm determines annual billing rates for all attorneys, including Staff Attorneys. Please identify and describe all factors considered and/or resources relied upon in making these determinations.

48. Please explain how the process described above does or does not vary in determining billing rates charged to hourly clients and why.

49. Please list all of the Firm's hourly rates charged to hourly clients for each of the years 2010-2016. For each attorney, please list the relative experience level.

50. Please list all of the Firm's hourly rates charged to non-hourly clients (whether in class action or other contingency-fee litigation) for each of the years 2010-2016. For each attorney, please list the relative experience level.

51. Please list all of the hourly rates charged or associated with any matters in which the Firm has acted as local counsel for each of the years 2010-2016. For each attorney, please list the relative experience level.

52. Please identify the Firm's managing partner for each of the years from 2010 to present, and list all members of the Firm's Executive Committee and describe their respective roles in determining annual rates.

53. Explain how the Firm adjusts its hourly rates to reflect the geographic region in which a matter is filed/pending. If the Firm does not adjust its rates, explain why not.

54. Identify and describe all instances in which the Firm has billed an attorney at a lesser or higher rate than the annual rate determined by the Managing Partner, in conjunction with the Executive Committee, for a particular year and explain why that decision was made.

55. Describe in detail the process for finalizing the term sheet and Final Settlement in the SST Litigation, including the role of the U.S. Department of Labor, U.S. Attorney's Office, U.S. Department of Justice and/or the U.S. Securities and Exchange Commission in the negotiations.

56. Describe in detail how the Firm prepared the Fee Petition and identify all individuals who assisted in the preparation and the nature of their contribution(s).

57. Describe in detail any review or steps taken to scrutinize or verify the time reported by the Law Firm prior to submitting the Firm's Fee Petition/Lodestar calculation. If the answer is none, explain why.

58. Describe what, if any, steps the Law Firm took to review, verify, or compare the Fee Petitions and/or Lodestar calculations prepared by the Plaintiffs' Firms or ERISA firms with the Firm's Fee Petition prior to filing its Fee Petition with the Court. If no action was taken, explain why not.

59. Identify and describe all communication the Firm had with the Plaintiffs' Law Firms and/or ERISA counsel relating to the Firm's preparation of the Fee Petition, including but not limited to preparation of the Lodestar calculation, the inclusion of Staff Attorneys for whom Thornton had paid costs, calculation of a Lodestar multiplier, and reasonableness of attorneys' fees.

60. Identify all individuals at the Firm who reviewed, assisted or contributed to the preparation and submission of Thornton's Fee Petition and, if appropriate, describe the nature of their contributions.

61. Describe how the Law Firm and/or the Plaintiffs' Law Firms arrived at a total fee percentage roughly equal to 25% of the final Fee Award. Please explain whether the Firm prepared its Lodestar calculation to achieve a 25% award of the total settlement amount.

62. Identify all billing entries, costs and/or expenses incurred by the Firm during the SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor.

63. Explain the significance of the statement made in Paragraph 5 to the *Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP In Support of Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Expenses* (Docket #104-17), affirming that the hourly rates included in Exhibit A to the *Declaration* are the Firm's "regular rates charged for their services, which have been accepted in other complex class actions." Please describe any other instances in which the Firm has submitted a Fee Petition with the same or

similar language.

64. Do you contend that the rates listed in the Firm's Fee Petition represent the prevailing rates in the community for similar services performed by lawyers of reasonably comparable skill, experience and reputation for each of the respective tasks performed? Why or why not?

65. Identify, in detail, each error in your Fee Petition, and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s).

66. Describe when and how the Law Firm first learned about the Boston Globe's inquiry into the Fee Award, and underlying billing practices employed by the Firm and other counsel in the SST Litigation, that preceded the publication of the December 17, 2016 Article.

67. Describe when and how the Law Firm first identified duplicative billing entries reflected in the Firm's Fee Petition and describe all actions taken by the Firm to review, confirm, and/or correct those errors.

68. Describe in detail how the Law Firm participated in the drafting of the November 10, 2016 Letter, including the full names of all individuals who contributed to the Letter, the nature of any internal review by the Firm, and all individuals outside the firm who reviewed and/or contributed to the Letter and the nature of their contribution(s).

69. Identify and describe all documents relied upon by the Law Firm in the drafting of the November 10, 2016 Letter.

70. State the total number of class members and the estimated recovery or settlement amounts, net of fees and expenses, due to each class member.

71. Itemize the total estimated damages to the ERISA and non-ERISA plaintiffs and summarize the factual basis for the estimate.

72. Identify, in detail, any additional errors in your any communication with the Court or with the Special Master, since filing of the Fee Petition(s) and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s).

73. Identify and explain any mistakes you have identified in the Fee Petition, Motion for Attorneys' Fees, and/or Fee Award, not described above.

74. Identify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge.

75. Identify and describe the steps taken by the Firm to identify documents responsive to the corresponding Requests for Production of Documents served by the Special Master including, without limitation, the name and title of those involved, the process undertaken, the database and documents searched, and the parameters of any electronic search including date range, timekeepers and search terms.

76. Identify with specificity sufficient to constitute a valid response to a request for production of documents, any documents identified by you as responsive to the Special Master's Request for Production of Documents but withheld from production to the Special Master on grounds of any evidentiary or other privilege or otherwise including (a) the type of document; (b) its date if any; (c) any identifying marks such as bates stamp or other numeric designation; (d) the reason you withheld it from production; and (e) the current location of the document. To the extent any such document or other responsive document has been destroyed, identify (a) the type of document; (b) its date, if any; (c) the date of its destruction; (d) the circumstance thereof; and (e) the persons involved therein. For each such person, please provide their name, current or prior title or position with the Law Firm, the date, if any, of termination of employment with the Law Firm and the reason therefor, and the last known residential and business address.

77. Identify the timekeeping, accounting, and billing software systems utilized by the Law Firm to record and bill attorney time charges, costs and expenses associated with legal and other services rendered by the Law Firm in connection with the SST Litigation and the persons within the Law Firm with the most knowledge and responsibility for the system and operation.

Date: May 18, 2017

Respectfully submitted,

SPECIAL MASTER HONORABLE
GERALD E. ROSEN (RETIRED),
By his Attorneys,

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CERTIFICATE OF SERVICE

I, William F. Sinnott, hereby certify that I have caused a copy of the foregoing document to be served upon Richard M. Heimann, Esquire, Lieff Cabraser Heimann & Bernstein, LLP, 275 Battery Street, 29th Floor, San Francisco, CA 94111, by electronic mail and first class mail, postage prepaid, this 18th day of May, 2017.

William F. Sinnott

EXHIBIT D

From: William Sinnott [mailto:wsinnott@dbslawfirm.com]
Sent: Tuesday, May 23, 2017 5:06 PM
To: Heimann, Richard M.
Cc: Fineman, Steven E.; Lukey, Joan; Kelly, Brian; Fuller, Anthony E.; Elizabeth McEvoy
Subject: Revised RFPs & Ints. for Lieff

Richard:

As Joan Lukey likely informed you, we had a very productive meeting with Joan and Justin yesterday in which we significantly narrowed the scope of the written discovery served on May 18, 2017. In an effort to alleviate the burden on the firms and prioritize the information we need in advance of the depositions (as scheduled) in June, we've adjusted the "due date" for several of the requests—reflecting a new, tiered schedule—as well as eliminated a significant amount of interrogatories and requests for production altogether. As indicated in the attached annotated version of the May 18 Interrogatories and Requests for Production, we've categorized the requests into those due on June 1, 2017, those due on June 9, 2017, and those due on July 10, 2017. Please see below additional clarification based on our discussion yesterday with Labaton's counsel.

In the event that the Firm objects to any of the revised interrogatories and/or RFPs, for any reason, please send us an email detailing the nature of each request and corresponding Ints/RFP by no later than **Friday, May 26, 2017**. We will consider all timely objections and do our best to further narrow the scope of eliminate extraneous information, if appropriate.

Finally, if the Firm has already produced information requested as part of its prior document productions, please respond in writing with the specific date(s) or production and Bates nos. of all responsive documents. Such information need not be produced a second time.

Interrogatories

No. 2- Stricken in its entirety for now. The Special Master reserves the right to propound additional discovery specifically to address the subject matter, experience and/or expertise of the Law Firm prior to its involvement in the SST Litigation, involving FX-based claims.

No. 4- Stricken in its entirety for now. The Special Master reserves the right to propound additional discovery specifically to address potential double-billing of Staff Attorney and attorney time between the SST Litigation and other, concurrent litigations in which the Firm was involved.

Nos. 10-11, 13- Strike the portion of each interrogatory seeking a description of the "basic substance" of certain communications referenced therein.

No. 10- Please describe the Firm's understanding of the role played by the listed government agencies.

No. 14- Please provide an overview of the litigation strategy throughout the course of the litigation. To the extent that strategy changed, please identify generally the time period or relevant event (i.e. Lobby Conference, Motion to Dismiss, access to State Street production) that caused a change in said strategy.

Nos. 15-16- If the answer is "none," so state in your response.

No. 18- Figures need not be exact; approximations or ranges for the total number of pages or GB are acceptable. The reference to "general description of the information contained in the production" may include brief descriptions for the various categories of documents, such as "real time trading transactions"; "internal State Street emails between traders and compliance"; and/or "foreign exchange market spreadsheets of exchange rates."

Nos. 19/22/29- To the extent these interrogatories overlap in substance, the Firm need not answer twice. However, insofar as one or more interrogatories seeks information that is not included in the other two, please respond to all sub-questions presented.

No. 33- Reference to "all other matters in which the Firm entered into a similar arrangement [] to share costs with other firms" refers to any other matters in which the firm agreed to share the costs of the time spent/billed by the Firm's staff attorneys with another firm, and sought reimbursement directly or indirectly from that firm for staff attorney time. If none, so state in your response.

No. 46- Relates to any situation, whether or not arising to a true "dispute," in which the Firm ended representation of a client/class representative prematurely or otherwise before the anticipated conclusion of a matter, whether due to insistence of the client/class representative or the Firm, and where the Firm sought payment from the client or the client paid for the work already performed by the Firm. If an hourly rate was paid, please identify that rate. If another sum was paid, please provide that figure and the basis for that payment.

No. 47- Relates principally to hourly rates listed on the Firm's fee petitions, and also includes any other instance in which the Firm has represented a client/class representative on a non-hourly basis, and then sought reimbursement from another party or the Court that is not captured in a fee petition.

No. 54- Interrogatory seeks identification/description only of those instances in the State Street Litigation where the Firm billed an attorney at a higher or lesser rate than the rate determined by the Firm. Please explain the deviation in any such instance.

No. 56/60- To the extent these interrogatories overlap in substance, the Firm need not answer twice. However, to the extent No. 60, seeking information specifically relating to the Firm's review or involvement in Thornton's Fee Petition, goes beyond the scope of No. 56, please answer all sub-questions presented.

RFPs

No. 1- A hard drive containing the database is acceptable. If you contend such production is barred under the terms of the protective order entered into with State Street's counsel during the State Street Litigation, please respond stating with specificity the nature of such an objection.

No. 2- As discussed yesterday, production of all documents marked "hot" or "smoking hot" in the Catalyst database is sufficient; the phrase "bearing on material issues" is, therefore, stricken.

No. 3: Request seeks documents relating to representation of class representatives in the State Street Litigation only. The reference to all documents "referring to, relating to, or evidencing terms of the law Firm's representation of class

representatives" relates to any written communications, emails, notes that set out the terms of an agreement that is not otherwise reflected in a formal written agreement previously produced, or any documents that contain terms that amend a formal agreement and is not otherwise contained in another written agreement produced therein.

Nos. 4-5: Requests seek only those documents referenced therein from 2009-2011, representing the general timeframe with Lieff first became involved in the State Street Litigation.

Nos. 8-9: Requests seeks only those documents referenced therein from 2010-2011 and 2015-2016. To the extent you object to producing communications relating to the review and adjustment of annual billing rates during this time frame, please respond stating with specificity the nature of such objection.

No. 10- The Firm need only produce those emails and/or other communications or documents soliciting opinions and/or retaining an expert to provide an opinion as described therein, as well as the opinions or work product received.

No. 15- To the extent that a single 1099 or W-2 captures all compensation paid by the Firm to a Staff Attorney, the Firm need not produce the individual paystubs reflected on those documents. However, in the event a Staff Attorney received individual or intermittent payments that are not reflected on a 1099 and/or W-2, please produce both the appropriate 1099/W-2 and all records of payment made, in order to provide a complete record of all payments made in connection with that staff attorney's work on the State Street Litigation.

No. 16- If the Firm is unable to complete the search due to a large volume of responsive documents, please respond with the proposed search terms and total number of "hits." Should this be the case, we can provide a list of timekeepers and/or narrowed search terms.

No. 19- If Lieff did not retain an expert, so state in your response.

No. 21- If the Firm is unable to complete the search due to a large volume of responsive documents, please respond with the proposed search terms and total number of "hits." Should this be the case, we can provide a list of timekeepers and/or narrowed search terms.

No. 32- Please search and produce all responsive documents for the attorney deponents (excluding staff attorneys) who will testify on June 5, 14, or 16 by June 9. All other responsive documents located should be produced no later than July 10.

Bill

William Sinnott, Esq.

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This electronic message and any files attached hereto contain confidential or privileged information from the law firm of Donoghue, Barrett, and Singal. This information is intended to be for the use of the individuals or entities to whom it is addressed only. If you are not the intended recipient, be aware that any disclosure, copying, distribution or use of the contents of this information is strictly prohibited. If you have received this transmission in error, please notify the sender by reply email and destroy all copies of this message. To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS TO LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Pursuant to Rule 53(c) of the Federal Rules and the Court's March 8, 2017 Order (pp. 3-4), Special Master Honorable Gerald E. Rosen (Retired), by his undersigned counsel, hereby requests that Lieff Cabraser Heimann & Bernstein, LLP produce the documents described below for inspection and copying at the offices of Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, Massachusetts 02108, within fourteen (14) days from the date of service hereof.

DEFINITIONS

1. The terms "you", "your", "the Firm", and "the Law Firm" refer to Lieff Cabraser Heimann & Bernstein, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

2. The term "Thornton" refers to Thornton Law Firm, LLP, formerly known as Thornton & Naumes, LLP, and all employees, agents, counsels, attorneys, and representatives.

3. The term "Labaton" or "Labaton Sucharow" refers to Labaton Sucharow LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

4. The term "Plaintiffs' Law Firms" refers to Labaton Lieff, and/or Thornton, and their respective employees, contractors, affiliates, agents, counsels, and representatives, collectively and/or individually.

5. The term "ERISA firms" or "ERISA counsel" refers to Brian McTigue and/or the McTigue Law Firm, the Law Offices of Keller Rohrback, LLP, Zuckerman Spaeder, LLP, Beins Alexrod, P.C., and any firms retained by one or more of the above, and all employees, agents, counsels, attorneys, and representatives.

6. The term "ARTRS" refers to the Arkansas Teacher Retirement System and/or its Executive Director, George Hopkins, Esq.

7. The term "State Street Litigation", "SST Litigation" or "Litigation" refers to *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

8. The term "State Street Document Review", "SST Document Review" or "Document Review" refers to the Law Firm's review of hard copy and electronic documents produced as part of discovery in *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

9. The term "State Street" refers to State Street Bank and Trust Company and/or State Street Global Markets, defendants in the SST Litigation.

10. The term "settlement in principle" refers to the settlement agreement reached in substance between counsel by and through mediation.

11. The term "Court" refers to the United States District Court for the District of Massachusetts.

12. The term "Fee Petition" or "Fee Application" refers to the *Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs* (Docket #104), and Exhibits 1-32 attached thereto, filed with the Court in the State Street Litigation. In particular, "Fee Petition" in conjunction with one or more of the individual firms, refers to the respective Exhibit (and exhibits attached thereto) in which an individual law firm sought approval for payment of its respective fee and expenses

incurred in the SST Litigation, including all declarations, affidavits, and/or the Lodestar reports filed therewith.

13. The term "Motion for Attorneys' Fees" refers to Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses, including the Memorandum in Support and exhibits, filed with the Court on or about September 15, 2016 and October 21, 2016, respectively (Docket #102, 108).

14. The term "Final Settlement" refers to the Stipulation and Agreement of Settlement dated July 26, 2016 (Docket #89).

15. The term "Fee Award" refers to a certain award of attorneys' fees of $74,541,250.00 and expenses and costs of $1,257,697.94, as approved by the Court in the Lawsuit by Order dated November 2, 2016.

16. The term "November 10, 2016 Letter" refers to the letter from David Goldsmith to Judge Wolf dated November 10, 2016 (Exhibit A to Docket #117), advising the Court of inadvertent errors in the Fee Petitions and Fee Order.

17. The term "December 17, 2016 Article" refers to the Boston Globe article entitled *Critics hit law firms' bills after class-action lawsuits*, published on or about December 17, 2016.

18. The term "hourly rates charged" refers to the hourly billing rates corresponding to work of an individual attorney or staff member of the firm, appearing on a fee petition submitted to the Court or otherwise charged to a client for work performed on a legal matter, including the rates listed on the Fee Petitions submitted in the SST Litigation.

19. The term "Staff Attorneys" refers to licensed attorneys working on a part-time or full-time basis for the Law Firm, but who are not deemed "associates" or otherwise on a traditional partnership track.

20. The term "hourly clients" refers to all past, present, and prospective clients who agree to pay and/or are charged for legal services rendered on an hourly basis, notwithstanding the actual amount paid or collected.

21. The term "non-hourly clients" refers to all past, present, and prospective clients who do not pay for legal services on an hourly rate, such as clients paying a flat fee, retained through a contingency arrangement and/or class action litigation, or other non-hourly fee structure, notwithstanding the actual amount paid or collected.

22. Any word written in the singular also includes the plural and vice-versa.

23. In case of doubt as to the scope of a clause including "and," "or," "any," "all," "each," or "every," the intended meaning is inclusive rather than exclusive.

24. The term "any" and the term "all" are intended to mean "any and all."

25. As used herein, the term "or" and the term "and" shall mean "and/or" and vice-versa.

26. As used herein, the terms "relating to" or "referring to" or "concerning" or "constituting" or the like mean and include all documents that in any manner or form are relevant in any way to or bear upon the subject matter in question, including, without limitation, all documents which contain, record, reflect, summarize, evaluate, comment upon, transmit, refer to, or discuss that subject matter or that in any manner state the background of, or were the basis or bases for, or that record, evaluate comment upon, or were referred to, relied upon, utilized, generated, transmitted, or received in arriving at, your conclusions, opinions, estimates, calculations, positions, decisions, beliefs, assertions or allegations, that undermine, contradict, or conflict with your conclusions, opinions, calculations, estimates, positions, beliefs, assertions, or allegations, concerning the subject matter in question.

27. The term "date" means the exact day, month, and year, if ascertainable, or the best approximation thereof if not.

28. The term "communication" as used herein includes, without limitation, the following: conversations, telephone conversations, e-mails, text messages, social media communications, and other electronic transmissions of any kind, statements, discussions, debates, arguments, disclosures, interviews, consultation and every other manner of oral utterance, correspondence, or electronic or written transmittals of information or messages of any kind.

29. The term "document" shall mean those things described in Rule 34(a) of the Federal Rules of Civil Procedure. The terms "document" and "documents" are used herein in the broadest possible sense and mean written, typed, printed, recorded or graphic matter, however produced or reproduced of any kind and description, and whether an original, master, duplicate or copy, including, but not limited to, e-mails, papers, notes, accounts, books, advertisements, letters, memoranda, notes of conversations, contracts, agreements, drawings, telegrams, tape recordings, communications (as defined in paragraph 28 hereof), including inter-office and intra-office memoranda reports, studies, working papers, corporate records, minutes of meetings, notebooks, bank deposit slips, bank checks, canceled checks, diaries, diary entries, appointment books, desk calendars, photographs, transcriptions or sound recordings or any type of personal or telephone conversations or negotiations, meetings or conferences, or things similar to any of the foregoing, and to include any data, information or statistics contained within any data storage modules, tapes, discs or other memory device, or other information retrievable from storage systems, including but not limited to, computer-generated reports and printouts. If any document has been prepared in multiple copies which are not identical, each modified copy or

non-identical copy is a separate "document." The word "document" also includes data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices in a reasonably usable form.

30. The term "draft" shall mean any earlier, preliminary, preparatory, proposed, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft or final document and whether or not the terms of the draft are the same or different from the terms of the final document.

INSTRUCTIONS

A. Unless otherwise specified, these requests seek documents for the period from January 1, 2010 until the present.

B. This document request ("Request") requires you to produce all documents called for herein that were created or originated by you, or that came into your possession, custody or control, from all files or other sources that contain responsive documents, wherever located and whether active, in storage, or otherwise.

C. This Request shall be deemed to include any document now or at any time in your possession, custody, or control. A document is deemed to be in your possession, custody, or control if it is in your physical custody, or if it is in the physical custody of any other person and you: (i) own such document in whole or in part; (ii) have a right, by contract, statute, or otherwise, to use, inspect, examine, or copy such document on any terms; (iii) have an understanding, express or implied, that you may use, inspect, examine, or copy such document on any terms; or (iv) as a practical matter, have been able to use, inspect, examine, or copy such document when you sought to do so. If any requested document was, but no longer is, in your control, state the disposition of each such document.

D. The obligation to produce the documents specified below is of a continuing nature; your production is to be supplemented if at any time you acquire possession, custody, or control of any additional responsive documents, or otherwise discover additional responsive documents, between the time of initial production and conclusion of the investigation, to the fullest extent required by the Federal Rules of Civil Procedure, the March 8, 2017 Court order, and the Local Rules of this Court.

E. Where only a portion of a document relates or refers to the subject indicated, the entire document is to be produced nevertheless, along with all attachments, appendices and exhibits.

F. Each document produced in response to the Requests below should be clearly categorized to indicate which Request(s) it is responsive to.

G. If any document or portion thereof is withheld under a claim of privilege, you shall produce so much of the document as is not subject to the possible claim of privilege, and shall furnish a statement, signed by an attorney representing you, which identifies each document or portion thereof for which a privilege is claimed, including the following information:

(i) The date of the document;

(ii) The name and title of the person who sent, authored, prepared, signed, or originated the document, or of the person who knows about the information contained therein;

(iii) The name and title of the recipient of the document;

(iv) All persons to whom copies of the document were furnished, along with such persons' job titles or positions;

(v) A brief description of the subject matter or nature of the document sufficient to assess whether the assertion of privilege is valid;

(vi) The specific basis upon which the privilege is claimed;

(vii) With respect to any claim of privilege relating to an attorney, or action or advice or work product of an attorney, the identity of the attorney involved; and

(viii) The paragraphs of this request to which such document responds.

H. All documents shall be produced as they are kept in the ordinary course of business and in their original file folders with any identifying labels, file markings, or similar identifying features. If there are no documents responsive to a category specified below, you shall so state in a writing produced at the time and place that documents are demanded to be produced by this request.

I. Documents created or stored electronically must be produced in their original electronic format, and not printed to paper or PDF. All electronically stored information ("ESI") shall be produced in electronic form (the "production set"). Each document will have its own unique identifier ("Bates number"), which must be consistently formatted across the production, comprising of an alpha prefix and a fixed length number of digits (e.g., "PREFIX0000001"). The production set shall consist of, and meet, the following specifications:

1. Image Files. All ESI will be rendered to single-page, black and white, Group IV *tagged image file* (".tif" or ".tiff") images with a resolution of 300 dpi, the file name for each page is named after its corresponding Bates number. Records in which a color copy is necessary to interpret the document (e.g., photographs, presentations, AUTOCAD, etc.) will be rendered to higher resolution, single-page *joint photographic experts group* (".jpg" or ".jpeg") format. Endorsements must follow these guidelines:

    a. Bates numbers must be stamped on the lower right hand corner of all images.

    b. Confidentiality must be stamped on the lower left hand corner of all images.

    c. Other pertinent language may be stamped on the bottom center, or top of the images, as deemed necessary.

2. Load Files. All ESI must be produced with appropriate data load files, denoting logical document boundaries. The following files should be included within each production set.

    a. A Concordance delimited ASCII text file (".dat").

i. The .dat file will contain metadata from the original native documents, wherein the header row (*i.e.*, the first line) of the .dat file must identify the metadata fields.

ii. The .dat file must be delimited with the standard Concordance delimiters (the use of commas and quotes as delimiters is not acceptable):

ASCII 020 [¶] for the comma character;
ASCII 254 [þ] for the quote character; and
ASCII 174 [®] for new line.

iii. All attachments, or *child* records, should sequentially follow the *parent* record.

iv. The following fields and metadata will be produced:

Beginning Bates; Ending Bates; Beginning Bates Attachment; Ending Bates Attachment; Custodian; File Name; From; Recipient; CC; BCC; Subject; Date Sent; Time Sent; Last Modified Date; Last Modified Time; Author; Title; Date Created; Time Created; Document Extension; Page Count; MD5Hash; Text Path; and Native File Path.

b. Image cross-reference files, *Opticon* image file (".opt") and *IPRO View Load* file (".lfp"), which link images to the database and identifies appropriate document breaks.

J. If any document requested herein has been lost, discarded, or destroyed, that document so lost, discarded, or destroyed shall be identified in writing (produced at the time and place that documents are demanded to be produced by this request) as completely as possible, together with the following information: date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.

DOCUMENTS REQUESTED

1. The Catalyst and Relativity document databases created or used in the SST Litigation, as annotated, compiled and used in the course of the litigation and/or document review, including instructions, software, and anything else necessary to access and analyze the data therein. **[JULY 10]**

2. All so-called "hot docs," as understood or identified by the Law Firm~~, and any other documents or information identified during the SST Litigation bearing on the material issues in the Litigation, including but not limited to liability and damages~~. **[JUNE 9]**

3. All engagement letters, fee agreements, retention letters, and/or other documents referring to, relating to, or evidencing terms of the Law Firm's participation in the SST Litigation and/or representation of class representatives. **[JUNE 9]**

4. All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of hourly clients, from ~~2008 to the present~~ ***2009-2011***. **[JULY 10]**

5. All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of non-hourly clients, from ~~2008 to the present~~ ***2009-2011***. **[JULY 10]**

~~6. All documents and/or communications relating to how the Law Firm records, accounts for and/or seeks reimbursement for hours billed by Staff Attorneys in other class action or contingency cases, including the hourly rates the Law Firm would charge if successful, from 2010 to the present.~~

7. Copies of all billing rate tables, spreadsheets, fee binders, or other collection of the Law Firm's annual billing rates, from 2010 to the present.

8. All minutes, notes, recordings, memoranda or other documents relating to or created by the Law Firm's Managing Partner or Executive Committee during meetings to determine annual billing rates, from ~~2008 to the present~~ ***2010-2011 and 2015-2016***. **[JUNE 9]**

9. All documents and/or communications between and among the Firm's Managing Partner and the Firm's Executive Committee relating to review and adjustment of annual billing rates, from ~~2008 to the present~~ ***2010-2011 and 2015-2016***. **[JUNE 9]**

10. All documents and/or communications relating to the Law Firm's internal classification of costs and expenses, including but not limited to any ethical, legal, or factual opinions solicited by the firm by third parties regarding the classification of Staff Attorneys as fees vs. expenses. **[JUNE 1]**

~~11. A complete set of time records for all attorneys, including Staff Attorneys, and other Law Firm staff who worked on or contributed to the SST Litigation, including but not limited to hand-written time sheets/ledgers, emails, electronic entries, pre-bills, and/or client bills, including the hourly rate billed and/or corresponding to the hours recorded.~~

~~12. All documents referring to, relating to, evidencing or constituting the basis for and amounts of any costs and expenses billed, incurred or charged by the Law Firm for legal or other services rendered in connection with the SST Litigation including but not limited to documents pertaining to the terms under which Staff Attorneys and/or third parties provided services to the Law Firm in the Lawsuit.~~

~~13. All documents and/or communications relating to or evidencing the Law Firm's use of Catalyst in connection with the SST Document Review, including all records of time spent in the Catalyst database, costs incurred, and coding of electronic documents.~~

~~14. All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm attorneys and non-legal staff assigned to or who contributed to the SST Litigation, for work performed on the Litigation.~~

15. All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm's Staff Attorneys assigned to or who contributed to the SST Litigation, for work performed on the Litigation. **[JUNE 1]**

16. All documents referring to, relating to, evidencing or constituting discussions between the Law Firm and the Plaintiffs' Law Firms relating to sharing costs and/or expenses of the SST Document Review/SST Litigation, including but not limited to sharing the cost of Staff Attorneys, hosting costs for Catalyst database, and other expenses associated with conducting voluminous document review. **[JUNE 9]**

17. All agreements, contracts, and/or memorialization of an arrangement to allocate and/or share the cost of certain of the Law Firm's Staff Attorneys to Thornton, including the compensation, reimbursement, and/or invoicing of costs associated with the same. **[JUNE 9]**

18. All documents referring to, relating to, evidencing or constituting discussions with Thornton regarding Thornton's plan or intention to include Staff Attorney time as part of Thornton's Fee Petition and/or Lodestar calculation. **[JUNE 9]**

19. All expert reports, factual or legal opinions, or other work product solicited from a third-party by the Law Firm in connection with factual and/or legal issues arising in the SST Litigation, including but not limited to the foreign-exchange market, foreign-exchange trading practices, and custodial management of retirement funds. **[JULY 10]**

~~20. 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.~~

21. All documents and/or communications relating to discussions between and among the Plaintiffs' Law Firms and ARTRS/George Hopkins regarding the substantive allegations and progress of the SST litigation, including but not limited to the filing of the complaint/amended complaint, court orders, mediation, and/or the agreement to settlement in principle. **[JULY 10]**

~~22. All documents and/or communications with ARTRS/George Hopkins regarding the Final Settlement, including but not limited to the fairness of the total award for the class, payment of service award, and the Fee Award, including any allocation of those fees among counsel.~~

23. Current CVs or resumes for all Staff Attorneys who worked on or contributed to the SST Litigation/Document Review. **[JUNE 1]**

24. All written guidance, training manuals, policies/procedures, search criteria, other documents provided to the Firm's Staff Attorneys relating to the SST Document Review, including but not limited to materials related to use of Catalyst database. **[JUNE 1]**

25. All other documents relating to the SST Litigation, other than those responsive to Request No. 24 above, that the Law Firm provided to its Staff Attorneys, including but not limited to case pleadings, mediation reports, legal memoranda. **[JUNE 1]**

26. All written work product produced by Staff Attorneys assigned to the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries. **[JUNE 1]**

27. A complete copy of the binder(s) containing discursive memoranda pertaining to the SST Litigation/SST Document Review, including all attachments. **[JUNE 1]**

~~28. All presentations, memoranda, or other submissions, including potential exhibits, any plaintiffs' counsel prepared for or submitted to the mediator, including all exhibits thereto.~~

~~29. All communications between the Law Firm and counsel for State Street relating to the SST Litigation, including but not limited to document productions, mediations, and settlement.~~

30. All communications with the U.S. Department of Labor, including all local field offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission relating to the SST Litigation. **[JULY 10]**

31. All documents and/or communications relating to the selection and staffing of Staff Attorneys on the SST Litigation/SST Document Review. **[JUNE 1]**

32. All documents and/or communications relating to the allocation of certain Staff Attorneys to Thornton under the cost-sharing agreement entered into by the Firm in or about 2014 or 2015. **[JUNE 9/JULY 10]**

~~33. All documents relating to, referring to or evidencing a secondary review or quality control process of the SST Document Review performed by the Law Firm.~~

34. All documents and/or communications between and among the Law Firm and its accounting and/or billing personnel relating to the accounting for, recording, and/or invoicing of Staff Attorneys for whom Thornton had agreed to share the costs. **[JUNE 1]**

35. All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from the Fee Petition of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs. **[JUNE 1]**

~~36. All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from the Fee Petition of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs in other class action or litigation matters.~~

~~37. All invoices, requests for payment, and/or similar documents sent to or requested by Thornton pursuant to the cost-sharing agreement between the Firm and Thornton to share the costs of certain Staff Attorneys, including all emails or other communications related to the same.~~

38. All documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records. **[JUNE 9]**

39. All documents, other than those requested in Request No. 38 above, reviewed or considered by the Law Firm in calculating the Firm's Lodestar calculation. **[JUNE 9]**

40. All documents relating to, referring to, or constituting the Law Firm's Fee Petition, including all drafts, spreadsheets, outlines, notes, emails. **[JUNE 9]**

~~41. All documents relating to, referring to, or constituting the Motion for Attorneys' Fees, including all drafts, spreadsheets, outlines, notes, emails.~~

~~42. All documents relied upon by the Law Firm in preparing and filing the Motion for Attorneys' Fees.~~

~~43. All communications between and among the Law Firm, the Plaintiffs' Law Firms, and the ERISA firms, relating to preparation of the Motion for Attorneys' Fees and/or the Fee Petitions filed in the SST Litigation.~~

44. All documents and/or communications relating to the discovery of billing errors disclosed in the November 10, 2016 Letter filed with the Court, including but not limited to communications between and among you, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms. **[JUNE 9]**

~~45. All documents, including notes, outline, drafts and exhibits, explaining or attempting to correct any part of the Fee Petition(s).~~

~~46. All documents illustrating, demonstrating, or establishing any errors you or anyone identified in any part of the Fee Petition(s).~~

47. All documents relating to, referring to, evidencing, or constituting the November 10, 2016 Letter, including all drafts, outlines, notes, and communications relating to the filing of that correspondence. **[JUNE 9]**

~~48. All documents and/or communications relating to, referring to or evidencing corrective actions or subsequent review taken by the Law Firm after discovery of the billing errors disclosed in the November 10, 2016 Letter.~~

49. All documents and/or communications relating to the December 17, 2016 Article, including but not limited to communications between and among the Law Firm, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms. **[JUNE 9]**

50. All documents relating to Michael Bradley's involvement in the SST Litigation/SST Document Review, including but not limited to communications with Mr. Bradley and all documents relating to or referring to an agreement between Mr. Bradley and Thornton to participate in the SST Document Review. **[JUNE 9]**

51. All documents relating to, referring to or evidencing payments made to Michael Bradley in connection with his work on the SST Litigation/SST Document Review. **[JUNE 9]**

52. All written work product produced by Michael Bradley as part of his involvement in the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries. **[JUNE 9]**

53. All documents you may contend support your Fee Petition for reimbursement of fees and/or expenses, which you have not produced thus far. **[JUNE 9]**

Date: May 18, 2017

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his Attorneys,

William F. Sinnott (BBO #547423)
Elizabeth J. McEvoy 9BBO #683191)
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Boston, MA 02108
Telephone: (617) 720-5090
Facsimile: (617) 720-5092
wsinnott@dbslawfirm.com
emcevoy@dbslawfirm.com

CERTIFICATE OF SERVICE

I, William F. Sinnott, hereby certify that I have caused a copy of the foregoing document to be served upon Richard M. Heimann, Esquire, Lieff Cabraser Heimann & Bernstein, LLP, 275 Battery Street, 29th Floor, San Francisco, CA 94111, by electronic mail and first class mail, postage prepaid, this 18th day of May, 2017.

_____

William F. Sinnott

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. STATE STREET BANK AND TRUST COMPANY, Defendant.	No. 11-cv-10230 MLW
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SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST SET OF INTERROGATORIES TO LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order (pp. 3-4), Special Master Honorable Gerald E. Rosen's (Retired), by his undersigned counsel, hereby propounds the following Interrogatories upon Lieff Cabraser Heimann & Bernstein, LLP. The Special Master requests that Lieff Cabraser Heimann & Bernstein, LLP answer the Interrogatories herein under oath and provide responses within fourteen (14) days from the date of service hereof, to: William F. Sinnott, Esq., Donoghue Barrett & Singal, P.C., One Beacon Street, Suite 1320, Boston, Massachusetts 02108.

DEFINITIONS

1. The term "you", "your", "the Firm", and "the Law Firm" refer to Lieff Cabraser Heimann & Bernstein, LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

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3. The term "Labaton" or "Labaton Sucharow" refers to Labaton Sucharow LLP, and all of its employees, contractors, affiliates, agents, counsels, and representatives.

4. The term "Plaintiffs' Law Firms" refers to Labaton, Lieff, and/or Thornton, and their respective employees, contractors, affiliates, agents, counsels, and representatives, collectively and/or individually.

5. The term "ERISA firms" or "ERISA counsel" refers to Brian McTigue and/or the McTigue Law Firm, the Law Offices of Keller Rohrback, LLP, Zuckerman Spaeder, LLP, Beins Alexrod, P.C., and any firms retained by one or more of the above, and all employees, agents, counsels, attorneys, and representatives.

6. The term "ARTRS" refers to the Arkansas Teacher Retirement System and/or its Executive Director, George Hopkins, Esq.

7. The term "State Street Litigation", "SST Litigation" or "Litigation" refers to *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

8. The term "State Street Document Review", "SST Document Review" or "Document Review" refers to the Law Firm's review of hard copy and electronic documents produced as part of discovery in *Arkansas Teacher Retirement System, et al. v. State Street Corporation, et al.*, C.A. No. 1:11-cv-10230-MLW, pending in the United States District Court for the District of Massachusetts.

9. The term "State Street" refers to State Street Bank and Trust Company and/or State Street Global Markets, defendants in the SST Litigation.

10. The term "settlement in principle" refers to the settlement agreement reached in substance between counsel by and through mediation.

11. The term "Court" refers to the United States District Court for the District of Massachusetts.

12. The term "California Action" refers to the qui tam lawsuit(s) originally filed under seal in California and other states against State Street that was unsealed on or about October 20, 2009 by the intervention of the Attorney General for the State of California.

13. The term "BNY Mellon Action" refers to the investigation and prosecution of the multidistrict litigation entitled *In re Bank of New York Mellon Corp.* and related actions, including but not limited to Civil Action 12-MD-02335 filed in the United States District Court for the Southern District of New York.

14. The term "Fee Petition" or "Fee Application" refers to the *Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-To Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and*

Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (Docket #104), and Exhibits 1-32 attached hereto, filed with the Court in the State Street Litigation. In particular, "Fee Petition" in conjunction with one or more of the individual firms, refers to the respective Exhibit (and exhibits attached thereto) in which an individual law firm sought approval for payment of its respective fee and expenses incurred in the SST Litigation, including all declarations, affidavits, and/or the Lodestar reports filed therewith.

15. The term "Motion for Attorneys' Fees" refers to Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Litigation Expenses, including the Memorandum in Support and exhibits, filed with the Court on or about September 15, 2016 and October 21, 2016, respectively (Docket #102, 108).

16. The term "Final Settlement" refers to the Stipulation and Agreement of Settlement dated July 26, 2016 (Docket #89).

17. The term "Fee Award" refers to a certain award of attorneys' fees of $74,541,250.00 and expenses and costs of $1,257,697.94, as approved by the Court in the Lawsuit by Order dated November 2, 2016.

18. The term "November 10, 2016 Letter" refers to the letter from David Goldsmith to Judge Wolf dated November 10, 2016 (Exhibit A to Docket #117), advising the Court of inadvertent errors in the Fee Petitions and Fee Order.

19. The term "December 17, 2016 Article" refers to the Boston Globe article entitled *Critics hit law firms' bills after class-action lawsuits*, published on or about December 17, 2016.

20. The term "hourly rates charged" refers to the hourly billing rates corresponding to work of an individual attorney or staff member of the firm, appearing on a fee petition submitted

to the Court or otherwise charged to a client for work performed on a legal matter, including the rates listed on the Fee Petitions submitted in the SST Litigation.

21. The term "Staff Attorneys" refers to licensed attorneys working on a part-time or full-time basis for the Law Firm, but who are not deemed "associates" or otherwise on a traditional partnership track.

22. The term "hourly clients" refers to all past, present, and prospective clients who agree to pay and/or are charged for legal services rendered on an hourly basis, notwithstanding the actual amount paid or collected.

23. The term "non-hourly clients" refers to all past, present, and prospective clients who do not pay for legal services on an hourly rate, such as clients paying a flat fee, retained through a contingency arrangement and/or class action litigation, or other non-hourly fee structure, notwithstanding the actual amount paid or collected.

24. Any word written in the singular also includes the plural and vice-versa.

25. In case of doubt as to the scope of a clause including "and," "or," "any," "all," "each," or "every," the intended meaning is inclusive rather than exclusive.

26. The term "any" and the term "all" are intended to mean "any and all."

27. As used herein, the term "or" and the term "and" shall mean "and/or" and vice-versa.

28. As used herein, the terms "relating to" or "referring to" or "concerning" or "constituting" or the like mean and include all documents that in any manner or form are relevant in any way to or bear upon the subject matter in question, including, without limitation, all documents which contain, record, reflect, summarize, evaluate, comment upon, transmit, refer to, or discuss that subject matter or that in any manner state the background of, or were the basis or bases for, or that record, evaluate comment upon, or were referred to, relied upon, utilized,

generated, transmitted, or received in arriving at, your conclusions, opinions, estimates, calculations, positions, decisions, beliefs, assertions or allegations, that undermine, contradict, or conflict with your conclusions, opinions, calculations, estimates, positions, beliefs, assertions, or allegations, concerning the subject matter in question.

29. The term "date" means the exact day, month, and year, if ascertainable, or the best approximation thereof if not.

30. The term "communication" as used herein includes, without limitation, the following: conversations, telephone conversations, e-mails, text messages, social media communications, and other electronic transmissions of any kind, statements, discussions, debates, arguments, disclosures, interviews, consultation and every other manner of oral utterance, correspondence, or electronic or written transmittals of information or messages of any kind.

31. The term "document" shall mean those things described in Rule 34(a) of the Federal Rules of Civil Procedure. The terms "document" and "documents" are used herein in the broadest possible sense and mean written, typed, printed, recorded or graphic matter, however produced or reproduced of any kind and description, and whether an original, master, duplicate or copy, including, but not limited to, e-mails, papers, notes, accounts, books, advertisements, letters, memoranda, notes of conversations, contracts, agreements, drawings, telegrams, tape recordings, communications (as defined in paragraph 30 hereof), including inter-office and intra-office memoranda reports, studies, working papers, corporate records, minutes of meetings, notebooks, bank deposit slips, bank checks, canceled checks, diaries, diary entries, appointment books, desk calendars, photographs, transcriptions or sound recordings or any type of personal or telephone conversations or negotiations, meetings or conferences, or things similar to any of the foregoing, and to include any data, information or statistics contained

within any data storage modules, tapes, discs or other memory device, or other information retrievable from storage systems, including but not limited to, computer-generated reports and printouts. If any document has been prepared in multiple copies which are not identical, each modified copy or non-identical copy is a separate "document." The word "document" also includes data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices in a reasonably usable form.

32. The term "draft" shall mean any earlier, preliminary, preparatory, proposed, or tentative version of all or part of a document, whether or not such draft was superseded by a later draft or final document and whether or not the terms of the draft are the same or different from the terms of the final document.

INSTRUCTIONS

A. Pursuant to Rule 53(c) of the Federal Rules of Civil Procedure and the Court's March 8, 2017 Order (pp. 3-4), you are required to answer the following Interrogatories under oath and within 14 days, or within the time otherwise required by Court order.

B. For each of the Interrogatories listed below, please include the full name(s) of all persons from the Law Firm (attorneys, staff, agents, consultants, or affiliates) who have knowledge of the information provided.

C. These Interrogatories are deemed to be continuing and to require supplemental responses, if you obtain additional, contradictory, or different information. Such supplemental answers shall be filed promptly upon the discovery by you of such supplemental information. Each Interrogatory is to be answered separately and as completely as possible. The fact that an investigation is continuing and discovery is not complete shall not be used as a reason for failure to answer any Interrogatory as fully as possible.

D. If you refuse to answer any Interrogatory or any part thereof on the grounds of privilege, please identify the claimed privilege (i.e., attorney-client) and the nature of any information you refuse to disclose, referring specifically to the Interrogatory or any part thereof to which the claimed privilege applies, the form in which said information exists, and the grounds for the claimed privilege.

E. If the answer to all or any part of an Interrogatory is not presently known by or available to you, include a statement to that effect, specifying the portion of the Interrogatory which cannot be completely answered.

INTERROGATORIES

1. Describe each of the Law Firm's practice area(s), including areas of specialty, special services offered, the total number of attorneys and staff, and a brief description of any representative matters. **[JUNE 1]**

~~2. Identify all other class actions or other litigations in which the Firm has been or is currently engaged in relating to the foreign exchange market, mismanagement of retirement funds, and/or any other subject matter overlapping the allegations in the SST Litigation. Please include all such matters on which the Firm has worked, as counsel of record or otherwise, the complete case caption, the docket number, and the outcome.~~

3. Describe in detail the Firm's involvement in the California Action and in the BNY Mellon Action and how that involvement assisted the Firm in the SST Litigation. **[JUNE 1]**

~~4. Identify all other class actions or other litigation in which the Firm was engaged during the pendency of the SST Litigation. For each action:~~

~~a. Please identify the timekeepers who worked on the matter and provide their~~

~~hourly rate(s);~~

~~b. Please provide the detailed, itemized hourly billing entries for each timekeeper.~~

5. Explain how and when the Law Firm became involved in the SST Litigation, including any conversations between and among the Firm and ARTRS, the Plaintiffs' Law Firms, and/or the ERISA firms. **[JUNE 1]**

6. Describe the role played by the Law Firm in filing the substantive claims alleged in the SST Litigation, including the filing of the Complaint (Docket #1) and/or the Amended Complaint (Docket #10), a description of any legal or factual research performed, consultations with State Street, legal drafting and/or review of pleadings. **[JUNE 1]**

~~7. Summarize the factual basis for State Street's liability and your/plaintiffs' contention that State Street was legally liable for damages to the class members.~~

8. Describe the Firm's theory of damages, including an estimate of total damages to the customer and/or ERISA classes, whether this theory changed throughout the course of the SST Litigation, and if so, what factors affected the Firm's theory and total calculation of estimated damages. **[JUNE 1]**

9. Identify and describe all risk factors you considered prior to getting involved in the SST Litigation, including any "bad facts," meritorious defenses and/or unsettled legal issues, or other circumstances that affected the potential outcome and total damages recoverable in the case. **[JUNE 1]**

10. Describe the frequency and nature of communications with the Plaintiffs' Law Firms over the course of the Litigation. Please specify the attorneys with whom you dealt ~~and the basic substance of those conversations~~. **[JULY 10]**

11. Describe the role of the U.S. Department of Labor, including any field divisions or offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and

Exchange Commission, in the SST Litigation ~~and the basic substance of the Law Firm's communications with each agency through the course of the Litigation~~. **[JULY 10]**

~~12. Explain the role played by ARTRS and/or George Hopkins in the SST Litigation, including Mr. Hopkins' substantive contributions to the pleadings and/or case strategy, and what, if any, role he had in the negotiation and mediation of the Final Settlement.~~

13. Describe the frequency and nature of communications with ERISA counsel over the course of the Litigation. Please specify the attorneys with whom you dealt ~~and the basic substance of those conversations~~. **[JULY 10]**

14. Explain the Law Firm's litigation strategy in pursuing the claims raised in the SST Litigation, including the strategy employed in mediation. Identify and describe all events that impacted or caused the Firm to change that strategy. **[JULY 10]**

15. Explain any tensions and/or adversarial positions assumed between the ERISA counsel, on the one hand, and the Plaintiffs' Law Firms, on the other, including differences in litigation strategy, legal theories, damages, and/or theories of liability asserted during the SST Litigation. **[JULY 10]**

16. Explain how the adversarial positions described above impacted or did not impact the Law Firm's strategy, including its discovery, mediation, and/or the settlement of the SST Litigation. **[JULY 10]**

17. Describe in detail all agreements between the Firm/Plaintiffs' Law Firms, on the one hand, and the ERISA firms, on the other, to allocate to the ERISA firms a fixed percentage of the total Fee Award rendered by the Court in the SST Litigation. As to any agreement that did not represent the final agreement for allocation of the Fee Award, explain the reason for modifying a previous agreement, including all persons involved in these discussions and their affiliation/firm. **[JUNE 9]**

18. Describe in detail the nature and the scope of the SST Document Review, including the total number of pages and/or size of the productions, the nature and date of each document production(s) received from State Street, all other document production(s) received in connection with the Litigation, and a general description of the information contained in each production. **[JUNE 1]**

19. Describe in detail how the Law Firm conducted the SST Document Review, including how it selected and/or staffed Staff Attorneys, a description of all training binders/protocols or search terms used for Document Review, and a brief description of the tasks assigned to Staff Attorneys and any other individuals who participated, and how those tasks furthered the Firm's overall litigation strategy. **[JUNE 1]**

20. Describe how the Law Firm utilized the Catalyst database, including all persons who had access to the database, any electronic and/or technical training provided to those individuals, and a description of the information maintained in the Catalyst database during the course of the SST Document Review. **[JUNE 1]**

21. Describe in detail all documents destroyed and/or deleted from the Catalyst database, including the date, and explain why each document was deleted/destroyed. **[JUNE 1]**

22. Identify and describe any training the Firm provided to Staff Attorneys relating to the substantive allegations in the SST Litigation/SST Document Review, including addressing all legal issues, key witnesses, theories of liability, damages, and critical topics raised in the case. **[JUNE 1]**

~~23. Please list all class actions or other litigations in the past five years in which the Firm has assigned Staff Attorneys to work on the matter. For each matter, please list the full case caption, the docket number, the outcome of the case, and the hourly rates charged, if any, for each Staff Attorney who worked on the matter, and the nature of the work performed by the~~

~~assigned Staff Attorneys.~~

24. Please list the full name of each Staff Attorney who worked on the SST Litigation/Document Review. Please include for each Staff Attorney: his/her employment classification (full-time/part-time employee or independent contractor); how long he or she worked (has worked) at the Firm; the name/description of any other cases to which he or she was assigned during the pendency of SST Litigation/Document Review; whether he/she was allocated to Thornton for any portion of the SST Litigation; any prior experience in securities class action litigations, foreign-exchange trading and/or mismanagement of custodial funds; the physical location where the work was performed; and the hourly rate charged in the Fee Petition. **[JULY 10]**

25. For each of the Staff Attorneys listed above, please describe all compensation paid to the Staff Attorney and the total number of hours recorded for work on the SST Litigation/Document Review. **[JULY 10]**

26. Identify any other individuals who worked on the SST Document review who were not Staff Attorneys and explain their affiliation with the Law Firm, their employment status, and how they were compensated for their time. **[JUNE 1]**

~~27. Explain how Staff Attorneys working on the SST Litigation recorded, including through handwritten and/or interim measures, and subsequently reported their time to the Firm and what, if any, steps were taken by the Firm to review or scrutinize those hours.~~

28. Explain how the Firm supervised and/or performed quality control of the work performed by the Staff Attorneys and others who participated in the SST Document Review, including the name, title, and tasks performed by any supervising individual. **[JUNE 1]**

29. Explain in detail the job responsibilities and tasks performed by the Staff Attorneys assigned to the SST Document Review, including those Staff Attorneys allocated to

Thornton, including but not limited to, coding, deposition preparation, creation of witness kits and similar work. **[JUNE 1]**

30. Describe the process for assigning and reviewing factual, legal, and/or discursive memoranda prepared by Staff Attorneys, including how such memoranda were relevant to, used as part of the SST Litigation, and/or shared among counsel. **[JUNE 1]**

31. Describe the Firm's understanding of how fees, costs and/or expenses associated with performance of discovery in the SST Document Review would be shared among the Firm, the Plaintiffs' Law Firms, and/or the ERISA firms, including but not limited to who would be responsible for: compensating Staff Attorneys for hours worked; hosting Catalyst and/or other electronic database(s); compiling "hot docs" and other documents relative to the liability and/or damages theories; and/or other expenses associated with the SST Document Review. **[JULY 10]**

32. For each of the categories listed above, explain the Firm's understanding of how those fees, costs and/or expenses would be reported to the Court in the event of a successful verdict and/or settlement. **[JULY 10]**

33. Explain the origin of the cost-sharing agreement with Thornton through which the Firm agreed to allocate the costs associated with a certain number of Staff Attorneys to Thornton, including the names and descriptions of all other matters in which the Firm entered into a similar arrangement (whether or not documented) to share costs with other firms, prior to or after the SST Litigation. **[JUNE 1]**

34. Describe the Firm's understanding, in or about early 2015, as to how Thornton would account for the allocation/sharing of costs for certain of the Firm's Staff Attorneys in its Fee Petition, including the Firm's understanding as to which firm was responsible for reporting the total number of hours worked by those Staff Attorneys on its Fee Petition and/or Lodestar calculation. **[JUNE 1]**

~~35. Please state whether the Firm's understanding of how Thornton would account for the sharing of Staff Attorney costs has changed since 2015, and if so, when, and explain what prompted that change.~~

~~36. Explain the Firm's current understanding of the all cost-sharing agreements (formal or informal) between the Law Firm and Thornton to allocate and/or share costs for certain of the Firm's Staff Attorneys assigned to work on the SST Litigation.~~

37. Explain what knowledge, if any, the Firm had about the existence of a cost-sharing agreement(s) (formal or informal) between Labaton and Thornton to allocate and/or share costs for certain of Labaton's Staff Attorneys assigned to work on the SST Litigation. **[JUNE 9]**

38. Describe in detail the process through which the Law Firm invoiced or otherwise sought reimbursement from Thornton for costs of those Staff Attorneys allocated to Thornton as part of the SST Litigation/Document Review. **[JUNE 1]**

39. Explain the Firm's process for removing time reported by Staff Attorneys allocated to Thornton for whom Thornton reimbursed the Firm, from the Firm's Fee Petition, including the role of the Firm's Accounting Department, and explain why time reported by Christopher Jordan and Jonathan Zaul for reviewing Thornton folders 2/9/15 to 4/14/15 was not removed from the Firm's timekeeping records. **[JUNE 1]**

40. Explain the Firm's process for removing time reported by Staff Attorneys allocated to Thornton for whom Thornton paid directly through a third-party staffing agency from the Firm's Fee Petition, including the role of the Firm's Accounting Department, and explain why time reported by Staff Attorneys Ann Ten Eyck and Rachel Wintterle for work performed from March through June 2015, was not removed from the Firm's timekeeping records. **[JUNE 1]**

~~41. Identify and describe all communications between the Law Firm and Thornton relating to the firms' cost-sharing agreement to share the costs of certain Staff Attorneys, including discussions regarding how those costs would be incorporated into the firms' respective Fee Petitions.~~

~~42. Identify and describe all communications between and among the Firm, Labaton, and Thornton relating to cost-sharing agreement(s) between any of the firms, including discussions regarding how those costs would be incorporated into the firms' respective Fee Petitions.~~

43. Describe what knowledge, if any, the Firm had in early 2015 about Michael Bradley's involvement in the SST Litigation, including any knowledge of Thornton's agreement to pay Mr. Bradley an agreed-upon rate of $500/hour. **[JUNE 9]**

44. Identify and describe all communications relating to Michael Bradley's participation in the SST Litigation/SST Document Review from 2010 through November 2016, including relating to compensation or an hourly billing rate that Thornton would charge for Mr. Bradley's time spent on the matter. **[JUNE 9]**

~~45. Explain how the Firm supervised and/or performed quality control of the work performed by Michael Bradley in the SST Document Review, including the name, title, and nature of any supervising individual.~~

46. Please describe any previous matters, whether based on a contingency, hourly, or other fee arrangement, in which the Firm engaged in a fee dispute with a client or class representative prior to the conclusion of the representation. For each such matter, explain how that fee dispute was resolved and any hourly rate/quantum meruit applied for work performed. **[JULY 10]**

47. Explain how the Law Firm determines annual billing rates for all attorneys,

including Staff Attorneys. Please identify and describe all factors considered and/or resources relied upon in making these determinations. **[JUNE 9]**

48. Please explain how the process described above does or does not vary in determining billing rates charged to hourly clients and why. **[JUNE 9]**

49. Please list all of the Firm's hourly rates charged to hourly clients for each of the years 2010-2016. For each attorney, please list the relative experience level. **[JULY 10]**

50. Please list all of the Firm's hourly rates charged to non-hourly clients (whether in class action or other contingency-fee litigation) for each of the years 2010-2016. For each attorney, please list the relative experience level. **[JULY 10]**

51. Please list all of the hourly rates charged or associated with any matters in which the Firm has acted as local counsel for each of the years 2010-2016. For each attorney, please list the relative experience level. **[JULY 10]**

52. Please identify the Firm's managing partner for each of the years from 2010 to present, and list all members of the Firm's Executive Committee and describe their respective roles in determining annual rates. **[JULY 10]**

53. Explain how the Firm adjusts its hourly rates to reflect the geographic region in which a matter is filed/pending. If the Firm does not adjust its rates, explain why not. **[JUNE 9]**

54. Identify and describe all instances in which the Firm has billed an attorney at a lesser or higher rate than the annual rate determined by the Managing Partner, in conjunction with the Executive Committee, for a particular year and explain why that decision was made. **[JULY 10]**

55. Describe in detail the process for finalizing the term sheet and Final Settlement in the SST Litigation, including the role of the U.S. Department of Labor, U.S. Attorney's Office, U.S. Department of Justice and/or the U.S. Securities and Exchange Commission in the

negotiations. **[JULY 10]**

56. Describe in detail how the Firm prepared the Fee Petition and identify all individuals who assisted in the preparation and the nature of their contribution(s). **[JUNE 9]**

57. Describe in detail any review or steps taken to scrutinize or verify the time reported by the Law Firm prior to submitting the Firm's Fee Petition/Lodestar calculation. If the answer is none, explain why. **[JUNE 9]**

58. Describe what, if any, steps the Law Firm took to review, verify, or compare the Fee Petitions and/or Lodestar calculations prepared by the Plaintiffs' Firms or ERISA firms with the Firm's Fee Petition prior to filing its Fee Petition with the Court. If no action was taken, explain why not. **[JUNE 9]**

59. Identify and describe all communication the Firm had with the Plaintiffs' Law Firms and/or ERISA counsel relating to the Firm's preparation of the Fee Petition, including but not limited to preparation of the Lodestar calculation, the inclusion of Staff Attorneys for whom Thornton had paid costs, calculation of a Lodestar multiplier, and reasonableness of attorneys' fees. **[JUNE 9]**

60. Identify all individuals at the Firm who reviewed, assisted or contributed to the preparation and submission of Thornton's Fee Petition and, if appropriate, describe the nature of their contributions. **[JUNE 9]**

61. Describe how the Law Firm and/or the Plaintiffs' Law Firms arrived at a total fee percentage roughly equal to 25% of the final Fee Award. Please explain whether the Firm prepared its Lodestar calculation to achieve a 25% award of the total settlement amount. **[JULY 10]**

62. Identify all billing entries, costs and/or expenses incurred by the Firm during the

SST Litigation that the Firm did not include in its Fee Petition/Lodestar calculation, and the reasons therefor. **[JUNE 9]**

63. Explain the significance of the statement made in Paragraph 5 to the *Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP In Support of Lead Counsel's Motion for An Award of Attorneys' Fees and Payment of Expenses* (Docket #104-17), affirming that the hourly rates included in Exhibit A to the *Declaration* are the Firm's "regular rates charged for their services, which have been accepted in other complex class actions." Please describe any other instances in which the Firm has submitted a Fee Petition with the same or similar language. **[JUNE 9]**

64. Do you contend that the rates listed in the Firm's Fee Petition represent the prevailing rates in the community for similar services performed by lawyers of reasonably comparable skill, experience and reputation for each of the respective tasks performed? Why or why not? **[JUNE 9]**

65. Identify, in detail, each error in your Fee Petition, and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s). **[JULY 10]**

66. Describe when and how the Law Firm first learned about the Boston Globe's inquiry into the Fee Award, and underlying billing practices employed by the Firm and other counsel in the SST Litigation, that preceded the publication of the December 17, 2016 Article. **[JUNE 9]**

67. Describe when and how the Law Firm first identified duplicative billing entries reflected in the Firm's Fee Petition and describe all actions taken by the Firm to review, confirm, and/or correct those errors. **[JUNE 9]**

68. Describe in detail how the Law Firm participated in the drafting of the November

10, 2016 Letter, including the full names of all individuals who contributed to the Letter, the nature of any internal review by the Firm, and all individuals outside the firm who reviewed and/or contributed to the Letter and the nature of their contribution(s). **[JUNE 9]**

69. Identify and describe all documents relied upon by the Law Firm in the drafting of the November 10, 2016 Letter. **[JUNE 9]**

~~70. State the total number of class members and the estimated recovery or settlement amounts, net of fees and expenses, due to each class member.~~

~~71. Itemize the total estimated damages to the ERISA and non-ERISA plaintiffs and summarize the factual basis for the estimate.~~

72. Identify, in detail, any additional errors in your any communication with the Court or with the Special Master, since filing of the Fee Petition(s) and explain each step or action taken to correct each error, including all documents or information consulted or relied upon in making the correction(s). **[JUNE 9]**

73. Identify and explain any mistakes you have identified in the Fee Petition, Motion for Attorneys' Fees, and/or Fee Award, not described above. **[JUNE 9]**

74. Identify any other individuals, not listed above, who have knowledge of the Interrogatories and/or the SST Litigation and explain the general nature of such knowledge. **[JUNE 9]**

75. Identify and describe the steps taken by the Firm to identify documents responsive to the corresponding Requests for Production of Documents served by the Special Master including, without limitation, the name and title of those involved, the process undertaken, the database and documents searched, and the parameters of any electronic search including date range, timekeepers and search terms. **[JULY 10]**

76. Identify with specificity sufficient to constitute a valid response to a request for

production of documents, any documents identified by you as responsive to the Special Master's Request for Production of Documents but withheld from production to the Special Master on grounds of any evidentiary or other privilege or otherwise including (a) the type of document; (b) its date if any; (c) any identifying marks such as bates stamp or other numeric designation; (d) the reason you withheld it from production; and (e) the current location of the document. To the extent any such document or other responsive document has been destroyed, identify (a) the type of document; (b) its date, if any; (c) the date of its destruction; (d) the circumstance thereof; and (e) the persons involved therein. For each such person, please provide their name, current or prior title or position with the Law Firm, the date, if any, of termination of employment with the Law Firm and the reason therefor, and the last known residential and business address. **[JULY 10]**

77. Identify the timekeeping, accounting, and billing software systems utilized by the Law Firm to record and bill attorney time charges, costs and expenses associated with legal and other services rendered by the Law Firm in connection with the SST Litigation and the persons within the Law Firm with the most knowledge and responsibility for the system and operation. **[JULY 10]**

Date: May 18, 2017

Respectfully submitted,

SPECIAL MASTER HONORABLE
GERALD E. ROSEN (RETIRED),
By his Attorneys,

William F. Sinnott (BBO #547423)
Elizabeth J. McEvoy (BBO #683191)
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CERTIFICATE OF SERVICE

I, William F. Sinnott, hereby certify that I have caused a copy of the foregoing document to be served upon Richard M. Heimann, Esquire, Lieff Cabraser Heimann & Bernstein, LLP, 275 Battery Street, 29th Floor, San Francisco, CA 94111, by electronic mail and first class mail, postage prepaid, this 18th day of May, 2017.

_____
William F. Sinnott

EXHIBIT E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS

In accordance with the Federal Rules of Civil Procedure, Lieff Cabraser Heimann & Bernstein LLP ("LCHB") hereby responds to Special Master Honorable Gerald E. Rosen's (Ret.) First Request for the Production of Documents propounded on LCHB on May 18, 2017, as revised on May 23, 2017.

GENERAL OBJECTIONS

LCHB makes the following general objections, which are incorporated by reference into each Request response, whether or not a specific further objection is made with respect to a specific Request. Each Request response incorporates, is subject to, and does not waive the general objections.

1. LCHB objects to the Requests and Instructions to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or otherwise is privileged, protected or exempt from discovery.

2. LCHB objects to the Requests and Instructions to the extent they purport to impose obligations that differ from or exceed those imposed by the Federal Rules of Civil Procedure, particularly Rule 34, and by any court decisions interpreting those Rules.

3. LCHB objects to the Requests and Instructions to the extent they seek information beyond the scope of, or not relevant to, the Courts' February 6, 2017 Memorandum and Order in the above-referenced actions.

4. LCHB has made reasonable efforts to respond to the Requests based on its understanding and interpretation of each Request. If the Special Master subsequently asserts a reasonable interpretation of a Request which differs from that of LCHB, LCHB reserves the right to supplement its responses.

5. LCHB will make all reasonable efforts to produce documents responsive to the Requests on or before the dates specified in the Special Master's May 23, 2017 revised Requests. LCHB, however, reserves the right to supplement its productions should it require additional time to complete the production, and/or should responsive documents be discovered following the designated dates for production.

6. LCHB objects to Definition No. 1 to the extent it contemplates the production of documents from any source other than the law firm, its partners, associates, of counsel, employees and contractors. LCHB has no "affiliates," and no "agents" or "representatives" that are or would be in the possession of responsive documents.

RESPONSES TO THE REQUESTS

REQUEST FOR PRODUCTION NO. 1:

The Catalyst and Relativity document databases created or used in the SST Litigation, as annotated, compiled and used in the course of the litigation and/or document review, including instructions, software, and anything else necessary to access and analyze the data therein. [July 10]

RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that the words "annotated" and "compiled" in the context of the Request are vague and over broad. LCHB further objects to this Request to the extent it requires LCHB to act in violation of the November 19, 2012 Order for the Production and Exchange of Confidential Information in the above-referenced actions. Subject to and without waiving those objections, as soon as practicable after LCHB is permitted to produce State Street documents in compliance with the November 19, 2012 Order for the Production and Exchange of Confidential Information, LCHB will produce a copy of the Catalyst document database used in the SST Litigation, along with information necessary for the Special Master to access the database.

REQUEST FOR PRODUCTION NO. 2:

All so-called "hot docs," as understood or identified by the Law Firm. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 2:

LCHB incorporates the general objections stated above. LCHB further objects to this Request to the extent it requires LCHB to act in violation of the November 19, 2012 Order for the Production and Exchange of Confidential Information in the above-referenced actions. LCHB further objects to this Request on the grounds that the complete collection of "hot" documents sought by this Request are identifiable in the Catalyst database sought by Request No. 1, above, and cannot be produced before the Catalyst database is produced. Subject to and without waiving those objections, as soon as practicable after LCHB is permitted to produce State Street documents in compliance with the November 19, 2012 Order for the Production and Exchange of Confidential Information, LCHB will produce a copy of the Catalyst document database used in the SST Litigation, along with information necessary for the Special Master to access the database, as well "hot" documents attached to memoranda responsive to Request Nos. 26 and 27.

REQUEST FOR PRODUCTION NO. 3:

All engagement letters, fee agreements, retention letters, and/or other documents referring to, relating to, or evidencing terms of the Law Firm's participation in the SST Litigation and/or representation of class representatives. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 3:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that the phrase "evidencing terms of the Law Firm's participation in the SST Litigation" is vague and over broad. Subject to and without waiving those objections, LCHB responds as follows. LCHB understands from a May 23, 2017 email from William

Sinnott to Richard M. Heimann that this Request "seeks documents relating to representation of class representatives in the State Street Litigation only." LCHB has no responsive "engagement letters, fee agreements, retention letters," or any other related documents between it and any client or any class representative in the SST Litigation.

REQUEST FOR PRODUCTION NO. 4:

All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of hourly clients, from 2009-2011. [July 10]

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

LCHB incorporates the general objections stated above. LCHB further objects to this Request to the extent it seeks documents protected by the attorney-client privilege. LCHB further objects to this Request on the grounds that the phrase "evidencing terms" is vague, over broad and seeks information that is not relevant in this proceeding. LCHB further objects to this Request on the grounds that the time period covered by the Request, 2009-2011, is too narrow and excludes the production of relevant documents. Subject to and without waiving those objections, LCHB will produce, on or before July 10, 2017, responsive documents through 2016.

REQUEST FOR PRODUCTION NO. 5:

All engagement letters, fee agreements, retention letters, RFPs, and/or other documents referring to, relating to, or evidencing terms and/or hourly rates associated with the Law Firm's representation of non-hourly clients, from 2009-2011. [July 10]

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

LCHB incorporates the general objections stated above. LCHB further objects to this Request to the extent it seeks documents protected by the attorney-client privilege. LCHB further objects to this Request on the grounds that the phrase "evidencing terms" is vague, over broad and covers information not relevant in this proceeding. LCHB further objects to this

Request on the grounds that it is unduly burdensome in that it will require LCHB to gather and produce thousands of pages of documents relating to LCHB's representation of dozens of class representatives and thousands or individual non-hourly clients, even for the limited period 2009-2011. LCHB further objects to this Request on the grounds that the time period covered by the Request, 2009-2011, seeks documents that are not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB will produce representative responsive documents on or before July 10, 2017.

REQUEST FOR PRODUCTION NO. 7:

Copies of all billing rate tables, spreadsheets, fee binders, or other collection of the Law Firm's annual billing rates, from 2010 to the present.

RESPONSE TO REQUEST FOR PRODUCTION NO. 7:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that the phrase "other collection of the Law Firm's annual billing rates" is vague and unintelligible. Subject to and without waiving those objections, LCHB will produce its hourly rate schedule for the requested time period on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 8:

All minutes, notes, recordings, memoranda or other documents relating to or created by the Law Firm's Managing Partner or Executive Committee during meetings to determine annual billing rates, from 2010-2011 and 2015-2016. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 8:

LCHB incorporates the general objections set forth above. LCHB further objects to this Request on the grounds that it is vague. Subject to and without waiving those objections, LCHB responds as follows. LCHB understands this Request to seek, in part, certain documents created or generated "during meetings to determine annual billing rates." LCHB has no such responsive

documents. LCHB will, however, produce otherwise responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 9:

All documents and/or communications between and among the Firm's Managing Partner and the Firm's Executive Committee relating to review and adjustment of annual billing rates, from 2010-2011 and 2015-2016. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 9:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 10:

All documents and/or communications relating to the Law Firm's internal classification of costs and expenses, including but not limited to any ethical, legal, or factual opinions solicited by the firm by third parties regarding the classification of Staff Attorneys as fees vs. expenses. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 10:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that the phrase "internal classification of costs and expenses" is vague and unintelligible. LCHB further objects to this Request to the extent it seeks attorney work product in cases unrelated to the SST Litigation. Subject to and without waiving those objections, LCHB will produce responsive expert opinions on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 15:

All W-2s, 1099s, paystubs, or other documentation of payments made to the Firm's Staff Attorneys assigned to or who contributed to the SST Litigation, for work performed on the Litigation. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 15:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that it is vague, over broad and seeks information that is not relevant to the subject matter of this proceeding. LCHB further objects to this request to the extent it seeks personal and confidential identification and financial information, including social security numbers. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 16:

All documents referring to, relating to, evidencing or constituting discussions between the Law Firm and the Plaintiffs' Law Firms relating to sharing costs and/or expenses of the SST Document Review/SST Litigation, including but not limited to sharing the cost of Staff Attorneys, hosting costs for Catalyst database, and other expenses associated with conducting voluminous document review. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 16:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that the phrase "other expenses associated with conducting voluminous document review" is vague and unintelligible. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 17:

All agreements, contracts, and/or memorialization of an arrangement to allocate and/or share the cost of certain of the Law Firm's Staff Attorneys to Thornton, including the compensation, reimbursement, and/or invoicing of costs associated with the same. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 17:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB has produced and will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 18:

All documents referring to, relating to, evidencing or constituting discussions with Thornton regarding Thornton's plan or intention to include Staff Attorney time as part of Thornton's Fee Petition and/or Lodestar calculation. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 18:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB has produced and will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 19:

All expert reports, factual or legal opinions, or other work product solicited from a third-party by the Law Firm in connection with factual and/or legal issues arising in the SST Litigation, including but not limited to the foreign-exchange market, foreign-exchange trading practices, and custodial management of retirement funds.

RESPONSE TO REQUEST FOR PRODUCTION NO. 19:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has no responsive documents.

REQUEST FOR PRODUCTION NO. 21:

All documents and/or communications relating to discussions between and among the Plaintiffs' Law Firms and ARTRS/George Hopkins regarding the substantive allegations and progress of the SST litigation, including but not limited to the filing of the complaint/amended complaint, court orders, mediation, and/or the agreement to settlement in principle. [July 10, 2017]

RESPONSE TO REQUEST FOR PRODUCTION NO. 21:

LCHB incorporates the general objections stated above. LCHB further objects to this Request to the extent it seeks privileged attorney-client communications and/or protected attorney work product. LCHB further objects to this Request on the grounds that it seeks

documents not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds that it has no responsive documents.

REQUEST FOR PRODUCTION NO. 23:

Current CVs or resumes for all Staff Attorneys who worked on or contributed to the SST Litigation/Document Review. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 23:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has already produced detailed biographical information for each LCHB Staff Attorney who worked on the SST Litigation, and will re-produce that information and resumes for each of those Staff Attorneys on or before June 1, 2017.[1]

REQUEST FOR PRODUCTION NO. 24:

All written guidance, training manuals, policies/procedures, search criteria, other documents provided to the Firm's Staff Attorneys relating to the SST Document Review, including but not limited to materials related to use of Catalyst database. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 24:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has already produced responsive documents and will re-produce responsive documents on or before June 1, 2017.[2]

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[1] *See* LCHB's April 5, 2017 Presentation to Special Master Judge Rosen at pages 18-40. LCHB will re-produce the Presentation with the page numbers Bates stamped, on or before June 1, 2017.

[2] *See* LCHB's April 5, 2017 Presentation to Special Master Judge Rosen at pages 41-47. LCHB will re-produce the Presentation with the page numbers Bates stamped, on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 25:

All other documents relating to the SST Litigation, other than those responsive to Request No. 24 above, that the Law Firm provided to its Staff Attorneys, including but not limited to case pleadings, mediation reports, legal memoranda. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 25:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 26:

All written work product produced by Staff Attorneys assigned to the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 26:

LCHB incorporates the general objections stated above. LCHB further objects to this Request to the extent it requires LCHB to act in violation of the November 19, 2012 Order for the Production and Exchange of Confidential Information in the above-referenced actions as the responsive documents contain discussion and analysis of, and include copies of, certain State Street documents subject to the Order. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017, or as soon as practicable after LCHB is permitted to produce State Street documents in compliance with the November 19, 2012 Order for the Production and Exchange of Confidential Information.

REQUEST FOR PRODUCTION NO. 27:

A complete copy of the binder(s) containing discursive memoranda pertaining to the SST Litigation/SST Document Review, including all attachments. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 27:

LCHB incorporates the general objections stated above. LCHB further objects to this Request to the extent it requires LCHB to act in violation of the November 19, 2012 Order for

the Production and Exchange of Confidential Information in the above-referenced actions as the responsive documents contain discussion and analysis of, and include copies of, certain State Street documents subject to the Order. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017, or as soon as practicable after LCHB is permitted to produce State Street documents in compliance with the November 19, 2012 Order for the Production and Exchange of Confidential Information.

REQUEST FOR PRODUCTION NO. 30:

All communications with the U.S. Department of Labor, including all local field offices, the U.S. Attorney's Office, the U.S. Department of Justice, and/or the U.S. Securities and Exchange Commission relating to the SST Litigation. [July 10]

RESPONSE TO REQUEST FOR PRODUCTION NO. 30:

LCHB incorporates the general objections stated above. LCHB further objects to this Request on the grounds that it is over broad and seeks communications that are not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB will produce responsive documents on or before July 10, 2017.

REQUEST FOR PRODUCTION NO. 31:

All documents and/or communications relating to the selection and staffing of Staff Attorneys on the SST Litigation/SST Document Review. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 31:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 32:

All documents and/or communications relating to the allocation of certain Staff Attorneys to Thornton under the cost-sharing agreement entered into by the Firm in or about 2014 or 2015. [June 9 / July 10]

RESPONSE TO REQUEST FOR PRODUCTION NO. 32:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9 and/or July 10, 2017.

REQUEST FOR PRODUCTION NO. 34:

All documents and/or communications between and among the Law Firm and its accounting and/or billing personnel relating to the accounting for, recording, and/or invoicing of Staff Attorneys for whom Thornton had agreed to share the costs. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 34:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 35:

All documents and/or communications between and among the Law Firm and accounting and/or billing staff requesting nullification of or requesting removal from the Fee Petition of certain hours worked by Staff Attorneys for whom another firm or Company had agreed to share the costs. [June 1]

RESPONSE TO REQUEST FOR PRODUCTION NO. 35:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 1, 2017.

REQUEST FOR PRODUCTION NO. 38:

All documents relied upon by the Law Firm in preparing and filing the Firm's Fee Petition, including but not limited to expense reports, billing records, emails, invoices, and/or other records. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 38:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 39:

All documents, other than those requested in Request No. 38 above, reviewed or considered by the Law Firm in calculating the Firm's Lodestar calculation. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 39:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 40:

All documents relating to, referring to, or constituting the Law Firm's Fee Petition, including all drafts, spreadsheets, outlines, notes, emails. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 40:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 44:

All documents and/or communications relating to the discovery of billing errors disclosed in the November 10, 2016 Letter filed with the Court, including but not limited to communications between and among you, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 44:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 47:

All documents relating to, referring to, evidencing, or constituting the November 10, 2016 Letter, including all drafts, outlines, notes, and communications relating to the filing of that correspondence. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 47:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 49:

All documents and/or communications relating to the December 17, 2016 Article, including but not limited to communications between and among the Law Firm, the Plaintiffs' Law Firms, class representatives, and/or the ERISA firms. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 49:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 50:

All documents relating to Michael Bradley's involvement in the SST Litigation/SST Document Review, including but not limited to communications with Mr. Bradley and all documents relating to or referring to an agreement between Mr. Bradley and Thornton to participate in the SST Document Review. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 50:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB will produce responsive documents on or before June 9, 2017.

REQUEST FOR PRODUCTION NO. 51:

All documents relating to, referring to or evidencing payments made to Michael Bradley in connection with his work on the SST Litigation/SST Document Review.

RESPONSE TO REQUEST FOR PRODUCTION NO. 51:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has no responsive documents.

REQUEST FOR PRODUCTION NO. 52:

All written work product produced by Michael Bradley as part of his involvement in the SST Litigation/SST Document Review, including all memoranda, factual summaries, deposition preparation, written analyses, witness kits, summaries. [June 9]

RESPONSE TO REQUEST FOR PRODUCTION NO. 52:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has no responsive documents.

REQUEST FOR PRODUCTION NO. 53:

All documents you may contend support your Fee Petition for reimbursement of fees and/or expenses, which you have not produced thus far. [June 9]

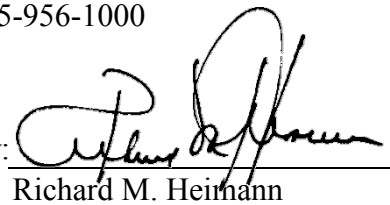
RESPONSE TO REQUEST FOR PRODUCTION NO. 53:

LCHB incorporates the general objections stated above. Subject to and without waiving those objections, LCHB responds that it has no responsive documents.

Dated: May 26, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: 
Richard M. Heimann

Attorneys for Lieff Cabraser Heimann & Bernstein, LLP

EXHIBIT F

DONOGHUE BARRETT & SINGAL

July 5, 2017

Via Email

Joan A. Lukey, Esq.
Choate, Hall & Stewart LLP
Two International Place
Boston, MA 02110

Richard M. Heimann, Esq.
Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111

Brian T. Kelly, Esq.
Nixon Peabody LLP
100 Summer Street
Boston, MA 02110

Re: Special Master's Request for Supplemental Submission from Labaton Sucharow, LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm, LLP

Arkansas Teacher Retirement System, et al v. State Street Corporation, et al., C.A. No. 1:11-cv-10230-MLW;

Dear Joan, Richard, and Brian:

In the course of the Special Master's investigation, the Special Master has, on several occasions, discussed with representatives of the law firms his desire to provide the participant law firms an opportunity to more formally address the factual and legal issues in this case before finalizing his report. We now invite Labaton Sucharow, Lieff Cabraser Heimann & Bernstein, and the Thornton Law Firm to provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his Final Report and Recommendation. The above firms should submit one, consolidated response which is due to undersigned counsel by the close of business on August 1, 2017.

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DONOGHUE BARRETT & SINGAL

Areas of Concern Identified in Judge Wolf's March 8th Order

According to Judge Wolf's March 8th Memorandum and Order ("Order"), the Special Master is charged with investigating and preparing a Report and Recommendation concerning all issues relating to the attorneys' fees, expenses, and service awards previously made in this case. Specifically, the Report and Recommendation shall address, at least:

- The accuracy and reliability of the representations made by the parties in their requests for awards of attorneys' fees and expenses, including but not limited to whether counsel employed the correct legal standard and had a proper factual basis for what was represented to be the lodestar for each firm;

- The accuracy and reliability of the representations made in the November 10, 2016 letter from David Goldsmith, Esq. of Labaton Sucharow, LLC to the Court (Docket #116);

- The accuracy and reliability of the representations made by the parties requesting service awards;

- The reasonableness of the amounts of attorneys' fees, expenses, and service awards previously ordered, and whether any or all of the them should be reduced;

- Whether any misconduct occurred in connection with such awards, and if so;

- Whether it should be sanctioned (under Fed. R. Civ. P. 11(b)(3) & (c) & Mass. R. Prof. C. 3.3(a)(1) & (3)).

Order, pp. 2-3.

DONOGHUE BARRETT & SINGAL

Requests

In addition to addressing the above-described areas of inquiry, if you so desire, you may also provide input on the following topics which have arisen during the course of the Special Master's investigation and are related to his mandate from Judge Wolf. For each topic, please provide a full response and include any legal or factual support for your position.

1. Explain the justification/rationale for current billing practices relating to Staff Attorneys paid approximately $30-$60 per hour but billed on the Fee Petition in excess of $400 per hour. Secondly, explain the justification/rationale for charging the same hourly rates for Staff Attorneys employed by a law firm (and whom are eligible for benefits and receive a W-2) and Contract Attorneys (for whom a law firms pays a third-party staffing agency) on the Fee Petition submitted to the Court.

2. Describe the appropriate venue for determining the hourly billing rates charged on the Fee Petition submitted in this case, whether Boston, New York, San Francisco or elsewhere. Please explain what import, if any, the venue of the case has in determining the appropriate hourly billing rate for purposes of the Fee Petition.

3. Explain, in general terms, the role of lead counsel in preparing and filing fee petitions in multi-firm class action matters. Specifically, explain in detail those duties and obligations with which Labaton (as lead counsel) was charged in drafting, compiling, and submitting the Fee Petition (Docket #104) and whether Labaton fulfilled each of these duties. Please include any recommendations on best practices or possible ways to improve current practices and/or reform the lead counsel role in future cases.

4. Please comment on the accuracy of the following language, which appears in the following exhibits to the Fee Petition—Declaration of Lawrence A. Sucharow, Esq., ¶ 7 (Docket #104-15); Declaration of Garrett J. Bradley, Esq., ¶ 4 (Docket #104-16); and Declaration of Daniel P. Chiplock, Esq., ¶ 5, (Docket #104-17):

DONOGHUE BARRETT & SINGAL

The hourly rates for the attorneys and professional support staff in my firm included in Exhibit A are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions.

In your discussion, please address any potential areas of confusion, misinterpretation or lack of transparency arising out of the use of this language in the Fee Petition. Please include any suggestions, recommendations or model language that would enhance the integrity of Fee Petitions and the predictability with which Courts may rely on them in assessing hourly rates.

5. Describe the appropriate factors and/or criteria law firm management should consider in setting hourly billing rates of "off-track" Staff Attorneys, such as those Staff Attorneys represented on the Fee Petition, including but not limited to comparable associate and/or partner hourly rates, comparative data from other law firms, and historical rates accepted by other courts in other class action fee petitions.

6. Explain the reasoning, including any monetary and non-monetary benefits, for entering into a cost-sharing agreement by which a firm employing Staff and/or Contract Attorneys invoices another firm for the work performed by one or more Staff Attorneys, such as the agreement between Labaton and Lieff, on the one hand, and Thornton, on the other, to allocate to Thornton the cost of certain Staff and/or Contract Attorneys in the State Street matter and relatedly, for permitting Thornton to claim the hours expended by those Staff and/or Contract Attorneys on the Thornton Fee Petition. Explain why the parties chose to enter into a cost-sharing agreement of this nature rather than negotiating direct payments to share in one-third of the costs, without having Thornton claim Staff and/or Contract Attorneys on the Fee Petition.

7. If you desire, you may provide input on recommendations for the Special Master and the Court on best practices or possible ways to improve current practices, or both, in any or all of these areas.

DONOGHUE BARRETT & SINGAL

The above topics are not exhaustive of issues raised in the Special Master's inquiry and, of course, the Special Master's Final Report may address other areas that have arisen or are related to his inquiry and investigation. Toward that end, if you wish, you may provide any other input that you believe is relevant to or raised by the Special Master's inquiry.

Confidentiality

The submission should be addressed to Counsel for the Special Master and submitted directly to Counsel via email and/or first-class mail. To maintain the confidentiality of the Special Master's investigation, submissions should not be filed on ECF. However, should you wish to comment on the corresponding responses submitted by the ERISA law firms, you are encouraged to do so in your response.

Given the great importance of the anticipated responses, it may be necessary for the Special Master to refer to and/or quote one or more of the firms' responses in his Final Report. In the event such reference becomes part of the Final Report, the Special Master reserves the right to include the firms' submission(s) as an exhibit to his Final Report, which will be made available to the public.

Please feel free to contact me with any questions or concerns.

Thank you.

Very yours truly,

William F. Sinnott
Counsel to the Special Master

EXHIBIT G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

CONSOLIDATED RESPONSE BY LABATON SUCHAROW LLP, LIEFF CABRASER HEIMANN & BERNSTEIN LLP, AND THORNTON LAW FIRM LLP TO SPECIAL MASTER'S JULY 5, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Labaton Sucharow LLP ("Labaton Sucharow"), Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"), and the Thornton Law Firm LLP ("Thornton," and collectively with Labaton Sucharow and Lieff Cabraser, the "Firms"), respectfully provide this consolidated response to the Special Master's July 5, 2017 Request for Supplemental Submission.

I. PRELIMINARY STATEMENT

The Special Master invites the Firms to now "provide any information they should find relevant, as such information will inform the Special Master's findings, conclusions, and recommendations presented in his Final Report and Recommendation." The Firms wish to note for the record that in the course of the Special Master's investigation, the Firms have provided an abundance of information that should inform the Special Master's findings, conclusions, and recommendations. Specifically, the Firms each participated in multi-hour informal interviews with the Special Master, his counsel, and his technical advisor on April 4 and 5, 2017; collectively responded to 193 interrogatories on June 1, June 9 and July 10, 2017; collectively responded to 104 document requests by producing more than 176,000 pages of requested documents; and produced witnesses for a total of 27 depositions between June 5 and July 17 2017.

The Firms respectfully submit that the substantial factual record developed by the Special Master during his investigation does not warrant any change in the Court's November 2, 2016 Fee Award [Dkt. No. 111] nor the imposition of sanctions on any of the Firms. The reasonableness of the Firms' Fee Petition is further supported by the accompanying declaration of William B. Rubenstein ("Rubenstein Decl."), the Sidley Austin Professor of Law at Harvard Law School, and one of the nation's leading national experts on class action law and practice.

II. RESPONSE TO AREAS OF CONCERN RAISED BY THE COURT AND ADDRESSED BY THE SPECIAL MASTER

The Firms submit that the extensive factual record, along with the declaration of Professor Rubenstein, should lead the Special Master to make the following findings:

- The Firms employed the correct legal standards in their request for an award of attorneys' fees and expenses. *See* Mem. of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs ("Fee Brief") [Dkt. No. 103-1] at 3-5, 24; Rubenstein Decl. at 7-12, 27-34.

- Except as stated below and previously on the record in this case, as well as in the Firms' discovery responses to the Special Master, the representations made by the Firms in the request for awards of attorneys' fees and expenses were accurate and reliable, and counsel asserted a proper factual basis for what was represented to be the lodestar for each firm. *See* LS Interrog. Resp. Nos. 17-19, 23-25, 27-29, 32, 33, 36, 37, 40, 41, 44-47, 51, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 47, 48, 53, 57, 62, 63, 64, 72, 73; Thornton Interrog. Resp. Nos. 49-51, 55, 64, 66.

- The Firms acknowledge, as they did in their November 10, 2016 letter to the Court [Dkt. No. 116], that some Staff Attorney lodestar was "double-counted" in the Firms' request for attorneys' fees. These errors were unintentional and brought to the Court's attention by the Firms promptly upon their learning of the mistakes. *See* LS Interrog. Resp. Nos. 63-66; LCHB Interrog. Resp. Nos. 39, 40, 67, 68; Thornton Interrog. Resp. Nos. 67, 69, 74, 75. The factual record submitted to the Special Master during the course of this investigation confirms the Firms' position that the errors were unintentional.

- The representations made in the November 10, 2016 letter to the Court [Dkt. No. 116] were and are materially accurate and reliable. LS Interrog. Resp. Nos. 63, 66, 67, 71; LCHB Interrog. Resp. Nos. 65, 68, 69, 72, 73; Thornton Interrog. Resp. Nos. 70, 71, 74-76.

- Labaton Sucharow submits that its representations requesting a service award to Arkansas Teacher Retirement System were accurate and reliable. *See* LS Interrog. Resp. Nos. 4, 17; Belfi Dep. at 33:23-34:9, 37:12-41:6; Goldsmith Dep. at 18:6-23:18.

- Neither Lieff Cabraser nor Thornton had clients in this matter for which they sought service awards.

- None of the Firms made representations to the Court concerning the service awards sought by counsel for the ERISA plaintiffs.

- The attorneys' fees, expenses and service award to Arkansas Teacher Retirement System were reasonable, and none should be reduced beyond the $2 million the Firms already have contributed to the cost of the Special Master's investigation. In addition to this $2 million, the Firms have incurred substantial other costs relating to this investigation, including, for Labaton Sucharow and Thornton, the costs of outside counsel; and, for all three firms, the substantial time spent by senior members of each firm participating in this investigation. The costs already associated with this investigation shall continually serve as an important reminder to the Firms to double check future fee petitions to ensure their clarity and accuracy to the court. The Firms are fully cognizant of the lessons of this investigation, as reflected in the Firms' recommendations on best practices described below. That fact notwithstanding, the net effect of the errors in reported lodestar were modest with respect to the lodestar multiplier that was used as a cross-check against the requested percentage-based fee, and still well within the bounds of what is considered acceptable in this Circuit. *See* LS Interrog. Resp. Nos. 59, 63; LCHB Interrog. Resp. Nos. 59, 61; Fee Brief at 7, 24-25; Rubenstein Decl. at 30-34.

- No misconduct occurred in connection with the attorneys' fees, expenses, or service award to Arkansas Teacher Retirement System previously ordered. The double-counting of lodestar at the center of the Special Master's inquiry, while regrettable both in terms of the initial confusion caused to the Court and the subsequent substantial time and expense devoted to explaining the matter, was an inadvertent and honest mistake. LS Interrog. Resp. Nos. 33, 36, 37, 54-59, 61-67, 71; LCHB Interrog. Resp. Nos. 39, 65, 67; Thornton Interrog. Resp. Nos. 67, 69, 75.

- None of the Firms should be sanctioned in this matter.

III. SPECIAL MASTER'S REQUEST FOR INPUT ON SPECIFIC TOPICS

A. Request No. 1 – Billing Practices Relating To Staff Attorneys

For all three of the Firms, billing rates for Staff Attorneys are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of an appropriate market rate for the legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22; Politano Dep. at 35:22-37:2, 38:19-42:2, 45:6-49:4; Johnson Dep. at 12:5-16; 13:4-17. This approach is consistent with the general practice of the marketplace and applicable case authority. *See* Rubenstein Decl. at 2, 12-30. Billing 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. Fineman Dep. at 48:3-17, 50:6-11; Rubenstein Decl. at 29-30; Johnson Dep. at 20:5-22:13, 25:7-19.

With respect to the second part of this request, Labaton Sucharow responds that all of its Staff Attorneys were Labaton Sucharow employees, and accordingly the question of whether "agency" versus non-agency Staff Attorneys should appropriately be billed at the same rate does not apply to it. *See* Johnson Dep. at 19:4-11, 22:5-13.

Lieff Cabraser responds that those of its Staff Attorneys who were paid directly by the firm (versus those paid through an agency) performed the lion's share of Lieff Cabraser's document review in the litigation. *See* LCHB Interrog. Resp. No. 24. Some Staff Attorneys actually began their work on the litigation as agency attorneys before being hired directly by Lieff Cabraser. *Id.* By the time the Staff Attorneys were working on the detailed issue memoranda discussed during discovery in this matter (which entailed a deeper analysis of the documents reviewed), only one LCHB Staff Attorney was still being paid through an agency—Virginia Weiss. *Id.* The remaining LCHB Staff Attorneys were all being paid directly by Lieff Cabraser, and their hours heavily outnumbered those contributed by agency attorneys. *Id.* Throughout the litigation, LCHB Staff Attorneys were given the same type of assignments, supervised in the same manner, and expected to produce the same quality of work regardless of whether they were paid directly by the firm or through an agency. *See, e.g.*, LCHB Interrog. Resp. Nos. 19, 22, 29-30; Chiplock Dep. at 113:14-116:10; Dugar Dep. at 95:7-99:12; Fineman Dep. at 41:4-8, 43:14-44:11; Heimann Dep. at 51:18-53:2.

For instance, while being paid through an agency in 2015, Ms. Weiss authored detailed issue memoranda just as the other Staff Attorneys did. These memoranda have been produced to

the Special Master. *See* LCHB-0028663-0028672 (and exhibits at LCHB-0028677-0029118); LCHB-0029119-0029124 (and exhibits at LCHB-0029125-LCHB-0029182). So, for that matter, did the two Staff Attorneys (Ann Ten Eyck and Rachel Wintterle) who were physically situated in LCHB's San Francisco offices for several months but contracted through an agency that was paid directly by Thornton. These memoranda have also been produced. *See* LCHB-0003314-0003319; LCHB-0029183-0029200 (and exhibits at LCHB-0029201-0031489); LCHB-0031490-0031528 (and exhibits at LCHB-0031529-0039667). The only two (2) other LCHB Staff Attorneys who were still paid by an agency in 2015 (Jade Butman and Andrew McClelland) did not produce memoranda simply because they had stopped working on the State Street Litigation well before those assignments were given. *See* LCHB Interrog. Resp. No. 24.

Billing rates for Staff Attorneys at Lieff Cabraser are not impacted by whether they are being paid directly by the firm or are being paid through an agency; they are based (just as for any other type of attorney, such as an associate or partner) on the firm's understanding of appropriate market rates for similar legal services rendered. *See* Fineman Dep. at 47:5-12; 48:3-17; 50:25-51:6; 52:10-22; 55:4-10; Heimann Dep. at 57:16-58:10, 62:4-68:22. Even so, in 2015, the amount paid by the firm to an agency for an agency attorney's work, on an hourly basis, was comparable to the hourly pay the firm would have made directly to a Staff Attorney being paid directly by the firm. *See* Fineman Dep. at 36:21-38:7.

B. Request No. 2 – The Appropriate Venue For Determining Hourly Billing Rates

The Firms set their billing rates based on what they perceive to be, as described under applicable Supreme Court and First Circuit authority, "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *See Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) (quoting *Blum v. Stenson*, 465

U.S. 886, 895 n.11 (1984)); LS Interrog. Resp. No. 51; Johnson Dep. at 12:5-14:19; LCHB Interrog. Resp. Nos. 47, 48, 53, 64; Fineman Dep. at 76:7-77:8; Thornton Interrog. Resp. Nos. 49, 50, 51, 55. Labaton Sucharow is in New York, Lieff Cabraser is principally in San Francisco, and Thornton is in Boston. *Id.* Each of the Firms, however, maintains a national class action practice and litigates in many locations other than these home bases. Given the specific role that hourly rates play in determining the reasonableness of the overall fee award in this case, the Firms' rates should not be adjusted to Boston rates for purposes of analyzing the fee petition. *See* Rubenstein Decl. at 19-20 and n.31.

As was mentioned above, the Firms' rates were not provided in the fee application as the "basis" for their requested fee, but rather simply to enable a "cross-check" of the overall time and effort expended on the case against the requested "percentage-of-fund" fee. The First Circuit, it should be noted, is predominantly a percentage-of-fund jurisdiction, and does not mandate a lodestar cross-check. *See In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995) (noting the "distinct advantages" of the percentage-of-fund method over the lodestar method of calculating fees); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005); Rubenstein Decl. at 8-9. When a lodestar cross-check is performed regardless, the focus is not on the "necessity and reasonableness of every hour" expended by counsel, but rather on whether the fee broadly reflects the degree of time and effort expended by counsel. These points were briefed before Judge Wolf in support of the Firms' fee award, and were not disputed. *See* Fee Brief at 3-4, 24. Indeed, when David Goldsmith revealed to Judge Wolf that the Firms were "contemplating [a percentage of the fund] in the 25 percent range" for the attorneys' fees, Judge Wolf responded, "That's great . . . I usually start with 25 percent in mind." Trans. of Status Conference (Dkt. No. 85), June 23, 2016, at 15:5-22.

As noted above, Labaton Sucharow, Lieff Cabraser and Thornton all maintain complex class action practices that are national in scope. Accordingly, the Firms' billing rates – which were based on rates used by national peer plaintiff and defense law firms that litigate matters of a similar magnitude – are appropriate and were set using the correct legal standard. *See* LS Interrog. Resp. Nos. 44, 51, 62; Thornton Interrog. Responses 49, 51, 55, 66; LCHB Interrog. Resp. Nos. 47, 48, 53, 64.

To the extent that rates prevailing in the Boston legal market have particular or greater relevance, Professor Rubenstein has opined that Plaintiffs' counsel's billing rates were reasonable. Professor Rubenstein forms these opinions on the basis that (a) Plaintiffs' counsel's rates are consistent with rates that courts in Massachusetts have awarded in approving class action fee petitions in recent years; (b) the rates fall far below those that have been judicially approved in the context of fee petitions submitted by defense firms in bankruptcy cases in this District; and (c) the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in the District of Massachusetts and in $100-$500 million cases throughout the country. *See* Rubenstein Decl. at 1-3, 12-27. Professor Rubenstein has also shown that if one goes to the trouble of adjusting the out-of-town rates to the Boston market, it has about a 3% effect on the total lodestar, meaning that the cross-jurisdictional rate differentials are immaterial, especially for cross-check purposes. *Id.* at 21-22. Moreover, Thornton has many years of experience in the Boston market, and its court-approved rates are comparable to those of the other firms here.

C. Request No. 3 – The Role Of Lead Counsel In Preparing And Filing Fee Petitions In Multi-Firm Class Actions

In multi-firm class action cases, lead counsel has overall responsibility for preparing and filing a fee petition. This responsibility generally includes researching and drafting the

supporting brief, drafting the principal fee declaration or portion of the omnibus settlement and fee declaration in support of the fee petition, securing individual fee and expense declarations from co-counsel (often by circulating a model declaration), and securing any client or expert declarations that may be submitted. Lead counsel may and often will delegate certain research and drafting assignments to co-counsel.

Lead counsel's responsibility with respect to the accuracy of individual fee declarations other than its own has limitations. For example, lead counsel supplies a template for such declarations, but does not require the use of any particular language. Moreover, because lead counsel does not have access to co-counsel's internal timekeeping records, lead counsel must rely on co-counsel to report their own lodestar accurately. *See* LS Interrog. Resp. No. 56; Goldsmith Dep. at 119:3-20; Chiplock Dep. at 228:7-9 ("I don't view it as Labaton's ultimate responsibility to ensure that Lieff Cabraser's lodestar was reported accurately.").

Lead counsel has a responsibility to make reasonable efforts to detect and remedy errors in co-counsel's fee declarations to the extent they may be apparent on their face. *See* Goldsmith Dep. at 119:3-120:17. Here, the existence of double-counting between the Thornton and Labaton Sucharow fee declarations, and between the Thornton and Lieff Cabraser fee declarations, was not apparent on the face of any single fee declaration, but rather would become apparent only if the fee declarations were compared with one another. *Id.*

Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys, all of whom were Labaton Sucharow employees, to Thornton and invoiced it on a monthly basis for the work those Staff Attorneys performed. *See* Goldsmith Dep. at 91:20-92:3, 95:19-22; Rogers Dep. at 70:3-73:3; Politano Dep. at 22:8-24:23, 26:11-19, 28:15-23; LS Interrog. Resp. Nos. 23, 32, 37. Labaton Sucharow

invoiced Thornton at a rate of $50 per hour for each staff attorney. *See e.g.* TLF-SST-000153; TLF-SST-003418 – TLF-SST-003420; TLF-SST-000415. The $50 hourly rate included a share of the overhead costs associated with each staff attorney. Garrett Bradley Dep. at 93:23-95:5.

In reaching and implementing this cost-sharing arrangement, Labaton Sucharow and Thornton did not discuss which firm would claim the hours expended by these Staff Attorneys in its individual fee declaration. *Cf.* Sucharow Dep. at 26:20-22, 38:20-39:4; Belfi Dep. at 59:6-15; Goldsmith Dep. at 104:12-107:5, 122:6-13; Rogers Dep. at 95:16-96:2; Zeiss Dep. at 24:19-25:4; Politano Dep. at 22:22-25; LS Interrog. Resp. No. 33. It has since become apparent that the Firms had different views as to which firm would claim which Staff Attorneys on its respective fee petitions. *See* Chiplock Dep. At 135:20-137:11 ("I mean, we didn't write it out, but it was obvious to me that . . . when you're paying someone to do work, and you're taking on the risk of not being paid for that work, which is always a risk in our cases . . . you include it in your lodestar at the end of the day."); Garrett Bradley Dep., at 76:6-77:22 ("My assumption all along is, since we were on the papers, we're local counsel, that we would just include those people in our fee petition and on a rolling basis, as we got towards the end and Evan Hoffman is asking for a daily breakdown of time for the individuals that are Thornton's, we just understood that to mean that we were going to put them on our fee application."); Rogers Dep., at 91:18-96:2 ("Q: And did you have an understanding . . . whether Thornton was going to claim those staff attorneys on their fee petition? A: I certainly assumed they would . . . They were paying for it up front," and later stating that he had "no knowledge" of any discussions concerning why Thornton was allocated staff attorneys, nor any discussions concerning whether or how Thornton would claim staff attorneys on its fee petition)"; Goldsmith Dep., at 105:9-106:13 (also acknowledging that there was never an agreement concerning how Labaton Sucharow and Thornton would claim

staff attorneys on their respective fee petitions, but clarifying that he "certainly never made" an assumption "that the Thornton firm would put those people on its lodestar report").

In other cases involving staff attorney cost-sharing, Labaton Sucharow's general practice has been to report all hours billed by its staff attorney employees on its own fee declaration, and to work out any associated economic issues with co-counsel separately. *See* Politano Dep. at 22:18-25 (Q: "Did you have any understanding of whether those staff attorneys would be reported on the firm's fee petition? 'The firm' being Labaton." A: "The common practice was that it would be on Labaton's fee declaration, but there was no discussion at that point as to the way it would be handled."), 23:14 (testifying that this "common practice" was followed "[n]inety percent of the time"); Rogers Dep. at 96:13-17 ("I've seen it done both ways. I think it's more common to do what Judge Rosen's referring to as the latter . . . one big omnibus fee petition and then kind of dole it out at the end."); Johnson Dep. at 32:3-4 (alternative practice of cross-reporting has been used in "very, very few cases"); Goldsmith Dep. at 97:11-99:16 (alternative practice used in two other cases); Goldberg Dep. at 46:10-11 (alternative practice used in "[o]nly one case that I remember"); LS Interrog. Resp. No. 32; *see also* Zeiss Dep. at 24:21-25:2 ("[F]rom my perspective . . . the lodestar reports are reports of each firm's personnel based on their own time records. . . . It would never occur to me that one firm could be reporting personnel from Labaton.").

Indeed, among the 16 class action matters that Labaton Sucharow has identified in discovery as involving staff attorney cost-sharing, *see* LS Interrog. Resp. No. 32, ten (10) have proceeded to a court-approved settlement to date.[1] Labaton Sucharow adhered to its general

[1] The 10 settled cases are *City of Providence v. Aeropostale*, *Broadcom*, *Celestica*, *Countrywide*, *J. Crew Group*, *Lehman Brothers*, *Massey Energy*, *Nu Skin*, *Regions Morgan Keegan*, and *Semtech*.

practice of reporting staff attorney time exclusively in its own fee declaration in at least seven (7) of the ten (10) settled cases. Still, Labaton Sucharow acknowledges that, like here, other law firms have occasionally claimed Labaton Sucharow employed staff attorneys on their fee petitions. Johnson Dep. at 28:24-29:7.

Here, the lack of discussion (both internally and externally) as to which firm would report the hours on its individual fee petition, Labaton Sucharow's familiarity with its own general practice, and Thornton's reasonable belief that it would list the Staff Attorneys for whose labor and overhead it had paid, caused a good faith error to occur: Labaton Sucharow followed its general practice, while Thornton acted in accord with its own reasonable beliefs, and a good faith mistake was made.[2]

Nicole Zeiss, Labaton Sucharow's Settlement Counsel, reviewed each fee declaration individually for form, pursuant to her usual practice at the time. *See* Zeiss Dep. at 11:15-22, 55:25-56:3; LS Interrog. Resp. No. 54. She did not compare the declarations to each other, however. It was not her usual practice to do so; there is ordinarily no reason to believe that there should be any overlap between employees of different firms; and she was not told by anyone at Labaton Sucharow that there was the potential for attorney time to be reported in more than one fee declaration. *See* Zeiss Dep. at 24:19-25:4, 56:3-10; LS Interrog. Resp. No. 56.

Additionally, the existence of double-counting between Thornton and Lieff Cabraser fee declarations was smaller in kind and less obvious on its face, and would not have been immediately clear on first comparison, particularly to a reviewing attorney from Labaton

[2] The differential in hours reported by the two firms for some Staff Attorneys appears to have occurred at least in part because the firms used different sources. Thornton used numbers that were in a report sent to Thornton by Todd Kussin in an email dated August 25, 2015 (TLF-SST-031158); Labaton Sucharow used numbers that it pulled from its system approximately a year later (LS Interrog. Resp. No. 54).

Sucharow. Although the Thornton and Lieff Cabraser fee declarations include a handful of overlapping Staff Attorney names, the numbers of hours and lodestars for such Staff Attorneys consistently differ, and Labaton Sucharow in any event was unaware of any agreement between Thornton and Lieff Cabraser regarding which of those two firm's fee declarations should reflect the time of attorneys hosted by Lieff Cabraser but paid for by Thornton. See LS Interrog. Resp. No. 36; Goldsmith Dep. at 122:8-10. Moreover, of the six (6) attorneys who reported time that was listed by both Lieff Cabraser and Thornton in their fee declarations, the hours for two (2) of them (Virginia Weiss and Andrew McClelland)[3] were ***correctly*** allocated between Lieff Cabraser and Thornton and not double-counted—meaning there actually were no errors as to these two particular attorneys for Labaton Sucharow to detect. *See* LCHB Interrog. Resp. No. 40; Chiplock Dep. at 151:8-152:2.

This leaves only four (4) attorneys who reported at least some time that was inadvertently duplicated and incorrectly included in both Lieff Cabraser's and Thornton's fee declarations—Christopher Jordan, Jonathan Zaul, Ann Ten Eyck, and Rachel Wintterle.[4] *See* LCHB Interrog.

[3] It bears mentioning that both Ms. Weiss and Mr. McClelland were agency attorneys who were not paid directly by Lieff Cabraser, meaning Thornton paid an outside agency (not Lieff Cabraser) directly for the hours spent by Ms. Weiss and Mr. McClelland reviewing documents assigned to Thornton. *See* LCHB Interrog. Resp. Nos. 19, 24, 31; Hoffman Dep. at 60:2-8; 60:19-61:16; 80:8-13. Lieff Cabraser accordingly did not send invoices to Thornton for these two attorneys. Furthermore, Ms. Weiss worked remotely and thus was not making use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

[4] Messrs. Jordan and Zaul were the only Staff Attorneys who were directly paid by Lieff Cabraser but who also performed at least some work (roughly 9 weeks) that was reimbursed by Thornton (and later included in Thornton's fee declaration). *See* LCHB Interrog. Resp. Nos. 24, 31, 38; Hoffman Dep. at 61:17-62:5. Messrs. Jordan and Zaul were accordingly the only two Lieff Cabraser lawyers whose time (again, 9 weeks' worth) was invoiced to Thornton. Messrs. Jordan and Zaul, like Ms. Weiss, also worked remotely, and therefore did not make use of Lieff Cabraser's San Francisco facilities. *See* LCHB Interrog. Resp. No. 24.

Ms. Ten Eyck and Ms. Wintterle, meanwhile, were lawyers hired from and paid via an outside agency for the entirety of the 3 to 4 months they worked on the case. *See* LCHB

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Resp. Nos. 31, 65; Chiplock Dep. at 152:3-154:20, 156:7-21. And for each of these four (4) attorneys, the duration of the cost-sharing or hosting arrangement (and the resulting inadvertent redundancy in time-reporting) ranged from just 9 weeks to roughly 3 ½ months—modest, in other words, in comparison to the more than 5-year lifespan of the litigation. *See* LCHB Interrog. Resp. Nos. 31, 38, 65; Hoffman Dep. at 61:17-62:5 (describing sharing relationship as to Messrs. Jordan and Zaul "[t]hat didn't go on for maybe more than a month or two."). This factor (combined with the correct allocation of the lodestar by the two (2) other shared Lieff Cabraser/Thornton Staff Attorneys named above) made any timekeeping duplication between Lieff Cabraser's and Thornton's fee declarations even less readily detectable by Labaton Sucharow than the duplication between Labaton Sucharow's and Thornton's fee declarations.

Notwithstanding the foregoing, Labaton Sucharow acknowledges that it, as lead counsel, bore final responsibility to avoid errors in the Fee Petition that reasonably could be detected. *See* Goldsmith Dep. at 117:4-11. The double-counting in both pairs of fee declarations regrettably was not detected before the Fee Petition was filed. Upon learning of the double-counting, however, Labaton Sucharow disclosed it to the Court promptly, publicly, and candidly. *See* Goldsmith Dep. at 165:15-166:15.

D. Request No. 4 – Accuracy Of Fee Declaration Language

The language concerning "hourly rates" that was contained in the individual fee declarations was never intended to mislead the Court, but rather was intended to inform the Court that the hourly rates were the same as or materially similar to rates accepted by courts in other class action matters in which the Firms had filed fee petitions, and were not special rates

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Interrog. Resp. Nos. 19, 24, 31, 40. Lieff Cabraser did not send invoices for the hours worked by these two attorneys because Thornton paid the agency directly for their time. *See* LCHB Interrog. Resp. Nos. 19, 24, 38, 40.

for this action. *See* LS Interrog. Resp. Nos. 61, 71; LCHB Interrog. Resp. No. 63. For Labaton Sucharow and Lieff Cabraser, the fee petitions were also meant to impart that the same annual rates for each attorney and non-lawyer staff person listed therein are used in the lodestar reports for all fee petitions in a given year (typically for purposes of a lodestar cross-check). *Id.*; *see also* Rubenstein Decl. at 12 n.14.

Nonetheless, we recognize that the Court and perhaps others have interpreted this sentence in a manner other than as intended. In particular, we understand that the Court read this sentence to mean that the law firms' rates are billed to clients that pay for the firms' services on an hourly basis. Labaton Sucharow and Lieff Cabraser have in limited circumstances had clients who have paid by the hour that were actually billed at those rates, or the analogous rates in a given year, and the rates in question (or comparable rates in earlier years) were in fact the "regular" rates charged in such circumstances. *See* LS Interrog. Resp. Nos. 45, 46; Johnson Dep. at 53:13-16; Politano Dep. at 43:4-11; LCHB Interrog. Resp. Nos. 49, 54, 63; Heimann Dep. at 87:7-89:7; Chiplock Dep. at 194:24-198:5, 204:6-205:3. Therefore, even if the word "charged" were read in the literal fashion described above (rather than in the manner it was intended), the "hourly rates" sentence on its face is not misleading as to Labaton Sucharow and Lieff Cabraser. It nonetheless remains true that the overwhelming majority of these firms' clients (and all of Thornton's clients) retain the Firms' services on a contingency basis.

As concerns the language in Garrett Bradley's declaration that refers to the rates as those of attorneys and professional support staff "in my firm," Thornton responds that it did not intend through this language to suggest that all persons listed in the fee declaration were employees of Thornton. This language resulted from Thornton's use of a template declaration provided to all firms by Labaton Sucharow. Unfortunately, Thornton did not modify the template language

stating that all of the individuals listed in its fee petition were its own employees. As Thornton has acknowledged in its responses to the Special Master's inquiries and in depositions of its partners – *see, e.g.*, Garrett Bradley Dep. at 81:12-83:13 – it should have modified the language in the template Labaton Sucharow provided to make it more precise (for example, by inserting an additional phrase after "in my firm," such as "or performing work on behalf of my firm").

In an effort to avoid any potential confusion, misinterpretation, or perceived lack of transparency going forward, we recommend that counsel be encouraged to use the following revised and expanded language:

> The hourly rates for the attorneys and professional support staff in my firm, ***or performing work on behalf of my firm***, included in Exhibit A are the ~~same as my~~ firm's regular rates charged for their type of services ***in contingent-fee matters.*** ~~charged for their services, which~~ ***These rates (or materially similar rates)*** have been accepted ***by courts*** in other complex class actions ***for purposes of "cross-checking" lodestar against a proposed fee based on the percentage-of-fund method or determining a reasonable fee under the lodestar method.***
>
> ***Based on my knowledge and experience, these rates are within the range of rates normally and customarily charged in their respective cities by attorneys and professional support staff of similar qualifications and experience in cases similar to this litigation.***
>
> ***To the extent the firm represents clients in non-contingent/ hourly fee matters, these rates are also the regular rates that generally would be charged to those clients for services rendered. The firm's current clients, however, do not typically pay an hourly rate and instead retain the firm's services on a contingent-fee basis.***

This revised and expanded language is derived in part from the individual fee declarations submitted in the similar *Bank of New York Mellon* Indirect FX class action in which Lieff Cabraser and Thornton, but not Labaton Sucharow, were involved. *See* LCHB Interrog. Resp. No. 63; Chiplock Dep. at 195:14-202:22. The language is intended to clarify, among other

things, that the hourly rates used in connection with the lodestar cross-check of the requested fee—while fully supported, customary in the industry, and accepted by courts in other complex class actions—are used for all lodestar reports in a given year but are not typically billed to the firms' clients because the firms' clients do not typically pay by the hour. *See* Chiplock Dep. at 200:3-201:7, 208:15-209:18; Chiplock Dep. Ex. 2 (Lieff Cabraser fee declaration in *Bank of New York Mellon*); *see also* LS Interrog. Resp. Nos. 46 (setting forth rates charged to clients that paid by the hour), 71; LCHB Interrog. Resp. No. 63.

E. Request No. 5 – Factors To Consider In Setting Hourly Billing Rates Of Staff Attorneys

Labaton Sucharow submits that the appropriate factors and criteria law firm management should consider in setting hourly billing rates of "off-track" staff attorneys, including the Staff Attorneys referenced in the Fee Petition, are described in Labaton Sucharow's Responses to Interrogatory Nos. 44 and 45. *See also* Politano Dep. at 38:2-42:2.

Lieff Cabraser, for its response, refers to the response to Sections A and B above (and the testimony and discovery responses cited therein), in addition to the documents produced by Lieff Cabraser and the declaration by Professor Rubenstein.

Thornton, for its response, states that given the contingency nature of its work, Thornton does not set hourly billing rates annually or as a routine matter. *See* Thornton Interrog. Resp. Nos. 49, 51, 52, 55. In this case, Thornton used a rate of $425 per hour for the Staff Attorneys for whose labor and overhead it paid because that rate had been used and accepted by the court in *In re Bank of New York Mellon Corp.*, 12-MD-02335, S.D.N.Y., and because it was Thornton's understanding, from communications with co-counsel more than a year prior to the submission of the Fee Petition, that a rate of $425 per hour therefore would be reasonable to use in the State

Street Litigation. *See* Hoffman Dep. at 58:17-59:18; Garrett Bradley Dep. at 48:20-49:5; Thornton Interrog. Resp. Nos. 27, 52.

Thornton submits the following information concerning the hourly rate of Michael Bradley, the outside attorney who performed document review work on the matter, and for whose work Thornton used an hourly rate of $500 in its lodestar calculation. As Thornton has previously identified in its interrogatory responses, Mr. Bradley is an actively practicing, Massachusetts-admitted lawyer who occasionally performs work for Thornton and its clients. *See* Thornton Interrog. Resp. No. 45; Michael Bradley Dep. at 29:11-16. As detailed in his deposition and in Thornton's responses to interrogatories, Mr. Bradley is an experienced lawyer who has been practicing since 2005, including for the government and as a solo practitioner. *Id*. at 11:7-12:9. Michael Bradley is not an employee of the firm, but rather has provided legal services to the firm and its clients on occasion.

A need for Mr. Bradley's services arose in 2013, when the Firms began to receive documents in the State Street matter and, consequently, began staffing a document review. Garrett Bradley believed that Michael Bradley's experience as an attorney and his background, specifically his service as the former head of the Massachusetts Underground Economy Task Force, might make him particularly qualified to potentially provide a unique perspective on the documents he reviewed. As such, Garrett Bradley approached Michael Bradley, who agreed to assist Thornton with the document review. Garrett Bradley sought and received the approval of Michael Thornton, then-managing partner of Thornton, for this arrangement.

Michael Bradley was justified in requesting and receiving $500 per hour for his services. Michael Bradley Dep. at 28:17-29:5. Mr. Bradley and Garrett Bradley have testified that Michael Bradley's rate of $500 per hour was based on two key benchmarks. First, Michael Bradley had

been paid $450 per hour by a private client prior to beginning his work on the State Street matter.[5] Michael Bradley Dep. at 28:17-29:5. Second, Michael Bradley's $500 per hour rate was also benchmarked to his risk of receiving nothing for his time. Unlike in the case of his paying client, in the State Street matter Michael Bradley performed the work on a contingent basis, thus saving Thornton the upfront cost of paying him for his work, and taking on the risk that, if the case did not have a positive resolution for the Plaintiffs, he would not be compensated for his work. *See* Thornton Interrog. Resp. Nos. 43, 44; Michael Bradley Dep. at 28:17-29:5; Garrett Bradley Dep. at 53:22-54:10. Michael Bradley took this risk and performed work, without pay, for more than two years. Charging a slightly higher rate for Mr. Bradley's work than for the work of attorneys who were paid concurrently for their work accords with commonly accepted principles governing contingent fee matters. *See United States v. Overseas Shipholding Grp., Inc.*, 625 F.3d 1, 13 (1st Cir. 2010) (quoting *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (1st Cir. 1969)) ("[T]he fact that a fee arrangement is contingent upon success is a relevant factor in determining the appropriate fee level. The reason is that 'the fact that the attorney is willing to take an all-or-nothing-arrangement might justify a fee which is higher than the going hourly rate in the community'"); *see also* Restatement (Third) of the Law Governing Lawyers § 35, Comment c, "Reasonable contingent fees" (2000) ("A contingent fee may permissibly be greater than what an hourly fee lawyer of similar qualifications would receive for the same representation. A contingent-fee lawyer bears the risk of receiving no pay if the client loses and is entitled to compensation for bearing that risk.") *See also* Rubenstein Decl. at 30, n. 48.

[5] Indeed, Michael Bradley charged a private client $500 per hour in early 2017 as well. Michael Bradley Dep. at 16:17-17-3.

Finally, Thornton submits that, as his testimony and documents produced by Thornton demonstrate, Michael Bradley consistently reviewed documents in the Catalyst database over a two-year period. Mr. Bradley's work during this period totaled 449.1 hours. Thornton mistakenly undercounted this time in its lodestar chart, accounting for only 406.1 hours of his time. *See* Michael Bradley Dep. at 30:5-12; 55:13-56:10; 58:19-59:11; *see e.g.* TLF-SST-005020; TLF-SST-000588 – TLF-SST-000611; TLF-SST-010790; TLF-SST-010826; TLF-SST-010832; TLF-SST-013319.

F. Request No. 6 – Reasoning For Entering Into The Cost-Sharing Agreement In This Matter

Labaton Sucharow states that the principal reasons for entering into a cost-sharing agreement by which a firm employing staff attorneys invoices another firm for the work performed by one or more of those staff attorneys are to share costs and risk, so that the firm receiving and paying the invoices has "skin in the game" with respect to an ongoing and expensive project. Staff attorney cost-sharing is simply one example of the arrangements that law firms in multi-firm class actions make in an effort to share work, costs, and associated risk equitably. *See* Belfi Dep. at 50:19-51:16; LS Interrog. Resp. 30, 32 ; *see also* Chiplock Dep. at 127:11-128:16; Garrett Bradley Dep. at 43:4-13.

Here, as noted in No. 3 above, Labaton Sucharow entered into a cost-sharing agreement with Thornton in which Labaton Sucharow allocated certain Staff Attorneys to Thornton and invoiced Thornton on a monthly basis for the work those Staff Attorneys performed. While attorneys from both firms recall the cost-sharing arrangement, no one from either firm recalls an explicit agreement about how these hours would be accounted for on eventual fee declarations, which led to the reasonable assumptions and good-faith error described above.

Lieff Cabraser, for its part, assumed (like Thornton) that Thornton would include any Staff Attorney hours for which Thornton had borne financial responsibility, and thus the risk of non-payment, in its own lodestar report. LCHB Interrog. Resp. Nos. 34, 39, 40; Thornton Interrog. Resp. Nos. 31, 36. As noted above, four of the Staff Attorneys for whom Thornton shared financial responsibility with Lieff Cabraser were agency lawyers, for whom Thornton paid outside agencies directly. *See supra n.* 3, 4. Only two of the Staff Attorneys shared between Lieff Cabraser and Thornton were ordinarily paid directly by Lieff Cabraser. For just those two attorneys, therefore, Lieff Cabraser prepared invoices for the time to be reimbursed by Thornton (roughly 9 weeks' worth). *See supra* n. 4.

G. Request No. 7 – Recommendations On Best Practices

The Firms collectively submit the following recommendations that the Special Master may wish to include in his Report and Recommendation to the Court. Together we respectfully submit five global reforms that, taken together, will significantly reduce the likelihood of confusion, misinterpretation, or any perceived lack of transparency regarding counsel's disclosure concerning hourly rates, and will significantly reduce the likelihood of recurrence of errors of the kind found here. In addition, we submit individual policy changes that each firm will implement in order to further safeguard against the inadvertent errors that occurred in this case.

First, the Firms agree that, promptly after a court grants preliminary approval to a proposed settlement,[6] lead counsel shall commence or revisit a substantive dialogue with all

[6] *See* Goldsmith Dep. at 115:23-116:22 (116:17-22:"[I]n my mind, one of the reasons this happened is because you had a very large passage of time between the end of the review project and putting in the papers where the review project impacted the presentation."); 123:23-124:7 (preliminary approval is "the right time to do it because that's the time you have an actual settlement . . . . That is the point the lawyers are looking ahead to filing a settlement motion and

Footnote continued on next page

counsel in the case concerning protocols for reporting lodestar in a forthcoming petition for attorney's fees. The subjects of this dialogue shall include, without limitation, which law firms will submit an individual fee declaration; the hourly rates used for professionals and paraprofessionals; whether certain categories of time should be excluded in whole or in part; whether certain timekeepers should be excluded in whole or in part; and how time logged by staff attorneys or other attorneys engaged on a temporary basis will be reported. Lead counsel shall ensure that the lodestar reporting protocol is documented and circulated among all counsel, and that all counsel are in agreement before individual fee declarations are prepared and filed.[7]

Second, in cases where the costs of any staff may have been shared, lead counsel, upon receiving draft fee declarations from co-counsel, shall promptly circulate all such draft

Footnote continued from previous page
fee petition. So people are going to naturally have those issues in mind."), 124:8-18, 130:15-24; *see also* Chiplock Dep. at 174:24-176:17, 181:10-182:21 (testifying that significant and unusual factor here was passage of more than a year between (1) agreement in principle to settle litigation and discussions among counsel concerning lodestar reporting issues and (2) filing of fee petition).

[7] *See* Goldsmith Dep. at 122:4-127:3 (123:7-14: "[W]hen the court issues an order granting preliminary approval to the case, that should be the point, or at least the latest point, where all the counsel get together and discuss . . . how this is going to be handled."); Rogers Dep. at 105:12-15 ("[I]t probably would have been good for the three parties to have literally memorialized some kind of agreement."); Chiplock Dep. at 221:12-18 ("I think there should have been more coordination and communication amongst the firms before the individual fee declarations were submitted, in order to assure that we did not confuse the court."); Lesser Dep. at 90:13-15 ("Case of this size with this many firms, this number of attorneys involved, obviously, you can have better communication, more coordination . . . ."); Zeiss Dep. at 56:14-57:3 ("So now what I do is, when a settlement's passed to me, I ask our accounting department if there is any STA cost sharing, I speak with the litigation team, see if there's any STA cost sharing. . . . And then, if there is, yes, we talk internally about how we think it should be handled, and speak with the firms that are . . . sharing the costs and make sure we're all on the same page about how the time will be reported.").

declarations to all counsel before the fee petition is filed. All counsel shall review all the draft fee declarations closely and share any perceived errors or concerns with all other counsel.[8]

Third, each individual firm declaration submitted in support of a petition for attorney's fees shall include clear and accurate language concerning that firm's billing practices. For instance, the revised and expanded model language set forth in Section D above, or substantially similar language, will be used by the Firms in future fee applications. *See* Goldsmith Dep. at 126:3-11.

Fourth, the Firms agree that further direction from the presiding judge is necessary to ensure that all facts relevant to the court's analysis of a fee petition are brought to its attention. To that end, the firms suggest that the Special Master recommend that each judge presiding over a class action lawsuit draft a standing order that sets forth those facts which the presiding judge believes are important to his or her analysis of an eventual fee petition. Such direction would

[8] *See* Goldsmith Dep. at 125:4-9 ("Another issue that I would suggest or reform that I would suggest is that lead counsel, upon receiving drafts of all of the fee declarations from cocounsel, circulate them to all of the counsel in the case."), 125:18-24 ("What I would suggest going forward is that we particularly circulate them, everyone to everyone, so you've got multiple eyes, you got redundancy. And I think, again, it will prompt people to point out potential issues or problems."); *see* Johnson Dep. at 55:23-56:11 ("The second thing we have done is to work with Nicole Zeiss to expand the checklist that she uses for all settlements. In the past we focus[ed] that checklist on areas that we thought would potentially be more problematic, and those related primarily to expenses. We have now expanded that so that a cross check is done with all of the attorneys listed on the main fee application and any small fee declaration."); Chiplock Dep. at 159:5-18 ("So it was all there, all the hours were there, all the names were there, including names that appeared on more than one ledger. Had I seen the other two petitions and seen the overlapping names, . . . it might have spurred me to say, ' . . . I'm going to go back and make sure that we deleted the time we needed to delete before this petition goes in.'"), 225:8-13 ("I think there would have been a benefit to the people who had been involved in the nitty gritty of the litigation maybe being more involved in eyeballing the fee declarations."), 228:10-16 ("[O]nly one firm [Labaton] had access to all the fee declarations before they were filed. And if there was an opportunity to catch a mistake, that was it, in addition to the opportunities that I had and missed before my individual fee declaration was filed."); Lesser Dep. at 90:16-18 ("[A]s far as reviewing critical documents, build some more redundancy into the system so that things don't get missed.").

ensure that class counsel do not mistakenly fail to identify facts that the court wishes to consider, enable class counsel to staff each case according to that judge's preferences (if any), and encourage the compilation and recordation of relevant information from the beginning of the case. *See, e.g.*, Heimann Dep. at 91:17-100:20.

Fifth, the Firms recommend that in complex class cases involving multiple firms, where there is a leadership structure amongst counsel imposed, the firms should report their lodestar to lead counsel on at least a semi-routine basis for the lifetime of the case. While typical in the multi-district litigation ("MDL") context (and often made mandatory in MDL orders appointing a leadership structure or committee), this practice is less regularized in class cases that are not MDLs. While such exchange was done in this case on several occasions and on an ad-hoc basis, regulating this process will aid in the capturing and correcting of errors or inadvertent duplication between the Firms as to any of their shared Staff Attorneys. Accordingly, it may be beneficial to make such periodic reports amongst plaintiffs' counsel a more regular and required feature of complex class cases such as this one, particularly if any timekeepers are performing work for more than one firm, and for lead counsel to be more specifically tasked with implementing and enforcing this requirement (*i.e.*, in the order appointing lead counsel) in addition to its other functions.

In addition to the above global recommendations, to avoid possible double-counting clerical errors like the ones that occurred here, Labaton Sucharow has now adopted for all cases going forward the following policy to formalize its general practice for the reporting of staff attorney hours in a fee petition: In all future class actions in which Labaton Sucharow serves as lead or co-lead counsel, all hours billed by staff attorneys who are Labaton Sucharow employees will be reported to the court exclusively in Labaton Sucharow's individual fee declaration and

lodestar report, regardless of whether or to what extent costs relating to such staff attorney were paid or reimbursed by another law firm during the pendency of the case.[9] Lieff Cabraser, for its part, will follow the same practice going forward.

For its part, when it enters into cost-sharing arrangements by which non-employee attorneys have performed work on a case, Thornton will disclose the existence of such agreements to the court in its individual fee declaration.

These reforms will be effective because they are straightforward, easy to implement, and widely if not universally applicable to the Firms' class action matters. We respectfully submit them for the Special Master's and the Court's consideration.

Dated: August 1, 2017

Respectfully submitted,

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[9] *See* Johnson Dep. at 55:2-8 ("[W]e are now prohibiting the practice of allowing staff attorneys to work as Labaton employees and for their hourly rates to be reimbursed to us by another firm. So that is prohibited in all cases."); Goldsmith Dep. at 126:12-127:3 ("I think personally that our firm should have a specific policy going forward on how this will be done. . . . And the policy that I would advocate is that all Labaton Sucharow staff attorney time should be on the Labaton Sucharow lodestar."); *see also* Belfi Dep. at 55:2-15; G. Bradley Dep. at 78:17-79:1; Chiplock Dep. at 138:3-21; Lesser Dep. at 55:15-20; Rogers Dep. at 93:2-11; Sucharow Dep. at 26:7-15; Thornton Dep. at 74:16-75:6 (remarks of Special Master describing method of reporting staff attorney lodestar and cost-sharing consistent with this policy).

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EXHIBIT H

EXHIBIT I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

EXPERT DECLARATION OF WILLIAM B. RUBENSTEIN

1. I am the Sidley Austin Professor of Law at Harvard Law School and a leading national expert on class action law generally and class action fees in particular. The law firm Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") has retained me to provide my expert opinion on several aspects of the fee petition that Counsel[1] submitted in this matter in September 2016, as corrected for the subsequently-found accounting errors. After setting forth my qualifications to serve as an expert and disclosing my prior relationship to this case and these firms (Part I, *infra*),[2] I provide the Special Master with empirical data and policy analysis to support the following four opinions relevant to analysis of the reasonableness of Counsel's 2016 fee request:

- ***Counsel's fee approach is the most widely used.*** (Part II, *infra*). Counsel's fee petition employed a percentage approach, provided the Court with information about their lodestar for cross-check purposes, and addressed a series of factors that courts have deemed relevant to the reasonableness inquiry. The percentage approach with a lodestar cross-check is the approach that courts most frequently use to assess the reasonableness of fee requests in common fund class action cases. It improves on the percentage approach standing alone (which could lead to a windfall for counsel) by making a rough comparison of the fee sought to

[1] Lead Counsel Labaton Sucharow LLP ("Labaton Sucharow") filed the fee petition for all the firms in the case. *See* Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 102) at 2. In the accompanying brief, Lead Counsel specifies that, in addition to its firm, the term "Plaintiffs' Counsel" encompassed five other firms. *See* Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs (ECF No. 103-1) at 8 n.2. The total lodestar in the case, however, encompasses work from three additional firms, or nine in all. *See* Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-To Motion for Final Approval of Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for An Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, Ex. 24 (ECF No. 104-24) at 2 (Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards). This Declaration uses the term "Counsel" as a short-hand reference to all of these firms.

[2] I typically provide a short synopsis of the litigation in my expert reports, but given the post-hoc nature of this report, I have not done so here.

counsel's time in the case. Simultaneously, it improves on the lodestar approach standing alone (which could bog the court down in review of counsel's time records) by enabling a check on the percentage approach without requiring an extensive audit of counsel's hours and rates.

- ***Counsel's billing rates were reasonable.*** (Part III, *infra*). Counsel's fee petition supplied the Court with billing rates for all professional time-keepers. Three sets of comparison data support the conclusion that the rates employed were reasonable: *first*, the rates are consistent with rates that courts in this community have awarded in approving class action fee petitions in recent years; *second*, Counsel's rates fall far below the court-approved rates charged by large corporate firms in bankruptcy cases in this market; and *third,* the blended billing rate for the entire case is consistent with blended billing rates in court-approved fee petitions in class action settlements in this community and in $100-$500 million cases throughout the country.

- ***Counsel appropriately billed non-partnership-track attorneys at market rates and the billing rates employed were reasonable.*** (Part IV, *infra*). Counsel employed non-partnership track attorneys to perform work such as document review and analysis. An empirical analysis of 12 recent cases in which courts have approved fee petitions containing rates for "contract" or "staff" attorneys shows that Counsel's rates for these non-partnership track attorneys are unexceptional: Counsel's blended rate is within pennies of the comparison set's average rate. Public policy also supports Counsel's billing of these non-partnership track attorneys at market rates, not cost, as empirical evidence shows that these attorneys were well-qualified for the legal work that they undertook and as billing at market rates is consistent with how law firms in the private market bill such attorneys, complies with the ABA's suggested ethical approach, and provides the right incentives for plaintiff firms.

- ***Counsel's fee was reasonable, as evidenced by the modest size of the lodestar multiplier***. (Part V, *infra*). The Court-awarded fee embodied a lodestar multiplier (based on Counsel's corrected lodestar) of 2.01. Three sets of data support the reasonableness of a fee that is roughly 2 times greater than Counsel's lodestar: it is below the mean for settlements of this size reported in the leading empirical analyses of class action fee awards, it is below the mean of a comparison group of $100-$500 million settlements, and it is fully consistent with the Court's characterization of the risks Counsel shouldered and the results that they achieved for the class herein.

I am aware of the fact that the fee petition in this case initially contained errors with regard to the lodestar cross-check information submitted to the Court. While those accounting errors were of

course unfortunate, their impact on the lodestar cross-check submission was relatively negligible and did not undermine the reasonableness of the fee Counsel proposed.

I.
BACKGROUND AND QUALIFICATIONS[3]

2. I am the Sidley Austin Professor of Law at Harvard Law School. I graduated from Yale College, *magna cum laude*, in 1982 and from Harvard Law School, *magna cum laude*, in 1986. I clerked for the Hon. Stanley Sporkin in the U.S. District Court for the District of Columbia following my graduation from law school. Before joining the Harvard faculty as a tenured professor in 2007, I was a law professor at UCLA School of Law for a decade, and an adjunct faculty member at Harvard, Stanford, and Yale Law Schools while a litigator in private practice during the preceding decade. I am admitted to practice law in the Commonwealth of Massachusetts, the State of California, the Commonwealth of Pennsylvania (inactive), the District of Columbia (inactive), the U.S. Supreme Court, six U.S. Courts of Appeals, and four U.S. District Courts.

3. My principal area of scholarship is complex civil litigation, with a special emphasis on class action law. I am the author, co-author, or editor of five books and more than a dozen scholarly articles, as well as many shorter publications (a fuller bibliography appears in my c.v., which is attached as Exhibit A). Much of this work concerns various aspects of class action law. Since 2008, I have been the sole author of the leading national treatise on class action law, *Newberg on Class Actions*, and as of this summer, I have re-written from scratch the entire 10-volume treatise. In 2015, I wrote and published a 600-page volume (volume 5) of the Treatise on attorney's fees, costs, and incentive awards; this volume has already been cited in

[3] My full c.v. is attached as Exhibit A.

numerous federal court fee decisions. For five years (2007–2011), I published a regular column entitled "Expert's Corner" in the publication *Class Action Attorney Fee Digest*. My work has been excerpted in casebooks on complex litigation, as noted on my c.v.

4. My expertise in complex litigation has been recognized by judges, scholars, and lawyers in private practice throughout the country for whom I regularly provide consulting advice and educational training programs. For this and the past seven years, the Judicial Panel on Multidistrict Litigation has invited me to give a presentation on the current state of class action law at the annual MDL Transferee Judges Conference. The Ninth Circuit invited me to moderate a panel on class action law at the 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop. The American Law Institute selected me to serve as an Adviser on a Restatement-like project developing the *Principles of the Law of Aggregate Litigation*. In 2007, I was the co-chair of the Class Action Subcommittee of the Mass Torts Committee of the ABA's Litigation Section. I am on the Advisory Board of the publication *Class Action Law Monitor*. I have often presented continuing legal education programs on class action law at law firms and conferences.

5. My teaching focuses on procedure and complex litigation. I regularly teach the basic civil procedure course to first-year law students, and I have taught a variety of advanced courses on complex litigation, remedies, and federal litigation. I have received honors for my teaching activities, including: the Albert M. Sacks-Paul A. Freund Award for Teaching Excellence, as the best teacher at Harvard Law School during the 2011–2012 school year; the Rutter Award for Excellence in Teaching, as the best teacher at UCLA School of Law during the

2001–2002 school year; and the John Bingham Hurlbut Award for Excellence in Teaching, as the best teacher at Stanford Law School during the 1996–1997 school year.

6. My academic work on class action law follows a significant career as a litigator. For nearly eight years, I worked as a staff attorney and project director at the national office of the American Civil Liberties Union in New York City. In those capacities, I litigated dozens of cases on behalf of plaintiffs pursuing civil rights matters in state and federal courts throughout the United States. I also oversaw and coordinated hundreds of additional cases being litigated by ACLU affiliates and cooperating attorneys in courts around the country. I therefore have personally initiated and pursued complex litigation, including class actions.

7. I have been retained as an expert witness in roughly 70 cases and as an expert consultant in about another 25 cases. These cases have been in state and federal courts throughout the United States, most have been complex class action cases, and many have been MDL proceedings. I have been retained to testify as an expert witness on issues ranging from the propriety of class certification to the reasonableness of settlements and fees. I have been retained by counsel for plaintiffs, for defendants, for objectors, and by the judiciary: in 2015, the United States Court of Appeals for the Second Circuit appointed me to brief and argue for affirmance of a district court order that significantly reduced class counsel's fee request in a large, complex securities class action, a task I completed successfully when the Circuit summarily affirmed the decision on appeal. *See In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom. Berman DeValerio v. Olinsky*, 673 F. App'x 87 (2d Cir. 2016).

8. My past work encompasses prior *expert witness* work for and against a number of firms involved in this matter and current and past *legal work* on behalf of the Thornton Law Firm LLP (the "Thornton Fim"), including on an issue at the inception of this case. Specifically, in 2011, the Thornton Firm retained me to advise it on the representation of the class in this matter and the separate representation of the *qui tam* relators in actions against State Street and I worked with the firm in that capacity between February 24, 2011 and June 6, 2011. I am also currently assisting the Thornton Firm in a different complex litigation context, again on issues arising out of the representation of multiple parties that are un-related to the billing issues before the Special Master. Until Lieff Cabraser contacted me in March 2017 about the present retention, I had no other involvement in (or even knowledge of the progress of) this fee-related matter. The Thornton Firm has informed me that it has no objection to my appearing as an expert witness on the fee-related issues presently before the Special Master. I similarly believe that my duties to the Thornton Firm arising out of the unrelated 2011work on this case and my present work on an unrelated collateral matter do not interfere with my ability to provide my own independent expert opinions on the present fee-related matter, but I make this disclosure so that the Special Master has full information. Finally, as is more readily evident from the cases listed on my resume, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback LLP ("Keller Rohrback") have each previously retained me as an expert witness in class action cases. I have also been retained as an expert witness by parties adverse to the Lieff Cabraser firm, or to Plaintiffs' Steering Committees on which it served, or to its clients in about five cases and I worked as court-appointed counsel against a group of plaintiffs' firms, including Lieff Cabraser, arguing for affirmance of a reduced fee award in the Second Circuit, as referenced in the prior paragraph.

9. I have been retained in this case to provide an opinion concerning the issues set forth in the first paragraph, above. I am being compensated for providing this expert opinion. I was paid a flat fee in advance of rendering my opinion, so my compensation was in no way contingent upon the content of my opinion.

10. In analyzing these issues, I have discussed the case with the counsel who retained me. I have also reviewed documents from this and related litigations, a list of which is attached as Exhibit B. I have also reviewed the applicable case law and scholarship on the topics of this Declaration.

11. Additionally, my research assistants, under my direction, have compiled four sets of data relevant to my analysis and ultimate opinions:

- a data set of 20 cases reflecting billing rates that judges in the District of Massachusetts – and in Massachusetts state courts – have approved in ruling on class action fee requests in the past dozen years (Exhibit C);
- a data set of six fee petitions containing 169 rates utilized by corporate firms in bankruptcy cases that Massachusetts bankruptcy courts have approved in recent years (Exhibit D);
- a data set of 20 class action settlements with aggregate settlement values of $100-$500 million (Exhibit E);
- a data set of 12 class action cases in which courts throughout the country have approved fee petitions that contain billing rates for "contract lawyers" or "staff attorneys" in recent years (Exhibit F).

II.
COUNSEL'S FEE APPROACH IS THE MOST WIDELY USED APPROACH TO FEES IN COMMON FUND CLASS ACITONS

12. Counsel sought a fee of approximately $74.5 million (ECF No. 102 at 2) and they demonstrated the reasonableness of that request according to a percentage approach (with

multiple factors) and a lodestar cross-check. (ECF No. 103-1). Empirical evidence shows that this is the most common approach courts take to fees.[4]

13. Specifically, the most fine-grained data of fee awards demonstrates that courts use a pure lodestar approach in 9.6% of cases, a pure percentage approach in 37.8% of cases, and a mix of the two (typically, a percentage approach with a lodestar cross-check) in 42.8% of cases, with another 9.8% of cases employing some other method or not specifying which method.[5]

14. I explain in the *Newberg* treatise how these current practices developed.[6] After adoption of the current class action rule in 1966, courts tended to employ a percentage approach to fees, but a 1973 decision of the Third Circuit endorsed an hourly approach, labeling it the

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[4] It is also consistent with the law in the First Circuit. In reporting on First Circuit law in the *Newberg* treatise, I wrote:

1. *Percentage or lodestar fee method.* The First Circuit gives its district courts discretion as to whether to use a percentage or lodestar method.
2. *Reasonableness review criteria.* The First Circuit has not identified any particular list of factors for assessing the reasonableness of proposed percentage awards in common fund cases, instead holding that the district courts—when employing the percentage method—should award fees on an individualized, case-by-case basis. District courts in the First Circuit have sometimes utilized the multifactor tests used in the Second and Third Circuits and at other times have employed the Seventh Circuit's market mimicking approach.
3. *Lodestar cross-check.* The First Circuit has held that a lodestar cross-check is entirely discretionary.

5 William B. Rubenstein, Newberg on Class Actions § 15:96 (5th ed.) (2015) (footnotes omitted) (hereafter *Newberg on Class Actions*).

[5] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. Empirical Legal Stud. 248, 272 (2010) (hereafter "Eisenberg and Miller II")).

[6] 5 *Newberg on Class Actions, supra* note 4, at § 15:64.

"lodestar" method,[7] and many courts began to utilize that method. In response to concerns engendered by the lodestar method, the Third Circuit convened a Task Force consisting of a cross-section of lawyers, judges, and scholars, all with expertise in the area of class action attorney's fees, to develop – in a neutral, non-investigatory setting – a set of best practices.[8] The Task Force concluded that a (negotiated) percentage method was the preferable approach for fee awards in common fund cases and many courts subsequently moved toward a percentage approach to awarding fees in common fund cases. By 2004, the *Manual for Complex Litigation* stated that "[a]fter a period of experimentation with the lodestar method … the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases."[9] Yet, since the *Manual* made that statement, empirical evidence demonstrates that courts have moved to something of a hybrid: a percentage approach with a lodestar cross-check. Thus, in cases from 1993–2002, 56.4% of courts used the pure percentage, while in cases from 2003–2008 cases, only 37.8% did.[10] This is about a one-third decrease in the use of the pure percentage approach. The big gain was in courts' use of the mixed approach – it shot up about 75% from the first period to the second, growing from 24.3% of cases to 42.8% of cases.

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[7] *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp*., 487 F.2d 161, 168-69 (3d Cir. 1973).

[8] For a description of the Task Force's membership and methodology, see Report of the Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237, 253-54 (1985).

[9] Federal Judicial Center, *Manual for Complex Litigation, Fourth*, § 14.121 (2004) (citations omitted).

[10] *See* 5 *Newberg on Class Actions, supra* note 4, at § 15:67 (reporting on data from Eisenberg and Miller II, supra note 5, and Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. Empirical Legal Stud. 27, 52 (2004) (hereafter "Eisenberg and Miller I")).

15. This approach is favored because it improves on either approach standing alone.[11] The percentage approach without a lodestar cross-check could lead to counsel securing a windfall. A lodestar approach standing alone could engross the court in an unnecessary audit of counsel's hours and rates, as the entire fee turns on the specific time billed. By contrast, using a lodestar cross-check enables a court to make a rough estimate of counsel's lodestar for the sole purpose of ensuring against a windfall.[12] A review of counsel's lodestar is appropriate, but over-emphasis on it – especially in a case of this magnitude, involving so many lawyers throughout the country – could bog the court down in unnecessary detail.

16. In a recent case in the California Supreme Court, I submitted my own *amicus* brief advocating for the Court to encourage the use of a lodestar cross-check. The Court embraced my brief, writing the following:

> The utility of a lodestar cross-check has been questioned on the ground it tends to reintroduce the drawbacks the 1985 Task Force Report identified in primary use of the lodestar method, especially the undue consumption of judicial resources and the creation of an incentive to prolong the litigation. We tend to agree with the amicus curiae brief of Professor William B. Rubenstein that these concerns are likely overstated and the benefits of having the lodestar cross-check available as a tool outweigh the problems its use could cause in individual cases.
>
> With regard to expenditure of judicial resources, we note that trial courts conducting lodestar cross-checks have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to "focus on the general question of whether the fee award appropriately reflects the degree

[11] For a defense of the lodestar cross-check method, and a discussion of the points in this paragraph, see 5 *Newberg on Class Actions, supra* note 4, at § 15:86.

[12] Courts in nearly every Circuit have noted the summary nature of the lodestar cross-check. *See id.* at n.13 (collecting cases, including cases from within this Circuit) (citing, *inter alia*, *In re Tyco Intern., Ltd. Multidistrict Litigation*, 535 F. Supp. 2d 249, 273 (D.N.H. 2007) ("'The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting.'" (quoting *In re Rite Aid Corp. Securities Litigation*, 396 F.3d 294, 306, 60 Fed. R. Serv. 3d 851 (3d Cir. 2005), as amended, (Feb. 25, 2005))).

> of time and effort expended by the attorneys." 5 Newberg on Class Actions, supra, § 15:86, p. 331. . . The trial court in the present case exercised its discretion in this manner, performing the cross-check using counsel declarations summarizing overall time spent, rather than demanding and scrutinizing daily time sheets in which the work performed was broken down by individual task. Of course, trial courts retain the discretion to consider detailed time sheets as part of a lodestar calculation, even when performed as a cross-check on a percentage calculation.
>
> As to the incentives a lodestar cross-check might create for class counsel, we emphasize the lodestar calculation, when used in this manner, does not override the trial court's primary determination of the fee as a percentage of the common fund and thus does not impose an absolute maximum or minimum on the potential fee award. If the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment. Courts using the percentage method have generally weighed the time counsel spent on the case as an important factor in choosing a reasonable percentage to apply. (5 Newberg on Class Actions, supra, § 15:86, pp. 332–333. . .). A lodestar cross-check is simply a quantitative method for bringing a measure of the time spent by counsel into the trial court's reasonableness determination; as such, it is not likely to radically alter the incentives created by a court's use of the percentage method.[13]

17. In sum, the percentage approach with a lodestar cross-check is, empirically speaking, the fee method courts utilize most often in common fund cases, and they do so for sound policy reasons. The approach Counsel took in its fee petition in this case was therefore fully consistent with normal practice in common fund class actions.

18. Because Counsel submitted their lodestar for cross-check purposes, not for the purposes of setting an exact fee based on the lodestar, the error in their lodestar calculation does not mean that the fee awarded was necessarily in error: the lodestar was a means not an end. The critical question is the effect that the lodestar error had on the cross-check. As Counsel reported in correcting it, the lodestar error meant that their multiplier in the case was approximately 2 rather than 1.8 (ECF No. 116 at 3). As I discuss below, utilizing empirical

[13] *Laffitte v. Robert Half Intern. Inc.*, 376 P.3d 672, 687-88 (Cal. 2016) (some citations omitted).

evidence of multipliers, this difference in the context of this case was not significant (Part V, *infra*). This is not, of course, to excuse the mistake. It is, rather, to place the mistake in its proper context.

III.
COUNSEL'S BILLING RATES WERE REASONABLE

19. To investigate the reasonableness of Counsel's billing rates, I utilize empirical evidence to generate three independent comparison sets:

- I compare the hourly rates for each timekeeper in this case to hourly rates that courts in this District (and in Massachusetts state court) have awarded in approving class action fee petitions in recent years.

- I compare the hourly rates for each timekeeper in this case to the hourly rates that defense firms charge for similar work in this market, as evidenced by rates Massachusetts bankruptcy courts have approved in recent years.

- I compare the blended billing rate for this case to the blended billing rate of other class action cases in this District and to other class action cases involving $100-$500 million settlement funds.

20. I have chosen to compare Counsel's billing rates to rates other class action (and bankruptcy) courts have approved because it is my expert opinion that such court-sanctioned rates provide the best comparison group. The primary reason they are the best comparable evidence is that class action attorneys make a living getting paid by their clients through court-approved fee petitions;[14] thus the "market" rates for their services are generally the rates that

[14] Given this fact, I found unambiguous the statements in this case's fee declarations that the "hourly rates for the attorneys and professional support staff in my firm . . . are the same as my firm's regular rates charged for their services, which have been accepted in other complex class actions." *E.g.*, Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15 at ¶ 7 (Sept. 15, 2016). I read "regular rates charged" as meaning that these were rates submitted in class action fee petitions, a reading confirmed by the succeeding clause's statement that the rates had been "accepted [by courts] in other complex class actions."

courts approve for their services.[15] Other ways of assessing the reasonableness of the hourly rates in cross-check submissions include the following:

- Occasionally, lawyers will submit, and courts rely on, affidavits from other lawyers in the community about prevailing rates.[16] Such affidavits have the benefit of being sworn to under penalty of perjury, and therefore likely provide accurate reporting on the rates included in them, but they may not represent a fair cross-section of evidence given the manner in which they are produced.[17]

- Occasionally lawyers will present evidence collected from surveys such as the *National Law Journal* survey. A few courts have deemed survey evidence sufficient for lodestar cross-check purposes because the cross-check "does not involve bean counting or mathematical precision."[18] Nonetheless, survey evidence is notoriously unreliable for multiple reasons: (a) the survey drafters can skew answers – even inadvertently – simply in the way questions are drafted; (b) results are often reported by attorney type (junior associate, senior partner, etc.) and with bands of rates so that tailored comparisons are impossible; (c) survey respondents, unlike lawyers filing fee petitions, do not sign survey responses under the penalty of perjury; and (d) most problematically, surveys embody a selection bias in that they may neither be sent to nor responded to by an appropriate comparison group; this is particularly a problem in that (e) the nature, legitimacy, and transparency of the organization undertaking the survey – and the context in which the survey is taken – will have a significant effect

[15] For this reason, the Second and Ninth Circuit have criticized the Seventh Circuit's belief that there is some other market approach to class action attorney's fees. *See* 5 *Newberg on Class Actions*, *supra* note 4, at § 15:79 ("'[T]o the extent that a market analogy is on point, in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size.'") (quoting *Vizcaino v. Microsoft Corp*., 290 F.3d 1043, 1049–50 (9th Cir. 2002)).

[16] *See, e.g., Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) ("[E]vidence of prevailing market rates may include affidavits from other area attorneys.").

[17] *Cotton v. City of Eureka*, 889 F. Supp. 2d 1154, 1167 (N.D. Cal. 2012) (finding declarations from other attorneys unhelpful for being too general); *Wilhelm v. TLC Lawn Care, Inc*., No. CIV. A. 07-2465-KHV, 2009 WL 57133, at *5 (D. Kan. Jan. 8, 2009) (agreeing with defendant's contention that "the affidavits of other plaintiffs' attorneys should be disregarded because they are self-serving" and "contradict plaintiffs' other evidence").

[18] *In re Schering-Plough Corp*., No. CV 08-397 (DMC)(JAD), 2013 WL 12174570, at *28 n. 27 (D.N.J. Aug. 28, 2013), report and recommendation adopted sub nom. *In re Schering-Plough Corp. Enhance Sec. Litig*., No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013).

on who responds to the survey and how. Accordingly, courts are often quite skeptical of such evidence.[19]

- Occasionally courts rely on something called the *Laffey* Matrix[20] – particularly in fee-shifting cases in the District of Columbia – but this is a disfavored approach and one that I am quite critical of for a host of reasons.[21]

In short, as the goal of this endeavor is to ascertain proper billing rates for lawyers pursuing class action lawsuits, I agree with the many courts that have found that the best comparable evidence are rates that other courts have approved for class action work.[22]

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[19] *See In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig*., No. 06 C 7023, 2016 WL 4765679, at *14 (N.D. Ill. Sept. 13, 2016) (noting "skepticism" amongst courts about applying survey rates that fail to differentiate large and small firms); *Forkum v. Co-Operative Adjustment Bureau, Inc*., No. C 13-0811 SBA, 2014 WL 3101784, at *4 (N.D. Cal. July 3, 2014) (finding a fee survey "largely unhelpful in determining the reasonable hourly rates for the attorneys that worked on this case" because it is "not [a] reliable measure[] of rates in [the court's District] because [it] provide[s] no data on the prevailing hourly rates charged in this District"); *Lorik v. Accounts Recovery Bureau, Inc*., No. 1:13-CV-00314-SEB, 2014 WL 1256013, at *2–3 (S.D. Ind. Mar. 26, 2014) (criticizing the "fairly obvious facial weaknesses" in a fee survey, such as insufficient sample size, lack of detailed geographical differentiation, and response bias, and finding "[t]he customary and judicially preferred standard by which the reasonableness of hourly rates is measured ordinarily comes from [evidence of rates charges by] . . . other lawyers who regularly practice in a particular geographical area and who provide similar or comparable legal services"); *California Durham v. Cont'l Cent. Credit*, No. 07CV1763 BTM WMC, 2011 WL 6783193, at *2 n.1 (S.D. Cal. Dec. 27, 2011) (finding a fee survey "is of limited usefulness because [it] does not beak down the hourly rates by region within California").

[20] The matrix originated in *Laffey v. Northwest Airlines, Inc*., 572 F. Supp. 354 (D.D.C. 1983).

[21] *See* 5 *Newberg on Class Actions*, supra note 4, at § 15:43.

[22] *See, e.g., Van Horn v. Nationwide Prop. & Cas. Ins. Co*., 436 F. App'x 496, 498–99 (6th Cir. 2011) (noting that courts should determine reasonable hourly rates by looking to, *inter alia*, the rates used in analogous cases); *Plyler v. Evatt*, 902 F.2d 273, 277 & n.2 (4th Cir. 1990) (noting courts should weigh a fee applicant's hourly rates against the prevailing market rates in the relevant community, which looks to, *inter alia*, "attorneys' fee awards in similar cases"); *Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 262 (N.D. Cal. 2015) (noting evidence of prevailing market rates includes affidavits from area attorneys and "examples of rates awarded to counsel in previous cases"); *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F. Supp. 2d 732, 756 (S.D. Tex. 2008) (noting Fifth Circuit courts determine whether an hourly rate is reasonable by looking to affidavits from other attorneys in the community and "rates actually

Court-approved rates in Massachusetts class action cases

21. For purposes of this Declaration, I utilized a database of 481 fee rates contained in 20 class action fee petitions approved by federal and state courts in Massachusetts in recent years.[23] A list of these cases is attached as Exhibit C. For each timekeeper, my research assistants identified the timekeeper's initial year of admission to the bar either by using the information in the fee petition or, if the information was not listed therein, by examining the firm's website and/or the relevant state bar website. As the fee petition herein was submitted in 2016, we adjusted all hourly rates in prior cases to 2016 dollars using the U.S. Bureau of Labor CPI Inflation Calculator.[24] Once each timekeeper's experience level had been identified and all of the dollar amounts had been set at 2016 levels, we plotted the rates on an x-y axis, with the x-

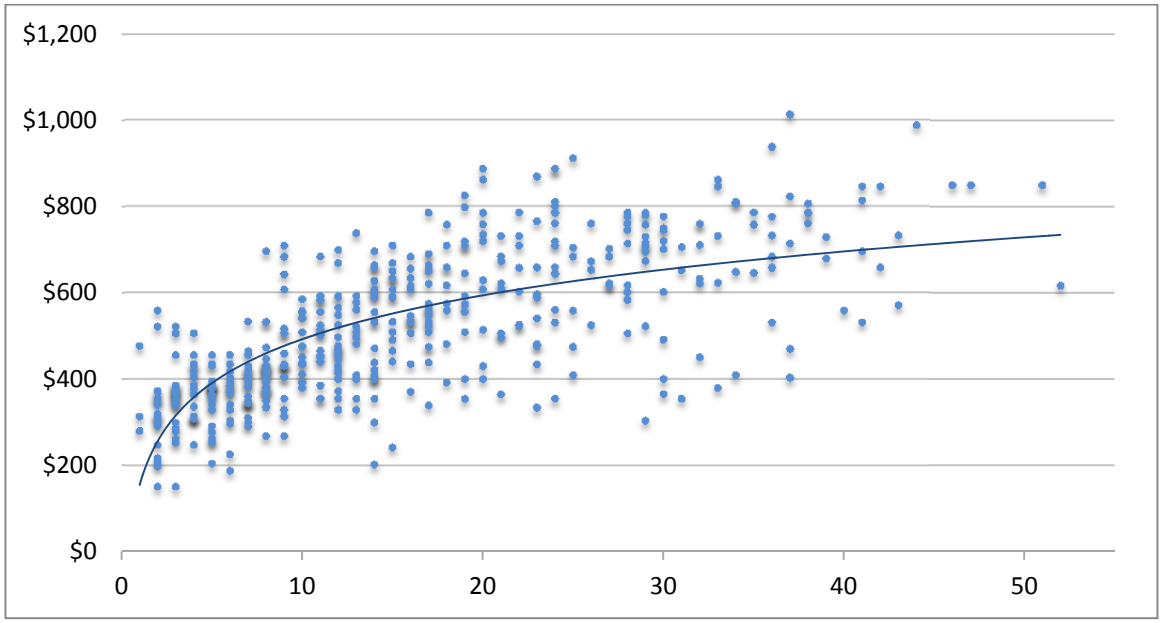
billed and paid in similar lawsuits"); *Faircloth v. Certified Fin. Inc*., No. CIV. A. 99-3097, 2001 WL 527489, at *10 (E.D. La. May 16, 2001) (looking to "decisions of other courts in this jurisdiction" to determine a proposed hourly rate was reasonable).

[23] I originally compiled this dataset for my 2016 work as an expert witness on attorney's fees in a case entitled, *Geanacopoulos v. Philip Morris USA Inc*., No. 98-6002-BLS1 (Mass. Super.). To do so, I searched for reported fee decisions of Massachusetts courts (state and federal) in class action cases. Employing a neutral search sequence on Westlaw, I identified a total of 54 decisions since January 1, 2005. I read through all 54 decisions; some were not class action cases, some were not fee decisions, and some did not enable a review of the utilized hourly rates. A total of 18 of the cases met all these criteria and became the baseline for my rate study. In some of these 18 cases, counsel sought an award lower than their total lodestar and/or the court made an award lower than the total lodestar. So long as the court did not express concern about counsel's proposed billing rates in affirming the fee request, I coded these rates as affirmed, or judicially-approved, rates and included them in the data set. If a court explicitly lowered a specific billing rate, I utilized the lower rate in the data set. For purposes of this Declaration, my research assistants updated that dataset in two ways: we added the rates employed in that prior case as the court approved that fee petition and we searched for newer cases using the same criteria and identified one such case to add to the database.

[24] This calculator can be found at this hyperlink: http://data.bls.gov/cgi-bin/cpicalc.pl. For each year prior to 2016, we calculated the differential between $1,000 in that prior year and $1,000 in 2016. We then used that differential to calculate the 2016 rate for the prior year. For example, the calculator showed that $1,000.00 in January of 2015 was equivalent to $1,013.73 in January of 2016. Accordingly, we multiplied all 2015 rates by 1.01373 to adjust them to 2016 values.

axis representing the years since the timekeeper's admission to the bar and the y-axis representing the timekeeper's hourly rate. The resulting scatter plot, set forth below in Graph 1, provides a snapshot of hourly rates in judicially-approved fee applications in Massachusetts; the blue logarithmic trend line sketches the trend of these rates across experience levels.

GRAPH 1
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTION CASES



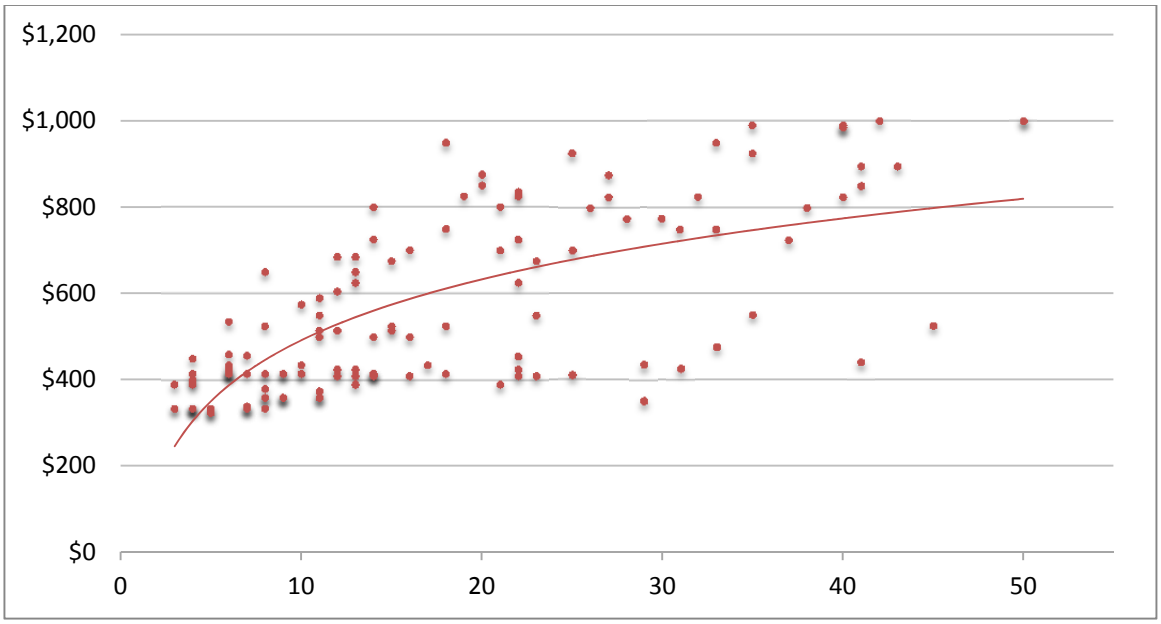
22. My research assistant next plotted the rates utilized by Counsel in this matter. Counsel supplied us with corrected lodestar data for three firms,[25] containing billing rates[26] for 103 lawyers. For the remaining six firms, we used the submissions they made at the time of the

[25] These are: Labaton Sucharow; Lieff Cabraser; and the Thornton Firm.

[26] Counsel utilize their current rates for all time spent in the litigation. The law supports using current rates as "an appropriate adjustment for delay in payment," *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). In my experience, this is typically how this issue is handled. It is my opinion that it is reasonable for Counsel, who had not been paid in the nearly six years that this case was pending, to use current hourly rates as an adjustment for the delay in payment.

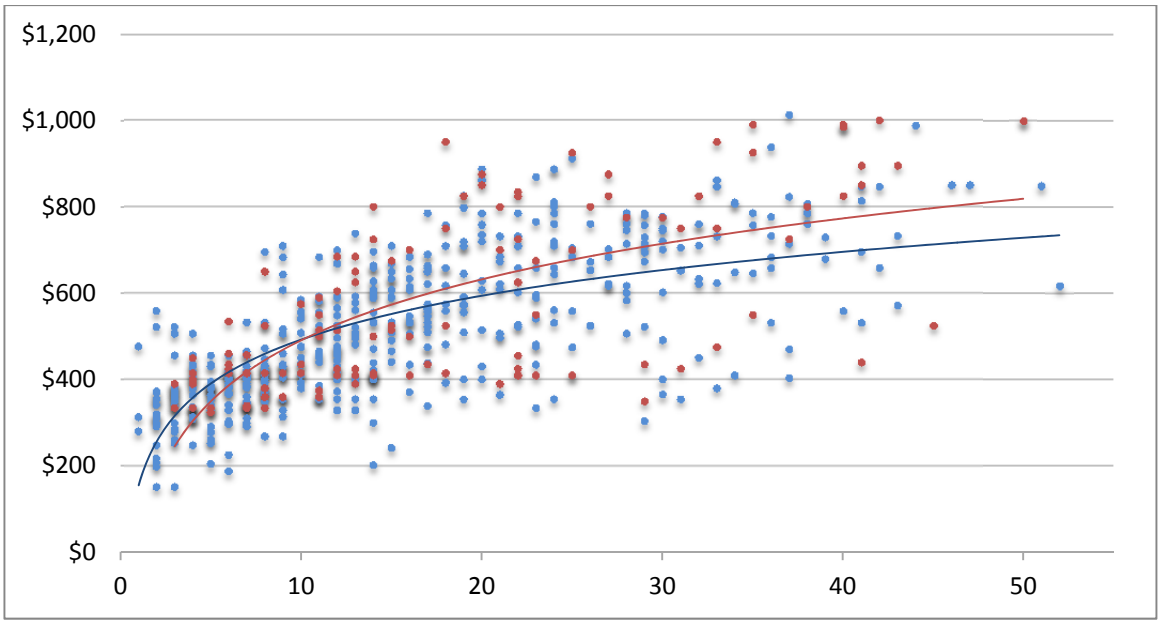
fee petition, which contained rates for 38 lawyers, bringing the total number in this data set to 141. After identifying the year of admission to the bar for each such timekeeper, we plotted these rates onto the same type of x-y axis that we had employed for the Massachusetts comparison set. The resulting scatter plot, set forth below in Graph 2, provides a snapshot of Counsel's billing rates, with the red logarithmic trend line sketching the trend of Counsel's rates across experience levels.

GRAPH 2
COUNSEL'S HOURLY RATES



23. Finally, we aggregated the data from Graphs 1 and 2 onto a single scatter plot that indicates the judicially-approved rates in Massachusetts with blue dots and a blue logarithmic line and Counsel's proposed rates with red dots and a red logarithmic line. These data appear in Graph 3, below.

GRAPH 3
COUNSEL'S HOURLY RATES COMPARED TO
HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS
IN MASSACHUSETTS CLASS ACTIONS



24. As Graph 3 demonstrates, the two logarithmic trend lines track one another closely. For lawyers with fewer than about 11 years of experience, Counsel's trend line lies below the trend line for rates in approved Massachusetts class action fee petitions, and then among more senior lawyers, Counsel's trend line rises slightly above the trend line of the comparison group. The proposed rates for 76 of Counsel's 141 lawyers (53.9%) are below the Massachusetts trend line. When the differences between the trend lines are compared at all 141 points, Counsel's trend line is, on average, 1.01% above the trend line for rates in approved Massachusetts class action fee petitions. This means that Counsel's proposed rates are, across the board, virtually identical to the rates that judges in Massachusetts have approved for similar work – other class action litigation – by similarly experienced attorneys.

25. The portion of Counsel's trend line that is above the comparison trend line exceeds the comparison by an average of 6.32%. That Counsel's trend line across their senior lawyers in this case is roughly 6% above the average lawyers' trend line makes perfect sense for two inter-related reasons. *First*, Labaton Sucharow, Lieff Cabraser, and Keller Rohrback are three of the leading class action firms in the United States, and the Thornton Firm is a premier firm in this market with a similar high profile throughout the country. The lawyers at these firms possess years of remarkable experience, have track records of superb achievement, and can be counted among the elite of the profession generally and this area of law specifically. As the comparison set picks up a range of approved class action cases in this community, it encompasses lawyers with far less expertise undertaking far more mundane matters. Indeed, *second*, one would expect higher than average billing rates in a case of this magnitude – a $300 million class action against one of the largest banks in the United States[27] and defended by one of the largest law firms in the United States.[28] Accordingly, if there is any surprise in the data it is only that the trend line across these senior lawyers is but 6% above the trend line of the wide swath of lawyers with different skill levels who are represented in the comparison group.

26. In comparing Counsel's rates to Boston rates, I have not adjusted the rates from the non-Boston firms in this case to Boston levels. I have not done so because this is a level of detail generally beyond what is undertaken for lodestar cross-check purposes.[29] In lodestar cross-check cases, courts occasionally cite the standard, borrowed from fee-shifting

[27] State Street Bank is #271 on the Fortune 500 in 2017. This data point is available at hyperlink: http://fortune.com/fortune500/state-street-corp/.

[28] Wilmer Hale is the 26th largest large firm by revenue in the United States. This data point is available at hyperlink: https://en.wikipedia.org/wiki/List_of_largest_law_firms_by_revenue.

[29] *See* note 12, *supra.*

jurisprudence, that rates should be "those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[30] I am not aware of any appellate decisions mandating this approach for lodestar cross-check purposes in common fund cases, and it is a step rarely undertaken.[31] Nonetheless, if I were to do so, the rates for most timekeepers would decrease: application of a judicially-endorsed approach to adjusting lawyer rates by geographic market[32] would require decreasing the San Francisco rates (Lieff Cabraser) by 8.3%, the New York rates (Labaton Sucharow) by 3.4%, and the Washington, D.C. rates (McTigue Law LLP, Zuckerman Spaeder LLP, Beins Axelrod PC) by 0.3%, while increasing the

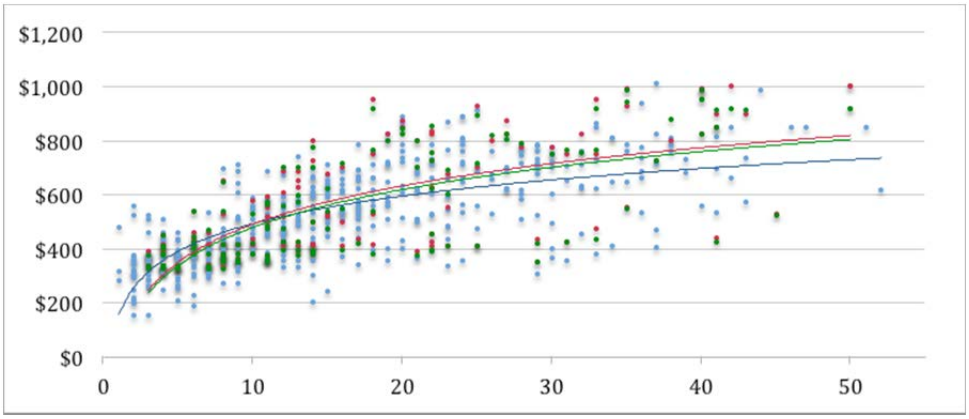
[30] *Martinez-Velez v. Rey-Hernandez*, 506 F.3d 32, 47 (1st Cir. 2007) ("Part of the fees calculation is the selection of an appropriate hourly rate for each attorney. Rates should be 'those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.'" (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984))).

[31] A search for the term "lodestar cross-check" in all federal cases returns 732 cases, while adding the phrase "and prevailing in the community for similar services" to the search returns a total of 51 cases. Of those 51 cases, only 11 involve a court holding that counsel should use local rates for purposes of a lodestar cross-check; nine of these 11 cases involve courts in the Eastern District of California insisting that lawyers from Los Angeles or San Francisco utilize Fresno rates. This means that outside of Fresno, a total of three of 732 reported cases (or .27%) in this search string insist upon geographic adjustment in the lodestar cross-check context (1.5% if Fresno is included). Even that miniscule percentage is likely exaggerated because there are thousands of lodestar cross-check decisions not reported on Westlaw and the reported cases likely select for aberrations of this type.

[32] I utilize the federal government's judicial differential methodology to adjust rates between different geographic markets, as set forth in *In re HPL Techs., Inc. Sec. Litig.*, 366 F. Supp. 2d 912, 921 (N.D. Cal. 2005). The federal government rates can be found at this hyperlink: http://www.uscourts.gov/careers/compensation/judiciary-salary-plan-pay-rates. The federal government increases the base rate by 26.73% for the Boston market, by 31.22% for the New York market, by 38.17% for the San Francisco market, by 27.10% for the D.C. market, by 24.24% for the Seattle market, and by 15.65% for the North/South Carolina market. This means that a base hourly rate of, say, $350/hour would be worth $443.56 in Boston ($350 x 1.2673) and $459.27 in New York ($350 x 1.3122). Therefore, one would have to multiply New York billing rates by 0.96579 ($459.27 x 0.96579=$443.56) to bring them down to Boston levels. The same conclusion can be achieved by the formula: <1-(1.2673/1.3122)>. I apply this approach for each market.

Seattle (Keller Rohrback) and South Carolina (Richardson Patrick Westbrook & Brickman LLC) rates by 2.0% and 9.6%, respectively. In Graph 4, below, these new geographically-adjusted rates are added to the prior graph: the Massachusetts-approved rates remain in blue, Counsel's unadjusted rates remain in red, and Counsel's rates adjusted to the Boston market appear in Celtic green. There is also a new green trend line for the geographically adjusted rates, but overall the rates drop so slightly that it is difficult to see the deviation of the green line's adjusted rates from the red line's unadjusted rates.

GRAPH 4
COUNSEL'S HOURLY RATES ADJUSTED TO BOSTON MARKET COMPARED TO COUNSEL'S UNADJUSTED HOURLY RATES AND HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS



Put most simply, adjusting for geography, Counsel's overall lodestar decreases by a total of 3.18%. While this means that Counsel's lodestar multiplier simultaneously increases, the increase is so small – from 2.01 to 2.07 – that the multiplier remains well within the range of reasonableness, as discussed below.[33] The small and immaterial effect of all this (geographic-

[33] *See* Part V, *infra.*

correction) work is precisely the reason that courts do not demand that it be undertaken in the cross-check setting.

27. In sum, the prior paragraphs demonstrate empirically that the rates that Counsel utilized in their lodestar cross-check submission in September 2016 were fully consistent with rates courts in Boston had explicitly or implicitly approved in awarding fees in class action cases.

Defense Firm Rates

28. Another relevant set of data concerning rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation,"[34] is the set of rates charged by large corporate defense firms. It is these large corporate firms – like Wilmer Hale in this case – that defend significant class action cases like this one; these firms therefore provide the services most comparable to the services that the plaintiffs' lawyers provide in these cases, utilizing reasonably comparable skills and calling on reasonably comparable experience.[35] Since corporate firms typically have private fee arrangements with their clients, the most public – and reliable – evidence of the rates that these firms charge appears in fee petitions submitted by them in bankruptcy cases.[36] For purposes of this Declaration, I

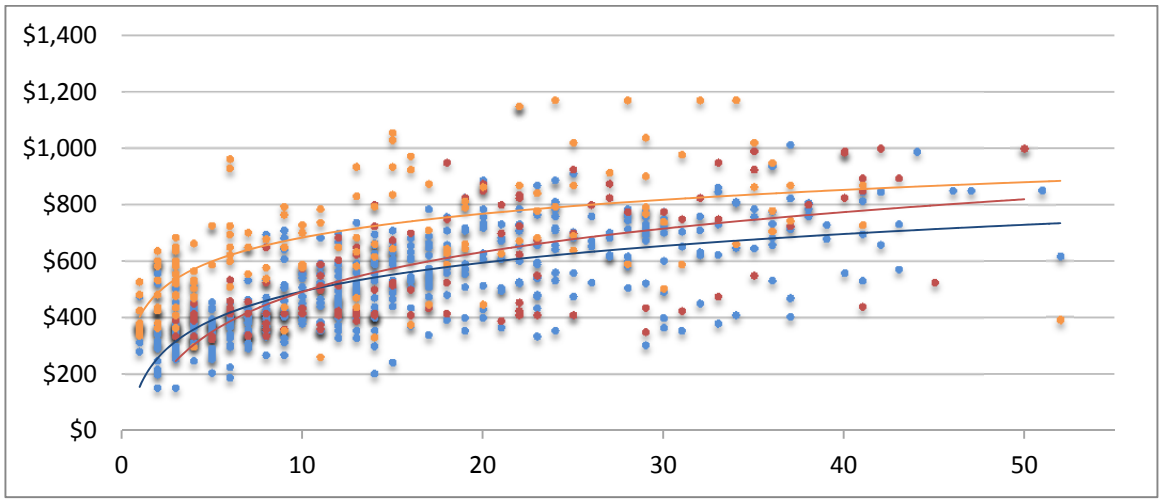
[34] *Martinez-Velez*, 506 F.3d at 47.

[35] There are of course some differences between plaintiff firms running large complex class actions and defendant firms defending such cases, but what is not different is that the two sets of firms are litigating the same cases against one another.

[36] I find these rates the most reliably comparable for four independent reasons. *First*, unlike rates reported in publications like the *National Law Journal*, these rates are provided lawyer-by-lawyer, not in ranges based on job types (like junior associates, or senior associates). *Second*, counsel seeking court approval for these rates swear to their accuracy. *Third*, in the bankruptcy context, the petitioning lawyers specifically represent that the rates they are using are the same rates that they use outside of the bankruptcy context. *See* 11 U.S.C. § 330(a)(3) (directing bankruptcy courts awarding attorneys' fees to take into account "all relevant factors, including . . . whether compensation is reasonable based on the customary compensation charged by

utilized a database of 169 fee rates contained in six fee petitions approved by bankruptcy courts in Massachusetts in five cases in recent years.[37] A list of those cases is attached as Exhibit D. Using orange dots and an orange logarithmic trend line, we plotted these rates (adjusted to 2016 dollars) onto the same x-y axis that contained the Massachusetts approved rates (in blue) and Counsel's rates (in red). The results are reflected in Graph 5, below.

GRAPH 5
CORPORATE FIRM RATES COMPARED TO BOTH HOURLY RATES IN JUDICIALLY-APPROVED FEE APPLICATIONS IN MASSACHUSETTS CLASS ACTIONS AND TO COUNSEL'S HOURLY RATES



comparably skilled practitioners in cases other than cases under this title"). *Fourth*, the type of work – providing legal services to a group of absent creditors in a piece of complex litigation – is generally analogous to what class action attorneys do.

[37] My research assistants consulted Chambers and Partners rankings to create a list of leading corporate firms. They then searched for these firms by name on Westlaw, filtering for cases in Bankruptcy Courts in the District of Massachusetts after 2009. When one of the firms on the Chambers list was named as counsel for one of the parties in a Westlaw case, my research assistants searched PACER for a fee petition filed by that firm. Four cases yielded five usable fee petitions; a fifth case, the Houghton Mifflin Harcourt bankruptcy, was found by searching for large bankruptcies in Massachusetts. My research assistants utilized every petition they found meeting these criteria.

As is visually evident, judicially-approved defense firm rates are significantly higher than the rates in judicially-approved fee applications for class action attorneys in Massachusetts and similarly far higher than Counsel's rates herein. Indeed, when the differences between the trend lines are compared at all 141 points in Counsel's fee petition, the defense firm rates are, on average, 37.53% above the trend line for Counsel's rates.

Blended Rate

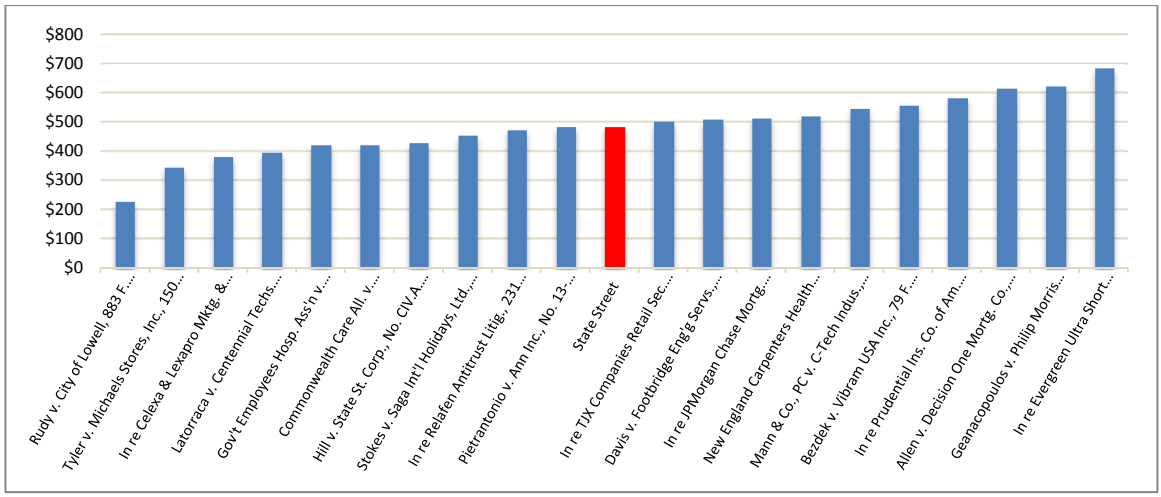
29. Counsel's blended billing rate[38] for the entire case – utilizing the corrected lodestars of the Labaton, Lieff Cabraser, and Thornton firms – is $484.70.[39] A quantitative analysis of this blended billing rate confirms its reasonableness.

30. To assess the reasonableness of the blended billing rate, I directed my research assistants to extract the blended billing rate from the 20 Massachusetts federal and state class action fee approvals that we had collected for this rate study. The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $227.51/hour to a high of $683.24/hour. The mean rate for these 20 cases is $484.05. The complete range of blended billing rates is reflected in Graph 6, below, with the blended billing rate in this case highlighted in red. As the Court can see, the blended billing rate in this case ($484.70) is just at the median of the graph and 65 cents, or 0.13%, above the mean, demonstrating its normalcy.

[38] A blended billing rate is captured by simply dividing the total lodestar by the total number of hours worked, thus providing the average hourly billing rate for the case across all timekeepers ranging from high-end partners to paralegals.

[39] If the rates are adjusted for geographic markets, *see supra* ¶ 26, the blended rate for this case falls to $469.29.

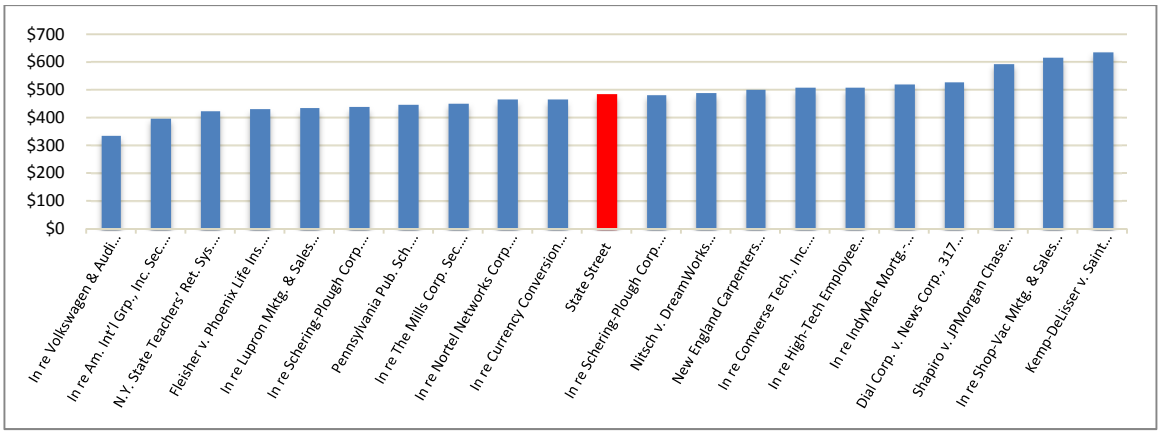
GRAPH 6
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN RECENT MASSACHUSETTS CLASS ACTION FEE APPROVALS



31. Because the blended billing rates in the Massachusetts cases tend to have emerged from smaller settlements (this is one of the largest settlements in Massachusetts history), I also compared the blended billing rate in this $300 million settlement to blended billing rates in 20 other settlements of comparable size ($100-$500 million). A list of those cases is attached as Exhibit E.[40] The blended billing rate (again adjusted to 2016 dollars) in these cases ranged from a low of $338.07/hour to a high of $637.67/hour. The mean rate for these 20 cases is $484.67. The complete range of blended billing rates is reflected in Graph 7, below, with the blended billing rate in this case highlighted in red.

[40] My research assistants compiled this list by searching on Westlaw for fee decisions in cases with settlement funds of this size that contained information about counsel's lodestar. Thus, they used search terms like "megafund" or "hundred million" to capture fund size and search terms like "lodestar" or "hours" to capture decisions that contained rate information. If the case had a fund of the right size, but the reported decision did not contain enough information about the fee petition, they tracked that down on PACER. No cases of the relevant size enabling reference to counsel's lodestar information were rejected.

GRAPH 7
COUNSEL'S BLENDED BILLING RATES COMPARED TO BLENDED BILLING RATES IN $100-$500 MILLION CLASS ACTION SETTLEMENTS



As is visually evident, the blended billing rate in this case ($484.70) is in the middle of the pack – right at the median in the graph – and but three cents above the mean, demonstrating its normalcy.

32. The reasonableness of Counsel's blended billing rate supports several further conclusions. The blended billing rate reflects the distribution of time between partners, associates, and paralegals. If only partners did this work, the blended billing rate would be very high, whereas if only paralegals billed, the blended billing rate would be very low. The fact that the blended billing rate in this case is at or below average across two comparison sets means that Lead Counsel distributed work among partners, associates, non-partnership track attorneys, and paralegals in an appropriate fashion. Given the slightly above-average rates of the most senior attorneys in this case noted above, it is a sign of good leadership that Lead Counsel was able to bring the blended rate in at this mean.

33. In sum, three separate empirical analyses (one with two sub-parts) support the conclusion that Counsel's rates are entirely normal: they are consistent with the mean for rates approved by courts in awarding fees in class actions in this community; they are below the rates charged by the defendant's firm to its paying clients for similar work; and the blended rate is consistent with rates in this community and for comparably-sized settlements.

IV.
COUNSEL APPROPRIATELY BILLED NON-PARTNER TRACK ATTORNEYS AT MARKET RATES AND THE RATES EMPLOYED WERE REASONABLE

34. Counsel employed non-partnership track attorneys to undertake some aspects of the class's legal work, particularly the review of documents. I have reviewed the rates at which these non-partnership track attorneys are included in the lodestar for cross-check purposes and make three factual observations about those rates, two empirical, one policy-oriented.

35. *First,* these are skilled attorneys. They are referred to as "contract" or "staff" attorneys solely by virtue of the fact that they are not on a partnership track at the relevant law firms, but are hired on more of an ad hoc basis.[41] The fact that these lawyers are not on a partnership track, standing alone, says nothing about their qualifications or about the type of work that they undertook. For purposes of this report, I reviewed Lieff Cabraser's slide presentation to the Special Master, which, as the Court knows, reflects the backgrounds and experiences of many of the non-partnership track attorneys who worked on this case. It appeared clear to me that these attorneys were very well qualified: they typically graduated from good law schools; have significant experience, including at the tasks to which they are assigned; and often

[41] While different firms call these attorneys different names – e.g., "contract attorneys" or "staff attorneys" – the defining characteristic of them is that they are not on a partnership track. Commentators often make the incorrect assumption that these attorneys are necessarily "temps." Many are salaried employees of the firms and work at these firms over many years.

work on a non-partnership track as a personal choice about how they wish their careers to proceed, not because they are unqualified for partnership track jobs. Moreover, the firms have convincingly attested that these attorneys did meaningful work.

36. *Second*, the rates at which counsel included non-partnership track attorneys in their lodestar for cross-check purposes are consistent with 57 rates that courts have explicitly or implicitly affirmed in approving fee petitions in 12 class action cases decided since 2013.[42] A list of those cases is attached as Exhibit F. The rates in those cases ranged from $250.00 to $550.00, with a mean (in 2016 dollars) of $379.53.[43] The blended rate for non-partnership attorneys in this case was $379.31. Thus the rate in this case is 22 cents, or 0.06%, below the mean of the comparison group.[44] Put simply, the billing rate for non-partnership track attorneys in this case is entirely normal.

[42] My research assistants compiled this list by searching for recent fee decisions involving staff or contract attorney rates, using a neutral search string in Westlaw. The search returned 29 cases. I read through all 29 cases. We then used the rates from any case with court-approved billing rates for contract or staff attorneys, accounting for experience, except for one case in which the contract attorneys simply staffed a calling center. This yielded 12 usable cases with 57 data points.

[43] Using a different data set, I recently reported a very similar numerical result in the Volkswagen "Clean Diesel" MDL. There, a set of 13 cases with 138 data points yielded an average contract attorney rate of $386.75 in 2017 dollars. *See* Declaration of William B. Rubenstein in Support of Plaintiffs' Motion for 3.0-Liter Attorneys' Fees and Costs at 21, *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case 3:15-md-02672-CRB (N.D. Cal.) (ECF No. 3396-2, Ex. B, filed June 30, 2017). Here, my 12 case data set's norm of $379.53 in 2016 dollars is the equivalent of $389.02 in 2017 dollars, which is virtually equivalent to the $386.75 I reported in VW (0.59% higher). Hence the two data sets reinforce one another.

[44] I removed Michael Bradley from this portion of my rate study since his hourly rate was set on a contingent basis, unlike the other non-partnership track attorneys. If he is included, the total for this case rises from $379.31 to $382.94, which is 0.90% above the mean of the comparison group.

37. *Third,*[45] the policy question of how to bill non-partnership track attorneys has arisen regularly in class suits as class counsel will often hire such lawyers to perform discrete functions in a particular case. Class counsel typically pay these attorneys at a lower hourly rate than the hourly rate they assign to them in the lodestar analysis in their fee petitions. To put numbers on this idea: the firms herein hired non-partnership track attorneys at rates ranging from $30 to $60/hour, then assigned these attorneys rates ranging from $335 to $440/hour[46] for purposes of the lodestar cross-check calculation based, for example, on the attorneys' number of years out of law school, their experience, and the type of work they performed. It is my expert opinion that several policy arguments support this approach:

- This is precisely the way in which firms bill legal services – including those of partners, associates, paralegals, and contract attorneys – to clients in the private market. For instance, a firm may pay a first-year associate a $150,000 annual salary and expect 2,000 hours of billable time in return. That means that the associate's salary breaks down to $75/hour. The associate likely costs the firm more than $75/hour because the firm has spent time recruiting and training the associate and because it pays for overhead, perhaps benefits, and other expenses associated with her work. Consequently, the associate who is receiving a $75/hour salary may actually cost the firm, say, $100/hour. But the firm then bills its clients, maybe, $375/hour for that associate's time, realizing a $275/hour, or 275%, profit for the associate's work. Regardless of the precise numbers that attach to the practice, the point is that law firms are in the business of making their partners a profit by having the partners bill the work done by their associates and paralegals to their clients at higher rates than they pay them. So long as a contract attorney is providing legal services to a client, a firm is entitled to bill her time to the client in the same manner.

- The ABA reached this conclusion nearly two decades ago, *see* ABA Formal Opinion 00-420, and I note as a matter of policy that courts have often cited to the ABA's guidance in concluding that class action firms "may charge a markup to cover overhead *and profit* if the contract attorney charges are billed as fees for legal services.[47] It makes sense that courts have so held because a contingent fee class action firm's lodestar operates in the same way as a private law firm's bill to its

[45] The language and citations in this and the following paragraphs are taken from 5 *Newberg on Class Actions*, supra note 4, at § 15:41.

[46] These ranges do not encompass Michael Bradley, as noted above. *See* note 44, *supra.*

[47] *In re AOL Time Warner S'holder Derivative Litig.,* No. 02 Civ. 6302(CM), 2010 WL 363113, at *26 (S.D.N.Y. Feb. 1, 2010) (emphasis added).

client: it embodies this basic profit for its partners and, in doing so, brings the lodestar in line with market rates.[48]

- Permitting class counsel to bill non-partnership track attorneys at market rates is cost-efficient: it encourages the firms to delegate work to attorneys who are likely billed at lower costs than are associates or partners. If class action firms could only bill non-partnership track attorneys at cost, they would likely transfer the work required to associates.

38. In sum, quantitative analysis of the rates paid non-partnership track attorneys shows that these rates are indistinguishable from the rates regularly approved by courts for such work and public policy strongly supports the manner in which Counsel billed non-partnership track attorneys.

V.
COUNSEL'S FEE WAS REASONABLE

39. Under the lodestar cross-check method, the measuring stick of the reasonableness of counsel's fee is the level of multiplier that it represents over the time they invested in the case. Counsel's fee embodied a lodestar multiplier of 2.01, or approximately 2.[49] Quantitatively, a 2

[48] The lodestar *multiplier* is meant to reward the class action firm over and above the market rate for undertaking a case on a contingency fee basis. Without such a multiplier, no firm would undertake contingent cases, as it would be far safer to simply reap the normal profit embodied in the lodestar but reflected, in a non-contingent case, in the bill to the client. *See, e.g.*, *Ketchum v. Moses* 17 P.3d 735, 742 (Cal. 2001) ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services. The implicit interest rate on such a loan is higher because the risk of default (the loss of the case, which cancels the debt of the client to the lawyer) is much higher than that of conventional loans. . . . A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." (internal quotation marks and citations omitted)).

[49] This is the multiplier for the full fee award to all counsel in the case divided by the hours of all counsel in the case. As noted above, *see supra* ¶ 26, if all hourly rates are adjusted to Boston rates, the multiplier rises to 2.07.

multiplier is consistent with multipliers that courts have previously approved in similar circumstances.

40. Three leading empirical studies of class action attorney's fees found the mean multipliers in all cases to be 1.42,[50] 1.65, [51] and 1.81,[52] while an older study found the mean multiplier to be 4.97.[53]

41. These studies also show that multipliers are higher in cases with larger returns, with the mean multipliers rising to 2.39 (in cases with recoveries over $44.6 million) in one study;[54] to 3.18 (in cases with recoveries over $175.5 million) in another study;[55] and to 4.5 (in cases with recoveries over $100 million) in a third study.[56]

42. In the set of 20 $100-$500 million settlements my research assistants assembled for purposes of this Declaration, the approved multipliers ranged from 0.92 to 8.3, with the average being 2.28. The 2.01 multiplier in this case is therefore 12% below the mean for

[50] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[51] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 833-34 (2010).

[52] Eisenberg & Miller II, *supra* note 5, at 272.

[53] Stuart J. Logan, Beverly C. Moore & Jack Moshman, *Attorney Fee Awards in Common Fund Class Actions*, 24 Class Action Rep. 167, 169 (2003) (hereafter "Logan").

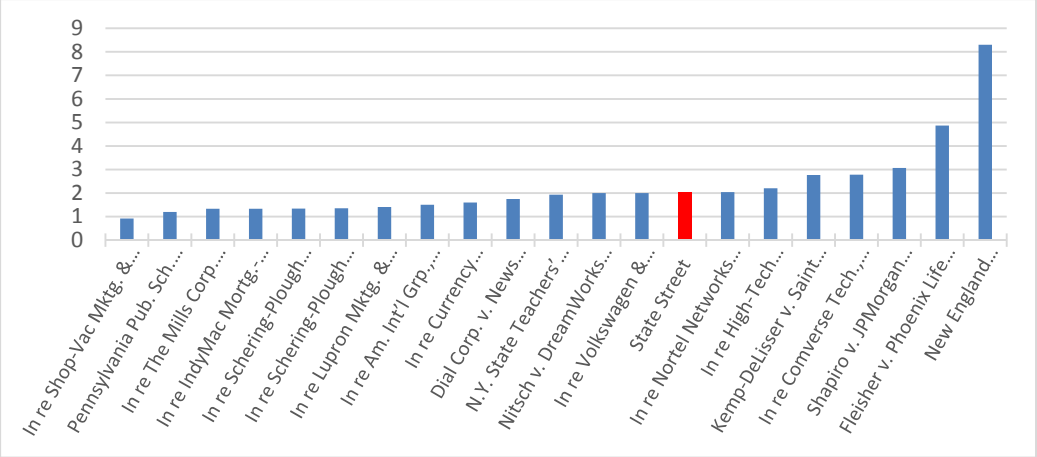
[54] 5 *Newberg on Class Actions, supra* note 4, at § 15:89 (reporting on data from William B. Rubenstein and Rajat Krishna, *Class Action Fee Awards: A Comprehensive Empirical Study* (draft on file with author)).

[55] Eisenberg & Miller II, *supra* note 5, at 274.

[56] Logan, *supra* note 53, at 167.

settlements of comparable size;[57] it appears a few cases higher than the median in Graph 8, below, but the only cases between this case and the median case have multiplier values of 2.0 rather than 2.01.

GRAPH 8
COURT-APPROVED MULTIPLIERS IN
$100-$500 MILLION-DOLLAR CASES



43. Beyond these bare statistics, case reports demonstrate that, in appropriate circumstances, courts have often approved percentage awards embodying lodestar multipliers far above the multiplier of 2 at issue here. In the leading Ninth Circuit opinion on point, for example, the Court established 25% as the benchmark percentage fee and approved a multiplier of 3.65, writing that this number "was within the range of multipliers applied in common fund cases"[58] and appending a list of such cases to its decision. Similarly, in Exhibit G, I provide a

[57] If Counsel's rates are adjusted to the Boston market and a 2.07 multiplier is employed, *see* ¶ 26, *supra,* that multiplier is 9.3% below the mean of the comparison set.

[58] *Vizcaino*, 290 F.3d at 1051; *see also Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) ("A 2.83 multiplier falls within the Ninth Circuit's presumptively acceptable range of 1.0–4.0. Given the complexity and duration of this litigation, the results obtained for the class, and the risk counsel faced in bringing the litigation, the Court finds the 2.83 multiplier appropriate." (citation omitted)).

list of 54 cases with multipliers over 3.5, 48 of which have multipliers of 4.00 or higher, and 31 of which have multipliers of 5.00 or higher. This list is not meant to be either exhaustive or representative of all multipliers. Rather, it demonstrates that courts approve percentage awards that embody multipliers well above the multiplier sought here in appropriate circumstances.

44. That such circumstances exist in this case is evident from this Court's conclusions at the fairness hearing:

> The amount awarded is about 1.8 times the lodestar. The lodestar is about $41 million. This is reasonable. In this case the plaintiffs' lawyers took on a contingent basis a novel, risky case. The result at the outset was uncertain, and it remained, until there was a settlement, uncertain. The plaintiffs' counsel were required to develop a novel case. This is not a situation where they piggybacked on the work of a public agency that had made certain findings. They were required to be pioneers to a certain extent. They were required to engage in substantial discovery that included production of nine million documents. They engaged in arduous arm's length negotiation that included 19 mediation sessions. They had to stand up on behalf of the class to experienced, able, energetic, formidable adversaries. They did that. And as I said, they generated a fair and reasonable return for the class, $300 million.[59]

The Court's finding regarding the risks that Counsel took and the results that they achieved are precisely the factors that support a multiplied fee award.[60] Nothing about the unfortunate miscalculation in Counsel's time-keeping displaces this conclusion, as the change in the proposed multiplier is simply from 1.8 to 2.

45. In sum, the requested multiplier is therefore above the mean for *all* cases but below the mean for *large* cases, it falls securely within the range of multipliers that courts have approved in appropriate circumstances in the past, and such circumstances existed in this case. As the purpose of the lodestar cross-check is to generate a multiplier enabling an assessment of

[59] Hearing Transcript, Nov. 2, 2016 (ECF No. 114) at 36.

[60] 5 *Newberg on Class Actions, supra* note 4, at § 15:87.

the reasonableness of the percentage award, a multiplier at this level fully supports the reasonableness of the fee the Court awarded Counsel in this matter.

* * *

46. I have testified that:

- Counsel's ***approach*** to its fee – presenting the Court with a requested percentage, providing information to enable a lodestar cross-check, and addressing a series of relevant factors – is the most common fee method and one normally used in large common fund cases like this one.

- Counsel's hourly ***billing rates*** are consistent with rates in class action cases in this community; lower than the rates charged by corporate firms in this market for similar work; and within pennies of the average blended hourly billing rates approved in other class action settlements in this community and in comparably-sized settlements.

- Counsel's approach to ***billing non-partnership track attorneys*** is consistent with prevailing law, policy, and ethical norms and the rates at which they bill these attorneys are fully consistent with the rates at which courts have approved contract and staff attorney work in other class action settlements.

- Counsel's ***multiplier*** of approximately 2 is below the mean for settlements of $100-$500 million and entirely reasonable given the unique risks that it shouldered and the superb results that it achieved for the class.

Executed this 31st day of July, 2017, in Los Angeles, California.

William B. Rubenstein

EXHIBIT A

PROFESSOR WILLIAM B. RUBENSTEIN

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Cambridge, MA 02138

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ACADEMIC EMPLOYMENT

HARVARD LAW SCHOOL, CAMBRIDGE MA

Sidley Austin Professor of Law — 2011-present
Professor of Law — 2007-2011
Bruce Bromley Visiting Professor of Law — 2006-2007
Visiting Professor of Law — 2003-2004, 2005-2006
Lecturer in Law — 1990-1996

Courses: Civil Procedure; Class Action Law; Remedies
Awards: 2012 Albert M. Sacks-Paul A. Freund Award for Teaching Excellence
Membership: American Law Institute; American Bar Foundation Fellow

UCLA SCHOOL OF LAW, LOS ANGELES CA

Professor of Law — 2002-2007
Acting Professor of Law — 1997-2002

Courses: Civil Procedure; Complex Litigation; Remedies
Awards: 2002 Rutter Award for Excellence in Teaching
Top 20 California Lawyers Under 40, *Calif. Law Business* (2000)

STANFORD LAW SCHOOL, STANFORD CA

Acting Associate Professor of Law — 1995-1997

Courses: Civil Procedure; Federal Litigation
Awards: 1997 John Bingham Hurlbut Award for Excellence in Teaching

YALE LAW SCHOOL, NEW HAVEN CT

Lecturer in Law — 1994, 1995

BENJAMIN N. CARDOZO SCHOOL OF LAW, NEW YORK NY

Visiting Professor — Summer 2005

LITIGATION-RELATED EMPLOYMENT

AMERICAN CIVIL LIBERTIES UNION, NATIONAL OFFICE, NEW YORK NY

Project Director and Staff Counsel — 1987-1995

Litigated impact cases in federal and state courts throughout the US. Supervised a staff of attorneys at the national office, oversaw work of ACLU attorneys around the country, and coordinated work with private cooperating counsel nationwide. Significant experience in complex litigation practice and procedural issues; appellate litigation; litigation coordination, planning and oversight.

HON. STANLEY SPORKIN, U.S. DISTRICT COURT, WASHINGTON DC

Law Clerk — 1986-87

PUBLIC CITIZEN LITIGATION GROUP, WASHINGTON DC

Intern — Summer 1985

EDUCATION

HARVARD LAW SCHOOL, CAMBRIDGE MA
J.D., 1986, *magna cum laude*

YALE COLLEGE, NEW HAVEN CT
B.A., 1982, *magna cum laude*
Editor-in-Chief, YALE DAILY NEWS

SELECTED COMPLEX LITIGATION EXPERIENCE

Professional Service and Highlighted Activities

♢ *Author,* NEWBERG ON CLASS ACTIONS (sole author of Fourth Edition updates since 2008 and sole author of all content in the Fifth Edition)

♢ *Speaker,* Judicial Panel on Multidistrict Litigation, Multidistrict Litigation (MDL) Transferee Judges Conference, Palm Beach, Florida (invited to present to MDL judges on recent developments in class action law and related topics (2010, 2011, 2012, 2013, 2014 (invited), 2015, 2016, 2017)

♢ *Special counsel,* Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ *Author, Amicus* brief filed in the United States Supreme Court on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ *Amicus curiae, Amicus* brief filed in – and approvingly cited by – California Supreme Court on proper approach to attorney's fees in common fund cases (*Laffitte v. Robert Half Int'l Inc*., 376 P.3d 672, 687 (Cal. 2016))

♢ *Adviser,* American Law Institute, *Project on the Principles of the Law of Aggregate Litigation*, Philadelphia, Pennsylvania

♢ *Advisory Board, Class Action Law Monitor* (Strafford Publications), 2008-

♢ *Co-Chair,* ABA Litigation Section, Mass Torts Committee, Class Action Sub-Committee, 2007

♢ *Planning Committee,* American Bar Association, Annual National Institute on Class Actions Conference, 2006, 2007

♢ "*Expert's Corner*" (Monthly Column)*, Class Action Attorney Fee Digest,* 2007-2011

Expert Witness

♢ Retained as an expert witness and submitted report explaining meaning of the denial of a motion to dismiss in American procedure to foreign tribunals (*In re Qualcomm Antitrust Matter,* declaration submitted to tribunals in Korea and Taiwan (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 3.0-liter settlement, referenced by court in awarding fees (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 3175924 (N.D. Cal. July 21, 2017))

♢ Retained as an expert witness concerning impracticability of joinder in antitrust class action (*In re Celebrex (Celecoxib) Antitrust Litigation,* Civ. Action No. 2-14-cv-00361 (E.D. Va. (2017))

♢ Submitted an expert witness declaration and deposed concerning impracticability of joinder in antitrust class action (*In re Modafinil Antitrust Litigation,* Civ. Action No. 2-06-cv-01797 (E.D. Pa. (2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in 2.0-liter settlement (*In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,* 2017 WL 1047834 (N.D. Cal., March 17, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Aranda v. Caribbean Cruise Line, Inc.,* 2017 WL 1368741 (N.D. Ill., April 10, 2017))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*McKinney v. United States Postal Service*, Civil Action No. 1:11-cv-00631 (D.D.C. (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Geancopoulos v. Philip Morris USA Inc.,* Civil Action No. 98-6002-BLS1 (Mass. Superior Court, Suffolk County))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request in sealed fee mediation (2016)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Gates v. United Healthcare Insurance Company,* Case No. 11 Civ. 3487 (S.D.N.Y. 2015))

♢ Retained as an expert trial witness on class action procedures and deposed prior to trial in matter

that settled before trial (*Johnson v. Caremark RX, LLC,* Case No. 01-CV-2003-6630, Alabama Circuit Court, Jefferson County (2016))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*In re High-Tech Employee Antitrust Litig*., 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015))

♢ Retained as an expert witness concerning adequacy of putative class representatives in securities class action (*Medoff v. CVS Caremark Corp.,* Case No. 1:09-cv-00554 (D.R.I. (2015))

♢ Submitted an expert witness declaration concerning reasonableness of proposed class action settlement, settlement class certification, attorney's fees, and incentive awards (*Fitzgerald Farms, LLC v. Chespeake Operating, L.L.C.,* Case No. CJ-2010-38, Dist. Ct., Beaver County, Oklahoma (2015))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request, referenced by court in awarding fees (*Asghari v. Volkswagen Grp. of Am., Inc*., 2015 WL 12732462 (C.D. Cal. May 29, 2015))

♢ Submitted an expert witness declaration concerning propriety of severing individual cases from class action and resulting statute of repose ramifications (*In re: American International Group, Inc. 2008 Securities Litigation,* 08-CV-4772-LTS-DCF (S.D.N.Y. (2015))

♢ Retained by Fortune Global 100 Corporation as an expert witness on fee matter that settled before testimony (2015)

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*In re: Hyundai and Kia Fuel Economy Litigation,* MDL 13-02424 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning reasonableness of attorney's fee request (*Ammari Electronics v. Pacific Bell Directory*, Case No. RG0522096, California Superior Court, Alameda County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Deutsche Bank Securities, Inc.,* Case No. CGC-10-497839, California Superior Court, San Francisco County (2014))

♢ Submitted an expert witness declaration and deposed concerning plaintiff class action practices under the Private Securities Litigation Reform Act of 1995 (PSLRA), as related to statute of limitations question (*Federal Home Loan Bank of San Francisco v. Credit Suisse Securities (USA) LLC,* Case No. CGC-10-497840, California Superior Court, San Francisco County (2014))

♢ Retained as expert witness on proper level of common benefit fee in MDL (*In re Neurontin Marketing and Sales Practice Litigation,* Civil Action No. 04-10981, MDL 1629 (D. Mass. (2014))

♢ Submitted an expert witness declaration concerning Rule 23(g) selection of competing counsel,

referenced by court in deciding issue (*White v. Experian Information Solutions, Inc.,* 993 F. Supp. 2d 1154 (C.D. Cal. (2014))

♢ Submitted an expert witness declaration concerning proper approach to attorney's fees under California law in a statutory fee-shifting case (*Perrin v. Nabors Well Services Co.,* Case No. 1220037974, Judicial Arbitration and Mediation Services (JAMS) (2013))

♢ Submitted an expert witness declaration concerning fairness and adequacy of proposed nationwide class action settlement (*Verdejo v. Vanguard Piping Systems,* Case No. BC448383, California Superior Court, Los Angeles County (2013))

♢ Retained as an expert witness regarding fairness, adequacy, and reasonableness of proposed nationwide consumer class action settlement (*Herke v. Merck,* No. 2:09-cv-07218, MDL Docket No. 1657 (*In re Vioxx Products Liability Litigation*) (E. D. La. (2013))

♢ Retained as an expert witness concerning ascertainability requirement for class certification and related issues (*Henderson v. Acxiom Risk Mitigation, Inc.,* Case No. 3:12-cv-00589-REP (E.D. Va. (2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and performing analysis of "net expected value" of settlement benefits, relied on by court in approving settlement (*In re Navistar Diesel Engine Products Liab. Litig.*, 2013 WL 10545508 (N.D. Ill. July 3, 2013))

♢ Submitted an expert witness declaration concerning reasonableness of class action settlement and attorney's fee request (*Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013))

♢ Submitted an expert witness declaration concerning propriety of preliminary settlement approval in nationwide consumer class action settlement (*Anaya v. Quicktrim, LLC,* Case No. CIVVS 120177, California Superior Court, San Bernardino County (2012))

♢ Submitted expert witness affidavit concerning fee issues in common fund class action (*Tuttle v. New Hampshire Med. Malpractice Joint Underwriting Assoc.,* Case No. 217-2010-CV-00294, New Hampshire Superior Court, Merrimack County (2012))

♢ Submitted expert witness declaration and deposed concerning class certification issues in nationwide fraud class action, relied upon by the court in affirming class certification order (*CVS Caremark Corp. v. Lauriello,* 175 So. 3d 596, 609-10 (Ala. 2014))

♢ Submitted expert witness declaration in securities class action concerning value of proxy disclosures achieved through settlement and appropriate level for fee award (*Rational Strategies Fund v. Jhung,* Case No. BC 460783, California Superior Court, Los Angeles County (2012))

♢ Submitted an expert witness report and deposed concerning legal malpractice in the defense of a class action lawsuit (*KB Home v. K&L Gates, LLP,* Case No. BC484090, California Superior Court, Los Angeles County (2011))

◊ Retained as expert witness on choice of law issues implicated by proposed nationwide class certification (*Simon v. Metropolitan Property and Cas. Co.,* Case No. CIV-2008-1008-W (W.D. Ok. (2011))

◊ Retained, deposed, and testified in court as expert witness in fee-related dispute (*Blue, et al. v. Hill*,Case No. 3:10-CV-02269-O-BK (N.D. Tex. (2011))

◊ Retained as an expert witness in fee-related dispute (*Furth v. Furth*, Case No. C11-00071-DMR (N.D. Cal. (2011))

◊ Submitted expert witness declaration concerning interim fee application in complex environmental class action (*DeLeo v. Bouchard Transportation,* Civil Action No. PLCV2004-01166-B, Massachusetts Superior Court (2010))

◊ Retained as an expert witness on common benefit fee issues in MDL proceeding in federal court (*In re Vioxx Products Liability Litigation*, MDL Docket No. 1657 (E.D. La. (2010))

◊ Submitted expert witness declaration concerning fee application in securities case, referenced by court in awarding fee (*In re AMICAS, Inc. Shareholder Litigation,* 27 Mass. L. Rptr. 568 (Mass. Sup. Ct. (2010))

◊ Submitted an expert witness declaration concerning fee entitlement and enhancement in non-common fund class action settlement, relied upon by the court in awarding fees (*Parkinson v. Hyundai Motor America*, 796 F.Supp.2d 1160, 1172-74 (C.D. Cal. 2010))

◊ Submitted an expert witness declaration concerning class action fee allocation among attorneys (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning settlement approval and fee application in wage and hour class action settlement (*Salvas v. Wal-Mart*, Civil Action No. 01-03645, Massachusetts Superior Court (2010))

◊ Submitted an expert witness declaration concerning objectors' entitlement to attorney's fees (*Rodriguez v. West Publishing Corp.,* Case No. CV-05-3222 (C.D. Cal. (2010))

◊ Submitted an expert witness declaration concerning fairness of settlement provisions and processes, relied upon by the Ninth Circuit in reversing district court's approval of class action settlement (*Radcliffe v. Experian Inform. Solutions Inc.*, 715 F.3d 1157, 1166 (9th Cir. 2013))

◊ Submitted an expert witness declaration concerning attorney's fees in class action fee dispute, relied upon by the court in deciding fee issue (*Ellis v. Toshiba America Information Systems, Inc.*, 218 Cal. App. 4th 853, 871, 160 Cal. Rptr. 3d 557, 573 (2d Dist. 2013))

◊ Submitted an expert witness declaration concerning common benefit fee in MDL proceeding in federal court (*In re Genetically Modified Rice Litigation*, MDL Docket No. 1811 (E.D. Mo. (2009))

♢ Submitted an expert witness declaration concerning settlement approval and fee application in national MDL class action proceeding (*In re Wal-Mart Wage and Hour Employment Practices Litigation*, MDL Docket No.1735 (D. Nev. (2009))

♢ Submitted an expert witness declaration concerning fee application in national MDL class action proceeding, referenced by court in awarding fees (*In re Dept. of Veterans Affairs (VA) Data Theft Litigation*, 653 F. Supp.2d 58 (D.D.C. (2009))

♢ Submitted an expert witness declaration concerning common benefit fee in mass tort MDL proceeding in federal court (*In re Kugel Mesh Products Liability Litigation*, MDL Docket No. 1842 (D. R.I. (2009))

♢ Submitted an expert witness declaration and supplemental declaration concerning common benefit fee in consolidated mass tort proceedings in state court (*In re All Kugel Mesh Individual Cases*, Master Docket No. PC-2008-9999, Superior Court, State of Rhode Island (2009))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Warner v. Experian Information Solutions, Inc.*, Case No. BC362599, California Superior Court, Los Angeles County (2009))

♢ Submitted an expert witness declaration concerning process for selecting lead counsel in complex MDL antitrust class action (*In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL Docket No. 1869 (D. D.C. (2008))

♢ Retained, deposed, and testified in court as expert witness on procedural issues in complex class action (*Hoffman v. American Express*, Case No. 2001-022881, California Superior Court, Alameda County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Salsgiver v. Yahoo! Inc.*, Case No. BC367430, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in wage and hour class action (*Voight v. Cisco Systems, Inc.*, Case No. 106CV075705, California Superior Court, Santa Clara County (2008))

♢ Retained and deposed as expert witness on fee issues in attorney fee dispute (*Stock v. Hafif,* Case No. KC034700, California Superior Court, Los Angeles County (2008))

♢ Submitted an expert witness declaration concerning fee application in consumer class action (*Nicholas v. Progressive Direct*, Civil Action No. 06-141-DLB (E.D. Ky. (2008))

♢ Submitted expert witness declaration concerning procedural aspects of national class action arbitration (*Johnson v. Gruma Corp.,* JAMS Arbitration No. 1220026252 (2007))

♢ Submitted expert witness declaration concerning fee application in securities case (*Drulias v. ADE Corp.,* Civil Action No. 06-11033 PBS (D. Mass. (2007))

◊ Submitted expert witness declaration concerning use of expert witness on complex litigation matters in criminal trial (*U.S. v. Gallion, et al*., No. 07-39 (E. D. Ky. (2007))

◊ Retained as expert witness on fees matters (*Heger v. Attorneys' Title Guaranty Fund, Inc.,* No. 03-L-398, Illinois Circuit Court, Lake County, IL (2007))

◊ Retained as expert witness on certification in statewide insurance class action (*Wagner v. Travelers Property Casualty of America*, No. 06CV338, Colorado District Court, Boulder County, CO (2007))

◊ Testified as expert witness concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corporate Derivative Litigation*, Case No. 01098905, California Superior Court, Santa Barbara Cty, CA (2006))

◊ Submitted expert witness declaration concerning fee application in common fund shareholder derivative case (*In Re Tenet Health Care Corp. Corporate Derivative Litigation*, Case No. CV-03-11 RSWL (C.D. Cal. (2006))

◊ Retained as expert witness as to certification of class action (*Canova v. Imperial Irrigation District*, Case No. L-01273, California Superior Court, Imperial Cty, CA (2005))

◊ Retained as expert witness as to certification of nationwide class action (*Enriquez v. Edward D. Jones & Co.,* Missouri Circuit Court, St. Louis, MO (2005))

◊ Submitted expert witness declaration on procedural aspects of international contract litigation filed in court in Korea (*Estate of Wakefield v. Bishop Han & Jooan Methodist Church* (2002))

◊ Submitted expert witness declaration as to contested factual matters in case involving access to a public forum (*Cimarron Alliance Foundation v. The City of Oklahoma City,* Case No. Civ. 2001-1827-C (W.D. Ok. (2002))

◊ Submitted expert witness declaration concerning reasonableness of class certification, settlement, and fees (*Baird v. Thomson Elec. Co.*, Case No. 00-L-000761, Cir. Ct., Mad. Cty, IL (2001))

Expert Consultant

◊ Provided expert consulting services to the ACLU on multi-district litigation issues arising out of various challenges to President Trump's travel ban and related policies (*In re American Civil Liberties Union Freedom of Information Act Requests Regarding Executive Order 13769*, Case Pending No. 28, Judicial Panel on Multidistrict Litigation (2017); *Darweesh v. Trump*, Case No. 1:17-cv-00480-CBA-LB (E.D.N.Y. (2017))

◊ Provided expert consulting services to law firm regarding billing practices and fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to law firm regarding fee allocation issues in nationwide class action (2016)

◊ Provided expert consulting services to the ACLU of Southern California on class action and procedural issues arising out of challenges to municipality's treatment of homeless persons with disabilities (*Glover v. City of Laguna Beach*, Case No. 8:15-cv-01332-AG-DFM (C.D. Cal. (2016))

◊ Retained as an expert consultant on class certification issues (*In re: Facebook, Inc., IPO Securities and Derivative Litigation*, No. 1:12-md-2389 (S.D.N.Y. 2015))

◊ Provided expert consulting services to lead class counsel on class certification issues in nationwide class action (2015)

◊ Retained by a Fortune 100 Company as an expert consultant on class certification issues

◊ Retained as an expert consultant on class action and procedure related issues (*Lange et al v. WPX Energy Rocky Mountain LLC*, Case No. #: 2:13-cv-00074-ABJ (D. Wy. (2013))

◊ Retained as an expert consultant on class action and procedure related issues (*Flo & Eddie, Inc., v. Sirius XM Radio, Inc.*, Case No. CV 13-5693 (C.D. Cal. (2013))

◊ Served as an expert consultant on substantive and procedural issues in challenge to legality of credit card late and over-time fees (*In Re Late Fee and Over-Limit Fee Litigation*, 528 F.Supp.2d 953 (N.D. Cal. 2007), *aff'd*, 741 F.3d 1022 (9th Cir. 2014))

◊ Retained as an expert on Class Action Fairness Act (CAFA) removal issues and successfully briefed and argued remand motion based on local controversy exception (*Trevino, et al. v. Cummins, et al.*,No. 2:13-cv-00192-JAK-MRW (C. D. Cal. (2013))

◊ Retained as an expert consultant on class action related issues by consortium of business groups (*In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico on April 20, 2010*, MDL No. 2179 (E.D. La. (2012))

◊ Provided presentation on class certification issues in nationwide medical monitoring classes (*In re: National Football League Players' Concussion Injury Litigation,* MDL No. 2323, Case No. 2:12-md-02323-AB (E.D. Pa. (2012))

◊ Retained as an expert consultant on class action related issues in mutli-state MDL consumer class action (*In re Sony Corp. SXRD Rear Projection Television Marketing, Sales Practices & Prod. Liability Litig.*, MDL No. 2102 (S.D. N.Y. (2009))

◊ Retained as an expert consultant on class action certification, manageability, and related issues in mutli-state MDL consumer class action (*In re Teflon Prod. Liability Litig.*, MDL No. 1733 (S.D. Iowa (2008))

◊ Retained as an expert consultant/co-counsel on certification, manageability, and related issues in nationwide anti-trust class action (*Brantley v. NBC Universal*, No.- CV07-06101 (C.D. Cal.

(2008))

♢ Retained as an expert consultant on class action issues in complex multi-jurisdictional construction dispute (*Antenucci, et al., v. Washington Assoc. Residential Partner, LLP, et al.,* Civil No. 8-04194 (E.D. Pa. (2008))

♢ Retained as an expert consultant on complex litigation issues in multi-jurisdictional class action litigation (*McGreevey v. Montana Power Company*, No. 08-35137, U.S. Court of Appeals for the Ninth Circuit (2008))

♢ Retained as an expert consultant on class action and attorney fee issues in nationwide consumer class action (*Figueroa v. Sharper Image*, 517 F.Supp.2d 1292 (S.D. Fla. 2007))

♢ Retained as an expert consultant on attorney's fees issue in complex class action case (*Natural Gas Anti-Trust Cases Coordinated Proceedings*, D049206, California Court of Appeals, Fourth District (2007))

♢ Retained as an expert consultant on remedies and procedural matters in complex class action (*Sunscreen Cases*, JCCP No. 4352, California Superior Court, Los Angeles County (2006))

♢ Retained as an expert consultant on complex preclusion questions in petition for review to California Supreme Court (*Mooney v. Caspari,* Supreme Court of California (2006))

♢ Retained as an expert consultant on attorney fee issues in complex common fund case (*In Re DietDrugs (Phen/Fen) Products Liability Litigation* (E. D. Pa. (2006))

♢ Retained as an expert consultant on procedural matters in series of complex construction lien cases (*In re Venetian Lien Litigation*, Supreme Court of the State of Nevada (2005-2006))

♢ Served as an expert consultant on class certification issues in countywide class action (*Beauchamp v. Los Angeles Cty. Metropolitan Transp. Authority*, (C.D. Cal. 2004))

♢ Served as an expert consultant on class certification issues in state-wide class action (*Williams v. State of California*, Case No. 312-236, Cal. Superior Court, San Francisco)

♢ Served as an exert consultant on procedural aspects of complex welfare litigation (*Allen v. Anderson*, 199 F.3d 1331 (9th Cir. 1999))

Ethics Opinions

♢ Retained to provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2017))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2013))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re*

Professional Responsibility Inquiries (2011))

♢ Provided expert opinion on issues of professional ethics in implicated by nationwide class action practice (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics implicated by complex litigation matter (*In re Professional Responsibility Inquiries* (2010))

♢ Provided expert opinion on issues of professional ethics in complex litigation matter (*In re Professional Responsibility Inquiries* (2007))

Publications on Class Actions & Procedure

♢ NEWBERG ON CLASS ACTIONS (sole author of supplements to 4th edition since 2008 and of 5th edition (2011-2017))

♢ *Profit for Costs*, 63 DEPAUL L. REV. 587 (2014) (with Morris A. Ratner)

♢ *Procedure and Society: An Essay for Steve Yeazell,* 61 U.C.L.A. REV. DISC. 136 (2013)

♢ *Supreme Court Round-Up – Part II*, 5 CLASS ACTION ATTORNEY FEE DIGEST 331 (September 2011)

♢ *Supreme Court Round-Up – Part I*, 5 CLASS ACTION ATTORNEY FEE DIGEST 263 (July-August 2011)

♢ *Class Action Fee Award* Procedures, 5 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2011)

♢ *Benefits of Class Action Lawsuits*, 4 CLASS ACTION ATTORNEY FEE DIGEST 423 (November 2010)

♢ *Contingent Fees for Representing the Government: Developments in California Law*, 4 CLASS ACTION ATTORNEY FEE DIGEST 335 (September 2010)

♢ *Supreme Court Roundup*, 4 CLASS ACTION ATTORNEY FEE DIGEST 251 (July 2010)

♢ *SCOTUS Okays Performance Enhancements in Federal Fee Shifting Cases – At Least In Principle,* 4 CLASS ACTION ATTORNEY FEE DIGEST 135 (April 2010)

♢ *The Puzzling Persistence of the "Mega-Fund" Concept*, 4 CLASS ACTION ATTORNEY FEE DIGEST 39 (February 2010)

♢ *2009: Class Action Fee Awards Go Out With A Bang, Not A Whimper*, 3 CLASS ACTION ATTORNEY FEE DIGEST 483 (December 2009)

♢ *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATTORNEY FEE DIGEST 407 (October 2009)

◊ *Supreme Court Preview*, 3 CLASS ACTION ATTORNEY FEE DIGEST 307 (August 2009)

◊ *Supreme Court Roundup*, 3 CLASS ACTION ATTORNEY FEE DIGEST 259 (July 2009)

◊ *What We Now Know About How Lead Plaintiffs Select Lead Counsel (And Hence Who Gets Attorney's Fees!) in Securities Cases*, 3 CLASS ACTION ATTORNEY FEE DIGEST 219 (June 2009)

◊ *Beware Of Ex Ante Incentive Award Agreements*, 3 CLASS ACTION ATTORNEY FEE DIGEST 175 (May 2009)

◊ *On What a "Common Benefit Fee" Is, Is Not, and Should Be*, 3 CLASS ACTION ATTORNEY FEE DIGEST 87 (March 2009)

◊ *2009: Emerging Issues in Class Action Fee Awards*, 3 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2009)

◊ *2008: The Year in Class Action Fee Awards*, 2 CLASS ACTION ATTORNEY FEE DIGEST 465 (December 2008)

◊ *The Largest Fee Award – Ever!*, 2 CLASS ACTION ATTORNEY FEE DIGEST 337 (September 2008)

◊ *Why Are Fee Reductions Always 50%?: On The Imprecision of Sanctions for Imprecise Fee Submissions*, 2 CLASS ACTION ATTORNEY FEE DIGEST 295 (August 2008)

◊ *Supreme Court Round-Up,* 2 CLASS ACTION ATTORNEY FEE DIGEST 257 (July 2008)

◊ *Fee-Shifting For Wrongful Removals: A Developing Trend?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 177 (May 2008)

◊ *You Cut, I Choose: (Two Recent Decisions About) Allocating Fees Among Class Counsel,* 2 CLASS ACTION ATTORNEY FEE DIGEST 137 (April 2008)

◊ *Why The Percentage Method?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 93 (March 2008)

◊ *Reasonable Rates: Time To Reload The (*Laffey*) Matrix,* 2 CLASS ACTION ATTORNEY FEE DIGEST 47 (February 2008)

◊ *The "Lodestar Percentage:" A New Concept For Fee Decisions?,* 2 CLASS ACTION ATTORNEY FEE DIGEST 3 (January 2008)

◊ *Class Action Practice Today: An Overview, in* ABA SECTION OF LITIGATION, CLASS ACTIONS TODAY 4 (2008)

◊ *Shedding Light on Outcomes in Class Actions*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20-59 (Joseph W. Doherty, Robert T. Reville, and Laura Zakaras eds. 2008) (with Nicholas M. Pace)

◊ *Finality in Class Action Litigation: Lessons From Habeas,* 82 N.Y.U. L. REV. 791 (2007)

◊ *The American Law Institute's New Approach to Class Action Objectors' Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 347 (November 2007)

◊ *The American Law Institute's New Approach to Class Action Attorney's Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 307 (October 2007)

◊ *"The Lawyers Got More Than The Class Did!": Is It Necessarily Problematic When Attorneys Fees Exceed Class Compensation?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 233 (August 2007)

◊ *Supreme Court Round-Up,* 1 CLASS ACTION ATTORNEY FEE DIGEST 201 (July 2007)

◊ *On The Difference Between Winning and Getting Fees,* 1 CLASS ACTION ATTORNEY FEE DIGEST 163 (June 2007)

◊ *Divvying Up The Pot: Who Divides Aggregate Fee Awards, How, and How Publicly?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 127 (May 2007)

◊ *On Plaintiff Incentive Payments,* 1 CLASS ACTION ATTORNEY FEE DIGEST 95 (April 2007)

◊ *Percentage of What?,* 1 CLASS ACTION ATTORNEY FEE DIGEST 63 (March 2007)

◊ *Lodestar v. Percentage: The Partial Success Wrinkle,* 1 CLASS ACTION ATTORNEY FEE DIGEST 31 (February 2007)(with Alan Hirsch)

◊ *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435 (2006) (excerpted in THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 447-449 (Richard A. Nagareda ed., 2009))

◊ *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 U.M.K.C. L. REV. 709 (2006)

◊ *On What a "Private Attorney General" Is – And Why It Matters*, 57 VAND. L. REV. 2129(2004) (excerpted in COMPLEX LITIGATION 63-72 (Kevin R. Johnson, Catherine A. Rogers & John Valery White eds., 2009)).

◊ *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865 (2002) (selected for the Stanford/Yale Junior Faculty Forum, June 2001)

◊ *A Transactional Model of Adjudication*, 89 GEORGETOWN L.J. 371 (2000)

◊ *The Myth of Superiority*, 16 CONSTITUTIONAL COMMENTARY 599 (1999)

◊ *Divided We Litigate: Addressing Disputes Among Clients and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997) *(*excerpted in COMPLEX LITIGATION 120-123 (1998))

Selected Presentations

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 1, 2017

♢ *Class Action Update,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2016

♢ *Judicial Power and its Limits in Multidistrict Litigation,* American Law Institute, Young Scholars Medal Conference, *The Future of Aggregate Litigation*, New York University School of Law, New York, New York, April 12, 2016

♢ *Class Action Update & Attorneys' Fees Issues Checklist,* MDL Transferee Judges Conference, Palm Beach, Florida, October 28, 2015

♢ *Class Action Law,* 2015 Ninth Circuit/Federal Judicial Center Mid-Winter Workshop, Tucson, Arizona, January 26, 2015

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2014

♢ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 29, 2013

♢ *Class Action Remedies,* ABA 2013 National Institute on Class Actions, Boston, Massachusetts, October 23, 2013

♢ *The Public Life of the Private Law: The Logic and Experience of Mass Litigation – Conference in Honor of Richard Nagareda,* Vanderbilt Law School, Nashville, Tennessee, September 27-28, 2013

♢ *Brave New World: The Changing Face of Litigation and Law Firm Finance*, Clifford Symposium 2013, DePaul University College of Law, Chicago, Illinois, April 18-19, 2013

♢ *Twenty-First Century Litigation: Pathologies and Possibilities: A Symposium in Honor of Stephen Yeazell,* UCLA Law Review, UCLA School of Law, Los Angeles, California, January 24-25, 2013

♢ *Litigation's Mirror: The Procedural Consequences of Social Relationships,* Sidley Austin Professor of Law Chair Talk, Harvard Law School, Cambridge, Massachusetts, October 17, 2012

♢ *Alternative Litigation Funding (ALF) in the Class Action Context – Some Initial Thoughts*, Alternative Litigation Funding: A Roundtable Discussion Among Experts, George Washington University Law School, Washington, D.C., May 2, 2012

♢ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Brooklyn Law School Faculty Workshop, Brooklyn, New York, April 2, 2012

◊ *The Operation of Preclusion in Multidistrict Litigation (MDL) Cases*, Loyola Law School Faculty Workshop, Los Angeles, California, February 2, 2012

◊ *Recent Developments in Class Action Law and Impact on MDL Cases,* MDL Transferee Judges Conference, Palm Beach, Florida, November 2, 2011

◊ *Recent Developments in Class Action Law,* MDL Transferee Judges Conference, Palm Beach, Florida, October 26, 2010

◊ *A General Theory of the Class Suit*, University of Houston Law Center Colloquium, Houston, Texas, February 3, 2010

◊ *Unpacking The "Rigorous Analysis" Standard,* ALI-ABA 12th Annual National Institute on Class Actions, New York, New York, November 7, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of California (Boalt Hall) School of Law Civil Justice Workshop, Berkeley, California, February 28, 2008

◊ *The Public Role in Private Law Enforcement: Visions from CAFA*, University of Pennsylvania Law Review Symposium, Philadelphia, Pennsylvania, Dec. 1, 2007

◊ *Current CAFA Consequences: Has Class Action Practice Changed?,* ALI-ABA 11th Annual National Institute on Class Actions, Chicago, Illinois, October 17, 2007

◊ *Using Law Professors as Expert Witnesses in Class Action Lawsuits,* ALI-ABA 10th Annual National
Institute on Class Actions, San Diego, California, October 6, 2006

◊ *Three Models for Transnational Class Actions*, Globalization of Class Action Panel, International Law Association 2006 Conference, Toronto, Canada, June 6, 2006

◊ *Why Create Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, UMKC Law Review Symposium, Kansas City, Missouri, April 7, 2006

◊ *Marks, Bonds, and Labels: Three New Proposals for Private Oversight of Class Action Settlements*, UCLA Law Review Symposium, Los Angeles, California, January 26, 2006

◊ Class Action Fairness Act, Arnold & Porter, Los Angeles, California, December 6, 2005

◊ ALI-ABA 9th Annual National Institute on Class Actions, Chicago, Illinois, September 23, 2005

◊ Class Action Fairness Act, UCLA Alumni Assoc., Los Angeles, California, September 9, 2005

◊ Class Action Fairness Act, Thelen Reid & Priest, Los Angeles, California, May 12, 2005

◊ Class Action Fairness Act, Sidley Austin, Los Angeles, California, May 10, 2005

♢ Class Action Fairness Act, Munger, Tolles & Olson, Los Angeles, California, April 28, 2005

♢ Class Action Fairness Act, Akin Gump Strauss Hauer Feld, Century City, CA, April 20, 2005

SELECTED OTHER LITIGATION EXPERIENCE

United States Supreme Court

♢ Co-counsel on petition for writ of *certiorari* concerning application of the voluntary cessation doctrine to government defendants (*Rosebrock v. Hoffman*, 135 S. Ct.1893 (2015))

♢ Authored *amicus* brief filed on behalf of civil procedure and complex litigation law professors concerning the importance of the class action lawsuit (*AT&T Mobility v. Concepcion,* No. 09-893, 131 S. Ct. 1740 (2011))

♢ Co-counsel in constitutional challenge to display of Christian cross on federal land in California's Mojave preserve (*Salazar v. Buono*, 130 S. Ct. 1803 (2010))

♢ Co-authored *amicus* brief filed on behalf of constitutional law professors arguing against constitutionality of Texas criminal law (*Lawrence v. Texas*, 539 U.S. 558 (2003))

♢ Co-authored *amicus* brief on scope of *Miranda* (*Illinois v. Perkins*, 496 U.S. 292 (1990))

Attorney's Fees

♢ Appointed by the United States Court of Appeals for the Second Circuit to argue for affirmance of district court fee decision in complex securities class action, with result that the Court summarily affirmed the decision below (*In re Indymac Mortgage-Backed Securities Litigation*, 94 F.Supp.3d 517 (S.D.N.Y. 2015), *aff'd sub. nom*., *Berman DeValerio v. Olinsky*, No. 15-1310-cv, 2016 WL 7323980 (2d Cir. Dec. 16, 2017))

♢ Served as *amicus curiae* and co-authored *amicus* brief on proper approach to attorney's fees in common fund cases, relied on by the court in *Laffitte v. Robert Half Int'l Inc*., 1 Cal. 5th 480, 504, 376 P.3d 672, 687 (2016).

Consumer Class Action

♢ Co-counsel in challenge to antenna-related design defect in Apple's iPhone4 (*Dydyk v. Apple Inc.,* 5:10-cv-02897-HRL, U.S. Dist. Court, N.D. Cal.) (complaint filed June 30, 2010)

♢ Co-class counsel in $8.5 million nationwide class action settlement challenging privacy concerns raised by Google's Buzz social networking program (*In re Google Buzz Privacy Litigation,* 5:10-cv-00672-JW, U.S. Dist. Court, N.D. Cal.) (amended final judgment June 2, 2011)

Disability

♢ Co-counsel in successful ADA challenge ($500,000 jury verdict) to the denial of health care in emergency room (*Howe v. Hull*, 874 F. Supp. 779, 873 F. Supp 72 (N.D. Ohio 1994))

Employment

♢ Co-counsel in challenges to scope of family benefit programs (*Ross v. Denver Dept. of Health*, 883 P.2d 516 (Colo. App. 1994)); *(Phillips v. Wisc. Personnel Com'n*, 482 N.W.2d 121 (Wisc. 1992))

Equal Protection

♢ Co-counsel in (state court phases of) successful challenge to constitutionality of a Colorado ballot initiative, Amendment 2 (*Evans v. Romer*, 882 P.2d 1335 (Colo. 1994))

♢ Co-counsel (and *amici*) in challenges to rules barring military service by gay people (*Able v. United States*, 44 F.3d 128 (2d Cir. 1995); *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994) (en banc))

♢ Co-counsel in challenge to the constitutionality of the Attorney General of Georgia's firing of staff attorney (*Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997))

Fair Housing

♢ Co-counsel in successful Fair Housing Act case on behalf of group home (*Hogar Agua y Vida En el Desierto v. Suarez-Medina*, 36 F.3d 177 (1st Cir. 1994))

Family Law

♢ Co-counsel in challenge to constitutionality of Florida law limiting adoption (*Cox v. Florida Dept. of Health and Rehab. Srvcs.*, 656 So.2d 902 (Fla. 1995))

♢ Co-authored *amicus* brief in successful challenge to Hawaii ban on same-sex marriages (*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993))

First Amendment

♢ Co-counsel in successful challenge to constitutionality of Alabama law barring state funding foruniversity student groups (*GLBA v. Sessions*, 930 F.Supp. 1492 (M.D. Ala. 1996))

♢ Co-counsel in successful challenge to content restrictions on grants for AIDS education materials (*Gay Men's Health Crisis v. Sullivan*, 792 F.Supp. 278 (S.D.N.Y. 1992))

Landlord / Tenant

♢ Lead counsel in successful challenge to rent control regulation (*Braschi v. Stahl Associates Co.*, 544 N.E.2d 49 (N.Y. 1989))

Police

♢ Co-counsel in case challenging DEA brutality (*Anderson v. Branen*, 27 F.3d 29 (2nd Cir. 1994))

Racial Equality

♢ Co-authored *amicus* brief for constitutional law professors challenging constitutionality of Proposition 209 *(Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997))

SELECTED OTHER PUBLICATIONS

Editorials

♢ *Follow the Leaders*, NEW YORK TIMES, March 15, 2005
♢ *Play It Straight*, NEW YORK TIMES, October 16, 2004
♢ *Hiding Behind the Constitution*, NEW YORK TIMES, March 20, 2004
♢ *Toward More Perfect Unions,* NEW YORK TIMES, November 20, 2003 (with Brad Sears)
♢ *Don't Ask, Don't Tell. Don't Believe It*, NEW YORK TIMES, July 20, 1993
♢ *AIDS: Illness and Injustice*, WASH. POST, July 26, 1992 (with Nan D. Hunter)

BAR ADMISSIONS

♢ Massachusetts (2008)
♢ California (2004)
♢ District of Columbia (1987) (inactive)
♢ Pennsylvania (1986) (inactive)

♢ U.S. Supreme Court (1993)

♢ U.S. Court of Appeals for the First Circuit (2010)
♢ U.S. Court of Appeals for the Second Circuit (2015)
♢ U.S. Court of Appeals for the Fifth Circuit (1989)
♢ U.S. Court of Appeals for the Ninth Circuit (2004)
♢ U.S. Court of Appeals for the Eleventh Circuit (1993)
♢ U.S. Court of Appeals for the D.C. Circuit (1993)

♢ U.S. District Courts for the Central District of California (2004)
♢ U.S. District Court for the District of the District of Columbia (1989)
♢ U.S. District Court for the District of Massachusetts (2010)
♢ U.S. District Court for the Northern District of California (2010)

EXHIBIT B

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT B
Partial List of Documents Reviewed by Professor Rubenstein
(other than case law and scholarship on the relevant issues)

1. Class Action Complaint, ECF No. 1
2. Amended Class Action Complaint, ECF No. 10
3. Memorandum of Law in Support of Plaintiff's Assented-to Motion for Appointment of Interim Lead Counsel and Liaison Counsel for the Proposed Class, ECF No. 8
4. Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 19
5. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, ECF No. 22
6. Reply Memorandum in Support of Defendant's Motion to Dismiss, ECF No. 29
7. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, ECF No. 33
8. Stipulation and Joint Motion to Continue Stay, ECF No. 66
9. Stipulation and Joint Motion to Continue Stay, ECF No. 71
10. Stipulation and Joint Motion to Continue Stay, ECF No. 75
11. Stipulation and Agreement of Settlement, ECF No. 89
12. Memorandum of Law in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 91
13. Declaration of Lawrence A. Sucharow in Support of Plaintiffs' Assented-to Motion for Preliminary Approval of Proposed Class Settlement, Preliminary Certification of Settlement Class, and Approval of Proposed Form and Manner of Class Notice, ECF No. 92
14. Exhibit A: Letter Dated March 18, 2011, ECF No. 92-1
15. Exhibit B: Labaton Sucharow Firm Resume, ECF No. 92-2
16. Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement, ECF No. 97
17. Defendants' Memorandum in Support of Class Action Settlement, ECF No. 99
18. Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class, ECF No. 100
19. Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses of Service Awards to Plaintiffs, ECF No. 102
20. [Proposed] Memorandum of Law in Support of Lead Counsel's Motion for an Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 103-1
21. Declaration of Lawrence A. Sucharow in Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of

Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 104

22. Exhibit 1: Declaration of George Hopkins in Support of Final Approval of Class Settlement, Award of Attorneys' Fees, Payment of Litigation Expenses, and Payment of Service Award to ARTRS, ECF No. 104-1
23. Exhibit 2: Letter Dates March 18, 2011, ECF No. 104-2
24. Exhibit 3: Motion to Dismiss, ECF No. 104-3
25. Exhibit 4: Lobby Conference Before Chief Judge Mark L. Wolf, ECF No. 104-4
26. Exhibit 5: Declaration of Jonathan B. Marks, ECF No. 104-5
27. Exhibit 15: Declaration of Lawrence A. Sucharow on Behalf of Labaton Sucharow LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-15
28. Exhibit 16: Declaration of Garrett J. Bradley, Esq. on Behalf of Thornton Law Firm, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-16
29. Exhibit 17: Declaration of Daniel P. Chiplock on Behalf of Lieff Cabraser Heimann & Bernstein, LLP in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-17
30. Exhibit 18: Declaration of Lynn Sarko on Behalf of The Andover Companies Employee Savings and Profit Sharing Plan and James Pehoushek-Strangeland in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-18
31. Exhibit 19: Declaration of J. Brian McTigue in Support of Motion for Attorneys' fees, Reimbursement of Expenses, and Incentive Awards to Certain Class Representatives, ECF No. 104-19
32. Exhibit 20: Declaration of Carl S. Kravitz in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-20
33. Exhibit 21: Declaration of Catherine M. Campbell on Behalf of Feinberg, Campbell & Zack, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-21
34. Exhibit 22: Declaration of Jonathan G. Axelrod on Behalf of Beins, Axelrod, PC in Support of Lead Counsel's Motion for an Award of Attorneys' Fees and Payment of Expenses, ECF No. 104-22
35. Exhibit 23: Declaration of Kimberly Keevers Palmer on Behalf of Richardson, Patrick, Westbrook & Brickman, LLC in Support of Lead Counsel's Motion for an Award of Attorneys' fees and Payment of Expenses, ECF No. 104-23
36. Exhibit 24: Master Chart of Lodestars, Litigation Expenses, and Plaintiffs' Service Awards, ECF No. 104-24
37. Exhibit 25: Rate Tables, ECF No. 104-25
38. Defendant's Statement of Reporting Status of Class Action Settlement, ECF No. 106
39. Reply Memorandum of Law in Further Support of (A) Plaintiffs' Assented-to Motion for Final Approval of Proposed Class Settlement and Plan of Allocation and Final Certification of Settlement Class and (B) Lead Counsel's Motion for an Award of Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 108

40. Supplemental Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing of Notice to Settlement Class Members and Requests for Exclusion, ECF No. 109
41. Order and Final Judgment, ECF No. 110
42. Order Awarding Attorneys' fees, Payment of Litigation Expenses, and Payment of Service Awards to Plaintiffs, ECF No. 111
43. Order Approving Plan of Allocation, ECF No. 112
44. Hearing Transcript, ECF No. 114
45. Letter Dated November 10, 2016, ECF No. 116
46. Memorandum and Order, ECF No. 117
47. The Competitive Enterprise Institute's Center for Class Action Fairness's Memorandum in Support of Motion for Leave to File *Amicus Curiae* Response to Court's Order of February 6 and for Leave to Participate as *Guardian ad Litem* for Class or *Amicus* in Front of Special Master, ECF No. 127
48. Memorandum of Lieff Cabraser Heimann & Bernstein, LLP Consenting to Appointment of Special Master, ECF No. 128
49. Memorandum of Labaton Sucharow LLP Consenting to Appointment of Special Master and Proposing Appointment of Co-Special Master, ECF No. 129
50. Order Regarding Class Notice, ECF No. 172
51. Memorandum and Order Regarding Appointment of Judge Rosen as Special Master, ECF No. 173
52. The Competitive Enterprise Institute's Center for Class Action Fairness's *Amicus* Response to Court's Order of February 6 – Leave to File granted March 8, 2017 (Dkt. 172), ECF No. 174
53. Memorandum and Order Regarding Class Notice, ECF No. 187
54. Memorandum and Order Regarding Motion for Relief from Fee Order, ECF No. 192
55. Special Master's Order Regarding the Law Firms' Objection to Retention of John W. Toothman as Advisor to Counsel to the Special Master, ECF No. 193
56. Objection of Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm LLP to Proposed Appointment of John W. Toothman as Expert in Proceeding Before the Special Master, ECF No. 194
57. Objection Plaintiffs' Law Firms' Objection to Special Master's Order Regarding Retention of John W. Toothman, ECF No. 199
58. Memorandum and Order Regarding Emergency Motion, ECF No. 200
59. Exhibit A: Notice of Proceedings that Could Result in an Additional Award to Class Members Who Have Claims, ECF No. 200-1
60. Exhibit B: Notice of Proceedings that Could Result in an Additional award to Class Members Who Have Claims, ECF No. 200-2
61. Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. Regarding Mailing and Emailing of Supplemental Notice to Settlement Class Members and/or Their Counsel, ECF No. 202
62. Order Regarding Email Addresses, ECF No. 203
63. Memorandum and Order – Toothman Order, ECF No. 204
64. Labaton Sucharow's Response to the Court's April 26, 2017 Order, ECF No. 205
65. Exhibit A: Declaration of Nicole M. Zeiss in Response to the Court's April 26, 2017 Order, ECF No. 205-1

66. Exhibit B: Declaration of Eric J. Miller on Behalf of A.B. Data, Ltd. in Response to the Court's April 26, 2017 Order, ECF No. 205-2
67. Memorandum and Order Regarding Special Master Billing Rate, ECF No. 206
68. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – June 1 Response
69. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 1, 2017
70. Thornton Law Firm, LLP's June 1, 2017 Responses to Special master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
71. 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
72. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on June 9, 2017
73. Thornton Law Firm, LLP's June 9, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories
74. Lieff Cabraser Heimann & Bernstein LLP's Corrected Responses to Special Master Honorable Gerald E. Rosen's (Ret.) Interrogatories Nos. 43 and 44
75. Labaton Sucharow LLP's Response to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories to Labaton Sucharow LLP – July 10 Response
76. Lieff Cabraser Heimann & Bernstein LLP's Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories Due on July 10, 2017
77. Thronton Law Firm, LLP's July 10, 2017 Responses to Special Master Honorable Gerald E. Rosen's (Ret.) First Set of Interrogatories

EXHIBIT C

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT C
Massachusetts Cases Affirming Class Action Fee Awards

1. *Allen v. Decision One Mortg. Co., LLC*, No. CIV.A. 07-11669-GAO, 2010 WL 1930148 (D. Mass. May 12, 2010)
2. *Bezdek v. Vibram USA Inc.*, 79 F. Supp. 3d 324 (D. Mass.), aff'd, 809 F.3d 78 (1st Cir. 2015)
3. *Commonwealth Care All. v. Astrazeneca Pharm. L.P.*, No. CIV.A. 05-0269 BLS 2, 2013 WL 6268236 (Mass. Super. Aug. 5, 2013)
4. *Davis v. Footbridge Eng'g Servs., LLC*, No. 09CV11133-NG, 2011 WL 3678928 (D. Mass. Aug. 22, 2011)
5. *Geanacopoulos v. Philip Morris USA Inc.*, No. 98-6002-BLS1, 2016 WL 757536 (Mass. Super. Feb. 24, 2016)
6. *Gov't Employees Hosp. Ass'n v. Serono Int'l, S.A.*, 246 F.R.D. 93 (D. Mass. 2007)
7. *Hill v. State St. Corp.*, No. CIV.A. 09-12146-GAO, 2015 WL 127728 (D. Mass. Jan. 8, 2015), appeal dismissed, 794 F.3d 227 (1st Cir. 2015)
8. *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. MDL 09-2067-NMG, 2014 WL 4446464 (D. Mass. Sept. 8, 2014)
9. *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, No. CIV.A. 08-11064-NMG, 2012 WL 6184269 (D. Mass. Dec. 10, 2012)
10. *In re JPMorgan Chase Mortg. Modification Litig.*, 18 F. Supp. 3d 62 (D. Mass. 2014)
11. *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*, No. 3:10-CV-30163-MAP, 2014 WL 6968424 (D. Mass. Dec. 9, 2014)
12. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005)
13. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395 (D. Mass. 2008)
14. *Latorraca v. Centennial Techs. Inc.*, 834 F. Supp. 2d 25 (D. Mass. 2011)
15. *Mann & Co., PC v. C-Tech Indus., Inc.*, No. CIV.A.08-11312-RGS, 2010 WL 457572 (D. Mass. Feb. 5, 2010)
16. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009)
17. *Pietrantonio v. Ann Inc.*, No. 13-CV-12721-RGS, 2014 WL 3973995 (D. Mass. Aug. 14, 2014)
18. *Rudy v. City of Lowell*, 883 F. Supp. 2d 324 (D. Mass. 2012)
19. *Stokes v. Saga Int'l Holidays, Ltd.*, 376 F. Supp. 2d 86 (D. Mass. 2005)
20. *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53 (D. Mass. 2015)

EXHIBIT D

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT D

Massachusetts Bankruptcy Cases Containing Corporate Firm Billing Rates

1. *In re Houghton Mifflin Harcourt Publishing Company*, 12-BK-15610 (Bankr. D. Mass. 2012), ECF. No. 168
2. *In re Lexington Jewelers Exch., Inc.*, No. 08-10042-WCH, 2013 WL 2338243 (Bankr. D. Mass. May 29, 2013), ECF No. 439-1
3. *In re McCabe Grp.*, 424 B.R. 1 (Bankr. D. Mass.), *aff'd in part, rev'd in part sub nom. McCabe v. Braunstein*, 439 B.R. 1 (D. Mass. 2010), ECF No. 404-8
4. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 485
5. *In re Oscient Pharm. Corp.*, No. 09-16576-HJB, 2010 WL 6602493 (Bankr. D. Mass. June 29, 2010); ECF No. 487-6
6. *In re The Educ. Res. Inst., Inc.*, 442 B.R. 20 (Bankr. D. Mass. 2010), ECF No. 1196-1

EXHIBIT E

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT E
Class Actions Settlements with Funds of $100-$500 Million

1. *Dial Corp. v. News Corp.*, 317 F.R.D. 426 (S.D.N.Y. 2016)
2. *Fleisher v. Phoenix Life Ins. Co.*, No. 11-CV-8405 (CM), 2015 WL 10847814 (S.D.N.Y. Sept. 9, 2015), ECF No. 310
3. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 293 F.R.D. 459 (S.D.N.Y. 2013), ECF No. 634-23
4. *In re Comverse Tech., Inc. Sec. Litig.*, No. 06-CV-1825 (NGG), 2010 WL 2653354 (E.D.N.Y. June 24, 2010)
5. *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110 (S.D.N.Y. 2009)
6. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015)
7. *In re IndyMac Mortg.-Backed Sec. Litig.*, 94 F. Supp. 3d 517 (S.D.N.Y. 2015)
8. *In re Lupron Mktg. & Sales Practices Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833 (D. Mass. Aug. 17, 2005)
9. *In re Nortel Networks Corp.*, No. 01-CV-1855(RMB), 2002 WL 1492116 (S.D.N.Y. Feb. 4, 2002), ECF No. 194
10. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Schering" settlement]
11. *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744 (D.N.J. Oct. 1, 2013) ["Merck" settlement]
12. *In re Shop-Vac Mktg. & Sales Practices Litig.*, No. 2380, 2016 WL 7178421 (M.D. Pa. Dec. 9, 2016)
13. *In re The Mills Corp. Sec. Litig.*, 265 F.R.D. 246 (E.D. Va. 2009)
14. *In re Volkswagen & Audi Warranty Extension Litig.*, 89 F. Supp. 3d 155 (D. Mass. 2015)
15. *Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr.*, No. 15-CV-1113 (VAB), 2016 WL 6542707 (D. Conn. Nov. 3, 2016)
16. *N.Y. State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226 (E.D. Mich. 2016)
17. *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. CIV.A. 05-11148PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009), ECF No. 769
18. *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2017 WL 2423161 (N.D. Cal. June 5, 2017)
19. *Pennsylvania Pub. Sch. Employees' Ret. Sys. v. Bank of Am. Corp.*, 318 F.R.D. 19, 23 (S.D.N.Y. 2016)
20. *Shapiro v. JPMorgan Chase & Co.*, No. 11 CIV. 7961 CM, 2014 WL 1224666 (S.D.N.Y. Mar. 24, 2014)

EXHIBIT F

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT F
Reported Class Action Fee Decisions
Containing Billing Rates for Contract or Staff Attorneys

1. *Chambers v. Whirlpool Corp.*, 214 F. Supp. 3d 877 (C.D. Cal. 2016), *judgment entered*, No. SACV111733FMOMLGX, 2016 WL 5921765 (C.D. Cal. Oct. 11, 2016), ECF No. 218-8
2. *City of Providence v. Aeropostale, Inc.*, No. 11 CIV. 7132 CM GWG, 2014 WL 1883494 (S.D.N.Y. May 9, 2014), *aff'd sub nom. Arbuthnot v. Pierson*, 607 F. App'x 73 (2d Cir. 2015), ECF No. 61-4
3. *In re Am. Apparel, Inc. S'holder Litig..*, No. CV1006352MMMJCGX, 2014 WL 10212865 (C.D. Cal. July 28, 2014), ECF No. 188-3
4. *In re Animation Workers Antitrust Litig.*, No. 14-CV-4062-LHK, 2016 WL 6663005 (N.D. Cal. Nov. 11, 2016), ECF Nos. 331-2, 331-3, 331-4
5. *In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5158730 (N.D. Cal. Sept. 2, 2015), ECF No. 1083-20
6. *In re Optical Disk Drive Prod. Antitrust Litig.*, No. 3:10-MD-2143 RS, 2016 WL 7364803 (N.D. Cal. Dec. 19, 2016), ECF No. 1963-1
7. *Long v. HSBC USA INC.*, No. 14 CIV. 6233 (HBP), 2016 WL 4764939 (S.D.N.Y. Sept. 13, 2016)
8. *McGreevy v. Life Alert Emergency Response, Inc.*, No. 14 CIV. 7457 (LGS), 2017 WL 1534452 (S.D.N.Y. Apr. 28, 2017)
9. *Mills v. Capital One, N.A.*, No. 14 CIV. 1937 HBP, 2015 WL 5730008 (S.D.N.Y. Sept. 30, 2015), ECF No. 52
10. *Phillips v. Triad Guar. Inc.*, No. 1:09CV71, 2016 WL 2636289 (M.D.N.C. May 9, 2016), ECF No. 145-1
11. *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014)
12. *St. Louis Police Ret. Sys. v. Severson*, No. 12-CV-5086 YGR, 2014 WL 3945655 (N.D. Cal. Aug. 11, 2014)

EXHIBIT G

Arkansas Teacher Retirement System et al.
v.
State Street Bank and Trust Co.
C.A. No. 11-10230-MLW; 11-12049-MLW; 12-11698-MLW
Expert Declaration of William B. Rubenstein

EXHIBIT G
List of Exemplary Cases With Multipliers Over 3.5

1. In re Merry-Go-Round Enterprises, Inc., 244 B.R. 327 (Bankr. D. Md. 2000) (19.6 multiplier)

2. Stop & Shop Supermarket Co. v. SmithKline Beecham Corp., NO. CIV.A. 03-457, 2005 WL 1213926, at *17-18 (E.D. Pa. May 19, 2005) (15.6 multiplier)

3. Kuhnlein v. Department of Revenue, 662 So.2d 309, 315 (Fla. 1995) (15 multiplier reduced to 5)

4. In re Doral Fin. Corp. Sec. Litig., No. 05-md-1706 (S. D. N.Y. July 17, 2007) (10.26 multiplier)

5. Weiss v. Mercedes-Benz, 899 F. Supp. 1297 (D. N.J. 1995), aff'd, 66 F.3d 314 (3d Cir. 1995) (9.3 multiplier)

6. Doty v. Costco Wholesale Corp., No. 05-3241 (C. D. Cal. May 14, 2007) (9 multiplier)

7. Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D. Mass. 1998) (8.9 multiplier)

8. Cosgrove v. Sullivan, 759 F. Supp. 1667, 167 n.1 (S. D. N.Y. 1991) (8.74 multiplier)

9. New England Carpenters Health Benefits Fund v. First Databank, Inc., Civil Action No. 05-11148-PBS, 2009 WL 2408560 (D. Mass. Aug. 3, 2009) (8.3 multiplier)

10. Newman v. Caribiner Int'l, Inc., No. 99 Civ. 2271 (S.D. N.Y. Oct. 19, 2001) (7.7 multiplier)

11. Hainey v. Parrott, No. 02-733 (S. D. Ohio Nov. 6, 2007) (7.47 effective multiplier)

12. In re Rite Aid Corp. Sec. Litigation, 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (6.96 multiplier)

13. Steiner v. Amer. Broadcasting Co., Inc., 248 Fed. Appx. 780, 783 (9th Cir. 2007) (6.85 multiplier)

14. In re UnitedHealth Group, Inc. PSLRA Litig., No. 06-1691 (D. Minn. Aug. 10, 2009) (6.49 multiplier)

15. The Music Force, LLC v. Viacom, Inc., No. 04-8239 (C.D. Cal. Aug. 8, 2007) (6.43 multiplier)

16. In re Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890 (1st Cir. 1985) (6 multiplier)

17. In re Cardinal Health Inc. Securities Litigations, 528 F. Supp. 2d 752, 768 (S.D. Ohio 2007) (6 multiplier)

18. In re Krispy Kreme Doughnuts, Inc. Sec. Litig., No. 04-416 (M.D. N.C. Feb. 15, 2007) (6 multiplier)

19. In re RJR Nabisco, Inc. Securities Litigation, No. 88 Civ. 7905(MBM), 1992 WL 210138, at *5-6 (S.D. N.Y. Aug. 14, 1992) (6 multiplier)

20. Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc., No. 03-2141 (D. S.C. Aug. 15, 2006) (6 multiplier)

21. In re Cardinal Health, Inc. Sec. Litig., No. 04-575, 2007 U.S. Dist. LEXIS 95127 (S. D. Ohio Dec. 31, 2007) (5.85 multiplier)

22. Dutton v. D&K Healthcare Res., Inc., No. 04-147 (E. D. Mo. June 5, 2007) (5.6 multiplier)

23. In re Charter Communications, Inc., Securities Litigation, No. MDL 1506, 2005 WL 4045741, at * 22 (E.D. Mo. June 30, 2005) (5.6 multiplier)

24. Roberts v. Texaco, Inc., 979 F. Supp. 185, 198 (S.D. N.Y. 1997) (5.5 multiplier)

25. Warner v. Experian Info. Solutions, Inc., No. BC362599 (Cal. Super. Ct. Los Angeles Co. Feb. 26, 2009) (5.48 multiplier)

26. Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011) (5.3 multiplier)

27. Di Giacomo v. Plains All American Pipeline, No. Civ.A.H-99-4137, 2001 WL 34633373, * at 11-12 (S.D. Tex. Dec. 19, 2001) (5.3 multiplier)

28. Craft v. County of San Bernardino, 624 F. Supp. 2d 1113, 1123-25 (C.D. Cal. 2008) (5.2 multiplier)

29. In re Enron Corp. Securities, Derivative & ERISA Litigation, 586 F. Supp. 2d 732, 803 (S.D. Tex. 2008) (5.2 multiplier)

30. In re Beverly Hills Fire Litig., 639 F. Supp. 915, 924 (E. D. Ky. 1986) (5 multiplier to attorney who performed the bulk of work on the case)

31. In re Fernald Litigation, No. C-1-85-149, 1989 WL 267038, at *4-5 (S.D. Ohio Sept. 29, 1989) (5 multiplier)

32. In re Cendant Corp. Securities Litigation, 404 F.3d 173, 183 (3d Cir. 2005) (multiplier in "mid-single digits")

33. In re United Rentals, Inc. Sec. Litig., No. 04-1615 (D. Conn. May 26, 2009) (4.79 multiplier)

34. Castillo v. General Motors Corp., No. 07-2142 (E. D. Cal. April 19, 2009) (4.77 multiplier)

35. Meijer, Inc. v. 3M, No. 04-5871, 2006 WL 2382718 (E. D. Pa. Aug. 14, 2006) (4.77 multiplier)

36. In re Xcel Energy, Inc., Securities, Derivative & "ERISA" Litigation, 364 F. Supp. 2d 980, 999 (D. Minn. 2005) (4.7 multiplier)

37. Maley v. Del Global Technologies Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (4.65 multiplier)

38. Teeter v. NCR Corp., No. 08-297 (C.D. Cal. Aug. 6, 2009) (4.61 multiplier)

39. Holleran v. Rita Medical Sys., Inc., No. RG06302394 (Cal. Super. Ct. Alameda Co. Aug. 1, 2007) (4.57 multiplier)

40. Rabin v. Concord Assets Group, Inc., No. 89 Civ. 6130, 1991 WL 275757 (S.D. N.Y. Dec. 19, 1991) (4.4 multiplier)

41. Agofonova v. Nobu Corp., No. 07-6926 (S. D. N.Y. Feb. 6, 2009) (4.34 multiplier)

42. Buccellato v. AT & T Operations, Inc., No. C10-00463-LHK, 2011 WL 3348055, at *2 (N.D. Cal. Jun. 30, 2011) (4.3 multiplier)

43. In re AremisSoft Corp. Sec. Litig., 210 F.R.D. 109, 135 (D.N.J. 2002) (4.3 multiplier)

44. Shannon v. Hidalgo County Board of Comm'r, No. 08-369 (D. N.M. June 4, 2009) (4.2 multiplier)

45. Simmons v. Andarko Petroleum Corp., No. CJ-2004-57 (Okla. Dist. Ct. Caddo Co. Dec. 23, 2008) (4.17 multiplier)

46. In re OSI Pharm., Inc. Sec. Litig., No. 04-5505 (E.D. N.Y. Aug. 22, 2008) (4.11 multiplier)

47. Blackmoss Inv., Inc. v. Gravity Co., No. 05-4804 (S. D. N.Y. Nov. 20, 2007) (4.0 multiplier)

48. In re WorldCom, Inc. Sec. Litig., 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2003) (4.0 multiplier)

49. In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 489 (S.D. N.Y. 1998) (3.97 multiplier)

50. Karpus v. Borelli (In re Interpublic Secs. Litig.), No. 02 Civ. 6527, 2004 WL 2397190, at *12 (S.D. N.Y. Oct. 26, 2004 (3.96 multiplier)

51. Vizcaino v. Microsoft Corp., 290 F.3d 1045, 1050-51 (9th Cir. 2002) (3.65 multiplier)

52. Donkerbrook v. Title Guar. Escrow Servs., Inc., No. 10-00616 LEK-RLP, 2011 WL 3649539, at *10 (D. Haw. Aug. 18, 2011) (3.6 multiplier)

53. Turner v. Murphy Oil USA, Inc., 472 F. Supp. 2d 830, 869 (E.D. La. 2007) (3.5 multiplier)

54. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 123 (2d Cir. 2005) (3.5 multiplier)

EXHIBIT I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) SUPPLEMENTAL INTERROGATORIES DUE ON AUGUST 11, 2017

In accordance with the Federal Rules of Civil Procedure, Lieff Cabraser Heimann & Bernstein, LLP ("LCHB" or the "Firm") hereby responds to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Interrogatories (the "Interrogatories"), propounded on LCHB on August 7, 2017, and made due on August 11, 2017.

GENERAL OBJECTIONS

LCHB makes the following general objections, which are incorporated by reference into each Interrogatory response, whether or not a specific further objection is made with respect to a specific Interrogatory. Each Interrogatory response incorporates, is subject to and does not waive the general objections.

1. LCHB objects to the Interrogatories and Instructions to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or that otherwise is privileged, protected or exempt from discovery.

2. LCHB objects to the Interrogatories and Instructions to the extent they purport to impose obligations that differ from or exceed those imposed by the Federal Rules of Civil Procedure, particularly Rule 33, and by any court decisions interpreting those Rules.

3. LCHB objects to the Interrogatories and Instructions to the extent they seek information beyond the scope of, or not relevant to, the Courts' February 6, 2017 Memorandum and Order in the above-referenced cases.

4. In responding to the Interrogatories, LCHB has made reasonable efforts to respond based on its understanding and interpretation of each Interrogatory. If the Special Master subsequently asserts a reasonable interpretation of an Interrogatory which differs from that of LCHB, LCHB reserves the right to supplement its responses.

5. LCHB will make all reasonable efforts to respond to the Interrogatories on or before the date(s) specified by the Special Master. LCHB, however, reserves the right to supplement its responses should it require additional time, and/or should responsive information be discovered following the designated dates for the responses.

6. LCHB objects to Definition No. 1 and Instruction B, to the extent they seek Interrogatory responses from any source other than the Law Firm, its partners, associates, of counsel, employees and contractors. LCHB has no "affiliates," and no "agents" or "representatives" that are or would be in the possession of responsive information.

RESPONSES TO THE SUPPLEMENTAL INTERROGATORIES

INTERROGATORY NO. 1:

Describe in detail the nature of the relationship and/or partnership between and among Labaton, Lieff and/or Thornton, on the one hand, and Damon Chargois, Esq. (or any firm represented by Mr. Chargois), whether past or present. In your answer, please include the following:

a. The origins of the relationship, including a detailed description of any past legal, financial, and/or professional affiliations between the Firm, on the one hand, and Mr. Chargois or any firm represented by Mr. Chargois, on the other, and if applicable a case caption or description of the matter;

b. Whether the Plaintiffs' Firms intended to pay a portion of the Fee Award to Mr. Chargois, whether or not said payment was made, and if so, the total amount of the intended (or actual) payment, date(s) of any payments made, and the basis therefor;

c. To the extent Mr. Chargois was involved in the SST Litigation, or contributed in any way to the investigation, litigation, mediation and/or settlement of the Litigation, describe in detail the nature of his involvement, the dates of any work performed, and any individuals and/or firms with knowledge of said involvement;

d. The nature of any proposed or actual agreements, whether informal or formal, between and among Labaton, Lieff, and/or Thornton, on the one hand, and Mr. Chargois, to compensate Mr. Chargois a percentage of the total attorney's fees awarded in the SST Litigation, regardless of the total amount of that aggregate fee;

e. The significance of Bob Lieff's email to Garrett Bradley, Michael Thornton, Eric Belfi, 'cc' Damon Chargois, Christopher Keller, and Daniel Chiplock, dated April 24, 2013 (Exhibit A), corresponding with Garrett Bradley concerning an obligation to pay "local counsel"

assisting Labaton in matters involving the Arkansas Teachers Retirement System 20% of the net fee to Labaton; and

f. Explain why the nature of this relationship and any intention to pay Mr. Chargois was not disclosed to Judge Wolf prior to submitting the Fee Petition nor to the Special Master during the course of his investigation.

RESPONSE TO INTERROGATORY NO. 1:

LCHB incorporates the general objections stated above. LCHB further objects to this Interrogatory on the grounds that it is argumentative, vague, overbroad and seeks information that is not relevant to the subject matter of this proceeding. Subject to and without waiving those objections, LCHB responds as follows:

LCHB has no relationship with Mr. Chargois. The Firm has no record of having any prior relations with Mr. Chargois on any other matter. The Firm had no contact with Mr. Chargois in the SST Litigation other than several emails on which LCHB attorneys were copied. No LCHB attorney has met or spoken with Mr. Chargois. LCHB has no direct or first-hand knowledge of any relationship and/or partnership between Mr. Chargois and any other firm in the SST Litigation.

a. LCHB does not have and has never had a "relationship and/or partnership" with Mr. Chargois, and does not believe it has ever worked with Mr. Chargois in any other matter.

b. The Plaintiffs' Law Firms did agree that a portion of the Fee Award would be paid to Mr. Chargois, and that payment was made on or about the same date as the payments to other firms in the Litigation (December 8, 2016). The amount paid to Mr. Chargois was 5.5% of the total Fee Award, or $4,099,768.75 (plus any accrued interest). The agreement to pay Mr. Chargois a percentage of the overall attorneys' fee awarded in the SST litigation was based, as it was understood by LCHB, on Mr. Chargois' role as local counsel for Labaton and the

written agreement amongst the Plaintiffs' Law Firms executed on or about August 30, 2016 (produced herewith).

c. LCHB has no firsthand knowledge of Mr. Chargois' involvement in the SST Litigation or the investigation leading up to it.

d. As stated above, a written agreement memorializing the fee allocations to the Plaintiffs' Law Firms, the ERISA firms, and Labaton's local counsel (i.e., Mr. Chargois) was executed on or about August 30, 2016. Prior to that, the Plaintiffs' Law Firms had agreed by email exchange in the summer of 2016 (preceded by earlier emailed correspondence in the April/May 2013 timeframe when the issue was first broached) to allocate 5.5% of the total Fee Award (or an amount estimated to equal 20% of Labaton's share of any Fee Award) to Mr. Chargois.

e. LCHB understood that Bob Lieff's email of April 24, 2013 indicated his agreement to Mr. Bradley's request that Labaton be permitted to satisfy its obligation to Mr. Chargois out of any Fee Award obtained in the SST Litigation.

f. LCHB defers to Labaton (as Lead Counsel) with respect to why the nature of Labaton's relationship with Mr. Chargois and any intention to pay Mr. Chargois a percentage of the Fee Award was not disclosed to the Court prior to submitting the Fee Petition.

With respect to why the foregoing information was not previously included in LCHB's discovery responses to the Special Master, LCHB simply and in good faith did not understand it to be responsive to the Special Master's prior discovery requests. Instead, LCHB understood the Special Master's prior discovery requests concerning the allocation of the Fee Award to be concerned solely with the percentage fee allocation that was made to the ERISA firms. This is because the Annotated and Revised Document Requests to LCHB dated May 23,

2017 (sent via email by Mr. Sinnott to Richard M. Heimann) specifically eliminated former Request No. 20, which sought "[a]ll 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" (emphasis supplied). Similarly, no prior interrogatory sought details concerning the specific fee allocations between and among the Plaintiffs' Law Firms. Instead, Interrogatory No. 17 asked LCHB to "[d]escribe in detail all agreements between the Firm/Plaintiffs' Law Firms, on the one hand, and the ERISA firms, on the other, to allocate to the ERISA firms a fixed percentage of the total Fee Award rendered by the Court in the SST Litigation" (emphasis supplied). LCHB responded accordingly, including by "explain[ing] the reason for modifying [that] previous agreement, including all persons involved in these discussions and their affiliation/firm." Mr. Chargois had no input or involvement, as far as LCHB is aware, in determining the percentage fee allocation to be made to the ERISA firms.

Dated: August 11, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

EXHIBIT J

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIEFF CABRASER HEIMANN & BERNSTEIN LLP'S RESPONSES TO SPECIAL MASTER HONORABLE GERALD E. ROSEN'S (RET.) SUPPLEMENTAL REQUEST FOR THE PRODUCTION OF DOCUMENTS

In accordance with the Federal Rules of Civil Procedure, Lieff Cabraser Heimann & Bernstein LLP ("LCHB") hereby responds to Special Master Honorable Gerald E. Rosen's (Ret.) Supplemental Request for the Production of Documents propounded on LCHB on August 7, 2017.

GENERAL OBJECTIONS

LCHB makes the following general objections, which are incorporated by reference into each Request response, whether or not a specific further objection is made with respect to a specific Request. Each Request response incorporates, is subject to, and does not waive the general objections.

1. LCHB objects to the Requests and Instructions to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or otherwise is privileged, protected or exempt from discovery.

2. LCHB objects to the Requests and Instructions to the extent they purport to impose obligations that differ from or exceed those imposed by the Federal Rules of Civil Procedure, particularly Rule 34, and by any court decisions interpreting those Rules.

3. LCHB objects to the Requests and Instructions to the extent they seek information beyond the scope of, or not relevant to, the Courts' February 6, 2017 Memorandum and Order in the above-referenced actions.

4. LCHB has made reasonable efforts to respond to the Requests based on its understanding and interpretation of each Request. If the Special Master subsequently asserts a reasonable interpretation of a Request which differs from that of LCHB, LCHB reserves the right to supplement its responses.

5. LCHB will make all reasonable efforts to produce documents responsive to the Requests on or before the date(s) specified by the Special Master. LCHB, however, reserves the right to supplement its productions should it require additional time to complete the production, and/or should responsive documents be discovered following the designated dates for production.

6. LCHB objects to Definition No. 1 to the extent it contemplates the production of documents from any source other than the law firm, its partners, associates, of counsel, employees and contractors. LCHB has no "affiliates," and no "agents" or "representatives" that are or would be in the possession of responsive documents.

RESPONSES TO THE REQUESTS

SUPPLEMENTAL REQUEST FOR PRODUCTION NO. 1:

All documents and/or communications relating to, referencing, or concerning Damon Chargois, Esq. or a law firm with which he was or is affiliated, including any agreements or understanding to which the Firm was privy, whether or not executed, contemplated in the SST Litigation. Please include all documents relating to, supporting, or otherwise evidencing the information provided by the Firm in response to Supplemental Interrogatory No. 1.

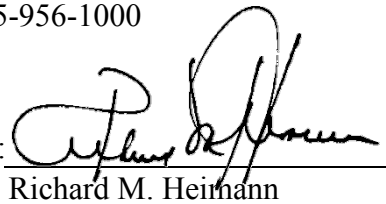
RESPONSE TO REQUEST FOR PRODUCTION NO. 1:

LCHB incorporates the general objections stated above. LCHB further objects to this Request as overbroad to the extent it seeks all documents and/or communications from January 1, 2010 to the present relating to, referencing, or concerning any "law firm with which [Mr. Chargois] was or is affiliated." LCHB does not know Mr. Chargois' employment history or his prior law firm affiliations (if applicable)—it only understands that it has no record of having worked or interacted with him in any context outside of the SST Litigation. Subject to and without waiving those objections, LCHB will produce responsive documents on or before August 11, 2017 as requested.

Dated: August 11, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: 

Richard M. Heimann

Attorneys for Lieff Cabraser Heimann & Bernstein, LLP

EXHIBIT K

DONOGHUE BARRETT & SINGAL

September 7, 2017

Via Email

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Re: Special Master's Request for Additional Supplemental Submission from Labaton Sucharow, LLP, Lieff Cabraser Heimann & Bernstein, LLP, and Thornton Law Firm, LLP

Arkansas Teacher Retirement System, et al v. State Street Corporation, et al., C.A. No. 1:11-cv-10230-MLW;

Dear Joan, Richard, and Brian:

As you know, in July, the Special Master invited your firms to submit, in order to more formally address the factual and legal issues in this case before finalizing his report, any information the firms may find relevant, in order to inform the Special Master's findings, conclusions, and recommendations presented in his Final Report and Recommendation. The firms accepted this invitation and submitted a consolidated response on August 1, 2017.

As discussed on last Tuesday following depositions, the Special Master is now presenting an opportunity for the firms to make a similar submission addressing the circumstances of the monies paid to Attorney Damon Chargois in the State Street case for his role as a referring attorney and the implications of that payment and circumstances in addressing the charge of Judge Wolf in paragraph 2 of his March 8, 2017 Order.

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DONOGHUE BARRETT & SINGAL

Should you deem the additional factors and topics discussed on pages 2 and 3 of our July 5, 2017 letter to be relevant or helpful to your additional submission, please make reference to them. As before, we encourage you to provide any other input that you believe is relevant to or raised by the Special Master's inquiry, to include recommendations on best practices or ways to improve current practices.

Confidentiality

As before, this supplemental submission should be addressed to Counsel for the Special Master and submitted directly to Counsel via email and/or first-class mail and should be received by us no later than October 2, 2017. To maintain the confidentiality of the Special Master's investigation, submissions should not be filed on ECF.

Given the great importance of the anticipated responses, it may be necessary for the Special Master to refer to and/or quote one or more of the firms' responses in his Final Report. In the event such reference becomes part of the Final Report, the Special Master reserves the right to include the firms' submission(s) as an exhibit to his Final Report, which will be made available to the public.

Please feel free to contact me with any questions or concerns.

Thank you.

Very yours truly,

William F. Sinnott
Counsel to the Special Master

EXHIBIT L

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN LLP TO SPECIAL MASTER'S SEPTEMBER 7, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully provides this individual response ("Response") to the Special Master's September 7, 2017 Request for Supplemental Submission concerning "the circumstances of the monies paid to Attorney Damon Chargois in the State Street case for his role as a referring attorney and the implications of that payment and circumstances in addressing the charge of Judge Wolf in paragraph 2 of his March 8, 2017 Order."

1. At all times throughout the litigation of the State Street matter and up through August 11, 2017, Mr. Chargois was described and represented to Lieff Cabraser as "local counsel" for Labaton Sucharow LLP ("Labaton") and/or the client, the Arkansas Teacher Retirement System ("ATRS"). Mr. Chargois was never described to Lieff Cabraser as a "referring," "forwarding," or any other kind of counsel by Labaton or Garrett Bradley (who was a partner at Thornton Law Firm LLP ("Thornton") throughout the litigation and, starting in or about 2015, also of counsel at Labaton).

2. Specifically, on April 24, 2013 (when Mr. Chargois' role in the litigation as well as his proposed allocation of a portion of the class attorneys' fee was first broached), Mr. Chargois was described to Lieff Cabraser by Mr. Bradley as "local counsel who assists Labaton in matters involving [ATRS]." *See* LCHB-0053483.[1] In subsequent communications in 2015 and 2016, Mr. Chargois was described to Lieff Cabraser variously as the "[A]rkansas local" (LCHB-0053491), the "Arkansas firm" (LCHB-0053531), the "Arkansas component" (*id.*), and "the local attorney in this matter who has played an important role." (LCHB-0053542). *See also* Chiplock Dep. (Sept. 8, 2017) at 102:3-13; 109:19-110:18; 115:8-117:8; 118:9-22.

[1] Mr. Chiplock, who was the principal Lieff Cabraser attorney on the case, was apparently copied on this initial April 24, 2013 email and one or more responses to it, but did not recall receiving them and did not himself reply. *See* Chiplock Dep. (Sept. 8, 2017) at 68:4-24; *see also* LCHB-0053522, 0053538, 0053541.

3. Lieff Cabraser attorneys, on the subsequent handful of occasions when they referenced Mr. Chargois in written communications to attorneys at Labaton and Thornton—which almost exclusively was in the context of discussing attorney fee allocations—referred in kind to Mr. Chargois as the "local counsel," "Arkansas local," "local Arkansas counsel," or simply "Arkansas" counsel. *See, e.g.,* LCHB-0053493, 0053507, 0053513, 0053522, 0053531, 0053549.

4. The "Agreement of Fees" entered into on August 30, 2016, approximately two weeks prior to the submission of the final settlement and fee approval papers to the Court, similarly references Mr. Chargois as "Labaton Sucharow's local counsel." LCHB-0053552. The fee allocation charts circulated by Labaton after final settlement approval had been granted (in November 2016) also refer to Mr. Chargois as "Labaton's Local Counsel." *See* LCHB-0053553-56, 0053560, 0053567.

5. Lieff Cabraser understood Mr. Chargois' stated role as "local counsel" throughout the litigation to mean that he was assisting ATRS and Labaton in Arkansas, including by interfacing with the client and/or performing local client-sided tasks that were helpful to the litigation. This was the type of role with which Lieff Cabraser was generally familiar from prior experience—and was the type of role played by Ohio-based local counsel (for Ohio-based clients) in the BNY Mellon litigation (in which Lieff Cabraser was lead counsel). Lieff Cabraser assumed that Mr. Chargois' role as local counsel was being performed at the behest of (and with the consent of) ATRS. All of the foregoing was consistent with the descriptions offered to Lieff Cabraser by Labaton and Mr. Bradley of Mr. Chargois' status and role in the litigation. *See, e.g.,* Chiplock Dep. (Sept. 8, 2017) at 101:24-104:18; 109:19-111:9; 115:8-118:22.

6. Lieff Cabraser did not learn that Mr. Chargois (a) actually was not local counsel, (b) had performed no work in the State Street litigation, and (c) was not known to the client

representative for ATRS (George Hopkins), until after Mr. Hopkins (of ATRS) and Mr. Belfi (of Labaton) were deposed on September 5, 2017.

7. Had the Court ordered an accounting of all attorneys' fees and their planned allocation pursuant to Fed. R. Civ. P. 54, or had asked specific questions to that effect at the final approval hearing, Lieff Cabraser has (and had) no reason to believe that Mr. Chargois' allocation (along with all of the others') would not have been made known to the Court. At no time, ever, did Lieff Cabraser agree to "conceal" the existence of Mr. Chargois from anyone, including ERISA counsel, any clients, or the Court,[2] either before[3] or after the final approval hearing (including in the November 28, 2017 "clawback" letter which Lieff Cabraser did not draft and which, without Lieff Cabraser's input, did not divulge Mr. Chargois' identity or fee interest to ERISA counsel).[4]

Dated: November 3, 2017

Respectfully submitted,

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275 Battery Street, 29th Floor
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415-956-1000

By:

Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

[2] *See, e.g.,* Chiplock Dep. (Sept. 8, 2017) at 100:7-101:23; 104:19-105:7; 108:19-109:7; 119:4-20; 140:4-141:10.

[3] Mr. Chiplock himself was not aware of Mr. Chargois when the original agreement memorializing a 9% fee allocation for ERISA counsel was signed in December 2013. *See* Chiplock Dep. (Sept. 8, 2017) at 120:19 – 121:15; *see also* LCHB-0053522, 0053538, 0053541. Mr. Lieff, for his part, did not recall Mr. Chargois' existence or stated role after the initial April 2013 email exchange until being reminded by Mr. Bradley in 2015 (and then again in 2016) of Mr. Chargois' putative status as local counsel. LCHB-0053531, 0053538.

[4] *See* Sucharow Dep. (Sept. 1, 2017) at 20:22-23:15; 26:1-24. Lieff Cabraser was not copied on the email correspondence concerning the clawback letter in which it was stated there was "no need for ERISA to see Damon's split." *Id*.

EXHIBIT M

From: William Sinnott [mailto:wsinnott@barrettsingal.com]
Sent: Sunday, March 25, 2018 5:27 PM
To: Heimann, Richard M.
Subject: Follow-up to Gillers Deposition

Richard--

At the conclusion of Professor Gillers testimony on Wednesday, you indicated that you have evidence concerning LCHB's state of mind.

We will consider any evidence which you identify in the record, or evidence which you provide that is not currently in the record, that relates to this issue and/or that supports the hypothetical you presented to Prof. Gillers during his second day of deposition.

Any new evidence should be supported by a sworn declaration.

Thanks.

Bill

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EXHIBIT N

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO MARCH 25, 2018 REQUEST BY SPECIAL MASTER

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully provides this response to the Special Master's request dated March 25, 2018, for "any evidence . . . identif[ied] in the record, or evidence . . . not currently in the record" relating to Lieff Cabraser's "state of mind" as to the issue of Damon Chargois's ("Chargois") role in the State Street litigation prior to September 2017, when details concerning his arrangement with Labaton Sucharow LLP ("Labaton") first came to light. This response is accompanied by sworn declarations by both Robert L. Lieff and Daniel P. Chiplock (the latter of which attaches pertinent emails and documents, including Lieff Cabraser's prior Supplemental Submission, dated November 3, 2017, discussing many of the same issues).

Both Mr. Lieff and Mr. Chiplock were questioned at their depositions about Chargois and what they understood regarding his involvement in the State Street case prior to September 2017. Both testified that they understood that Chargois was local counsel for the Arkansas Fund and for Labaton as lead counsel. Although neither directly communicated with Chargois, they were informed that he had played an important role in the litigation and they assumed he had provided legal services that were of value to the client and therefore to the class. They were familiar with the role of local counsel in cases like State Street, and understood that Chargois's role was similar to that of the Ohio funds' local counsel in the BNY Mellon litigation. Neither thought, or had reason to believe, that fees of 4 to 5.5 percent to local counsel were unreasonable in view of what they had been told and what they understood about Chargois's role in the case. The testimony at deposition included the following:

	Robert Lieff	**pages**
Q	And did he (Chargois) fit the description of what you think of as a "local counsel" based on what you knew about him?	58-59

A 2013-15? It was so represented, yes, by Garrett Bradley that he was local counsel, and it sounded like he was taking care of the situation in Arkansas as typically a local counsel would do. So that was my understanding.

Q Did you have any concerns about—beyond the financial aspect which appears to you to be non-problematic—that there might be other issues, ethical issues or client issues or class issues that the ERISA attorneys might suffer? 60-61

A Again, it's hard to answer this without reference to the timeframe. Back in the early days when I first heard about it, as I now know it was April 2013 I believe, and then again 2015, I didn't think too much about it because we had a very similar situation in the companion—I call it the companion but in the Bank of New York we had local counsel in Ohio dealing with the fund. I thought this was local counsel in Arkansas dealing with the fund.

Q Special Master: And the Labaton folks at no time told you anything more about the larger context of the relationship with Mr. Chargois? 66

A No.

Q Special Master: What was your understanding of what the relationship was between Mr. Chargois and Labaton? 67

A I thought he was local counsel for Labaton in this particular case. I assumed dealing with the Arkansas Fund because that's what local counsel will do. That was my understanding.

Q Special Master: We don't know how to characterize this, and we are asking all the witnesses in their experience if they know how to characterize it. Mr. Sucharow did characterize it as a forwarding fee arrangement. 78-80

A I saw that. I would say, first of all, we have to be talking about class actions only.

Q Special Master: Yes.

A That's what we are talking about. And in the context of class actions there is no such thing as a referral lawyer. You cannot refer a class action and be compensated. It just—it's not the way it works . . . Likewise, forwarding fee. I don't know what that means. But if it is a referral fee, there is no such thing in class actions.

Local counsel there definitely is, and there is no question about the use of local counsel, but you choose local counsel in each of your cases. Now that does not mean that if it is not the same counsel—I know, for example, we have represented funds in Ohio, and we have a law firm in Columbus, Ohio chosen by the attorney general, Mike DeWine, of Ohio, and he wants them to be our local counsel, and they work, and they get paid, and we get time records.

Q Special Master: But what was the basis of your firm's agreement to share in the payment then? 92-93

A Lead counsel said to the other two class firms that we have a local counsel in Arkansas helping us in Arkansas—later saying I think they were doing a good job or something—and that we have to compensate them for what they have done.
Q Special Master: And based on that—
A —I agreed
Q Special Master: —you agreed.
A Very common to do this, yeah.

Q Special Master: Did 5.5 percent seem to be a large number for a local counsel of 75 million dollars? 93-94
A I would have to look up, for example, what our local counsel in the Bank of New York case got, what percentage. I do not remember. But it does not seem on the face of it to be unusual. I think perhaps our local counsel got something similar to that, but I would have too look it up.
Q Special Master: Would it depend on how much work the local counsel did? Among other factors.
A Yes. In the Bank of New York case it was easy because we had their time records. And **we were lead counsel**. **When I am lead counsel, I look at this differently than when I am not lead counsel.** [Emphasis supplied].

Daniel Chiplock

Q Did you recall any conversation aside from the name Damon Chargois that referenced a referring attorney? 101-103
A No. And with respect to Mr. Chargois, he was never characterized to me as a referring attorney.
Q Special Master: How was he characterized to you?
A Local counsel. He was always described to me as—when I say "always" I mean there were maybe 5 or 6 emails during the life of this case on this issue that I can recall. He was always described as local counsel.
Q And what does that mean to you that someone is local counsel?
A Well, it can mean a few things. I can tell you what I thought it must have meant here. What I assumed when I was told local counsel—and I think there was another email from Garrett that said he played an important role in the case. So it was—it is not at all atypical in cases like this for an institutional plaintiff, especially a pension fund, to want there to be like a hometown lawyer or a local counsel who is close to them, who is involved in the case somehow. I can give you an example. In the BNY Mellon case we represented Ohio pension plans. The Ohio AG selected an Ohio counsel to work with us, we had no—we had no input into that. And that was their choice. They wanted to have what they called a local counsel, even though the case was pending in New York, to interface with them, to give them comfort, to respond to questions and maybe do, you know, one—run some things down on the local side on the client-facing side, you know, while we as national counsel are involved in the main part of the litigation. So we had local counsel in the BNY Mellon case who actually did a fair amount of interaction with the Ohio AG's office.

Q Do you recall what the payment terms were for Mr. Chargois? 106
A Ultimately?
Q Both historically and ultimately in State Street?
A Well, I think initially how it was characterized to us was that he was local counsel and that he was entitled to twenty percent of Labaton's fee, and the proposal by Garrett was that it instead be taken off the top of whatever the total fee turns out to be. So those were the terms as they were described in 2013 and then in 2015 and then again in 2016 I think. And then ultimately he was paid five and a half percent of the total fee.

Q Special Master: At 2015 when you became cognizant that there was going to be a fee—a payment to Mr. Chargois—were you advised by anyone at Labaton of the history with Mr. Chargois—Labaton's history with Mr. Chargois? 109-110
A No. What was always represented to us—at least the communications that I am copied on and that I took part in—were that he was a local counsel, and sometimes he is described as local counsel for Arkansas or Arkansas local counsel. And sometimes he is described as local counsel for Labaton.
Q Special Master: And what did you take that to mean?
A As I said earlier, I assumed—you know, between those representations and between this representation here (indicating) that he performed some kind of an important role, that he was some type of local counsel of the type that I described a little while ago.

Q But, in any event, you do recall being informed as to the arrangement, even though it was not solid or completely defined, between Labaton and consequently by the customer class firms and Mr. Chargois. 115-116
A I recall his—the description of him that was offered in that email which was I think the—the words they used were that he assisted Labaton in matters pertaining to Arkansas.
Q And did you interpret that description of he assisted as meaning he took an actual active role in those cases?
A I actually assumed that, yes. That it was some kind of a role, some kind of an assistance offered by a local counsel. And for that assumption I based it on my own experience, my own recent experience in the BNY Mellon case.

Dated: April 5, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF ROBERT L. LIEFF

Robert L. Lieff, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am Of Counsel to the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration to further elaborate on my prior testimony concerning my understanding and belief as to the role of "local counsel" in the State Street litigation and the attorney's fees allocated to local counsel.

2. During my deposition I was asked about the size of the fee for Mr. Chargois, local counsel to Labaton and to the Arkansas Fund.

> Q. Special Master: did 5.5% seem to be a large number for a local counsel of seventy-five million dollars?
>
> A. I would have to look up, for example, what our local counsel in the Bank of New York case got, what percentage. I do not remember. But it does not seem on the face of it to be unusual. I think perhaps our local counsel got something similar to that, but I would have to look it up.
>
> Q. Special Master: Would it depend on how much work the local counsel did? Among other factors.
>
> A. Yes. In the Bank of New York case it was easy because we had their time records. And we were lead counsel. When I am lead counsel I look at this differently than when I am not lead counsel. (93:14-94:9)

3. I have now confirmed that my recollection regarding the magnitude of the fee to our local counsel in the BNY Mellon case was correct. The court in the BNY Mellon case awarded fees to our local counsel of $3,154,291, or just slightly less than 4% of the total attorney fees awarded in the case.

4. I would have been aware of the fee request in the BNY Mellon case and the amount we were requesting for local counsel by no later than mid-2015 and of the actual award by the court as of September 2015. So I would clearly have had that in mind contemporaneously with the discussions in 2015 and again in 2016 regarding the fee allocation for local counsel in the State Street case.

5. In my answer to the Special Master's question, I remarked that I look at these types of matters, fee allocations among class counsel, differently when I am lead counsel. When Lieff Cabraser is lead counsel in class litigation we assume responsibility for assessing the contributions of subordinate counsel in connection with allocation of fees among counsel and with respect to fee requests. As lead counsel we do our best to make sure that fees are fairly allocated according to the value of the contributions to the class and that no fee allocation or fee request is unreasonable, either because it is too large or too small. Invariably we also share the information regarding fee allocation or fee requests with the court-appointed class representative(s) to obtain their approval of the allocation or request.

6. The Labaton firm has extensive experience in class litigation, particularly in the securities field. They have served as lead or co-lead counsel in scores of class action cases. I had every reason to believe, and did believe, that they had engaged in the process of reviewing the work done by local counsel and the contributions of local counsel, and that they and their client, the Arkansas Fund, were of the view that the fee allocation to Chargois was fair and reasonable and fully supported by his contribution to the case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2018.

Robert L. Lieff

1533142.1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF DANIEL P. CHIPLOCK

Daniel P. Chiplock, Esq., declares as follows, pursuant to 28 U.S.C. § 1746:

1. I am a partner with the law firm of Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser"). I submit this declaration to further elaborate on my prior testimony concerning my understanding and belief, at all times prior to September 2017, as to Chargois & Herron LLP's role as reputed "local counsel" in the State Street litigation, and the basis for that understanding and belief.

2. For my declaration, to avoid repetition, I specifically refer to and incorporate the Response by Lieff Cabraser Heimann & Bernstein LLP to [the] Special Master's September 7, 2017 Request for Supplemental Submission, dated November 3, 2017 ("the Supplemental Submission")[1], and the citations to the record therein.[2]

3. As detailed in the Supplemental Submission and my prior deposition testimony dated September 8, 2017 ("Sept. 8 Deposition"), in the few communications where Lieff Cabraser attorneys were copied or participated that concerned Damon Chargois, he was consistently referred to by attorneys outside of Lieff Cabraser as "local counsel" for Labaton Sucharow LLP ("Labaton") and/or the client, the Arkansas Teacher Retirement System ("ATRS").[3] *See* Exhibits A and B.

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[1] The Supplemental Submission is attached hereto as Exhibit A, for ease of reference.

[2] All emails referenced in the Supplemental Submission, in addition to several others relevant to the issue of Lieff Cabraser's mindset, are attached collectively as Exhibit B.

[3] The Ethical Report for Special Master Gerald E. Rosen by Prof. Stephen Gillers ("Ethical Report"), dated February 23, 2018, refers to an "original cost-sharing agreement" mentioning Mr. Chargois that purportedly was "circulated—but never executed—among Customer Class Counsel in 2011," but Lieff Cabraser has no record of its attorneys ever having received this document. *See* Ethical Report, p. 42 and n. 47. Indeed, the testimony cited in n. 47 of the Ethical Report appears to confirm that this document was not "circulated . . . among Customer Class Counsel" but instead was a draft that was circulated solely between Christopher Keller (of Labaton) and Garrett Bradley (of Thornton Law Firm). The first mention that Lieff Cabraser can find of Mr. Chargois in any communication involving Lieff Cabraser is the April 2013 email string described in paragraph 2 of the Supplemental Submission.

4. Lieff Cabraser's attorneys referred to Mr. Chargois in kind as "local counsel" in the handful of communications they exchanged with co-counsel about Mr. Chargois and in internal Lieff Cabraser communications. Co-counsel never corrected Lieff Cabraser's attorneys, nor suggested to Lieff Cabraser's attorneys that Mr. Chargois was anything other than "local counsel." *See* Exhibit B.

5. Lieff Cabraser was not lead counsel in the State Street litigation, and had no direct client relationship with ATRS. Indeed, the Lieff Cabraser attorneys did not interact with George Hopkins (the chief representative for ATRS in the litigation) at all during the State Street litigation, outside of the mediation sessions that Mr. Hopkins personally attended. Lieff Cabraser's attorneys also never spoke with Mr. Chargois to my knowledge, and had no interactions with him outside of a few group emails. For its understanding of Mr. Chargois' role and function in the State Street litigation, Lieff Cabraser accordingly relied on the representations by Labaton, who was lead counsel, and Mr. Garrett Bradley, who prior to the conclusion of the State Street litigation was Of Counsel to Labaton, and on Mr. Chargois' confirmations by email (copied to both Bob Lieff and myself) of his role as local counsel and his important role in the case. (For the latter, *see* Chargois' emails of April 25, 2013 [LBS025771] *and* July 8, 2016 [LCHB-0053544-45], contained in Exhibit B).

6. During the life of the State Street litigation, Lieff Cabraser had no visibility into any work being performed by Mr. Chargois. But this was not unusual for a local counsel working in tandem with a lead counsel, in my recent experience. In the BNY Mellon litigation (where Lieff Cabraser did serve as lead counsel), Lieff Cabraser worked with an Ohio-based local counsel for its Ohio-based public pension fund clients. That local counsel (who was selected by the Ohio Attorney General) communicated directly and virtually exclusively with Lieff Cabraser insofar as his work assignments were concerned. His work was focused primarily

on assisting Lieff Cabraser in guiding the Ohio pension fund clients through their responses to defendants' discovery requests, as well as helping to defend their depositions. This was but one distinct part of a very large and complex litigation effort (which involved taking more than 100 depositions overall, including scores of depositions of defendants and third parties all over the globe), which involved many law firms. Throughout this, the Ohio local counsel's principal focus remained serving the Ohio public pension funds' individual discovery and litigation needs (with some document review assignments as well). As such, he and his firm had very little (if any) contact with Lieff Cabraser's co-lead counsel in that case (Kessler Topaz Meltzer & Check LLP), and virtually none with the other law firms who were not serving in a co-lead capacity (which would have been analogous to Lieff Cabraser's position in the State Street litigation).

7. The total attorneys' fees awarded in the BNY Mellon litigation were $83,750,000, which equated to 25% of the $335 million settlement fund in that case. Ohio local counsel was ultimately awarded approximately 4% of the total fees by the court in that case, which was certainly within the range of fees commonly paid or awarded (in Lieff Cabraser's experience) to local counsel who have performed services for the class representatives or lead counsel and thus to the class as a whole.

8. The $335 million settlement in the BNY Mellon litigation was reached in principle by March 2015, and preliminarily approved in late April 2015. Notice to the class was sent shortly thereafter, and by then it was understood and communicated to class members that counsel would apply for approximately a 25% attorneys' fee. By the time the final settlement approval and fee petitions were filed in August 2015, the level of fee we would be requesting for Ohio local counsel in the BNY Mellon case was established – approximately 4%.

9. Accordingly, at about the same time that I was being apprised by co-counsel of Mr. Chargois' role as "local counsel" in the State Street litigation, and the contours of his fee

interest were being discussed, I was in the process of finalizing and requesting a proposed fee allocation in the BNY Mellon litigation that included a fee percentage for local counsel that was not substantially different from what was being discussed for Mr. Chargois. That proposed fee percentage did not strike me as outside of the norm for a local counsel such as Mr. Chargois had been described to me. Nor did I view it as unusual that I was not privy to the specific work Mr. Chargois had performed as local counsel; as stated above, the various non-lead counsel in BNY Mellon, to my knowledge, had little or no substantive direct contact with Ohio local counsel in that case.

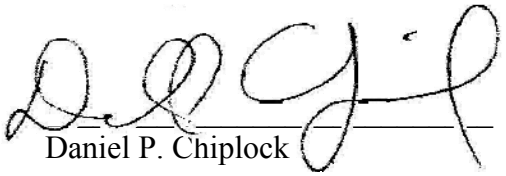
10. Based on lead counsel's descriptions, I understood during the State Street litigation that ATRS was gathering and producing a fairly substantial number of documents in response to defendant's requests. All told, according to lead counsel, ATRS produced more than 73,000 pages of documents,[4] an undertaking in which Lieff Cabraser was not directly involved. I also understood that prior to Lieff Cabraser being engaged as additional counsel for the proposed class, ATRS had spent substantial time investigating, with the assistance of its counsel, the underlying allegations against State Street (which were first made public by the October 2009 unsealing of a whistleblower lawsuit in California) before finally filing a lawsuit in 2011, and that this time period included one or more meetings with State Street representatives (none of which included my firm). It was my belief, informed both by (i) co-counsel's descriptions of Mr. Chargois as "local counsel" who was "assisting" Labaton in matters pertaining to ATRS and had performed "an important role" in the litigation, and (ii) my firm's recent experience in BNY Mellon, that Mr. Chargois had actually assisted and played an important role in these efforts. It was also my belief, for the same reasons, that Mr. Chargois' involvement in these efforts (and in

[4] *See* Decl. of Lawrence A. Sucharow, ¶ 97, Dkt. No. 104 (filed 9/15/16).

the litigation overall) was at ATRS' behest, and certainly (at a minimum) with its complete knowledge and consent. I assumed that ATRS and lead counsel in the State Street litigation regarded the proposed fee percentage for Mr. Chargois to be reasonable and justified by his value to the client, and therefore to the class, based on their knowledge of his work and contributions.

11. My belief during the 2015-2016 timeframe as to the apparent reasonableness of Mr. Chargois' fee interest as "local counsel" was further informed by historical experience at my firm. Over the years, for instance, Lieff Cabraser has been asked to serve as local counsel in a number of securities class actions. In some other types of class actions, including cases involving consumer protection statutes such as the Telephone Consumer Protection Act of 1991 ("TCPA"), Lieff Cabraser has requested counsel in the forum jurisdiction to act as our local counsel. In both circumstances, the local counsel (whether it is us or another firm) has often been offered the option of a fee arrangement predicated on lodestar or based on a percentage. When on a percentage basis, the fee has typically ranged from a low of 5% to a high of 10% of the total fees awarded in class cases. In the two most recent securities class cases in which Lieff Cabraser agreed to serve as local counsel, for instance, the fee share upon which Lieff Cabraser agreed at the outset with putative lead class counsel was 10% of the total fees awarded. While these cases have involved local counsel in the forum court, in contrast with Mr. Chargois' situation in the State Street litigation, this history comprises another baseline for commonly accepted percentage fee arrangements, in my experience, for local counsel in class litigation.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 5, 2018.



Daniel P. Chiplock

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

RESPONSE BY LIEFF CABRASER HEIMANN & BERNSTEIN LLP TO SPECIAL MASTER'S SEPTEMBER 7, 2017 REQUEST FOR SUPPLEMENTAL SUBMISSION

Lieff Cabraser Heimann & Bernstein, LLP ("Lieff Cabraser") respectfully provides this individual response ("Response") to the Special Master's September 7, 2017 Request for Supplemental Submission concerning "the circumstances of the monies paid to Attorney Damon Chargois in the State Street case for his role as a referring attorney and the implications of that payment and circumstances in addressing the charge of Judge Wolf in paragraph 2 of his March 8, 2017 Order."

1. At all times throughout the litigation of the State Street matter and up through August 11, 2017, Mr. Chargois was described and represented to Lieff Cabraser as "local counsel" for Labaton Sucharow LLP ("Labaton") and/or the client, the Arkansas Teacher Retirement System ("ATRS"). Mr. Chargois was never described to Lieff Cabraser as a "referring," "forwarding," or any other kind of counsel by Labaton or Garrett Bradley (who was a partner at Thornton Law Firm LLP ("Thornton") throughout the litigation and, starting in or about 2015, also of counsel at Labaton).

2. Specifically, on April 24, 2013 (when Mr. Chargois' role in the litigation as well as his proposed allocation of a portion of the class attorneys' fee was first broached), Mr. Chargois was described to Lieff Cabraser by Mr. Bradley as "local counsel who assists Labaton in matters involving [ATRS]." *See* LCHB-0053483.[1] In subsequent communications in 2015 and 2016, Mr. Chargois was described to Lieff Cabraser variously as the "[A]rkansas local" (LCHB-0053491), the "Arkansas firm" (LCHB-0053531), the "Arkansas component" (*id.*), and "the local attorney in this matter who has played an important role." (LCHB-0053542). *See also* Chiplock Dep. (Sept. 8, 2017) at 102:3-13; 109:19-110:18; 115:8-117:8; 118:9-22.

[1] Mr. Chiplock, who was the principal Lieff Cabraser attorney on the case, was apparently copied on this initial April 24, 2013 email and one or more responses to it, but did not recall receiving them and did not himself reply. *See* Chiplock Dep. (Sept. 8, 2017) at 68:4-24; *see also* LCHB-0053522, 0053538, 0053541.

3. Lieff Cabraser attorneys, on the subsequent handful of occasions when they referenced Mr. Chargois in written communications to attorneys at Labaton and Thornton—which almost exclusively was in the context of discussing attorney fee allocations—referred in kind to Mr. Chargois as the "local counsel," "Arkansas local," "local Arkansas counsel," or simply "Arkansas" counsel. *See, e.g.,* LCHB-0053493, 0053507, 0053513, 0053522, 0053531, 0053549.

4. The "Agreement of Fees" entered into on August 30, 2016, approximately two weeks prior to the submission of the final settlement and fee approval papers to the Court, similarly references Mr. Chargois as "Labaton Sucharow's local counsel." LCHB-0053552. The fee allocation charts circulated by Labaton after final settlement approval had been granted (in November 2016) also refer to Mr. Chargois as "Labaton's Local Counsel." *See* LCHB-0053553-56, 0053560, 0053567.

5. Lieff Cabraser understood Mr. Chargois' stated role as "local counsel" throughout the litigation to mean that he was assisting ATRS and Labaton in Arkansas, including by interfacing with the client and/or performing local client-sided tasks that were helpful to the litigation. This was the type of role with which Lieff Cabraser was generally familiar from prior experience—and was the type of role played by Ohio-based local counsel (for Ohio-based clients) in the BNY Mellon litigation (in which Lieff Cabraser was lead counsel). Lieff Cabraser assumed that Mr. Chargois' role as local counsel was being performed at the behest of (and with the consent of) ATRS. All of the foregoing was consistent with the descriptions offered to Lieff Cabraser by Labaton and Mr. Bradley of Mr. Chargois' status and role in the litigation. *See, e.g.,* Chiplock Dep. (Sept. 8, 2017) at 101:24-104:18; 109:19-111:9; 115:8-118:22.

6. Lieff Cabraser did not learn that Mr. Chargois (a) actually was not local counsel, (b) had performed no work in the State Street litigation, and (c) was not known to the client

representative for ATRS (George Hopkins), until after Mr. Hopkins (of ATRS) and Mr. Belfi (of Labaton) were deposed on September 5, 2017.

7. Had the Court ordered an accounting of all attorneys' fees and their planned allocation pursuant to Fed. R. Civ. P. 54, or had asked specific questions to that effect at the final approval hearing, Lieff Cabraser has (and had) no reason to believe that Mr. Chargois' allocation (along with all of the others') would not have been made known to the Court. At no time, ever, did Lieff Cabraser agree to "conceal" the existence of Mr. Chargois from anyone, including ERISA counsel, any clients, or the Court,[2] either before[3] or after the final approval hearing (including in the November 28, 2017 "clawback" letter which Lieff Cabraser did not draft and which, without Lieff Cabraser's input, did not divulge Mr. Chargois' identity or fee interest to ERISA counsel).[4]

Dated: November 3, 2017

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: _____
Richard M. Heimann
Attorney for Lieff Cabraser Heimann & Bernstein, LLP

[2] *See, e.g.,* Chiplock Dep. (Sept. 8, 2017) at 100:7-101:23; 104:19-105:7; 108:19-109:7; 119:4-20; 140:4-141:10.

[3] Mr. Chiplock himself was not aware of Mr. Chargois when the original agreement memorializing a 9% fee allocation for ERISA counsel was signed in December 2013. *See* Chiplock Dep. (Sept. 8, 2017) at 120:19 – 121:15; *see also* LCHB-0053522, 0053538, 0053541. Mr. Lieff, for his part, did not recall Mr. Chargois' existence or stated role after the initial April 2013 email exchange until being reminded by Mr. Bradley in 2015 (and then again in 2016) of Mr. Chargois' putative status as local counsel. LCHB-0053531, 0053538.

[4] *See* Sucharow Dep. (Sept. 1, 2017) at 20:22-23:15; 26:1-24. Lieff Cabraser was not copied on the email correspondence concerning the clawback letter in which it was stated there was "no need for ERISA to see Damon's split." *Id*.

EXHIBIT B

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Chronological Index of Pertinent Emails/Communications[1]

Tab		
1	LCHB-0053483	4/25/13 email from Garrett Bradley of Thornton Law Firm to Robert Lieff, copying Daniel Chiplock and others regarding "the obligation to the local counsel who assists Labaton in matters involving the Arkansas Teachers Retirement System." Lieff replies that he is in "full agreement" with proposal to allocate 4 or 5% of awarded attorneys' fees to Damon Chargois.
2	LBS025771	4/25/13 email from Chargois to Bradley (copying Lieff, Chiplock and others) agreeing to the same proposal, thereby confirming the description of him as "local counsel" assisting Labaton Sucharow LLP ("Labaton").
3	LCHB-0053491-92	8/6/15 email from Bradley to Lieff, copying Michael Thornton, referring to Chargois as the "Arkansas local," with an implied fee amount of 5% (arising in the context of negotiating a fee allocation among class counsel).
4	LCHB-0053493-4	8/28/15 string containing email from Lieff to Bradley referring in kind to "Arkansas local counsel," with a provision for 5% of fees. (Also in the context of negotiating a fee allocation among class counsel.)
5	LCHB-0053507-12	8/28/15 exchange between Lieff and Chiplock referring to "Arkansas local" at 5%. (Again, part of the same allocation effort.)

[1] These documents are being transmitted electronically by separate sharefile.

Tab		
6	LCHB-0053513-14	8/28/15 string containing email from Bradley to Chiplock and others regarding fee allocation, indicating that the "Arkansas fee is still being negotiated," with prior emails referring multiple times to either "Arkansas," "Arkansas fee," or "local Arkansas counsel."
7	LCHB-0053522-23	8/30/15 email exchange between Chiplock and Bradley where Chiplock asks for copy of written agreement discussing "local Arkansas counsel" fee component. Bradley responds saying the "Arkansas component" was to "come off the top."
8	LCHB-0053531-32	8/30/15 string containing emails from (i) Chiplock to Bradley asking for a copy of the written agreement relating to Arkansas local; (ii) Lieff to Bradley saying he does not have a copy of the agreement; and (iii) Bradley to Lieff and to Chiplock saying that he re-sent it to Lieff previously and that he will send it again when he gets to his office.
9	LCHB-0053538-40	6/14/16 email from Chiplock to Lieff, forwarding a copy of 8/30/15 and 7/28/15 emails from Bradley to Lieff and Chiplock and Thornton, with the note "I don't know how you get around this." The 8/30/15 and 7/28/15 emails from Bradley to Lieff each forwarded a copy of the original April 2013 email exchange, describing Chargois as "local counsel."
10	LCHB-0053541	6/14/16 email from Chiplock to Lieff indicating that he found the April 2013 email in archives, and that he had no memory of it. Forwarding a copy of the April 2013 email to Lieff and inquiring how "local counsel's" fee is going to be calculated.
11	TLF-SST-057140	7/8/16 email from Bradley to Lieff, Chiplock and others (copying Chargois) describing Chargois as "the local attorney in this matter who has played an important role."

Tab		
12	LCHB-0053542	7/8/16 email from Chiplock to Lieff forwarding a copy of the preceding email, and inviting Lieff to respond.
13	LCHB-0053544-45	7/8/16 email string containing a response from Chargois to Sucharow, copying Lieff, Chiplock and others, confirming his agreement to 5.5% and effectively confirming the description of his role in Bradley's email of the same date.
14	LBS039936-37	7/8/16 string containing email from Lieff to Bradley, copying others, confirming Lieff Cabraser's agreement to "5.5[%] to Chargois."
15	LCHB-0053548-49	String containing 8/12/16 corrective email from Lieff to Bradley, correcting Lieff's prior communication to include a reference to "**local counsel."** (Emphasis in original).
16	LCHB-0053552	August 2016 written agreement concerning proposed allocation of attorneys' fees, referencing "Labaton Sucharow's local counsel."
17	LCHB-0053553-55	11/23/16 email from Nicole Zeiss of Labaton to Lieff, Chiplock and others referring to "Labaton's local counsel."
18	LCHB-0053560-62	11/23/16 email exchange between Chiplock and Lieff agreeing that figures for Lieff Cabraser look correct.
19	LCHB-0053567-69	11/23/16 email from Chiplock to Zeiss confirming that Lieff Cabraser's figures look correct.

EXHIBIT O

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP

Report created on 06/28/2018 10:35:31 AM

From = 02/06/17 **To** 06/28/18

STATE STREET - ARKANSAS TEACHERS

Matter Number: 3344-0002

Soft Costs Incurred

	Amount
In-House Copies	$407.20
Postage	$0.46
Print	$9,736.40
Telephone	$424.59
Total Soft Costs:	**$10,568.65**

Hard Costs Incurred

	Amount
Computer Research	$2,712.26
Deposition/Transcripts	$36,125.94
Electronic Database	$7,920.00
Federal Express/Messenger	$208.87
Professional Fees	$1,225,826.08
Travel	$57,353.31
Total Hard Costs:	**$1,330,146.46**
Total Matter Costs:	**$1,340,715.11**

EXHIBIT P

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/29/18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: PETROBRAS SECURITIES LITIGATION	14-cv-9662 OPINION AND ORDER

JED S. RAKOFF, U.S.D.J.

The $3 billion settlement of this somewhat large securities class action is before the Court for final approval. The Settlement Agreement[1] comports with all legal requirements, and the objections to the settlement are without merit. But the nearly $300 million in attorneys' fees requested by plaintiffs' counsel needs to be reduced by roughly one-third.

Named plaintiffs Universities Superannuation Scheme Limited acting as sole corporate trustee for Universities Superannuation Scheme ("USS"), North Carolina Department of State Treasurer ("North Carolina"), and Employees' Retirement System of the State of Hawaii ("Hawaii") (collectively, "Class Representatives" or "Class Plaintiffs"), seek final approval of a proposed settlement agreement with defendants Petróleo Brasileiro S.A. ("Petrobras"), Petrobras Global Finance B.V., Petrobras America Inc. (collectively, the "Petrobras Defendants"), BB Securities Ltd., Citigroup Global Markets Inc., J.P. Morgan Securities LLC, Itaú

[1] Except where otherwise noted, all capitalized terms in this Opinion and Order have the same meanings as those assigned to them in the Stipulation of Settlement and Release. See Dkt. 767-1.

BBA USA Securities, Inc., Morgan Stanley & Co. LLC, HSBC Securities (USA) Inc., Mitsubishi UFJ Securities (USA), Inc., Merrill Lynch, Pierce, Fenner & Smith Incorporated, Standard Chartered Bank, Bank of China (Hong Kong) Limited, Banco Bradesco BBI S.A., Banca IMI S.p.A., Scotia Capital (USA) Inc. (collectively, the "Underwriter Defendants"), Almir Guilherme Barbassa, Jose Carlos Cosenza, Paulo Roberto Costa, Renato de Souza Duque, Guillherme de Oliveira Estrella, Maria das Graca Silva Foster, Jose Miranda Formigli Filho, José Sergio Gabrielli, Silvio Sinedino Pinheiro, Daniel Lima de Oliveira, José Raimundo Brandão Pereira, Sérvio Túlio da Rosa Tinoco, Paulo Jose Alves, Gustavo Tardin Barbosa, Alexandre Quintão Fernandes, Marcos Antonio Zacarias, Cornelis Franciscus Jozef Looman, Theodore M. Helms (collectively, the "Individual Defendants"), Banco Votorantim Nassau Branch, Santander Investment Securities Inc., Petrobras International Finance Company, and PricewaterhouseCoopers Auditores Independentes ("PwC Brazil").[2] See Memorandum of Law in Support of Class Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation ("Pl. Mem."), Dkt. 776. Contingent on approval of the settlement, counsel for Class Representatives, namely, Pomerantz LLP ("Pomerantz"), Labaton Sucharow LLP ("Labaton"), and Motley Rice LLC ("Motley

[2] Pursuant to the Stipulation of Settlement and Release, Dkt. 767-1, however, Paulo Roberto Costa and Renato de Souza Duque are not Released Parties, id. at 22.

Rice")[3] (collectively, "Class Counsel"), move for fees and costs, see Dkt. 791, as do four other law firms, namely, Wolf Popper LLP ("Wolf Popper"), Almeida Advogados ("Almeida"), Kahn, Swick & Foti, LLC ("KSF"), and Bernstein Litowitz Berger & Grossmann LLP ("BLBG"), who are counsel for plaintiffs in related individual actions, see Dkts. 777, 781, 784.

Six members of the class filed timely objections to either the settlement, the motion for fees and expenses, or both: William Thomas Haynes, as trustee for the W Thomas Haynes and Katherine Haynes Irrevocable Trust for the benefit of Sara L. Haynes ("Haynes"), see Objection of William Thomas Haynes ("Haynes Obj."), Dkt. 797; Spencer R. Bueno, see Objections of Spencer R. Bueno to Class Action Settlement ("Bueno Obj."), Dkt. 803; Julio A. Martinez and Sandra V. Bennun Serrano ("Martinez"), see Objection to Approval of Class Action ("Martinez Obj."), Dkt. 806; Mathis and Catherine Bishop ("Bishop"), see Objection to Proposed Settlement and Fee Application ("Bishop Obj."), Dkt. 811; Giulio Formenti on behalf of Renewable Carbon Corporation ("Formenti"), see Objection to the Petrobras Securities Litigation Case ("Formenti Obj."), Dkt. 812; and Richard and Emelina Gielata ("Gielata"), see Shareholder Objections to Proposed Settlement,

[3] Motley Rice is counsel for Union Asset Management Holding AG.

Plan of Allocation, Proof of Claim, Class Notice and Request for Attorneys' Fees ("Gielata Obj."), Dkt. 813.[4]

Class Plaintiffs, responding to the objections, argue that they are without merit. See Reply Memorandum of Law in Support of (1) Lead Plaintiff's Motion for Final Approval of Class Action Settlement and Plan of Allocation; and (2) Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Pl. Reply"), Dkt. 824.[5] Defendants concur as regards the Settlement Agreement, see Petrobras Defendants' and Underwriter Defendants' Reply in Support of Class Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation ("Def. Reply"), Dkt. 825; PricewaterhouseCoopers Auditores Independentes' Reply in Support of Class Plaintiffs' Motion for Final Approval of Settlement and Plan of Allocation, Dkt. 828, and

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[4] The Court is also in receipt of a letter from MaryAnne Lassegard who objects to the notice and settlement amount. See Letter dated June 5, 2018, Dkt. 832. This objection is untimely and Ms. Lassegard has not demonstrated standing to object. Id. Ms. Lassegard's objection is also without merit as Ms. Lassegard is incorrect that smaller shareholders will be disadvantaged by this Settlement compared with larger shareholders.

[5] Class Plaintiffs have also accused certain objectors of having improper motives including, in the case of Bueno and Gielata, allegedly seeking to extort personal payments through the device of frivolous appeals. See Pl. Reply at 4-14. As Class Plaintiffs do not currently seek any specific relief at the district court level, and the allegations of extortion, if true, will only become evident on appeal, the Court sees no need to reach these issues at this time.

take no position on the Plan of Allocation or Class Counsel's motion for fees and costs, see id.[6]

By way of brief background, on February 1, 2018, Class Plaintiffs moved, unopposed, for preliminary approval of a settlement agreement, see Dkt. 765, pursuant to the terms of which, the Petrobras Defendants would pay $2.95 billion and PwC Brazil would pay $50 million to the class in exchange for releases from all claims. See Stipulation of Settlement and Release, Dkt. 767-1; Amended Stipulation and Agreement of Settlement, Dkt. 767-10. On February 23, the Court held a preliminary approval hearing. See Transcript, Dkt. 773. On February 28, the Court granted Class Plaintiffs' motion for preliminary approval. See Order at 2, Dkt. 770. Thereafter, more than one million copies of the Class Notice were mailed to potential class members and a summary notice was published in major news publications worldwide. See Pl. Reply at 1.

On April 20, Class Plaintiffs moved for final approval of the proposed Settlement and Plan of Allocation and certification of the Settlement Class. See Dkt. 776. No institutional investor

[6] At the request of the Court, the Petrobras Defendants submitted a letter identifying time entries in Class Counsel's fee request warranting the Court's attention. See Letter from the Petrobras Defendants dated May 7, 2018 ("Def. Ltr.") at 2, Dkt. 793. Also at the Court's request, Class Counsel submitted a reply. See Letter on Behalf of Class Representatives dated May 18, 2018 ("Pl. Ltr."), Dkt. 814.

objected to the Settlement Agreement, Plan of Allocation, or proposed fee award and all but one of the institutional plaintiffs who had previously filed separate lawsuits but had not yet settled with defendants indicated their intention to remain members of the class and forego their individual claims. See Pl. Reply at 1-2.[7] On June 4, 2018, the Court held a settlement hearing at which objectors Haynes and Martinez appeared. See Transcript dated June 4, 2018 ("Tr."). After careful consideration of all the voluminous written filings and oral argument in this case, the Court hereby grants Class Plaintiffs' motion for final approval, finding that the Settlement Agreement and Plan of Allocation are fair, reasonable, adequate, and comport with all requirements of law. The Court also grants in full the motions of Wolf Popper, Almeida, and KSF for fees and costs, but only grants in part the motions of Class Counsel and BLBG for the same.

I. The Stipulation of Settlement and Plan of Allocation

[7] More than a dozen institutional investors filed separate, so-called "tag-along" actions based on the same basic allegations as the class complaint. Several have previously settled, and, with one exception, the remainder have decided to forgo their separate actions and, instead, receive their pro rata distributions as members of the class. The only separate institutional investor that has not so far indicated that it will, in effect, opt in to the settlement is Washington State Investment Board ("WSIB"). Counsel for that party and counsel for defendants should jointly call chambers by no later than July 2, 2018 to schedule the prompt trial of that remaining case.

This case grows out of a massive fraud, but whether defendants were responsible for the fraud or were themselves victims of the fraud was one of several hotly-contested issues that made the outcome of this case uncertain. The proposed settlement followed more than three years of litigation including, among other things, non-frivolous (though mostly unsuccessful) motions by defendants to dismiss plaintiffs' claims, defeat class certification, and obtain summary judgment in their favor, as well as extensive fact and expert discovery (including 68 depositions and review of more than 25 million pages of documents), preparations for trial, a substantial Second Circuit appeal, and a fully briefed petition for certiorari. See Pl. Mem. at 5-6. Familiarity with all these prior matters is here assumed.

The Settlement Amount equals approximately 22.3% of the likely recoverable damages suffered by the class (as estimated by Class Plaintiffs). See id. at 1. It represents, moreover, a 65% premium over the recoveries enjoyed by various individual plaintiffs (sophisticated institutional investors represented by experienced counsel) who have previously reached settlements with the Petrobras Defendants. Id. at 2. Furthermore, as mentioned, all but one of the remaining institutional plaintiffs have indicated their intention to remain class members and forgo their individual claims. See Pl. Reply at 1-2.

Under Federal Rule of Civil Procedure 23(e), the Court must approve a class action settlement before it can take effect. "A court may approve a class action settlement if it is fair, adequate, and reasonable, and not a product of collusion." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (internal quotations omitted). In making its determination, the Court can take into account, inter alia, (1) the complexity, expense, and duration of the litigation; (2) the class's reaction to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the defendants' ability to withstand a greater judgment; and (8) the range of reasonableness of the settlement fund in light of best possible recovery and all attendant litigation risks. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). Furthermore if, as here, the "settlement class" is different from the litigation class or classes previously certified, the Court must now certify the settlement class, although certain Rule 23 considerations are not applicable in this context. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997) ("a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial").

Since, in preliminarily approving the proposed settlement, the Court tentatively concluded that all the forgoing standards for approval had been met, it makes sense to re-visit these preliminary conclusions chiefly in terms of the objections that have now been raised. Objectors here principally challenge (1) certification, (2) the sufficiency of the class notice, (3) the proposed cy pres recipient, and (4) the settlement amount. The Court reviews each of these objections in turn. (Several objectors also take issue with the fee award requested by Class Counsel; the Court addresses these latter objections in Part II, infra.)

A. Certification

Objectors argue that the proposed settlement class is overbroad, and that, accordingly, it fails to satisfy the requirements of Rule 23 that (1) the diverse groups and individuals within the class be adequately represented by the named plaintiffs, see Haynes Obj. at 3-8; Gielata Obj. at 1-8; Bueno Obj. at 6-9, and that (2) common issues of law and fact predominate over those issues subject only to individualized proof, see Haynes Obj. at 9-12.

(1) Adequate Representation

The proposed settlement agreement defines the Settlement Class as all persons who purchased Petrobras Securities in a transaction "that satisfies any of the following criteria: (i) any transaction in a Petrobras Security listed for trading on the New

York Stock Exchange ("NYSE"); (ii) any transaction in a Petrobras Security that cleared or settled through the Depository Trust Company's book-entry system; or (iii) any transaction in a Petrobras Security to which the United States securities laws apply, including as applicable pursuant to the Supreme Court's decision in Morrison v. National Australia Bank, 561 U.S. 247 (2010)." Stipulation of Settlement and Release ¶ 1(j), Dkt. 767-1. Haynes, Gielata, and Bueno purport to identify an intraclass conflict in this case between those persons whose purchases of Petrobras Securities are connected to the U.S. solely by virtue of the fact that their transactions were cleared or settled through the Depository Trust Company ("DTC") in New York (the "DTC claimants") and those persons whose purchases of Petrobras Securities are otherwise domestic under the operative case law (the "domestic claimants"), for example because their purchases took place on U.S. exchanges. According to Gielata, the DTC claimants are not properly part of the class at all and should be filtered out by a special master. See Gielata Obj. at 4 ("the problem here is not the 'classic' Amchem conflict necessitating subclasses. Rather, the structural conflict here is [] class member claimants versus claimants that cannot be part of the class because their claims are barred by Morrison"). According to Haynes, while the DTC claimants may properly be part of the class, the domestic claimants are entitled to separate representation given the

relative strength of their claims. See Haynes Obj. at 6. Haynes proposes that the Court certify two or three subclasses for purposes of negotiating a new settlement (or continuing the litigation). Id. at 8. Bueno similarly suggests that the Court appoint subclass representatives. See Bueno Obj. at 9.

What this boils down to as a practical matter is that certain claimants who would have been unable to join the litigation classes previously certified by the Court because of extraterritorial impediments are now included in the settlement class so that the defendants can buy "global peace." In the Second Circuit, plaintiffs are entitled to settle even entirely non-meritorious claims. See In re Am. Int'l Grp., Inc. Sec. Litig., ("AIG"), 689 F.3d 229, 243 (2d Cir. 2012) ("defendants in class action suits are entitled to settle claims pending against them on a class-wide basis even if a court believes that those claims may be meritless"). While "no class may be certified that contains members lacking Article III standing," class members who have suffered injuries-in-fact, as all putative members here have, can settle their claims "irrespective of whether their injuries are sufficient to sustain any cause of action." Denney v. Deutsche Bank AG, 443 F.3d 253, 264-5 (2d Cir. 2006).

Domesticity - although not a matter of Article III standing, see Morrison v. Nat'l Australia Bank, 561 U.S. 247, 254 (2010) ("to ask what conduct § 10(b) reaches is to ask what conduct §

10(b) prohibits, which is a merits question") - is an element of plaintiffs' securities fraud claims. If contested by defendants, domesticity must be proven by plaintiffs as part of their case-in-chief. But defendants here have waived any domesticity requirement for the purposes of settlement. See Def. Reply at 3. Accordingly, even though the Court previously found that the DTC claimants could not establish domesticity as a matter of law (but not because they lacked Article III standing), Gielata is wrong that the DTC claimants cannot be part of the settlement class (assuming that the other requirements of Rule 23 are met). See AIG, 689 F.3d at 237-44 (certifying a settlement class even though some or all of the class members could not satisfy the reliance element of their securities fraud claims); Sullivan v. DB Invs., Inc., 667 F.3d 273 (3d Cir. 2011) (certifying a settlement class even though some members of the class lacked statutory standing).

Another objector, Haynes, concedes this much. But, Haynes argues, while the "release of claims arising from foreign transactions might command some settlement value," the "proper valuation" of such "foreign" claims must be "tested through arms-length negotiation by separate representatives." Haynes Obj. at 7. Since Class Counsel were "obligated to advance the collective interests of the class," Haynes reasons, they were unable to represent the distinct interests of the subclasses. Id. (quotations omitted). As a result, Haynes concludes, Class Counsel

agreed to a proposed settlement agreement that unfairly diluted the recovery of domestic-purchasing class members (like Haynes).

Federal Rule of Civil Procedure 23(a)(4) requires that the representatives in a class action "fairly and adequately protect the interests of the class." The Rule, among other things, "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 521 U.S. at 625. Representation is "adequate" where the class representatives have (1) an interest in vigorously pursuing the claims of the class and (2) no interests antagonistic to the interests of the other class members. In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig. ("Payment Card"), 827 F.3d 223, 231 (2d Cir. 2016), cert. denied sub nom. Photos Etc. Corp. v. Home Depot U.S.A., Inc., 137 S. Ct. 1374 (2017).

In the event a court identifies a "fundamental" conflict that goes "to the very heart of the litigation," Charron v. Wiener, 731 F.3d 241, 250 (2d Cir. 2013) (quotations omitted), the conflict must be addressed with a "structural assurance of fair and adequate representation for the diverse groups and individuals" among the class, Amchem, 521 U.S. at 627. "One common structural protection is division of the class into 'homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.'" Payment Card, 827 F.3d at 231 (quoting Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999)). Where a court

certifies a class at the same time as it approves a settlement, these requirements - "designed to protect absentees by blocking unwarranted or overbroad class definitions" - "demand undiluted, even heightened, attention." Amchem, 521 U.S. at 620.

Two Second Circuit cases bear on the question of whether there is a fundamental conflict here between the DTC claimants and the domestic claimants such that a failure to divide the settlement class into subclasses makes it impossible for the Court to determine whether the interests of all class members were fairly and adequately represented. The first is In re Literary Works in Electronic Database Copyright Litigation ("Literary Works"), 654 F.3d 242 (2d Cir. 2011), a copyright dispute. In that case the proposed settlement agreement divided the class into three categories: "Category A" covered works that had been registered with the Copyright Office in time to be eligible for statutory damages and attorneys' fees under the Copyright Act; "Category B" covered works that had been registered with the Copyright Office but not in time to be eligible for statutory damages; and "Category C" covered all other works, none of which could be litigated for damages purposes until they were registered with the Copyright Office. Id. at 246. Category A and B claims were substantially stronger than Category C claims, but Category C claims comprised more than 99% of all claims held by the putative class. Id.

The proposed plan of allocation in Literary Works employed a damages formula that disadvantaged Category C claims in a variety of ways. Among other things, the formula paid each Category A or B claim substantially more than each Category C claim. Id. The settlement also capped defendants' total liability at $18 million and, if the total amount of all claims plus costs and fees exceeded $18 million, then the payout to Category C claims would be reduced pro rata until the total amount of all claims plus costs and fees reached $18 million. Id. Only if, after reducing Category C claims to zero, the payout due to Category A and B claims exceeded the available funds would a reduction be applied to the Category A and B claims. Id.

In these circumstances, the Second Circuit found that class members' "interests diverge[d] as to the distribution of" the recovery because "each category of claim is of different strength and therefore commands a different settlement value." Id. at 254. Although all parties in Literary Works agreed that Category C claims were the weakest, the court saw "no basis for assessing whether the discount applied to Category C's recovery appropriately reflect[ed] that weakness." Id. at 253. Nor could such a basis be established, the court concluded, "in the absence of independent representation." Id. After all, the named plaintiffs — who held combinations of claims – had "no incentive to maximize the recovery for Category-C only plaintiffs, whose

claims were lowest in settlement value but eclipsed all others in quantity." Id. at 254.

In the second relevant case, Payment Card, the settlement agreement split plaintiffs into two classes: a Rule 23(b)(3) class covering merchants who accepted Visa or MasterCard between 2004 and 2012 (the "(b)(3) class") and a Rule 23(b)(2) class covering merchants who accepted Visa or MasterCard from 2012 onwards (the "(b)(2) class"). See 827 F.3d at 229. The proposed plan of allocation awarded the (b)(3) class up to $7.25 billion in monetary relief and the (b)(2) class injunctive relief in the form of changes to various network rules. Id. While members of the (b)(3) class could opt out, members of the (b)(2) class could not. Id. Nonetheless, the same counsel represented both classes. Id. at 234. In these circumstances, the Second Circuit found that representation was inadequate because the (b)(3) class "would want to maximize the cash compensation for past harm" and the (b)(2) class "would want to maximize restraints on network rules to prevent harm in the future." Id. at 233. "Unitary representation of separate classes that claim distinct, competing, and conflicting relief create unacceptable incentives for counsel to trade benefits to one class for benefits to the other in order somehow to reach a settlement." Id. at 234.

The facts in the instant situation are dramatically different from the facts in Literary Works and Payment Card. To begin with,

here, unlike in Literary Works, all plaintiffs have been placed on an equal footing because defendants waived any domesticity challenge for settlement purposes.[8] And here, unlike in Payment Card,[9] where the same lawyers sought to represent two settlement classes with starkly distinct interests, both the DTC claimants and domestic claimants in this case suffered the same injury and are receiving the same relief. Moreover, there are no claimants here who have not yet been injured, i.e. there is a closed universe of potential claimants.

Additionally, here, unlike in Literary Works,[10] the parties provide an explanation for why the weaker claims are being treated

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[8] In Literary Works, the proposed plan of allocation divided plaintiffs' claims into three sub-groups, with those eligible for statutory damages receiving greater relief than those not eligible for statutory damages. 654 F. 3d at 246.

[9] In Payment Card, the Second Circuit examined the settlement's substance for evidence of prejudice and found that "the bargain that was struck between relief and release on behalf of absent class members [was] so unreasonable that it evidences inadequate representation." 827 F.3d at 236. The problem was that merchants in the (b)(2) class that accept American Express or operate in states that prohibit surcharging would gain "no appreciable benefit from the settlement" and merchants that began business after July 20, 2021 would gain "no benefit at all." Id. at 238. Thus, in exchange for nothing, "class counsel forced these merchants to release virtually any claims they would ever have against the defendants." Id. No such problem exists here, where, at worst, recoveries of the domestic claimants are very slightly diluted because the Plan of Allocation does not include a process for differentiating between their claims and the claims of weaker claimants (and awarding the latter a lesser amount).

[10] In Literary Works, the Second Circuit said it could "discern no reason, and authors and publishers offer none" for why the Category

equally to the stronger ones: the substantial administrative costs of differentiating between the comparatively small number of DTC claimants and the overwhelming majority of domestic claimants.[11] See Supplemental Declaration of Niki L. Mendoza Regarding Class Notice, Exclusion Requests, Objections, and Claims Received to Date ("Mendoza Decl.") ¶¶ 17-19, Exhibit G, Declaration of Emma Gilmore in Support of Class Plaintiffs' Reply Memorandum of Law, Dkt. 827 (affirming that "it would be costly to require transaction-by-transaction determinations of whether" DTC claims otherwise complied with Morrison and that such analysis would be "time-consuming" and potentially "delay the administration of

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C claimants should bear all the losses if the amount of total claims exceeded the settlement cap. 654 F.3d at 254. "That only one category of claim was targeted for this penalty without credible justification," the court reasoned, "strongly suggests a lack of adequate representation for those class members who hold only claims in this category." Id.

[11] Class Plaintiffs estimate that DTC claimants make up about 2% of the class as defined in the stipulation. See Tr. at 7. This is, they argue, because most of the noteholders whose purchases cleared through DTC in New York were domestic within the meaning of Morrison for other reasons having to do with, for example, the location of the buyers or sellers or the location of the brokers. See Pl. Reply at 17. Although Class Plaintiffs' evidence on this point is not conclusive, objectors provide no alternative calculations supporting their contention that the percentage is higher than 2%. Additionally, were the Court to adopt objectors' proposal, no one contests that the claims administrator would have to undertake an analysis of each transaction and that such a process would be both timely and costly, detracting from the recovery of the Settlement Class and delaying distribution. Id. at 20.

claims and distribution of funds"). Lending credence to Class Plaintiffs' explanation is the fact that not one institutional investor has joined Haynes in his objection and Haynes himself has at most a couple hundred dollars at stake. See Tr. at 17:3 (St. John) (estimating Haynes' expected recovery at $66).[12]

Further still, each of the three named plaintiffs in this case are represented by separate counsel, and two of those three named plaintiffs, Hawaii and North Carolina, have exclusively domestic claims, while USS has both domestic and non-domestic claims. In other words, Hawaii and North Carolina are the sort of domestic-only class representatives that Haynes and Bueno ask the Court to appoint. Both were involved in the settlement negotiations and neither objected to the equal treatment of the DTC claimants, even though these institutional investors have orders-of-magnitude more money on the line than Bueno or Haynes and have no plausible reason to agree to disadvantageous settlement terms. See Tr. at 18:12-20 (Dubbs) (explaining that all of Hawaii's transactions were "domestic" per the Court's prior order, that Hawaii was actively engaged in the settlement negotiations, and that Hawaii is "satisfied with the result"). Objectors, for their part, provide no explanation as to why Hawaii or North Carolina would agree to

[12] Moreover, the Court notes that defendants "would not have agreed to the Settlement Amount without the inclusion of all the Settlement Class Members as defined." Def. Reply at 7.

a settlement that unfairly diluted their expected recovery. Indeed, counsel for these Representatives, while also representing the class as a whole, have a fiduciary duty to their individual clients to ensure that the Agreement and Plan advance their clients' interests. Accordingly, the Court finds that there is insufficient evidence of prejudice here to warrant the appointment of subclass representatives. See Literary Works at 252 (in evaluating the adequacy of representation a Court may "examine a settlement's substance for evidence of prejudice to the interests of a subset of plaintiffs").

(2) Predominance

Haynes also argues that the presence of the DTC claimants in the class definition means that the proposed class fails to meet the predominance requirement of Rule 23(b)(3). See Haynes Obj. at 9. The problem, according to Haynes, is that domesticity is an individual question requiring class members to present evidence that varies from member to member (including, e.g., facts concerning the formation of contracts, placement of purchase orders, and exchange of money). Id. Haynes faults plaintiffs for failing to put forth "class-wide evidence" of domesticity, which, Haynes argues, is needed to "prevent the fact-finder from 'having to look at every class member's transaction documents to determine who did and who did not have a valid claim.'" Haynes Obj. at 10 (quoting In re Petrobras Sec., 862 F.3d 250, 274 (2d Cir. 2017)).

But the predominance requirement differs between trial and settlement. See AIG, 689 F.3d at 241. That, as noted above, is because "with a settlement class, the manageability concerns posed by numerous individual questions [] disappear." Id. After all, the proposal is "that there be no trial." Amchem, 521 U.S. at 620. Although a Court must still consider whether the class is "cohesive," all plaintiffs here claim injury by reason of the same conduct, defendants' purported misrepresentations and omissions are common to all, plaintiffs' proof of intent would not differ between class members, and all class members have suffered an identical kind of injury. See Green v. Wolf Corp., 406 F.2d 291, 299-301 (2d Cir. 1968).[13] Accordingly, while a class including DTC claimants and domestic claimants might have created manageability problems or other challenges at trial, here, in the settlement context, such concerns are irrelevant. As domesticity is the only issue objectors contend poses a problem in this regard, the Court finds that common issues predominate and that Rule 23(b)(3) is satisfied for purposes of settlement.[14]

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[13] Moreover, the Second Circuit has previously held in this very case that, even in the trial context, after weighing the relationship between common and individual questions, the district court might yet "determine that any variation across plaintiffs" when it comes to domesticity on balance were "insufficient to defeat predominance." In re Petrobras Sec., 862 F.3d at 274 n.27.

[14] The Court approves the Plan of Allocation for the same reasons set forth above, finding that it is fair, reasonable, and adequate.

B. Class Notice

Gielata argues that the Class Notice is deficient because it fails to disclose three categories of materially relevant information: (1) the percentage of the Settlement Fund apportioned to American Depository Shares ("ADS"); (2) an explanation of why a release is given to the underwriter defendants despite their failure to contribute to the Settlement Amount; and (3) the compensation due to the claims administrator. See Gielata Obj. at 9-10. Gielata seeks supplemental notice and objects to the compensation of the claims administrator to the extent that it exceeds 1% of the Settlement Fund ($30 million). Id.

As regards the percentage of the Settlement Fund apportioned to ADS, the Plan of Allocation discloses how that percentage will be calculated and Gielata cites no case law for the proposition that such notice is deficient where it does not include break-downs of expected payouts.

As regards the Underwriter Defendants' contribution (or lack thereof) to the Settlement Fund, there is no requirement that the Notice disclose the rationale behind the release. See O'Brien v. Nat'l Prop. Analysts Partners, 739 F. Supp. 896, 902 (S.D.N.Y. 1990). Moreover, it is permissible for an issuer to provide to the underwriters that it indemnifies a release in a settlement without requiring a contribution from those underwriters. And, as the Court knows from its familiarity with the underlying case, the

plaintiffs' case against the underwriters was materially weaker than its case against the Petrobras Defendants and PwC Brazil.

As regards the claims administrator, that administrator, the Garden City Group, disclosed at the hearing (at the Court's direction) that it will in no event be paid 1% or more of the settlement fund and that its compensation is capped at $19 million. See Tr. at 22. Accordingly, the Court finds that the disclosure in this case was sufficient (and that the compensation of the claims administrator is reasonable).[15]

C. Cy Pres Award

Haynes and Bueno object to the cy pres recipient designated in the proposed settlement agreement. See Haynes Obj. at 8-9; Bueno Obj. at 4. As mentioned at the hearing, see Tr., the Court will permit further briefing on this issue, as appropriate, if and when the question becomes ripe for consideration, and the Court retains jurisdiction for that purpose.

D. Settlement Amount

Giulio Pieter Formenti, on behalf of Renewable Carbon Corp. ("RCC"), objects to the size of the settlement, arguing that a "fair" settlement for investors would be "the full value of the loss realized," or $12.40 per share. See Formenti Obj. at 2. RCC,

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[15] Bueno also argues that the Notice was deficient because, inter alia, the Plan of Allocation was not provided on the notice website and Class Plaintiffs have concealed the damages estimate provided by their expert. These arguments are without factual basis.

however, lacks standing to make this objection. RCC sold all of its Petrobras Securities on July 31, 2013, more than a year before the first alleged corrective disclosure in this case on October 16, 2014. See id. at 8 (showing that RCC sold its 90,200 shares of Petrobras on July 31, 2013). Moreover, as previously noted, any recovery in this case was far from a certainty, given the substantial defenses that were raised.

Bueno also objects to the settlement amount as part of a "kitchen-sink" brief that purports to identify inequities relating to at least a dozen aspects of the proposed settlement. See Bueno Obj. at 2-12. But as regards the settlement amount, Bueno argues only that Class Plaintiffs overstate the risks of proceeding to trial, see id. at 6, and that certain market analysts had expected settlement figures of between $5 billion and $10 billion, see id. at 2 n.1. Bueno does not weigh the other Grinnell factors, or consider the fact that the settlement amount represents a 65% premium over the settlements reached by institutional plaintiffs in the previously-settled individual actions. Indeed, the small number of objectors, their minor stakes in the settlement, and the size of the premium strongly suggest that the settlement amount is fair, adequate, and reasonable.

E. Other Objections

Bueno also objects to the Plan of Allocation as an "improper claimant fund-sharing scheme," id. at 9-11, that is "inappropriate

to the extent that silent class members receive nothing and class members who submit claims do not receive anything approaching their actual damages," id. at 10. But the only relevant authority cited by Bueno for this proposition is entirely inapposite. See Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1018 (2d Cir. 1973), vacated, 417 U.S. 156 (1974) (finding "fluid recovery" an "illegal" solution to manageability problems).[16] Among other things, the proposed settlement here requires proof of claim and the Plan of Allocation sets forth estimated distributions per share and per note before fees and expenses.

Martinez objects to the settlement's release of unknown claims, its failure to take into account "damages due to emotional stress," its failure to stipulate or disclose the "value" of the net settlement fund, and the payment of Class Counsel prior to the Court's determining what amount "was actually paid in cash to the class." See Martinez Obj. at 1-3.

Martinez cites no authority for his arguments. Indeed, the Court is of the view that the notice was sufficient and the Settlement is highly beneficial to Martinez. If Martinez remains a member of the class, Martinez will enjoy a recovery 65% larger per share than that enjoyed by numerous institutional plaintiffs

[16] In Eisen, "the cost of obtaining proofs of claim by individual members of the class and processing such claims was such as to make it clear that the amounts payable to individual claimants would be so low as to be negligible." 479 F.2d at 1017.

who spent large sums of money affirmatively litigating their same claims against defendants. Moreover, it is worth noting that, even taking the allegations in plaintiffs' complaints as fact, only a portion of the losses suffered by Petrobras shareholders in recent years are attributable to defendants' fraud. Losses incurred due to economic and political factors cannot be recovered through class action litigation. Finally, Martinez's objection to the timing of payment of counsel is discussed below.

II. Plaintiffs' Motions for Attorneys' Fees and Costs

Bueno objects to the compensatory award requested by the Class Representatives, and Bueno, the Bishops, Martinez, Gielata, and Haynes object to the fee award requested by Class Counsel. Wolf Popper, Almeida, KSF, and BLBG also move, without opposition or objection, for their fees and costs. The Court considers each request in turn.

A. Class Representatives

Class Representatives seek, pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), an award of $400,000 for expenses incurred directly relating to their representation of the class. See Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees and Reimbursement of Litigation Expenses ("Fee Mem.") at 1, Dkt. 787.

Bueno argues that there is no way for the Court to calculate the reasonableness of the amount as plaintiffs have not provided

a break-down. See Bueno Obj. at 12. But each Representative has provided sworn statements detailing the work performed, the people who performed it, and the time expended. See Dkts. 789-12-14. The Representatives also calculated estimated hourly rates. Id. The work performed by named plaintiffs was beneficial to the class and included reviewing drafts of the complaints, responding to defendants' interrogatories and document requests, producing responsive documents, providing oversight of the mediation and settlement process, authorizing the settlements, and reviewing drafts of the settlements before they were filed with the Court. See Corrected Decl. of Jeremy A. Lieberman ¶¶ 449-53, Dkt. 789. Lead plaintiff USS's representatives, for example, attended every substantive hearing and mediation session, and reviewed the vast majority of significant filings. See Fee Mem. at 25. USS also conducted at least 70 telephonic and in-person meetings with Class Counsel. Id.

When selecting the Class Representatives, the Court explicitly sought out representatives prepared to be highly engaged in the litigation. From its own review, the Court is more than satisfied that this expectation has been fully met. Accordingly, the Court finds that the requested awards are fair and reasonable.

B. Class Counsel

Class Counsel seeks a fee award of $284.4 million and reimbursement of $14,515,235.24 in litigation expenses.

Haynes, Gielata, Bueno, the Bishops, and Martinez object. Haynes argues (1) that Class Counsel's lodestar is substantially overstated, (2) that a multiplier of 1.78 stands at the outer limit of what the Court should allow, and that, accordingly, (3) class counsel's fee request should be reduced to $90.3 million or 3% of the $3 billion fund. See Haynes Obj. at 12-25. Gielata argues that (1) no lodestar multiplier is warranted in this case, (2) Class Counsel's lodestar is vastly inflated, (3) public policy disfavors a $285 million fee award, and (4) a fee award of 2% or $60 million would be appropriate. See Gielata Obj. at 10-20. Bueno argues that Class Counsel's fee request is excessive. See Bueno Obj. at 13. The Bishops argue that Class Counsel's fee award should be cut in half. See Bishop Obj. at 1. And Martinez argues that the Court should not award attorney's fees as a percentage of the Settlement Amount. See Martinez Obj. at 2.[17]

Under controlling law, "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his

[17] As noted, defendants, at the Court's request, submitted a letter on May 7, 2018 assessing the reasonableness of Class Counsel's fee application, and flagging for the Court's consideration, inter alia, the rates charged by more than 100 staff attorneys and project attorneys, the rates charged for translation work, and specific instances where counsel's time sheets do not support the amount of time billed. See Def. Ltr. at 2-3.

client is entitled to a reasonable attorney's fee from the fund as a whole." Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980). "The rationale for the doctrine is an equitable one: it prevents unjust enrichment of those benefitting from a lawsuit without contributing to its cost." Goldberger v. Integrated Res., Inc., 209 F.3d 43, 47 (2d Cir. 2000). Fee awards also "serve to encourage skilled counsel to represent those who seek redress for damages inflicted on entire classes of persons," and therefore "to discourage future misconduct of a similar nature." In re FLAG Telecom Holdings, Ltd. Sec. Litig., No. 02 Civ. 3400, 2010 WL 4537550, at *23 (S.D.N.Y. Nov. 8, 2010).

At the same time, counsel are not entitled to reap a windfall. See Goldberger, 209 F.3d at 49; Grinnell, 495 F.2d at 469. To that end, the Court must consider the reasonableness of the fee award in light of (1) the time and labor expended; (2) the magnitude and complexities of the litigation; (3) the risks of the litigation; (4) the quality of counsel's representation; (5) the requested fee in relation to the settlement; and (6) public policy. Id. at 50 (citing Union Carbide, 724 F. Supp. at 163). In considering these factors, Class Counsel's "lodestar" - i.e., what its work would have cost if billed at ordinary hourly rates - "remains useful as a baseline." Id.

(1) The Lodestar

Class Counsel states a lodestar of $158,923,426.50. This amount comprises over $110 million "billed" by Pomerantz contract and staff attorneys and over $27 million "billed" by Pomerantz partners and associates.[18] It also includes over $10 million "billed" by Labaton lawyers and $1.8 million "billed" by Motley Rice lawyers.

Rather than go to the added, considerable expense of appointing a Special Master, the Court asked the Petrobras Defendants to review the time sheets of Class Counsel and to identify issues meriting the Court's close attention. See Transcript dated February 23, 2018 at 34-35, Dkt. 773. Although somewhat unusual, the Court took this step because of defendants' intimate knowledge of various aspects of the case, and the Court's confidence was rewarded by the highly professional way in which defendants' counsel undertook their Court-directed task.

Among other things, defendants identified a series of specific instances where counsel's time sheets did not support the amount of time billed. For example, defendants' highlighted entries for one project attorney who billed 23 consecutive billable

[18] Nonetheless, it is well to keep in mind that cases like this one are always handled on a contingent fee basis, so that plaintiffs' counsel never do, in fact, bill the class on an hourly basis. Plaintiffs' counsel's real profit is the difference between what they pay their attorneys and staff on a salaried basis and what they receive in their fee award, and to this extent the "lodestar" is a somewhat artificial measure, though still useful as a check.

days for reading news articles on Petrobras - on most days for exactly 8.0 or 9.0 hours per day - totaling approximately 185 hours. Id. at 7. In another instance, a project attorney spent seven consecutive days reviewing the Consolidated Third Amended Class Action Complaint for at least 48 hours of total time after the Complaint had been filed. Id. Yet another project attorney billed eight hours per day at $450 per hour listing only "office closed" as the work description. Id.

While Class Plaintiffs did not necessarily concede the dubiousness of these and other charges questioned by defendants, they did voluntarily remove a number of them (such as the project attorney time billed while the office was "closed"), reducing their total lodestar from $159,496,169.50 to the above-mentioned $158,923,426.50. See Pl. Ltr. at 29. At the same time, Class Plaintiffs strenuously defended as justified and appropriate certain other charges identified by defendants. See id. In the end the Court, having undertaken its own personal review of the time sheets, concludes that the more global reductions described below, together with the aforementioned reductions agreed to by plaintiffs' counsel, sufficiently account for any sporadic and idiosyncratic overcharging that may have occurred.

Gielata argues that Pomerantz's billing rates for staff and contract attorneys are excessive and that such rates should be capped at a maximum of $200 per hour. See Gielata Obj. at 18-20.

Gielata further argues that the Court should reduce the number of reimbursable hours billed by these attorneys by 20% because their work focused on document review. Id. at 19.

Haynes argues that the $27,857,241.50 charged by 27 foreign project associates should be billed at-cost as an expense, see Decl. of Anna St. John ¶ 5, Dkt. 800 (listing the contract attorneys admitted only in Brazil and their amounts billed). According to Haynes, an attorney must be at least capable of being admitted pro hac vice in this Court in order to recover fees for legal services. See Haynes Obj. at 13-14 (citing Spanos v. Skouras, 364 F.2d 161, 168 (2d Cir. 1966) (en banc) and In re One Infant Child, No. 12 Civ. 7797, 2014 WL 704037, at *5 (S.D.N.Y. Feb. 20, 2014), rev'd sub nom. Souratgar v. Lee Jen Fair, 818 F.3d 72 (2d Cir. 2016) (denying reimbursement for legal services by a foreign attorney not admitted to practice in the United States)). Haynes further argues that the rates for contract attorneys should be reduced to $75 per hour and that the Court should sanction Class Counsel for overinflating their lodestar by applying a further 20% reduction. Id. at 18.

In evaluating these and other objections, the Court has spent a considerable amount of time personally reviewing the billing documentation submitted by plaintiffs' counsel, as well as the objections and responses pertaining thereto. The various reductions made below reflect not only that review, but also the

Court's familiarity from various other cases with appropriate billing rates and time allocations.

As regards the time billed by 27 foreign attorneys, Class Counsel do not address the case law cited by Haynes or identify cases supporting their position. Moreover, it would be improper to charge the class U.S.-attorney rates for this work. Accordingly, the full amount billed by these individuals must be deducted from Class Counsel's lodestar (approximately $27,569,829).[19] However, Class Counsel may add to their reimbursement request the actual costs they incurred compensating these attorneys.

As regards the amounts billed by staff and contract attorneys in this action (approximately $89,410,520.50 at Pomerantz, $6,375,370 at Labaton, and $1,180,333 at Motley Rice), see Def. Ltr. at 10,[20] the Court agrees with objectors that a reduction is appropriate to account for the considerable time spent by these attorneys on low level document review. However, given the legal

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[19] This figure takes into account the fact that Pomerantz, in adjusting its original lodestar, already subtracted around $287,412.50 from the time billed by these attorneys. See Decl. of Anna St. John ¶ 5, Dkt. 800.

[20] Whereas the Petrobras Defendants calculated a staff and project attorney lodestar for Motley Rice of $1,201,798, see Dkt. 793 at 10, the lower figure cited above takes into account the fact that Motley Rice withdrew certain time entries, reducing this amount by at least $21,465. Similarly, the figure for Pomerantz represents the firm's revised lodestar, $116,980,349.50, see Pl. Ltr. at Ex. A, less the amount billed by individuals not admitted to practice law in the United States, $27,569,829.

experience, language skills, and status of these attorneys,[21] the Court disagrees with Gielata and Haynes that their rates should be capped at or below $200. A more appropriate reduction is the one suggested by Gielata of 20%.

As regards the amounts billed by these attorneys for translating documents, however, a further reduction is required. While Class Counsel appropriately used attorneys to perform certain translation work in this case, such work is not appropriately billed at rates of between $325 and $625 per hour. Accordingly, these amounts (approximately $10 million at Pomerantz, $4,162,555 at Labaton, $752,783 at Motley Rice)[22] must be reduced by a further 50%.

Applying all the foregoing adjustments, and "rounding up" the figures in counsel's favor, the Court calculates an adjusted

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[21] For example, some of these attorneys received health insurance and an opportunity to participate in the firm's 401(k) program.

[22] $13,174,549 of Pomerantz's original lodestar is attributable solely to translation work performed by staff and project attorneys. See Def. Ltr. at 6. This figure, however, is both over- and under-inclusive. It is over-inclusive because it counts the time "billed" by non-U.S. attorneys, which the Court determined should be subtracted in its entirety. It is under-inclusive because it does not count the substantial amount of time "block billed" by Pomerantz lawyers for multiple tasks, including translation work. Indeed, the total time attributable in whole or in part to translation is more than $35 million and, subtracting non-U.S. attorney time, around $25 million. Nonetheless, this figure is still considerably over-inclusive. Accordingly, the Court adopts $10 million as a reasonable estimate of the amount of time Pomerantz billed (in its remaining lodestar) for translation work.

lodestar of $104.8 million, consisting of $96.0 million at Pomerantz, $7.5 million at Labaton, and $1.3 million at Motley Rice.

(2) The Multiplier

"[T]here is a strong presumption that the lodestar is sufficient," Perdue v. Kenny A., 559 U.S. 542, 546 (2010), without an enhancement multiplier. The fee applicant bears "the burden of proving that an enhancement is necessary." Id. at 553.

Gielata contends that no multiplier is warranted in this case because the risk of non-recovery was practically nonexistent, and Class Counsel's representation was unexceptional. See Gielata Obj. 11-16. Haynes concedes that a multiplier is warranted but argues that no more than the requested 1.78 multiplier is appropriate. See Haynes Obj. at 19-23. Anticipating a possible lodestar reduction, Class Counsel argues that even at "$104,461,062 [the] requested multiplier would be 2.7, well within the range of acceptable multipliers in this Circuit." Pl. Ltr. at 29. Accordingly, Class counsel contend, the Court should honor the ex ante fee agreement executed by Class Counsel with USS and award $284.5 million. See Fee Mem. at 17-21.

As an initial matter, the Court finds that there was, as previously mentioned, sufficient risk at both the motion to dismiss phase and the motion for summary judgment phase to warrant a multiplier. Additionally, the Court finds that Class Counsel's

performance was in many respects exceptional, with the result that, as noted, the class is poised to enjoy a substantially larger per share recovery than the recovery enjoyed by numerous large and sophisticated plaintiffs who separately settled their claims. It also bears mentioning, however, that this case involved fraud allegations that were previously widely reported and heavily investigated by the authorities in Brazil, so that much of the work that might otherwise have been required of plaintiffs' counsel had already been done, and done in a way that enhanced plaintiffs' bargaining position. As for the fact that plaintiffs negotiated, at the outset of the case, a particular fee arrangement with a particular client, this is at best just one factor to be weighed in assessing, after settlement has been reached, the full set of intervening events that have occurred and that provide a much better indication of what was the value of the attorneys' work to the class as a whole than any before-the-fact private agreement reached with an individual plaintiff.

Indeed, one purpose of the lodestar check is to ensure that even an arms-length fee agreement reached between class counsel and class representatives does not result in a harvest of fees at the expense of the class. As Class Counsel's adjusted lodestar is $104.8 million (and Class Counsel likely spent far, far less than this compensating its attorneys), the Court believes that the original 1.78 multiplier requested by Class Counsel is sufficient

to adequately account for the risks undertaken and the results achieved. Additional compensation above this amount would represent a windfall to Class Counsel, who were highly incentivized to heavily litigate this huge case regardless of the expected fee award.

It is important to also remember that we are dealing here, not just with percentages, billable rates, and multipliers, but with very large amounts of money in absolute terms that plaintiffs' counsel will be receiving under any analysis. Accordingly, the Court grants Class Counsel's motion in part and awards fees in the amount of $186.5 million - consisting of $170,880,000 to Pomerantz, $13,350,000 to Labaton, and $2,314,000 to Motley Rice - or roughly two-thirds of what was sought. The Court also awards costs in the amount of $14,515,235.24, plus whatever amount Class Counsel paid to employ the 27 foreign contract attorneys mentioned above.

As regards the fee award, fifty percent is payable to counsel immediately upon entry of final judgment. The other fifty percent shall be paid only after the distribution is completed. This schedule, which the Court has routinely employed in other cases, reflects that, on the one hand, counsel have spent a great deal of time and money to litigate this case and should not have to continue to shoulder the costs of funding this litigation any longer than necessary, but that, on the other hand, counsel should not be paid in full before their clients have received any of their

recovery, nor would it be helpful to eliminate an incentive for counsel to monitor the distribution agent and ensure that the settlement funds are distributed expeditiously. Dispensing half of counsel's fee award now and half later achieves both these purposes.[23]

C. Wolf Popper and Almeida

Wolf Popper and Almeida, counsel for the plaintiffs in Kaltman v. Petroleo Brasileiro S.A., No. 14 Civ. 9662 (S.D.N.Y.), seek an award of $307,629 in attorneys' fees and reimbursement of $1,219.66 in expenses. See Pl. Reply at 26-27. Class Counsel agrees to pay these fees out of its fee award. Id. As regards Wolf Popper's reimbursement request (which includes costs for filing fees, publishing the PSLRA notice, and online research) Class Counsel states that it is reasonable and the Petrobras Defendants state that counsel made a substantial contribution to the settlement outcome for the Settlement Class. Accordingly, the Court grants Wolf Popper's and Almeida's motions in full.

D. KSF

KSF seeks $589,915.50 in attorneys' fees and reimbursement of $2,650 in expenses. Id. at 27. Class Counsel agrees to pay the requested fees from its fee award. As regards KSF's expense request

[23] As noted earlier, Martinez objects to the immediate payment of counsel's legal fees. While it is not clear what timing objector has in mind or exactly what his rationales are, this resolution more than addresses any legitimate concerns he might have.

(which includes primarily transcript and court reporter costs), Class Counsel represents that KSF's work was performed with proper diligence and the Petrobras Defendants state that KSF made a substantial contribution to the class. Accordingly, the Court grants KSF's motion in full.

E. BLBG

BLBG seeks $2,114,085 in attorneys' fees and reimbursement of expenses in the amount of $1,146,873 for work performed and expenses incurred in relation to the prosecution of its claims on behalf of plaintiffs in four related cases: Hartford Mutual Funds, Inc. v. Petroleo Brasileiro S.A., No. 15 Civ. 9182 (S.D.N.Y.); Massachusetts Mutual Life Insurance Co. v. Petroleo Brasileiro S.A., No. 15 Civ. 9243 (S.D.N.Y.); Pacific Funds, et. al v. Petroleo Brasileiro S.A., No. 16 Civ. 2013 (S.D.N.Y.); and The Prudential Insurance Co. v. Petroleo Brasileiro S.A., No. 16 Civ. 7192 (S.D.N.Y.). See Application of Bernstein Litowitz Berger & Grossmann LLP for Reimbursement of Attorneys' Fee and Litigation Expenses ("BLBG Mem."), Dkt. 785.

BLBG does not seek an award equal to its lodestar but rather wishes that its adjusted lodestar be recognized by the Court and allocated at Class Counsel's discretion. See BLBG Mem. at 5. Class Counsel offers, with this caveat, to pay BLBG's fees out of its own fee award. See Pl. Reply at 29.

As regards BLBG's reimbursement request, Class Counsel "observe[s] that $256,867.35 of the requested expenses [are] attributable to the retention of the Direct Action Plaintiffs' loss causation/damages expert," who submitted a report that, Class Counsel asserts, was not beneficial to the Settlement Class. See id. Indeed, Class Counsel argues that the report was, in fact, detrimental to the Class and that reimbursement of this expense should be denied. See id. at 30.

The balance of BLBG's expense request consists of $616,745.70 for external ESI vendors, $192,400 for a financial consultant, $21,371.91 for travel, working meals, and transportation, $18,810.09 for legal research services, $17,842.96 for court reporting, transcripts, court fees, and service of process, $17,333.34 for mediation fees, and $5,502.38 for telephone costs, postage, and delivery costs. See Dkt. 786-28.

While BLBG persuasively argues that many of its efforts substantially aided the class and that the inclusion of the four above-mentioned plaintiffs in the settlement was a material term to the Settlement Agreement, a contention that neither defendants nor objectors dispute, see BLBG Mem. at 18, BLBG fails to show that its disbursements for mediation costs and expert costs advanced the interests of the class.[24] When these plaintiffs

[24] BLBG does not even seek to explain why or how the mediation benefited the class. See BLBG Mem. at 20.

decided to pursue individual actions rather than join the class, they accepted the risk that expense incurred by their counsel for efforts that did not redound to the benefit of the class (for whatever reason) would not be reimbursed by the class in the event that they later chose to opt-in to a class-wide settlement. Accordingly, the Court awards fees to BLBG in an amount to be determined by Class Counsel to be paid out of Class Counsel's fee award, but costs to BLBG in the amount of only $872,673.04 to be paid out of the Settlement Fund.

III. Conclusion

For the reasons stated above, and in the Court's preliminary approval of the settlement, the Court finds that the Settlement Agreement and Plan of Allocation are fair, reasonable, adequate, and otherwise in compliance with all applicable legal standards. Accordingly, the Court grants the motion of Class Plaintiffs for certification of the Settlement Class and for final approval of the Settlement Agreement and Plan of Allocation.

The Court also grants in part Class Counsel's motion for fees and costs, awarding in fees $300,000 to USS, $50,000 to North Carolina, $50,000 to Hawaii, $170,880,000 to Pomerantz, $13,350,000 to Labaton, and $2,314,000 to Motley Rice, and $14,515,235.24 plus the costs expended by Pomerantz on 27 foreign contract attorneys to Class Counsel in costs.

The Court also grants in part the motion of BLBG, awarding BLBG fees in an amount to be determined by Class Counsel to be paid from Class Counsel's fee award and $872,673.04 in costs to be paid from the Settlement Fund; grants in full Wolf Popper's motion, awarding Wolf Popper $107,629 in fees to be paid from Class Counsel's fee award and $1,219.66 in costs to be paid from the Settlement Fund; grants in full Almeida's motion, awarding Almeida $200,000 in fees to be paid from Class Counsel's fee award; and grants in full KSF's motion, awarding KSF $589,915.50 in fees to be paid from Class Counsel's fee award and $2,650.59 in costs to be paid from the Settlement Fund. As regards the fee awards, as noted above, counsel are to be paid 50% of the amounts due upon entry of final judgment and the remaining amounts after the settlement funds have been fully distributed to the class.

The Clerk is instructed to enter Final Judgment in accordance with the preceding paragraph, to close docket entry numbers 777, 781, 784, and 791, and to close the case. The Court will, however, retain jurisdiction over any further disputes arising in connection with the implementation of the Settlement or the payment of fees and costs.

SO ORDERED.

Dated: New York, NY
June 22, 2018

JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

Plaintiff,

No. 11-cv-10230-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs,

No. 11-cv-12049-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

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

Plaintiffs,

No. 12-cv-11698-MLW

vs.

STATE STREET BANK AND TRUST COMPANY,

Defendant.
_____/

SPECIAL MASTER'S MOTION FOR CLARIFICATION

This Motion is hereby ALLOWED and the Master's proposed is hereby ADOPTED.
WGY, D.J.
June 29, 2018

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP'S MOTION TO IMPOUND ONE EXHIBIT TO THE DECLARATION OF STEVEN E. FINEMAN IN SUPPORT OF THE RESPONSE AND OBJECTIONS OF LIEFF CABRASER HEIMANN & BERNSTEIN, LLP TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Pursuant to Fed. R. Civ. P. 7(b) and District of Massachusetts Local Rule 7.2, Lieff Cabraser Heimann & Bernstein LLP ("Lieff Cabraser") respectfully moves to impound one exhibit to the Declaration of Steven E. Fineman in Support of the Response and Objections of Lieff Cabraser Heimann & Bernstein, LLP to the Special Master's Report and Recommendations ("Fineman Declaration) – specifically: Exhibit A. As grounds for this motion, Lieff Cabraser states as follows:

1. Exhibit A (a) includes information that remains subject to a pending redaction request (as to another document or document(s)) in this matter (that request having not been objected to by the Special Master) and (b) is a document that is part of the record generated by the Special Master's investigation that was not attached as an exhibit to his Report and Recommendations. Accordingly, this document is subject to the protocol that the parties proposed for filing additional documents from the record. *See* ECF No. 259. As set forth in the referenced protocol, Lieff Cabraser seeks to file the unredacted version of this document under seal.

2. Accordingly, there is good cause pursuant to D. Mass. L.R. 7.2 to impound the unredacted version of Exhibit A.

3. Lieff Cabraser has filed via ECF a redacted version of Exhibit A and has indicated, by way of this motion, that an unredacted version is being filed under seal.

WHEREFORE, for the reasons set forth herein, Lieff Cabraser respectfully requests that the Court impound the unredacted version of Exhibit A.

Dated: June 29, 2018

Respectfully submitted,

Lieff Cabraser Heimann & Bernstein, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111
415-956-1000

By: */s/ Richard M. Heimann*
Richard M. Heimann (*pro hac vice*)
Attorney for Lieff Cabraser Heimann
& Bernstein, LLP

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(2)

I caused other counsel in this case to be contacted in order to confer regarding the substance of this motion. Labaton Sucharow LLP does not oppose this motion. Keller Rohrback LLP takes no position on this motion. The other parties had not provided their positions as of the time these documents were prepared for filing.

/s/ Richard M. Heimann
Richard M. Heimann

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I caused a true and correct copy of the above document to be served via ECF on counsel for all parties and counsel for the Special Master.

/s/ Richard M. Heimann
Richard M. Heimann