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 SUPPLEMENTAL OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

Labaton Sucharow LLP ("Labaton") hereby supplements its Objections filed early[1] on June 28, 2018 to the Master's Report and Recommendations. *See* ECF 359.

I. Had There Been an Obligation to Disclose the Fee Paid to Chargois, Which There Was Not, that Obligation Would Have Fallen to All With Knowledge of the Payment; and the Master's Exclusive Focus on Labaton Is Irrational and Misplaced.

As a matter of law, there was no obligation on the part of Labaton or the other Customer Class Counsel to disclose to the Court or to the class an allocation to another law firm made from attorneys' fees awarded by the Court, in the absence of a local rule or order of the Court requiring such a disclosure. *See generally* Labaton's Objections (ECF 359); Fed. R. Civ. P. 54(d)(2)(B)(iv).

However, assuming solely for the purposes of argument that such a disclosure obligation existed, the Master's ruling that "Labaton is solely responsible for the non-disclosure of this relationship" to the various constituencies, including "the class, ERISA counsel and the Court," defies legal logic and is incorrect. R&R at 368. Hence the Master's recommendation that "the appropriate remedy for the Chargois payment be disgorgement[2] of [the] entire $4.1 million

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[1] As the Court is aware, Labaton wished to file its Objections publicly at the same time that the Court filed the Special Master's Report and Recommendations ("Report" or "R&R") (ECF 357) publicly, to ensure that the two highly conflicting versions of events were made known to the public simultaneously. *See* Moving Parties' Motion To Set Revised Schedule for Requested Redactions and the Unsealing of the Special Master's Report and Recommendation (May 24, 2018) (ECF 229) at 7; Motion of Customer Class Counsel for Process Associated with Release of Report Before Release of Exhibits (June 26, 2018) (ECF 349). Instead, the Court chose to post the Report publicly on June 28 with no advance notice whatsoever. *See* ECF 356 *and* ECF 357. To minimize the irreparable damage caused by the Report, which Labaton contends is riddled with legal and factual errors, Labaton quickly filed in advance the Objections that were ready at that point. Now, still timely with regard to the July 5 deadline for filing Objections, Labaton files these additional Objections.

[2] Of course, Labaton cannot literally "disgorge" that which it has already paid to Chargois; only Chargois can disgorge that amount. *See* Merriam-Webster Online, https://www.merriam-webster.com/dictionary/disgorge#legalDictionary. To "disgorge" in a legal context is "to give up (as illegally gained profits) on request, under pressure, or by court order especially to prevent unjust enrichment."

Chargois amount, and that this disgorgement be solely the responsibility of Labaton," is also incorrect. *See id.*

Again, Labaton wishes to be perfectly clear that none of the three Customer Class firms, all of whom were aware that a fee division occurred, had a disclosure obligation. Nonetheless, Prof. Gillers, whom the Master reports that his Counsel retained "to opine on potential ethical and legal issues implicated by the [Chargois] Arrangement," R&R at 247 n.188, opined in his initial report that all three firms were obligated to disclose the Arrangement to the Court and to the class Ex. 232 at 66, 75.[3] He was in error as to all three firms; but, that error is instructive as to the lack of foundation for the Master's subsequent focus on Labaton alone.[4]

The Master's true concern throughout was with (a) the payment of a substantial fee to an attorney who did no work on the case, and (b) the failure to disclose that fee to the Court and class. But, a division of a fee (including a referral fee) between lawyers is permissible in Massachusetts with the appropriate notice to a client, *even when the recipient of the fee performed no work*. MRPC 1.5(e); *see also* Labaton's Objections (ECF 359) at 26-27.

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[3] The exhibits cited herein are the exhibits to the Master's Report and Recommendations.

[4] The lack of rationale underlying the Master's disclosure findings is highlighted by his subsidiary findings. For example, although he excuses Thornton from any obligation to disclose (as well he should as to all three firms) he finds that Thornton partner "Garrett Bradley had full knowledge of the Chargois Arrangement," R&R at 247 n.187; and that "Thornton had arrangements with Labaton similar to its arrangement with Chargois." *Id*. at 108-109 n.90. The Master appears to give Thornton a "pass" on any obligation to disclose, not because none of the firms had such an obligation, but because Labaton did not "disclose these critical details about Chargois and his role to Thornton law firm attorneys Mike Thornton, Mike Lesser, and Evan Hoffman." *See id* at 247 n.187. With regard to Lieff, the contention is that the firm was unaware that Chargois was receiving a "bare" fee division – i.e., a fee for no work – or that Labaton's obligation to Chargois predated the *State Street* case. *See, e.g.*, *id.* at 109-110 ("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 locally in Arkansas."). The Master acknowledges that Lieff knew that, once the attorneys' fee award was made to Customer Class Counsel, the three firms would – and did – allocate $4.1 million of their awarded fee to Chargois. What they reportedly did not know was that Chargois had not performed services to "justify" that fee division, which in Massachusetts is not required.

Therefore, the knowledge that Chargois received a division of a fee with no work performed, as opposed to serving as "local counsel," is irrelevant to the determination of which, if any, firm had a disclosure obligation. Had there had been a duty to disclose to the Court the identity of all attorneys who were sharing in the fee award – which, to be clear, there was not – that duty fell to any firm that was aware of the payment to Chargois, not to any firm that was aware that the fee division was made without services being rendered.

The Court should reject altogether the Master's conclusion that any firm was obligated to disclose the agreement to pay Chargois. *See generally* Labaton's Objections (ECF 359). The Court should equally reject the Master's arbitrary finding that Labaton was solely responsible for disclosing the Chargois payment when all three firms knew about, and contributed to, that payment. The Thornton Law Firm and Lieff did nothing wrong. But, the same is true of Labaton.

II. The Master's Improper Use of Prof. Gillers Taints His Report and Recommendations.

In his Supplemental Report, Prof. Gillers describes himself as the "equivalent of a court appointed expert. FRE 706." Ex. 233 at 2. The Master also treats Prof. Gillers as an expert. R&R at 137 ("The Special Master also retained . . . Professor Stephen Gillers as an expert on the ethical and professional conduct issues raised in this case."); *see also* June 28, 2018 Order (ECF 356) at 22 (noting that the Master has treated Prof. Gillers as a "fact witness[]"). Moreover, the Master relies heavily on Prof. Gillers' opinions and testimony. In fact, the Master's Report largely mirrors Prof. Gillers' opinions, with similar conclusions regarding (among other topics): the interplay between MRPC 1.5(e) and 7.2(b); the fee disclosure obligations imposed by federal case law; the application of MRPC 3.3 and the role of Comment 14A; the general duty of candor

to the court; and the ethical obligations owed to class members. *Compare* R&R at 246-327 *and* Ex. 233 at 66-103. In short, Prof. Gillers' opinions are critical to the Master's Report.

However, the Master's reliance on Prof. Gillers as an expert – which he acknowledges doing – is improper. Prof. Gillers is opining as to the law, which is not permissible. As the Court noted, "[m]ost of Gillers' opinions provide interpretations of ethical rules." ECF 356 at 21. Prof. Gillers also opines extensively on the Federal Rules of Civil Procedure and the disclosure obligations purportedly imposed by principles of class action law. *See, e.g.*, Ex. 233 at 76-97. Despite Class Counsels' objections, the Master did not shy away from incorporating Prof. Gillers' purely legal work. *See, e.g.*, R&R at 303 ("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.").[5]

As this Court noted, expert testimony regarding the law, as opposed to facts or mixed questions of fact and law, is generally impermissible. ECF 356 at 22; *see also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99-100 (1st Cir. 1997); *Pelletier v. Main St. Textiles*, LP, 470 F.3d 48, 54-55 (1st Cir. 2006). The preclusion of "expert" legal opinion extends to legal ethics "experts," including in connection with the Commonwealth's ethics rules. *Fishman v. Brooks*, 396 Mass. 643, 650 (1986) ("Expert testimony concerning the fact of an ethical violation is not

[5] Labaton objected to this use of Prof. Gillers shortly after receiving his first report, and – when this objection went unheeded – was then constrained to retain experts of its own to respond to Prof. Gillers. Labaton suggested, to no avail, that all such testimony from both sides should be in written legal briefs, an approach that other courts have taken. *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1239, 1246-47 n. 7 (N.D. Cal. 2000) ("The court notes that all three professors are respected scholars, and that their participation as *amici curiae* (or even as advocates for [a party]) might have been appropriate."). Had this approach been taken at the outset, the parties could have saved substantial costs, and the Master's Report would not be inherently and irreparably flawed by his improper reliance.

appropriate . . . A judge can instruct the jury (or himself) concerning the requirements of ethical rules."); *see also, e.g., In re Initial Pub. Offering Sec. Litig*., 174 F. Supp. 2d 61, 66-67 (S.D.N.Y. 2001) (declining to accept legal ethics professors' opinions regarding recusal); *McNamara v. Bre-X Minerals, Ltd.*, No. 5:97-CV-159, 2003 U.S. Dist. LEXIS 25641, at *20 (E.D. Tex. Mar. 31, 2003) ("The Court is persuaded that Defendants' proffered expert opinion concerning alleged ethical violations is inadmissible, as it amounts to an interpretation of law."); *In re McKesson HBOC, Inc. Sec. Litig*., 126 F. Supp. 2d 1239, 1246-47 (N.D. Cal. 2000) (striking "three declarations from law professors opining on the ethical propriety of the various solicitation tactics that the firm employed, a purely legal question"). Accordingly, Prof. Gillers' legal opinions were impermissible here.

In sum, the Master's Report rests on a foundation of improper expert testimony on the law. The Master has treated Prof. Gillers as an expert throughout the investigation and he relies extensively on his legal opinions. Thus, the whole of the Master's legal conclusions are tainted by his substantial use of and reliance on improper expert testimony. As such, the Master's Report must be stricken.

Dated: July 5, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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Counsel for Labaton Sucharow LLP

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to all counsel of record on July 5, 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

ASSENTED TO-MOTION FOR EXTENSION OF TIME TO COMPLY WITH THE COURT'S JUNE 28, 2018 ORDER

State Street Bank and Trust Company ("State Street") and the Special Master jointly request a brief, 10-day extension for all parties to comply with the schedule set forth in the Court's June 28, 2018 Order (the "Order")—until and including Friday, July 20, 2018. Dkt. No. 356. The brief 10-day extension is necessary to allow the parties to complete the meet and confer process contemplated in the Court's Order concerning redactions to exhibits to the Special Master's Report in an effort to reach agreement concerning the redactions, in whole or in part, and to reduce the volume of contested redactions that may require further Court review.

In accordance with the Order, the Special Master is continuing to review and to respond to State Street's and the plaintiff law firms' proposed redactions to various exhibits to the Special Master's Report. Special Master's counsel has been working diligently and provided additional responses to proposed redactions on June 29, July 2 and July 3, 2018. In parallel, State Street and the plaintiff law firms are continuing to analyze the Special Master's responses to previously-filed objections to identify areas where agreement can be reached. This review process has taken more time than anticipated at the June 22 hearing. Because of the number of currently contested exhibits, the current schedule does not afford the parties sufficient time to confer following the completion of the Special Master's review of the objections and circulation of his responses.

The parties believe that the brief requested extension will afford the Special Master the time to complete his responses to the parties' proposed redactions and should permit the parties to meaningfully confer and reach agreement on many of the outstanding objections, thereby reducing significantly the number of contested redactions that may require Court intervention.

WHEREFORE, State Street and counsel for the Special Master jointly respectfully request an additional 10 days, to and including to July 20, 2018, for all parties to complete the meet and

confer process, and to file the public record versions of redacted exhibits to the Special Master's Report, as contemplated by this Court's June 28, 2018 Order.

Dated: July 5, 2018

Respectfully submitted,

WILMER PICKERING HALE AND DORR LLP

By /s/ Daniel W. Halston
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Counsel for Defendants State Street Bank and Trust Co. and State Street Global Markets LLC

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Assented to by:

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Counsel for Andover Companies
Plaintiffs and proposed class

Not objected to by:

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James A. Moore (pro hac vice)
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By: /s/ Carl S. Kravitz
Carl S. Kravitz (pro hac vice pending)
Dwight Bostwick (pro hac vice pending)
Zuckerman Spaeder, LLP
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Washington, DC 20036

Counsel for Arnold Henriquez on behalf of Waste Management Retirement Savings Plan

LOCAL RULE 7.2(a)(2) CERTIFICATION

Pursuant to Local Rule 7.1(a)(2), I hereby certify that on July 5, 2018 State Street conferred by email with Class Counsel and the Special Master regarding this Motion. Barrett & Singal P.C. joined this motion. Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, Keller Rohrback LLP, and the Thornton Law Firm LLP assent to the Motion. Zuckerman Spaeder LLP and McTigue Law LLP do not object to this Motion.

/s/ Daniel Halston
Daniel W. Halston

CERTIFICATE OF SERVICE

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

/s/ Daniel Halston
Daniel Halston

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 LEAVE TO FILE LETTER WITH COURT (UNDER SEAL)

The Special Master respectfully moves for leave to file a letter with this Honorable Court, to be filed under seal until further Court order. Special Master seeks the Court's guidance on whether to respond to the Objections of Customer Class Counsel to the Special Master's Report and Recommendations and to enlarge the filed record. The Special Master's letter is Exhibit A to this Motion.[1]

WHEREFORE, Special Master respectfully requests that the Court grant its motion for leave.

Dated: July 6, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ *William F. Sinnott*
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CERTIFICATE OF SERVICE

I hereby certify that this Notice of Appearance was filed electronically on July 6, 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

[1] This Motion for Leave to File Letter is being filed via ECF, along with Special Master's Motion to Seal his letter. The Special Master's letter, which is Exhibit A to this motion, is subject to the pending Motion to Seal and is thus being filed conventionally under seal.

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 TO SEAL
SPECIAL MASTER'S LETTER SUBMITTED TO COURT (UNDER SEAL)

Pursuant to Local Rule 7.2, and as provided for in paragraphs 7 and 11 of the Court's March 8, 2017 Order, the Special Master hereby moves this Honorable Court to permit the Special Master's letter submitted to this Court (Under Seal), to be filed under seal until further Court order.

WHEREFORE, Special Master respectfully requests that the Court permit the letter be filed under seal.

Dated: July 6, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

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CERTIFICATE OF SERVICE

I hereby certify that this Notice of Appearance was filed electronically on July 6, 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, Plaintiff	)	
v.	)	C.A. No. 11-10230-MLW
STATE STREET BANK AND TRUST COMPANY, Defendants.	)	
ARNOLD HENRIQUEZ, MICHAEL T. COHN,WILLIAM R. TAYLOR, RICHARD A. SUTHERLAND, and those similarly situated, Plaintiff	)	
v.	)	C.A. No. 11-12049-MLW
STATE STREET BANK AND TRUST COMPANY, Defendants.	)	
THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND and all others similarly situated, Plaintiff	)	
v.	)	C.A. No. 12-11698-MLW
STATE STREET BANK AND TRUST COMPANY, Defendants.	)	

ORDER

WOLF, D.J. July 9, 2018

It is hereby ORDERED that:

1. The Special Master's Motion for Leave to File Letter With Court (Under Seal) (Docket No. 381) is ALLOWED.

2. In view of the presumption of public access to court records which has not been overcome, the Special Master's Motion to Seal Special Master's Letter Submitted to Court (Under Seal) (Docket No. 382) is DENIED. Therefore, Docket Nos. 381, 382, and 383 are UNSEALED.

3. Pursuant to paragraph 12(b) of the May 31, 2018 Order (Docket No. 237), the Master shall file, under seal to permit appropriate redactions, any additional documents or information developed in his investigation. The parties shall confer promptly and, within seven days of the Master's submission, file redacted versions of the additional documents for the public record if they have reached agreement on redactions. If they have disagreements, each party shall file under seal its proposed redactions, with a memorandum explaining its position.

4. The court is reserving judgment on whether the Master should respond to the objections of Customer Class Counsel and explain the implications of documents cited by them until the Master's future role in these proceedings, if any, is determined.

/s/ Mark L. Wolf

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEM, on behalf of itself and all others similarly situated, Plaintiffs, v. State Street Bank and Trust Company, 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

MOTION TO IMPOUND
KELLER ROHRBACK'S NOTICE OF EXCEPTIONS TO ECF 359 AND ECF 361

Pursuant to Fed. R. Civ. P. 7(b) and District of Massachusetts Local Rule 7.2, Keller Rohrback L.L.P. ("Keller Rohrback") respectfully moves to impound its Notice of Exceptions to ECF 359 and ECF 361 ("Notice of Exceptions"). As grounds for this motion, Keller Rohrback states as follows:

1. The Notice of Exceptions includes references to and citations to portions of Exhibit 37 of the Special Master's Report that are currently under seal and if unsealed, might still be subject to Court-approved redactions. Accordingly, this document is subject to the protocol that the parties proposed for filing additional documents from the record. *See* ECF No. 259. Accordingly, there is good cause pursuant to D. Mass. L.R. 7.2 to impound the unredacted version of the Notice of Exceptions.

2. As set forth in the referenced protocol, Keller Rohrback seeks to file an *unredacted* version of this document under seal. Keller Rohrback has filed via ECF a *redacted* version of the Notice of Exceptions and has indicated, by way of this motion, that an unredacted version is being filed under seal.

3. Keller Rohrback has contacted other counsel and counsel for the Special Master regarding the substance of this motion. Lieff Cabraser Heimann & Bernstein LLP, McTigue Law LLP, the Thornton Law Firm, State Street, Zuckerman Spaeder LLP, and Labaton Sucharow have all responded that they do not oppose the relief requested herein. As of the time of this filing, the Special Master (through counsel) has not yet responded.

WHEREFORE, for the reasons set forth herein, Keller Rohrback respectfully requests that the Court impound the unredacted version of the Notice of Exceptions.

RESPECTFULLY SUBMITTED this 10th day of July, 2018.

KELLER ROHRBACK L.L.P.

By: */s/ Lynn Lincoln Sarko*

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

CERTIFICATE OF SERVICE

I hereby certify that this document filed via the ECF system will be sent electronically to all counsel of record on July 10, 2018.

/s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

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, Defendants.	C.A. No. 11-10230-MLW
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THE ANDOVER COMPANIES EMPLOYEE SAVINGS AND PROFIT SHARING PLAN, on behalf of itself, and JAMES PEHOUSHEK-STANGELAND, and all others similarly situated, Plaintiff, v. State Street Bank and Trust Company, Defendants.	C.A. No. 12-11698-MLW

KELLER ROHRBACK'S NOTICE OF EXCEPTIONS TO ECF 359 AND ECF 361

Labaton Sucharow LLP ("Labaton") and Thornton Law Firm LLP ("Thornton") have filed objections to various aspects of the Special Master's Report (ECF 357 ("Report"); 357-1 ("Executive Summary")). The Labaton objection is ECF 359; the Thornton objection is ECF 361. Keller Rohrback L.L.P. files this Notice of Exceptions to address certain statements in those objections.

Both Labaton and Thornton appear to defend the non-disclosure of payment of $4.1 million to Damon Chargois, in part, by noting that [redacted], but there is no fair comparison between the two situations. Labaton knew [redacted]. Despite this, Labaton paid Mr. Chargois $4.1 million dollars of class legal fees.

In contrast, Mr. Sarko had no knowledge of [redacted]

[redacted]

Labaton and Thornton confuse the issue when they compare Labaton's non-disclosure of [redacted] with [redacted]

[redacted]

The record should be clear: [redacted]

[redacted]

[redacted][1] [redacted]

[redacted] Such disclosure at the time would have avoided the post-award investigative process in which the Court and the parties are now embroiled.

RESPECTFULLY SUBMITTED this 10th day of July, 2018.

KELLER ROHRBACK L.L.P.

By: */s/ Lynn Lincoln Sarko*

Lynn Lincoln Sarko
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Counsel for The Andover Companies Employee Savings and Profit Sharing Plan and James Pehoushek-Stangeland

[1]Mr. Sarko is not an expert in the bar and ethics rules for Massachusetts, New York, Texas, or Arkansas and therefore does not mean to express an opinion on the ultimate question of whether the payments to Mr. Chargois would have been proper if they had been accurately disclosed.

CERTIFICATE OF SERVICE

I hereby certify that this document filed via the ECF system will be sent electronically to all counsel of record on July 10, 2018.

/s/ Lynn Lincoln Sarko
Lynn Lincoln Sarko

United States Court of Appeals
For the First Circuit

No. 18-1651

IN RE: LABATON SUCHAROW LLP

Petitioner

CASE OPENING NOTICE

Issued: July 10, 2018

A petition for a writ of mandamus was received and docketed today by the clerk of the court of appeals in compliance with 1st Cir. R. 21.0. If the court requires a response to the petition, it shall do so by order.

An appearance form should be completed and returned immediately by any attorney who wishes to file pleadings in this court. 1st Cir. R. 12.0(a) and 46.0(a)(2). Any attorney who has not been admitted to practice before the First Circuit Court of Appeals must submit an application and fee for admission using the court's Case Management/Electronic Case Files ("CM/ECF") system prior to filing an appearance form. 1st Cir. R. 46.0(a). *Pro se* parties are not required to file an appearance form.

Dockets, opinions, rules, forms, attorney admission applications, the court calendar and general notices can be obtained from the court's website at www.ca1.uscourts.gov. Your attention is called specifically to the notice(s) listed below:

- Notice to Counsel and Pro Se Litigants

If you wish to inquire about your case by telephone, please contact the case manager at the direct extension listed below.

Margaret Carter, Clerk

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
John Joseph Moakley
United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210
Case Manager: Antonio Lopez-Blanco - (617) 748-9060

United States Court of Appeals
For the First Circuit

NOTICE OF ELECTRONIC AVAILABILITY OF CASE INFORMATION

The First Circuit has implemented the Federal Judiciary's Case Management/Electronic Case Files System ("CM/ECF") which permits documents to be filed electronically. In addition, most documents filed in paper are scanned and attached to the docket. In social security and immigration cases, members of the general public have remote electronic access through PACER only to opinions, orders, judgments or other dispositions of the court. Otherwise, public filings on the court's docket are remotely available to the general public through PACER. Accordingly, parties should not include in their public filings (including attachments or appendices) information that is too private or sensitive to be posted on the internet.

Specifically, Fed. R. App. P. 25(a)(5), Fed. R. Bank. P. 9037, Fed. R. Civ. P. 5.2 and Fed. R. Cr. P. 49.1 require that parties not include, or partially redact where inclusion is necessary, the following personal data identifiers from documents filed with the court unless an exemption applies:

- **Social Security or Taxpayer Identification Numbers.** If an individual's social security or taxpayer identification number must be included, only the last four digits of that number should be used.
- **Names of Minor Children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.
- **Dates of Birth.** If an individual's date of birth must be included, only the year should be used.
- **Financial Account Numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.
- **Home Addresses in Criminal Cases.** If a home address must be included, only the city and state should be listed.

See also 1st Cir. R. 25.0(m).

If the caption of the case contains any of the personal data identifiers listed above, the parties should file a motion to amend caption to redact the identifier.

Parties should exercise caution in including other sensitive personal data in their filings, such as personal identifying numbers, medical records, employment history, individual financial information, proprietary or trade secret information, information regarding an individual's cooperation with the government, information regarding the victim of any criminal activity, national security information, and sensitive security information as described in 49 U.S.C. § 114.

Attorneys are urged to share this notice with their clients so that an informed decision can be made about inclusion of sensitive information. The clerk will not review filings for redaction.

Filers are advised that it is the experience of this court that failure to comply with redaction requirements is most apt to occur in attachments, addenda, or appendices, and, thus, special attention should be given to them. For further information, including a list of exemptions from the redaction requirement, see http://www.privacy.uscourts.gov/.

United States Court of Appeals
For the First Circuit

NOTICE TO COUNSEL REGARDING
MANDATORY REGISTRATION AND TRAINING
FOR ELECTRONIC FILING (CM/ECF)

On August 21, 2017, the U.S. Court of Appeals for the First Circuit upgraded its CM/ECF system to NextGen CM/ECF, the latest iteration of the electronic case filing system. Use of the electronic filing system is mandatory for attorneys. If you intend to file documents and/or receive notice of docket activity in this case, please ensure you have completed the following steps:

- **Obtain a NextGen account.** Attorneys who had an e-filing account in this court prior to August 21, 2017 are required to update their legacy account in order to file documents in the NextGen system. Attorneys who have never had an e-filing account in this court must register for an account at www.pacer.gov. For information on updating your legacy account or registering for a new account, go to the court's website at www.ca1.uscourts.gov and select *E-Filing (Information)*.

- **Apply for admission to the bar of this court.** Attorneys who wish to e-file must be a member of the bar of this court. For information on attorney admissions, go to the court's website at www.ca1.uscourts.gov and select *Attorney Admissions* under the *Attorney & Litigants* tab. Bar admission is not required for attorneys who wish to receive notice of docket activity, but do not intend to e-file.

- **Review Local Rule 25.** For information on Loc. R. 25.0, which sets forth the rules governing electronic filing, go to the court's website at www.ca1.uscourts.gov and select *First Circuit Rulebook* under the *Rules & Procedures* tab.

cc:
Jonathan G. Axelrod
M. Frank Bednarz
Joel H. Bernstein
Beth E. Bookwalter
Dwight Bostwick
Garrett James Bradley
Graeme Bush
Renee J. Bushey
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Evan R. Hoffman
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Joan A. Lukey
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Michael R. Smith
Lawrence A. Sucharow
Michael P. Thornton
Mark L. Wolf
Justin Joseph Wolosz
Nicole M. Zeiss

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARKANSAS TEACHER RETIREMENT SYSTEMS, on behalf of itself and all others similarly situated, Plaintiffs, 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 its, and JAMES PEHOUSHEK-STANGELAND, and those similarly situated, Plaintiff, v. State Street Bank and Trust Company, Defendants.	§	C.A. No. 12-11698-MLW

MOTION TO IMPOUND
ZUCKERMAN SPAEDER'S NOTICE OF EXCEPTION
TO ECF 359, ECF 361 AND ECF 367

Pursuant to Fed. R. Civ. P. 7(b) and District of Massachusetts Local Rule 7.2, Zuckerman Spaeder LLP respectfully moves to impound its Notice of Exception to ECF 359, ECF 361 and ECF 367 ("Notice of Exception"). As grounds for this motion, Zuckerman states as follows:

1. The Notice of Exception includes references to and citations to deposition testimony that is currently under seal and if unsealed, might still be subject to Court-approved redactions. Accordingly, this document is subject to the protocol that the parties proposed for filing additional documents from the record. *See* ECF No. 259. Accordingly, there is good cause pursuant to D. Mass. L.R. 7.2 to impound the unredacted version of the Notice of Exceptions.

2. As set forth in the referenced protocol, Zuckerman seeks to file an *unredacted* version of this document under seal. Zuckerman has filed via ECF a *redacted* version of the Notice of Exceptions and has indicated, by way of this motion, that an unredacted version is being filed under seal.

3. Zuckerman has contacted other counsel and counsel for the Special Master regarding the substance of this motion. McTigue Law LLP, Keller Rohrback, L.L.P., State Street Bank (through counsel) and the Special Master (through counsel) have consented. Thornton Law Firm (through counsel) has responded, no position. Lieff Cabraser Heimann & Bernstein LLP and Labaton Sucharow have not responded as of the time of this motion.

WHEREFORE, for the reasons set forth herein Zuckerman respectfully requests that the Court impound the unredacted version of the Notice of Exceptions.

RESPECTFULLY SUBMITTED this 12th day of July, 2018.

ZUCKERMAN SPAEDER LLP

By: /s/ Carl S. Kravitz

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Counsel for Arnold Henriquez

CERTIFICATE OF SERVICE

I hereby certify that this document filed via the ECF system will be sent electronically to all counsel of record on July 12, 2018.

/s/ Carl S. Kravitz
Carl S. Kravitz

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. v.	§	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

ZUCKERMAN SPAEDER LLP'S NOTICE OF EXCEPTION
TO ECF 359, ECF 361, AND ECF 367 [REDACTED]

Zuckerman Spaeder LLP ("Zuckerman"), one of the ERISA Counsel, submits this response concerning the Special Master's Report dated May 14, 2018 ("Report"), excepting to one aspect of Customer Class Counsel's objections to it. The Report, at pp. 350, 368-69, recommends that Customer Class Counsel (Labaton, Thornton and Lieff) disgorge the $4.1 million payment made to Damon Chargois ("Chargois"), with $3.4 million being reallocated to ERISA Counsel (Zuckerman, Keller and McTique). *If* disgorgement is ordered, the recommended reallocation to ERISA Counsel should be adopted by the Court, and the objections to the reallocation should be overruled.

First, ERISA Counsel would not have agreed to file a joint fee petition with Customer Class Counsel, or to limit their fee to 9% of the total award on that joint petition, had the Chargois arrangement and payment been disclosed. Instead of a joint petition, ERISA Counsel would have filed *their own, separate* petition, seeking a reasonable fee based on the $60 million settlement they produced for the ERISA plans. Such a fee presumably would have been determined by standard common fund metrics.

Second, with the recommended reallocation of $3.4 million, ERISA Counsel's revised fee would be just under $10.9 million, or 18.167% of, the $60 million common fund produced for their clients. That fee would be reasonable by all applicable metrics, including a lodestar check.

A. Pertinent Background

In December 2013, ERISA and Customer Class Counsel agreed that they would file a joint petition for fees and that ERISA Counsel would receive 9% of the total fee awarded. At the time, State Street Bank ("Bank") had said that the ERISA trading volume was just under 9% of the total foreign currency volume at issue, but could have been as low as 5%. Report at 46, citing

Sarko (7/6/17) Dep. at 26, 59. At the time of the proposed settlement in 2016, the Bank had revised the range of the ERISA trading volume to 9-15% in order to take into account ERISA assets in group trusts. Labaton Obj. at 14, citing Kravitz Depo (7/6/17) at 53-54. *See also* ECF 103-1 at 12-13 ("ERISA Plans and eligible Group Trusts represent 9-15% of the total [volume]").[1]

On November 2, 2016, this Court approved a $300 million settlement, with $60 million of the total being allocated to the ERISA plans (the "ERISA Share"). It also granted counsel's joint fee petition and awarded a total attorney's fee of approximately $75 million. Of the total fee awarded, approximately $7.5 million was paid to ERISA Counsel. Report at 84-85.[2] Under the Plan of Allocation, however, $10.9 million of the total fee award was deducted from the $60 million ERISA Share for payment of attorneys' fees.[3] Thus, of $10.9 million deducted from the ERISA Share for fees, approximately $7.5 million went to ERISA Counsel, with the remaining $3.4 million going to Customer Class Counsel. Customer Class Counsel ultimately paid Chargois $4.1 million from the approximately $67.5 million of the total fee they received. Report at 88.[4]

[1] Labaton and Thornton now contend that the post-settlement claims administration process indicates an ERISA trading volume, including group trusts, of only 9-10%. Labaton Obj. at 95, Thornton Obj. at 94-95, 99. If accurate, that would underscore the exceptional premium obtained for the ERISA plans: 20% of the gross recovery based on 9-10% of the trading volume.

[2] Customer Class Counsel unilaterally increased ERISA Counsel's percentage of the total fee from 9% to 10% in recognition of the "'excellent work and contribution of ERISA Counsel.'" Sinnott quoting Labaton letter, Kravitz Dep. (9/11/2017) at 80-81.

[3] There was a cap of $10.9 million that could be deducted from the ERISA Share for fees, based on the insistence of the Department of Labor ("DOL"), and it was reached given the size of the overall fee awarded by the Court. The cap did not govern the allocation of fees within the cap as among counsel.

[4] Customer Class Counsel is correct that the $10.9 million cap, negotiated by and with the Department of Labor ("DOL"), was a cap on the amount of fees, from the overall fee award, that could be deducted from the ERISA share for fees, before distribution to the ERISA class members. It was not a directive as to what would amount would be payable to ERISA counsel. Nor does ERISA Counsel contend that the recommended reallocation should be approved for that reason.

ERISA Counsel had no knowledge of and did not participate in the alleged double counting or the arrangement with and payment to Chargois. Report at 115-18, 351-52.

B. ERISA Counsel Would Not Have Entered Into The 9% Agreement Had They Known Of The Chargois Arrangement And Payment But Instead Would Have Filed Their Own Petition For A Reasonable Fee.

Customer Class Counsel focus on the percentage of the ERISA volume to argue that the recommended reallocation to ERISA Counsel should be rejected. *E.g.*, Thornton Obj. at 93-99. But whether the ERISA trading volume is roughly 9% or more is not the principal reason that the recommended reallocation should be adopted. ERISA Counsel testified that they would not have agreed to file a joint petition (or have agreed to limit their fees to 9% of the total awarded on a joint petition), had they known of the Chargois arrangement and payment.

As Mr. Kravitz testified at his deposition, the Chargois arrangement and payment "raised a lot of questions … legal and ethical questions." Kravitz Dep. (9/11/2017) at 82-83. The point is not whether the Chargois arrangement was proper or improper. The point we are making here is that knowledge of the arrangement with Chargois would have raised legal and ethical questions that would have had to be answered before ERISA Counsel would have agreed to file a joint petition from which Chargois would also be paid. There would have been no way to get all the facts needed to answer these questions, even if the Chargois arrangement had been disclosed, and therefore no realistic way for ERISA Counsel to have been comfortable filing a joint petition.[5]

As a result ERISA counsel would have filed their own fee petition, seeking a reasonable attorney's fee from the $60 million common fund produced for the ERISA class members.

[5] Nor, in any event, would ERISA Counsel have agreed to receive less than Chargois in fees.The Special Master found that the amount of the payment to Chargois -- $4.1 million in this case – was significant with respect to ERISA Counsel's fee. Report at 300. That is true. Had ERISA Counsel known that a lawyer who did not work on this case was going to get substantially more than any of them individually, they would not have agreed to the 9%/joint petition deal for that additional reason as well. Report at 116-17.

C. $10.9 Million Is A Reasonable And Appropriate Fee For ERISA Counsel

With the recommended reallocation of the $3.4 million, ERISA Counsel's total fee will be $10.9 million, which is 18.167 % of the $60 million produced for the ERISA plans and would be a lower percentage than the 25% fee awarded by the Court on November 2, 2016, as "fair, reasonable and consistent with fee awards approved in cases within the First Circuit and other Circuits with similar recoveries." *See* [ECF 111], at page 4 of 5 (awarding approximately 25% on the entire $300 million settlement in this case). Without the reallocation, ERISA Counsel's fee is 12.5% of the $60 million.

In terms of lodestar, the reallocated fee of $10.9 million would be 1.628 times ERISA Counsel's total submitted lodestar of $6,694,333.75 (figure based on numbers submitted at the time of initial fee petition), which would be less than the lodestar multiple of 1.8 when the total fee was initially approved by the Court on the entire settlement. *See id.*, at pages 3 of 5 and 4 of 5 ($74,541,250 fee/$41,323,895.75 of total lodestar submitted by lead counsel).[6] Without the reallocation, ERISA Counsel will receive approximately a 1.12 multiple of their collective lodestar. Neither lodestar calculation accounts for the substantial time ERISA Counsel have been forced to expend in connection with the investigation of matters that had nothing to do with them.[7]

Further, there is no dispute that $60 million was an excellent result for the ERISA class members, making a fee percentage of 18.167% and a lodestar multiplier of 1.628 , after the recommended reallocation, all the more reasonable. Finally, the fees deducted from the $60 million ERISA Share would remain the same and within the $10.9 cap negotiated by the DOL.

[6] We are not vouching for these figures, but just noting the numbers recited and relied on by the Court in its November 2, 2016 Order on fees.

[7] The Special Master noted that one reason for the reallocation was to compensate ERISA Counsel for the time they were forced to spend in connection with the investigation. Report at 351-52.

*****

For these reasons the recommended reallocation of $3.4 million to ERISA Counsel should be adopted by the Court.

Dated: July 12, 2018

Respectfully submitted,

/s/ Carl S. Kravitz

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Counsel for Arnold Henriquez

CERTIFICATE OF SERVICE

I hereby certify that this document filed via the ECF system will be sent electronically to all counsel of record on July 12, 2018.

/s/ Carl S. Kravitz
Carl S. Kravitz

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. v.	§	No. 11-cv-12049 MLW
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ZUCKERMAN SPAEDER LLP'S NOTICE OF EXCEPTION
TO ECF 359, ECF 361, AND ECF 367 [REDACTED]

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A. Pertinent Background

In December 2013, ERISA and Customer Class Counsel agreed that they would file a joint petition for fees and that ERISA Counsel would receive 9% of the total fee awarded. [redacted]

[redacted][1]

On November 2, 2016, this Court approved a $300 million settlement, with $60 million of the total being allocated to the ERISA plans (the "ERISA Share"). It also granted counsel's joint fee petition and awarded a total attorney's fee of approximately $75 million. Of the total fee awarded, approximately $7.5 million was paid to ERISA Counsel. Report at 84-85.[2] Under the Plan of Allocation, however, $10.9 million of the total fee award was deducted from the $60 million ERISA Share for payment of attorneys' fees.[3] Thus, of $10.9 million deducted from the ERISA Share for fees, approximately $7.5 million went to ERISA Counsel, with the remaining $3.4 million going to Customer Class Counsel. Customer Class Counsel ultimately paid Chargois $4.1 million from the approximately $67.5 million of the total fee they received. Report at 88.[4]

[1] Labaton and Thornton now contend that the post-settlement claims administration process indicates an ERISA trading volume, including group trusts, of only 9-10%. Labaton Obj. at 95, Thornton Obj. at 94-95, 99. If accurate, that would underscore the exceptional premium obtained for the ERISA plans: 20% of the gross recovery based on 9-10% of the trading volume.

[2] [redacted]

[3] There was a cap of $10.9 million that could be deducted from the ERISA Share for fees, based on the insistence of the Department of Labor ("DOL"), and it was reached given the size of the overall fee awarded by the Court. The cap did not govern the allocation of fees within the cap as among counsel.

[4] Customer Class Counsel is correct that the $10.9 million cap, negotiated by and with the Department of Labor ("DOL"), was a cap on the amount of fees, from the overall fee award, that could be deducted from the ERISA share for fees, before distribution to the ERISA class members. It was not a directive as to what would amount would be payable to ERISA counsel. Nor does ERISA Counsel contend that the recommended reallocation should be approved for that reason.

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Customer Class Counsel focus on the percentage of the ERISA volume to argue that the recommended reallocation to ERISA Counsel should be rejected. *E.g.*, Thornton Obj. at 93-99. But whether the ERISA trading volume is roughly 9% or more is not the principal reason that the recommended reallocation should be adopted. [redacted]. [redacted]. The point is not whether the Chargois arrangement was proper or improper. The point we are making here is that knowledge of the arrangement with Chargois would have raised legal and ethical questions that would have had to be answered before ERISA Counsel would have agreed to file a joint petition from which Chargois would also be paid. There would have been no way to get all the facts needed to answer these questions, even if the Chargois arrangement had been disclosed, and therefore no realistic way for ERISA Counsel to have been comfortable filing a joint petition.[5]

As a result ERISA counsel would have filed their own fee petition, seeking a reasonable attorney's fee from the $60 million common fund produced for the ERISA class members.

[5] Nor, in any event, would ERISA Counsel have agreed to receive less than Chargois in fees.The Special Master found that the amount of the payment to Chargois -- $4.1 million in this case – was significant with respect to ERISA Counsel's fee. Report at 300. That is true. Had ERISA Counsel known that a lawyer who did not work on this case was going to get substantially more than any of them individually, they would not have agreed to the 9%/joint petition deal for that additional reason as well. Report at 116-17.

C. $10.9 Million Is A Reasonable And Appropriate Fee For ERISA Counsel

With the recommended reallocation of the $3.4 million, ERISA Counsel's total fee will be $10.9 million, which is 18.167 % of the $60 million produced for the ERISA plans and would be a lower percentage than the 25% fee awarded by the Court on November 2, 2016, as "fair, reasonable and consistent with fee awards approved in cases within the First Circuit and other Circuits with similar recoveries." *See* [ECF 111], at page 4 of 5 (awarding approximately 25% on the entire $300 million settlement in this case). Without the reallocation, ERISA Counsel's fee is 12.5% of the $60 million.

In terms of lodestar, the reallocated fee of $10.9 million would be 1.628 times ERISA Counsel's total submitted lodestar of $6,694,333.75 (figure based on numbers submitted at the time of initial fee petition), which would be less than the lodestar multiple of 1.8 when the total fee was initially approved by the Court on the entire settlement. *See id.*, at pages 3 of 5 and 4 of 5 ($74,541,250 fee/$41,323,895.75 of total lodestar submitted by lead counsel).[6] Without the reallocation, ERISA Counsel will receive approximately a 1.12 multiple of their collective lodestar. Neither lodestar calculation accounts for the substantial time ERISA Counsel have been forced to expend in connection with the investigation of matters that had nothing to do with them.[7]

Further, there is no dispute that $60 million was an excellent result for the ERISA class members, making a fee percentage of 18.167% and a lodestar multiplier of 1.628 , after the recommended reallocation, all the more reasonable. Finally, the fees deducted from the $60 million ERISA Share would remain the same and within the $10.9 cap negotiated by the DOL.

[6] We are not vouching for these figures, but just noting the numbers recited and relied on by the Court in its November 2, 2016 Order on fees.

[7] The Special Master noted that one reason for the reallocation was to compensate ERISA Counsel for the time they were forced to spend in connection with the investigation. Report at 351-52.

*****

For these reasons the recommended reallocation of $3.4 million to ERISA Counsel should be adopted by the Court.

Dated: July 13, 2018

Respectfully submitted,

/s/ Carl S. Kravitz

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Counsel for Arnold Henriquez

CERTIFICATE OF SERVICE

I hereby certify that this document filed via the ECF system will be sent electronically to all counsel of record on July 13, 2018.

/s/ Carl S. Kravitz
Carl S. Kravitz

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

CUSTOMER CLASS COUNSELS' MOTION FOR LEAVE TO FILE REPLY TO SPECIAL MASTER'S RESPONSE TO THEIR MOTION FOR AN ACCOUNTING, AND FOR CLARIFICATION THAT THE MASTER'S ROLE HAS CONCLUDED

Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and The Thornton Law Firm ("Customer Class Counsel") respectfully move for leave to file a reply memorandum in support of their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded, filed under seal on June 19, 2018. Customer Class Counsel seek to respond to arguments advanced by the Special Master in his Response to Customer Class Counsels' Motion for an Accounting, and for Clarification that the Master's Role has Concluded, which was filed under seal on July 3, 2018. Customer Class Counsels' proposed reply memorandum is limited to eight pages and is attached as Exhibit A to this Motion.[1]

Customer Class Counsels' proposed reply memorandum addresses, in focused fashion, arguments set forth in the Master's Reponse.

WHEREFORE, Customer Class Counsel respectfully request that the Court grant their motion for leave.

[1] Customer Class Counsels' Motion for Leave to File a Reply is being filed via ECF, along with Customer Class Counsels' Motion to Impound their Proposed Reply. Customer Class Counsels' Proposed Reply, which is Exhibit A to this motion, is subject to their pending Motion to Impound and is thus being filed conventionally under seal.

Dated: July 13, 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, on behalf of Customer Class Counsel, contacted other counsel in this case in order to confer regarding the substance of this motion. State Street does not oppose the motion. Zuckerman Spaeder LLP, McTigue Law LLP and Keller Rohrback take no position on the relief requested. Counsel for the Special Master have not indicated their position as of the time of filing.

/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 July 13, 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, 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

CUSTOMER CLASS COUNSELS' MOTION TO IMPOUND PROPOSED REPLY TO SPECIAL MASTER'S RESPONSE TO THEIR MOTION FOR AN ACCOUNTING, AND FOR CLARIFICATION THAT THE MASTER'S ROLE HAS CONCLUDED

Pursuant to Fed. R. Civ. P. 7(b) and District of Massachusetts Local Rule 7.2, Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein LLP, and The Thornton Law Firm ("Customer Class Counsel") respectfully move to impound their Proposed Reply to the Special Master's Response to Their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded (the "Proposed Reply"), which is Exhibit A to Customer Class Counsels' Motion for Leave to File Reply to Special Master's Response to Their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded.[1]

1. On May 16, 2018, this Court issued an Order confirming that the Special Master's Report and Recommendations, the related Executive Summary, and all attached exhibits (collectively, the "Master's Submission") were under seal in their entirety, and setting forth a process by which the parties could seek redactions so that a public version could be unsealed. ECF 223. On June 28, 2018, the Court unsealed the Report and Recommendations (with limited redactions) and the Executive Summary. ECF 357; 357-1.

2. On June 19, 2018, Customer Class Counsel filed their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded (the "Motion"). ECF 302. Customer Class Counsels' Memorandum in Support of their Motion, along with the supporting June 19, 2018 Transmittal Declaration of Joan A. Lukey, referenced information discussed in the Master's Report and Recommendations, along with other information that was under seal (some of which has not been unsealed). *See* ECF 301. Thus, pursuant to this Court's orders, Customer Class Counsel filed their Memorandum and the Lukey Transmittal Declaration under seal. *See id.*

[1] Customer Class Counsels' Motion for Leave to File a Reply to Special Master's Response to Their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded is being filed on ECF, while Exhibit A to that Motion (i.e., Customer Class Counsels' Proposed Reply) is being filed conventionally under seal.

3. In its June 28, 2018 Order, the Court directed the Master to respond to Customer Class Counsels' Motion. ECF 364. The Master filed his Response under seal on July 3, 2018, and a redacted version of his Response under seal on July 5, 2018.

4. Although Customer Class Counsel do not believe that the Proposed Reply contains information that needs to be sealed, it contains discussion of the Master's Response, which remains sealed. Accordingly, in an abundance of caution, Customer Class Counsel move pursuant to D. Mass. L.R. 7.2 to impound their Proposed Reply until this Court's further order.

WHEREFORE, for the reasons set forth herein, Customer Class Counsel respectfully request that the Court temporarily impound their Proposed Reply to the Special Master's Response to Their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded, which is Exhibit A to Customer Class Counsels' Motion for Leave to File Reply to Special Master's Response to Their Motion for an Accounting, and for Clarification that the Master's Role Has Concluded.

Dated: July 13, 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, on behalf of Customer Class Counsel, contacted other counsel in this case in order to confer regarding the substance of this motion. State Street does not oppose the motion. Keller Rohrback and McTigue Law LLP take no position on the relief requested. Zuckerman Spaeder LLP and counsel for the Special Master have not indicated their positions as of the time of filing.

/s/ Joan A. Lukey
Joan A. Lukey

CERTIFICATE OF SERVICE

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/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

LABATON SUCHAROW LLP'S MOTION FOR PARTIAL STAY PENDING RESOLUTION OF PETITION FOR WRIT OF MANDAMUS

Pursuant to Federal Rule of Civil Procedure 7(b) and Local Rule 7.1, Labaton Sucharow LLP ("Labaton") respectfully moves for a temporary stay of any substantive decisions[1] by the Court, pending a determination by the United States Court of Appeals for the First Circuit of Labaton's Petition for Writ of Mandamus, filed on July 6, 2018. Labaton has asked the Court of Appeals to direct this Court to vacate its order denying Labaton's motion for recusal pursuant to § 455(a), and to recuse itself from this case. For the reasons set forth in the accompanying memorandum of law, which is incorporated herein, this Court should refrain from taking further substantive action in this case until the Court of Appeals has the opportunity to rule on, and resolve, the petition.

WHEREFORE, for the reasons set forth herein, Labaton respectfully requests that the Court grant a partial stay, and defer any substantive decisions pending the resolution by the United States Court of Appeals for the First Circuit of Labaton's Petition for Writ of Mandamus.

[1] In order to avoid unnecessary delay, Labaton is not asking the Court to stay the deadlines for the parties to submit proposed redactions, nor is Labaton asking the Court to refrain from making decisions regarding the timing and substance of redaction requests. Labaton's motion is directed at all substantive decisions, including, without limitation, action on the Special Master's Report and Recommendation (and the objections thereto), as well as action on Customer Class Counsels' Motion for an Accounting, and for Clarification that the Master's Role Has Concluded (ECF No. 302).

Dated: July 13, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

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Counsel for Labaton Sucharow LLP

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. Lieff Cabraser Heimann & Bernstein LLP does not object. The Thornton Law Firm, State Street, Keller Rohrback L.L.P., and Zuckerman Spaeder LLP take no position. McTigue Law LLP and Counsel for the Special Master oppose.

/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 July 13, 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, 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

MEMORANDUM OF LAW IN SUPPORT OF LABATON SUCHAROW LLP'S MOTION FOR PARTIAL STAY PENDING RESOLUTION OF PETITION FOR WRIT OF MANDAMUS

Labaton Sucharow LLP ("Labaton") hereby submits this Memorandum in support of its Motion for Partial Stay Pending Resolution of Petition for Writ of Mandamus. For the reasons explained below, a temporary stay is warranted in order to allow the United States Court of Appeals for the First Circuit to consider and decide the Petition for Writ of Mandamus (the "Mandamus Petition"), which will thereby determine which judge will preside over this case going forward.[1]

Background

Following a fourteen-month investigation into issues relating to the attorneys' fees, expenses, and service awards made in the above-captioned case, on May 14, 2018, the Special Master (the "Master") submitted his 377-page Report and Recommendations ("Report"). As Labaton has explained in other filings, the Master's Report includes novel, unorthodox, and at times plainly incorrect findings of fact and conclusions of law, with which Labaton firmly disagrees. *See* Labaton Sucharow LLP's Objections to Special Master's Report and Recommendations (filed under seal on June 28, 2018; redacted version at ECF No. 359); Labaton Sucharow LLP's Supplemental Objections to Special Master's Report and Recommendations (ECF No. 379).

Pursuant to Federal Rule of Civil Procedure 53(f), the Court must now review the findings and conclusions in the Master's Report *de novo*. Among the issues that the Court will

[1] Labaton is not asking the Court to stay the deadlines for the parties to submit proposed redactions, nor is Labaton asking the Court to refrain from making decisions regarding the timing and substance of redaction requests. Labaton's motion is directed at all substantive decisions, including, without limitation, action on the Special Master's Report and Recommendation (and the objections thereto), as well as action on Customer Class Counsel filed a Motion for an Accounting, and for Clarification that the Master's Role Has Concluded (ECF No. 302).

decide is the propriety of a fee division that occurred between Customer Class Counsel[2] and Chargois & Herron, the Texas law firm that facilitated Labaton's introduction to Arkansas Teacher Retirement System ("ATRS"). Although a fee division with an attorney who does not work on a matter is permissible under Massachusetts law, the Master is highly critical of the fee-sharing here, and goes to great lengths to find (among other things) that Labaton was required to, but did not, disclose this fee division to the Court or the class. *See* Special Master's Report and Recommendations, at 246-326 (ECF No. 357). Labaton strongly contests all of these findings and conclusions.

Labaton believes that a reasonable person might conclude that an impartial, *de novo* review by this Court relating to this and other issues stemming from the Master's Report is not possible. One main source of Labaton's concern involves the May 30, 2018 hearing before the Court (the "May 30 Hearing") and its aftermath. At the May 30 Hearing, particularly during the Court's examination under oath of ATRS' Executive Director, the Court strongly suggested to the attorneys and others present in the courtroom that the Master's Report includes factual findings and conclusions of law involving public corruption in connection with ATRS. Such suggestions do not find support in the Master's Report or the record of the Master's proceedings. Following the May 30 Hearing, based upon this line of questions and for several other reasons, Labaton filed a motion asking the Court to consider whether it should recuse itself pursuant to 28 U.S.C. § 455(a). *See* Memorandum of Law in Support of Labaton Sucharow LLP's Motion Concerning Issues Raised at May 30 Hearing, at 2-3 (ECF No. 276). On June 21, 2018, the Court denied Labaton's recusal motion and stated that the reasons for the decision would be explained in a forthcoming Memorandum and Order. Order (ECF No. 315).

[2] Labaton, the Thornton Law Firm, and Lieff Cabraser Heimann & Bernstein, LLP.

The Court filed its Memorandum and Order setting forth its reasoning on June 28, 2018 ("Recusal Opinion") (ECF No. 358). The latter document greatly exacerbated Labaton's concerns, as it stated the Court's bases for the public corruption questions and comments at the May 30 Hearing: First, the Court admitted to one or more *ex parte* communications with the Master relating to a previously undisclosed conversation between the Master and an Assistant United States Attorney in January of 2018. The latter conversation concerned an unrelated investigation of the Thornton Law Firm, in which neither Labaton nor ATRS was involved. The Court nonetheless acknowledged speculating with the Master, with no apparent basis, that the "prosecutors' investigation suggested questions about whether any of the money paid to [] Chargois had been used to make political contributions or other payments, and the potential for the criminal investigation to expand to include Chargois." Recusal Opinion, at 39. Second, the Court acknowledged that the May 30 questions and comments related to an unsubstantiated newspaper article in January of 2017 relating to Labaton's political contributions in Massachusetts.

On Friday, July 6, 2018, Labaton filed the Mandamus Petition with the United States Court of Appeals for the First Circuit, asking the appellate court to order recusal on the ground that a reasonable person might question the Court's impartiality. The Mandamus Petition raises three main issues as the basis for the relief Labaton seeks: (a) that a reasonable person might question the Court's impartiality based upon the Court's *ex parte* communications with the Master (a number of which were revealed for the first time in the Recusal Opinion) and reliance upon media reports that did not relate to ATRS or this litigation (Mandamus Petition, at 20-24); (b) that a reasonable person might question the Court's ability to decide impartially who was responsible for determining or disclosing the existence of any fee division from Customer Class

Counsels' fee award (*id.* at 24-26); and (c) that a reasonable person might question the Court's ability to decide impartially whether the Master's Compensation has been excessive (*id.* at 26-27). The Mandamus Petition is pending.

Argument

Labaton respectfully requests that the Court stay any further action pending the outcome of the Mandamus Petition and a decision by the First Circuit regarding whether recusal is warranted pursuant to 28 U.S.C. § 455(a). This Court's authority to stay proceedings in the interest of "economy of time and effort for itself, for counsel, and for litigants" is well established. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 245-55. Labaton respectfully suggests that the weighing of competing interests strongly favors a temporary, partial stay of substantive decisions here, until the First Circuit decides whether this Court, or a different judge, will preside over the remaining phases of this case.

The principle is well established that, "[a]s a general rule, a trial judge who has recused himself 'should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge.'" *El Fenix de P.R. v. The M/Y Johanny*, 36 F.3d 136, 141-42 (1st Cir. 1994) (quoting 13A Wright & Miller, *Federal Practice & Procedure* § 3550 (2d ed. 1984)); *see also United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir. 1997) ("Once a judge recuses himself from a case, the judge may take no action other than the ministerial acts necessary to transfer the case to another judge"). Likewise, it follows that if the appellate court were to decide that a reasonable person could question the Court's impartiality, the Court should make no further decisions affecting the parties' rights.

Although the Court of Appeals has not yet ruled on the Mandamus Petition, this Court should enter a partial stay now. "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988). Section 455(a) "safeguards not only the litigants' constitutional entitlement to an unbiased adjudication, but the public's perception of the integrity of the judicial process." *El Fenix de P.R.*, 36 F.3d at 142 n.7 (internal citation omitted). Because Labaton has raised a serious question as to the Court's impartiality, the Court should defer further action in this case until the First Circuit has evaluated Labaton's petition and decided whether a writ should issue. Indeed, this Court has recognized the prudence of a stay of proceedings during the pendency of such a petition in the past. *See United States v. Salemme*, 164 F. Supp. 2d 86, 112-13 (D. Mass. 1998) (Wolf, J.) (declining to self-recuse, but providing that "if an authorized representative of the government requests a stay and expresses an intention to file promptly with the Court of Appeals for the First Circuit a petition for a writ of mandamus seeking to compel my recusal, I will stay this case in order to provide the Court of Appeals for the First Circuit whatever time it needs to act on that petition").

Denial of a stay could also lead to inefficiency and waste. If the Court of Appeals grants Labaton's Mandamus Petition, substantive decisions that post-date Labaton's recusal motion would likely need to be vacated. *See N.Y. City Housing Dep't Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir. 1996) ("order[s] rendered after the filing of the [§ 455(a) recusal] motion must be vacated – by the district judge or by writ of mandamus – if the motion ultimately is granted"); *Moody v. Simmons*, 858 F.2d 137, 144 (3d Cir. 1988) ("Because the judge should have recused after finding that his impartiality could reasonably be questioned, we will grant the writ of mandamus to vacate all orders (including opinions) entered by the judge after [the hearing on

recusal].”). Respectfully, it would not benefit any party or person to have this Court render substantive decisions only to have them subject to being vacated and treated as if they were never issued. The preferable path is to defer substantive decisions temporarily, until the Mandamus Petition is decided, thereby avoiding the inefficiency and the possible issuance of orders that the Court of Appeals determines should not have been decided by this Court.

Conclusion

For all of the foregoing reasons, Labaton respectfully requests that the Court stay any further substantive decisions in this matter, pending the outcome of Labaton’s Mandamus Petition in the United States Court of Appeals for the First Circuit.

Respectfully submitted,

Dated: July 13, 2018

By: */s/ Joan A. Lukey*

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