United States Court of Appeals
For the First Circuit

No. 18-1651

IN RE: LABATON SUCHAROW LLP,

Petitioner.

Before

Howard, Chief Judge,
Torruella and Thompson, Circuit Judges.

JUDGMENT

Entered: July 25, 2018

Petitioner Labaton Sucharow LLP has filed a petition for a writ of mandamus seeking an order from this court directing Judge Wolf to recuse himself from the ongoing fee-related proceedings. After careful consideration of the petition and relevant parts of the record, the petition is denied. Petitioner has not satisfied the stringent requirements for mandamus relief. In re Bulger, 710 F.3d 42 (1st Cir. 2013). The motion to expedite is denied as moot.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Hon. Mark L. Wolf
Robert Farrell, Clerk, United States District Court for the District of Massachusetts
Michael A. Lesser
Joel H. Bernstein
David J. Goldsmith
Garrett James Bradley
Daniel P. Chiplock
Michael P. Thornton
Jonathan D. Selbin
Lawrence A. Sucharow

Nicole M. Zeiss
Richard M. Heimann
Evan R. Hoffman
Paul J. Scarlato
Robert L. Lieff
Lynn Lincoln Sarko
Laura R. Gerber
Beth E. Bookwalter
William Henry Paine
Jeffrey B. Rudman
Daniel William Halston
M. Frank Bednarz
Theodore H. Frank
Joan A. Lukey
Stuart M. Glass
Justin Joseph Wolosz
Joshua Charles Honig Sharp
Catherine M. Campbell
Renee J. Bushey
Michael R. Smith
Carl S. Kravitz
Dwight Bostwick
Graeme Bush
J. Brian McTigue
Jonathan G. Axelrod
Kimberly Keevers Palmer
James A. Moore
William F. Sinnott
Elizabeth J. McEvoy

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 NOTICE OF FILING OF EXPANDED EXHIBIT 125

1. On July 23, 2018, the Special Master filed the exhibits to the Special Master's Report and Recommendations in redacted form. *See* ECF 401. Per pages 28 and 29 of the

Court's Memorandum and Order, ECF 356, the Special Master filed versions of the deposition transcript exhibits that contain only the pages cited in the Special Master's Report and Recommendations and any additional transcript pages designated by the parties, with appropriate redactions.

2. Labaton Sucharow LLP hereby designates an additional page (page 328) of Exhibit 125 to the Special Master's Report and Recommendations, the transcript of the October 2, 2017 deposition of Damon J. Chargois, ECF 401-124.

3. No parties have requested any redactions to this page of the deposition transcript.

4. With this notice, Labaton submits an expanded Exhibit 125 that contains additional page 328.

Dated: July 25, 2018

Respectfully submitted,

By: */s/ Justin J. Wolosz*

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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 25, 2018.

/s/ Justin J. Wolosz
Justin J. Wolosz

EX. 125

Expanded

Volume: 1

Pages: 1-330

JAMS

Reference No. 1345000011/C.A. No. 11-10230-MLW

In Re: STATE STREET ATTORNEYS FEES

BEFORE: Special Master Honorable Gerald Rosen,
United States District Court, Retired

DEPOSITION of DAMON J. CHARGOIS

October 2, 2017, 9:16 a.m.-5:01 p.m.

JAMS

One Beacon Street

Boston, Massachusetts

Court Reporter: Paulette Cook, RPR/RMR

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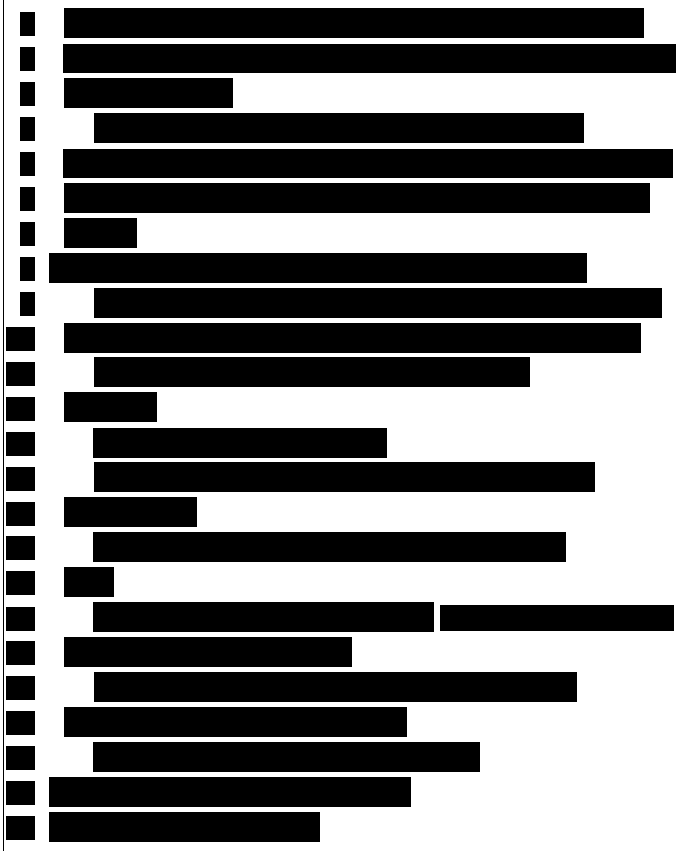

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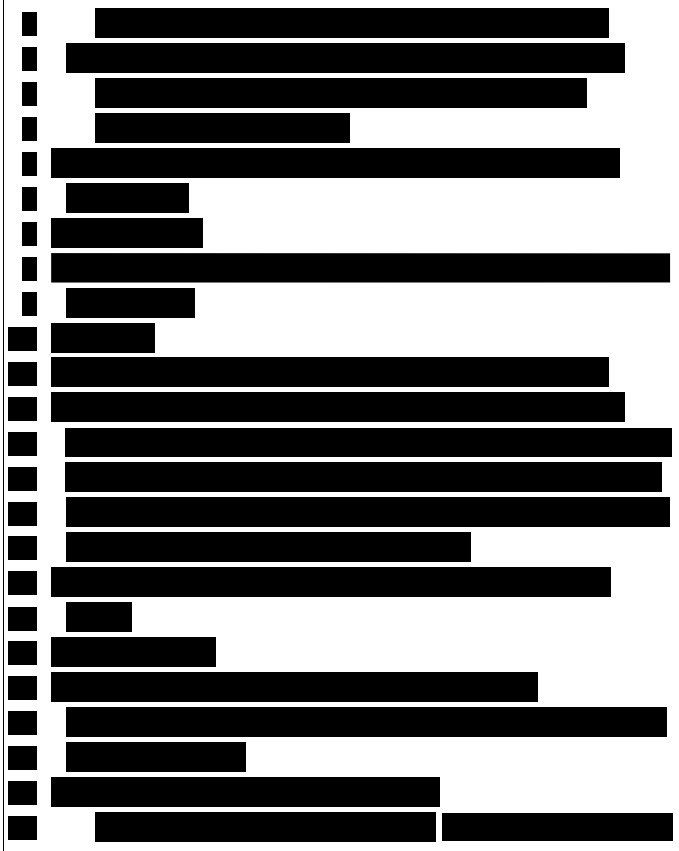

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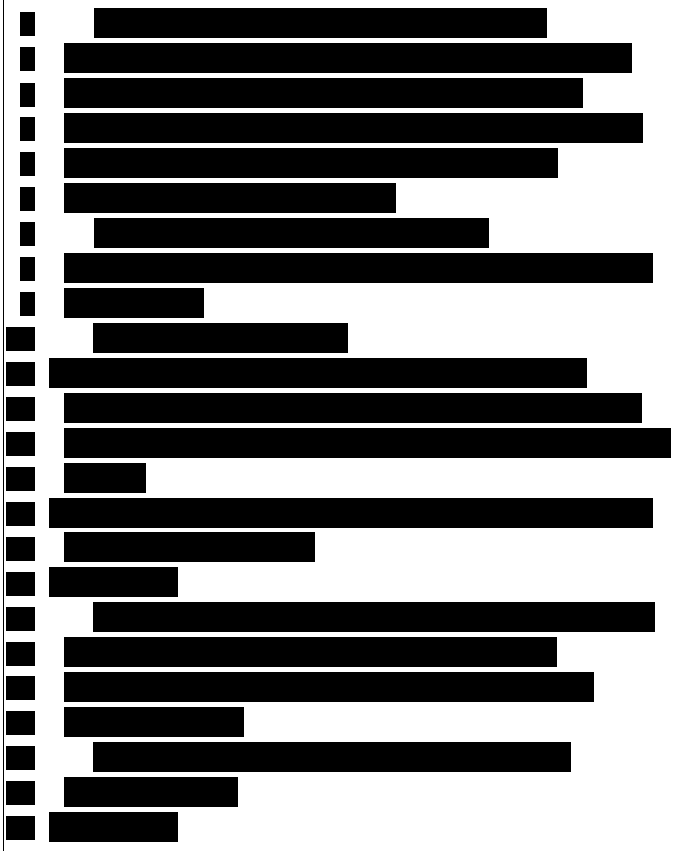

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that?
THE WITNESS: Either end of 2006 or beginning of 2007. Somewhere around there.
BY MR. SINNOTT:
Q. So what happened after you learned about Labaton's desire to make contact with you?
A. A lawyer in our office, Kamran Mashayekh, put us together -- 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 tell me a little 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.
Q. All right. Were you asked, in effect, to be local counsel --
A. Yes, sir.
Q. -- for Labaton? Okay.
Was that the expression that Labaton used in hiring you?

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A. I believe so in that case, yeah.
Q. All right. So describe what the HCC Holdings case was about and what you did on behalf of Labaton.
A. It was a securities fraud type of case on the civil side. Don't know much more substance than that.
And what I did was appear at one or two hearings with them. I believe -- I believe on that case I sponsored at least one of their lawyers to appear in court.
Q. Pro hac vice?
A. Sorry. Pro hac vice.
Q. Okay.
A. And at the appropriate time I believe I attended the mediation. I may be missing a couple of things but nothing of substance on the case.
Q. Okay. And was the case resolved at some point?
A. Yes, sir.
Q. And how was it resolved?
A. Settlement.
Q. And what was your participation in that? Did you have a role in that, or was that

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handled by Labaton's attorneys?
A. It was handled by Labaton attorneys.
Q. And did you assist in some fashion?
A. No.
Q. Okay. So it was handled exclusively by Labaton?
A. Yes, sir.
Q. All right. And in the course of working on behalf of Labaton in the HCC Holdings case, in addition to Eric Belfi, did you meet any other attorneys?
A. Yes, sir.
Q. Who did you meet?
A. Chris Keller.
Q. All right. And when did you meet Chris Keller? At what stage in the proceedings?
A. I met him first -- I was -- I believe the order of it is I met him either as we were discussing serving as local counsel somewhere around that time early on, but I believe I first met him when he and Eric Belfi came down, and I went up, and we met in Arkansas.
Q. Okay. So your recollection is that you met Belfi and Keller together in Little Rock?

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A. Yes, sir.
Q. And when you met them in Little Rock, what did they ask you to do?
A. They were interested in having a connection to Arkansas and to Little Rock and making inroads, and they asked me to help them make introductions.
Q. Okay. And when you say they asked you to make introductions, what type of persons did they want to meet?
A. Eric explained to me that he -- part of his job at Labaton was networking and client development or cultivation -- I don't remember the word but something along those lines, and that they did not have a presence in Little Rock and that we did and that if we could help introduce them to institutional investors or folks that could help them get introductions to institutional investors.
Q. And what was the basis of your knowledge of institutional investors?
A. I had none.
THE SPECIAL MASTER: Again, if you could just give us a timeframe.
THE WITNESS: Around the same timeframe. Early 2007.

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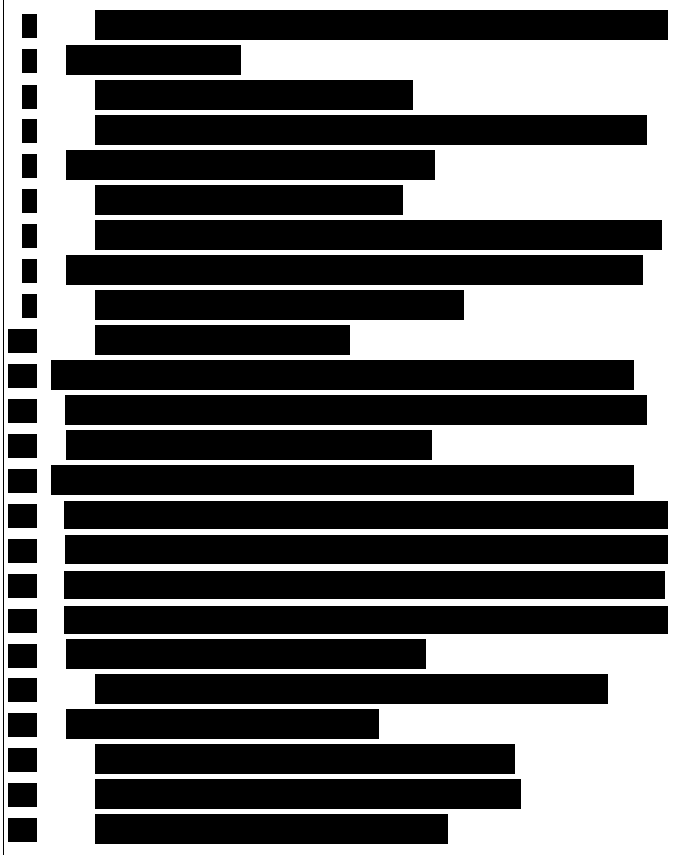

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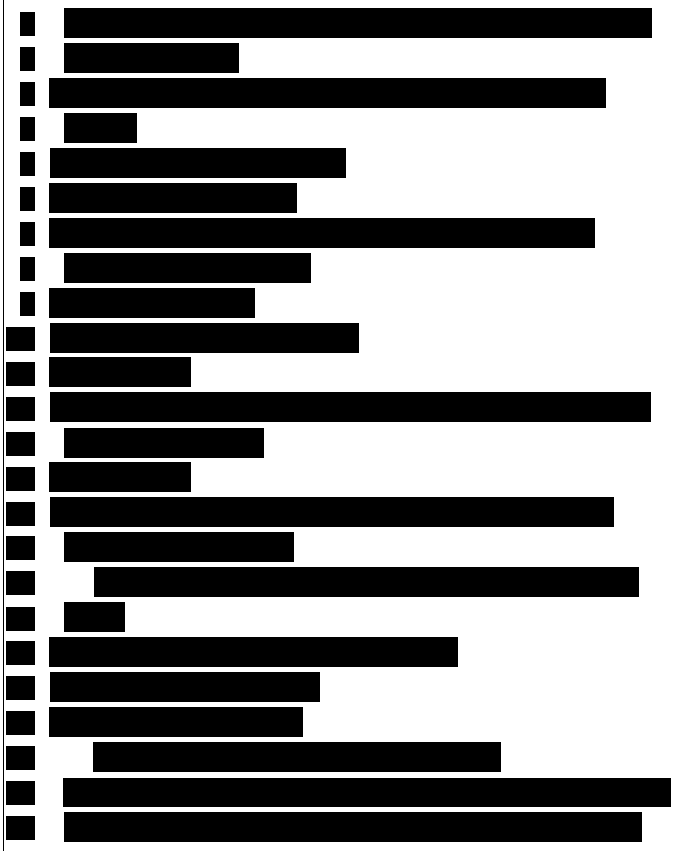

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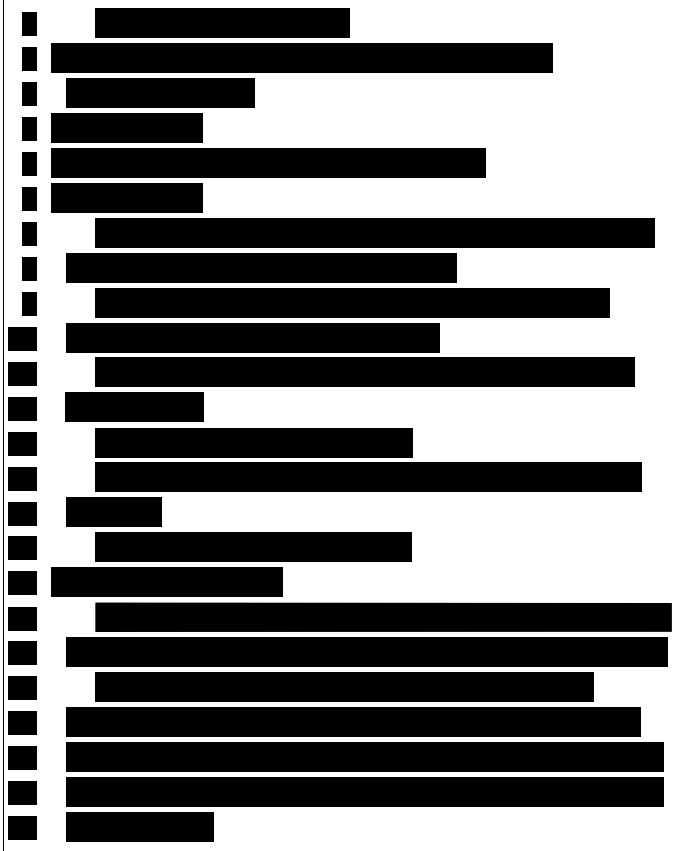

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investors?
A. I asked people that I knew if they knew what an institutional investor was and, if so, if they knew anyone that I could talk to.
Q. So you were starting from scratch? Is that a fair statement?
A. That's a fair statement.
Q. Okay.
THE SPECIAL MASTER: Did you have a partner in Arkansas?
THE WITNESS: I did.
THE SPECIAL MASTER: And that was?
THE WITNESS: Tim Herron.
THE SPECIAL MASTER: Tim Herron.
THE WITNESS: (Nods head.)
THE SPECIAL MASTER: Did Mr. Herron have relationships with institutional investors at the time?
THE WITNESS: No, sir.
THE SPECIAL MASTER: Was it just the two of you that were affiliated in the Little Rock office then?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Okay.

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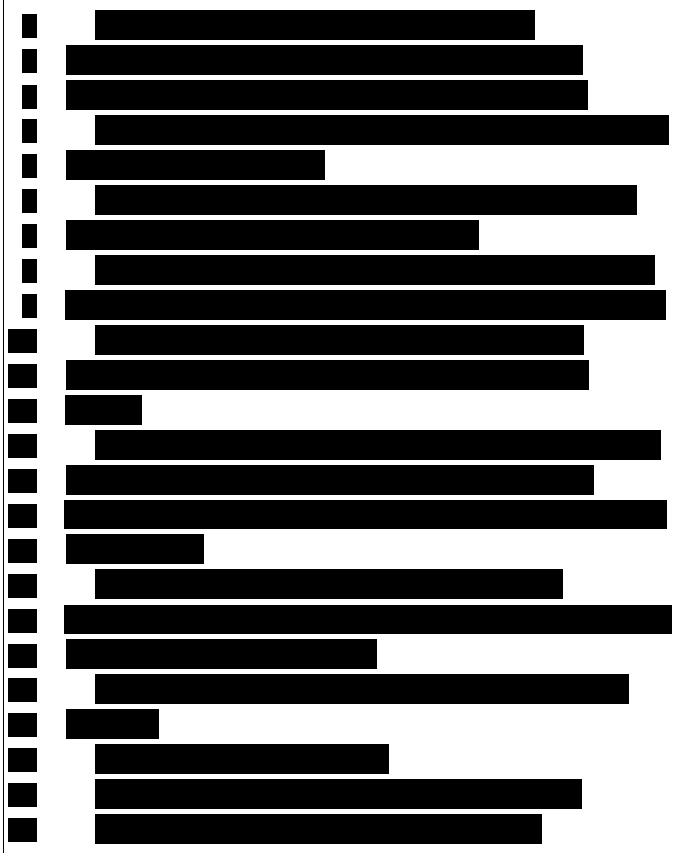

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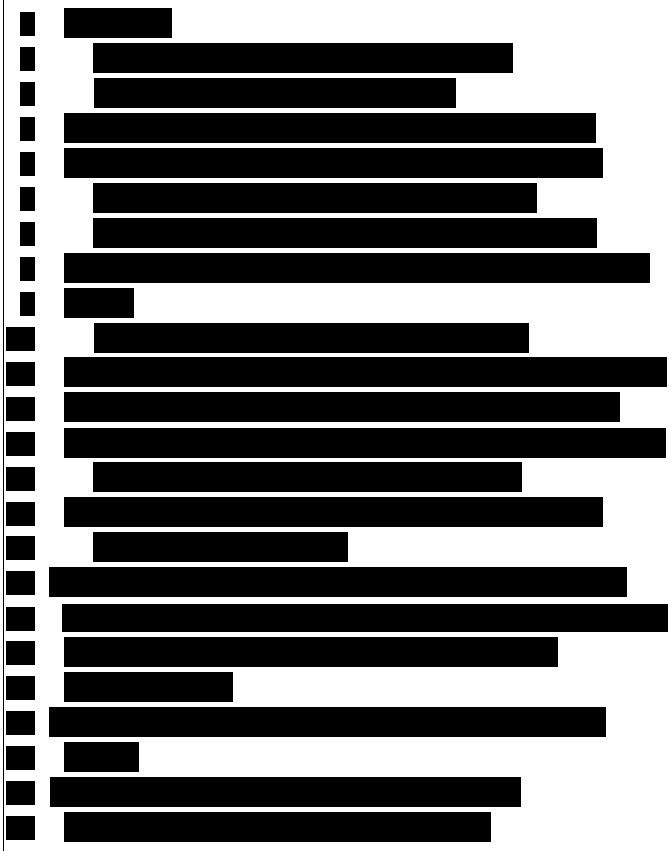

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A. Relatively new. I hate to say new because the hormone replacement therapy litigation was very active. I was there every month, and it was very, very involved.
Q. Okay. And was Labaton involved in that at all?
A. No, sir.
Q. Were any other firms involved or was that something that your own firm was handling?
A. It was my own firm. Our original cases.
Q. And was it a successful practice?
A. Ultimately, no. We couldn't afford them. So we ended up having to refer them out and close our Little Rock firm.
Q. Okay. And when did you ultimately close the Little Rock firm?
A. That was around 2010 or end of 2009.
Q. Now what did you do in order to assist Belfi and Keller in meeting institutional investors?
Tell us what your approach was to this and what you actually did.
A. Tim and I reached out to friends or associates, people that we knew, told them why we were reaching out to them and asking them if they had any information or knew anyone that we could talk to.
And Eric Belfi indicated that they also wanted to engage a local law firm to help them to establish a foothold, a presence in the community so that it's just -- I guess it gives a better impression than if they're some -- with all due respect, some guys that are beasts --
THE SPECIAL MASTER: New York firm.
A. -- just trying to get business, and they don't care about what's going on.
So we opened up doors and introduced them to anyone we knew, sure.
Q. Okay. And had the Labaton attorneys given you an idea of exactly the profile of persons or plans that they wanted to gain an introduction to?
THE SPECIAL MASTER: Or types of cases.
THE WITNESS: Yes, sir.
A. They were interested in getting introductions to institutional investors with the goal of monitoring their portfolios. They had to explain to me what that meant.
Once they explained to me what it meant, that's what I did.

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Q. Okay.
THE SPECIAL MASTER: Was that institutional investors with respect to monitoring as to certain kinds of cases, securities cases, transactional cases, antitrust cases? Or was that not --
THE WITNESS: I don't know.
THE SPECIAL MASTER: -- was that not specified?
THE WITNESS: That was not specified.
BY MR. SINNOTT:
Q. At some point did you have some success in making inroads into this area?
A. Yes, sir.
Q. Tell us about that.
A. Tim was friends with Senator Farris -- Steve Farris and asked him do you know anyone or point us to anyone we might be able to talk to, and he told Tim that recently a gentleman named Paul Doane had taken over Arkansas Teachers, and you might want to give him a try. Good luck.
Q. Did he facilitate that introduction in any way?
A. No, sir. Tim just told me about it, and I

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looked up Paul Doane and called him.
THE SPECIAL MASTER: Cold?
THE WITNESS: Yes, sir.
Q. And what was Mr. Doane's response when you called him?
A. The gist of it was who are you and why are you calling me, but I told him who I was, who our firm was. We're local not far from your office and how I got his name and why I was calling.
Q. Okay. And did he offer to help you?
A. I don't understand.
Q. Did he ask you to come in for a meeting? Or did he --
A. No, sir.
Q. -- extend -- you know, try to arrange for you to talk again with him?
A. No, sir.
Q. All right. What did he say?
A. He listened to what I had to say, and I asked him if I could meet with him. And then I told him that, you know, I was working with a New York law firm that specializes in institutional investors.
Q. Okay. So how did you leave it after that

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conversation?
A. Let me know if you're willing to give us some time.
Q. Okay. And what happened next?
A. He -- I don't know if it was a followup call by me or if it was that call, but he ultimately agreed to meet.
Q. Okay. And did you meet him by yourself, or were you accompanied by someone else?
A. The Labaton -- I believe it was Eric Belfi and Chris Keller, but I can't swear to that. I know Eric Belfi was there. I don't know if Chris Keller was there.
Q. Okay. And how soon after the telephone conversation did this meeting take place?
A. I'll guess within a week or two.
Q. Okay. And is it fair to say that Eric and Chris were responsive and came down --
A. Yes.
Q. -- at the time that you told them that the meeting would be -- time and date?
A. Yes, sir.
Q. Okay. So tell us what happened at that meeting.

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A. Eric --
THE SPECIAL MASTER: Hold that thought.
MR. SINNOTT: Sure.
THE SPECIAL MASTER: Was this the first institutional investor that you'd been successful in setting up a meeting with?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: I'm sorry. If you remember your question.
MR. SINNOTT: Okay. I do.
BY MR. SINNOTT:
Q. Tell us what happened at the meeting.
A. Eric Belfi presented all of the services that Labaton has available and what their -- what they could do and presented as a courtesy that they do this monitoring of the portfolio.
Q. Okay. And did Mr. Doane ask any questions of Eric?
A. I'm sure he did. I don't remember specific questions.
Q. Okay. Did you participate in the conversation?
A. I was there, but as far as substantive matters, no.

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Q. You let Eric do the talking?
A. Yes, sir.
Q. Okay. But you're a good listener?
A. I'm a good listener.
Q. Okay. How long was the meeting?
A. Maybe 30, 45 minutes.
Q. Okay. And how did Eric and Mr. Doane leave it at the end of the meeting?
A. Something along the lines of let's follow up, or I'll be in touch.
Q. Okay. And did you and Eric debrief after the meeting or go somewhere and talk about what happened and/or next steps?
A. I'm sure we talked after the meeting, but as far as next steps, no.
Q. All right. What's the next thing that happened with respect to Mr. Doane to your knowledge?
A. Eric Belfi called me and asked me to send a little blurb about my firm because he was interested in including us in the request for -- it's either an RFQ or an RFP but to include us in that.
Q. Okay.
A. And so I sent my firm information to him.

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Q. Had Mr. Doane raised the subject of a request for proposals or something along those lines, an RFP, during the conversation with Eric?
A. Not that I recall.
Q. Do you know where Eric got the idea that this would be an appropriate way to seek business with Arkansas?
A. I assume Paul Doane.
Q. Okay.
A. But I don't know.
Q. All right. You don't recall anything in the conversation about an RFP?
A. No.
Q. All right.
THE SPECIAL MASTER: So do you know did either Eric or Chris mention to you that they were going to pick up the threads from this first meeting and deal directly with Mr. Doane?
THE WITNESS: Yes.
Q. And did they indicate what, if anything, they'd be looking for you to do as part of this ongoing relationship with Mr. Doane?
A. At that time the impression that I had is that I would be local counsel just as I was in the

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HCC Holdings case.
Q. Okay. But that was an assumption on your part?
A. Yes, sir.
Q. And at some point did you attempt to introduce Eric and/or Christopher to any other figures in Little Rock?
A. Yes, sir.
Q. All right. Tell us about that.
A. In furtherance of the stated desire to be a presence in Little Rock, have an interest in Little Rock, Eric came down, and we showed him around Little Rock, introduced him to Senator Farris, and I don't know if it was that time or a subsequent time, but we asked and Mike Beebe was kind enough -- he was running for governor at the time -- to give us five minutes, ten minutes, and I introduced Eric to Mike Beebe.
Q. Okay. What was Mike Beebe's position at that time?
A. He was the outgoing attorney general.
THE SPECIAL MASTER: And running for governor?
THE WITNESS: And running for governor.

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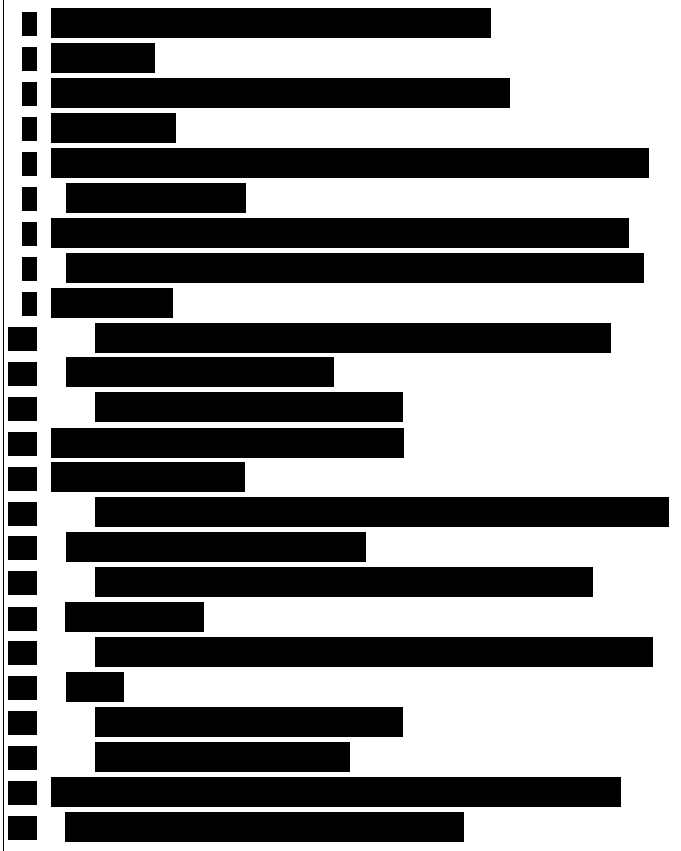

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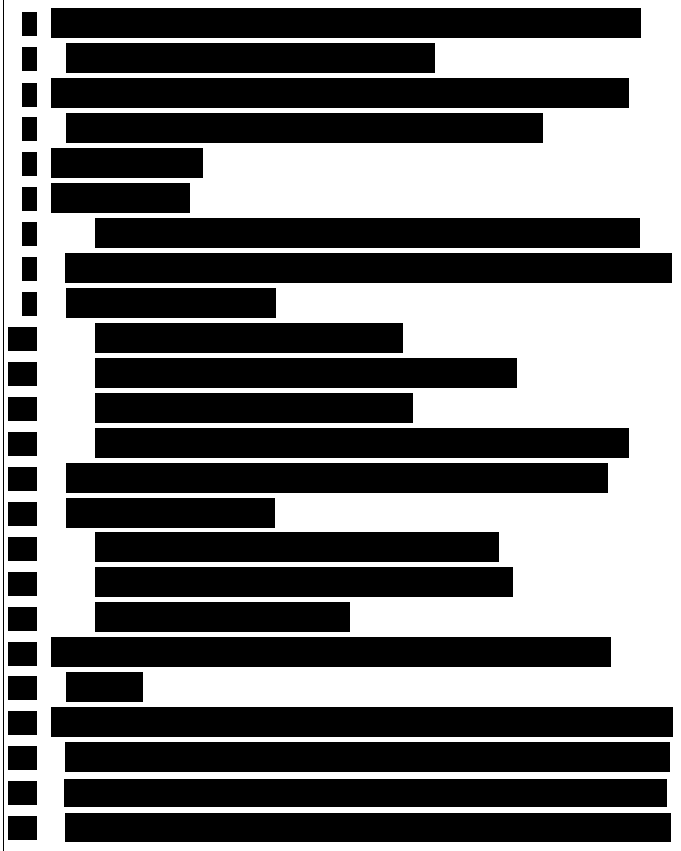

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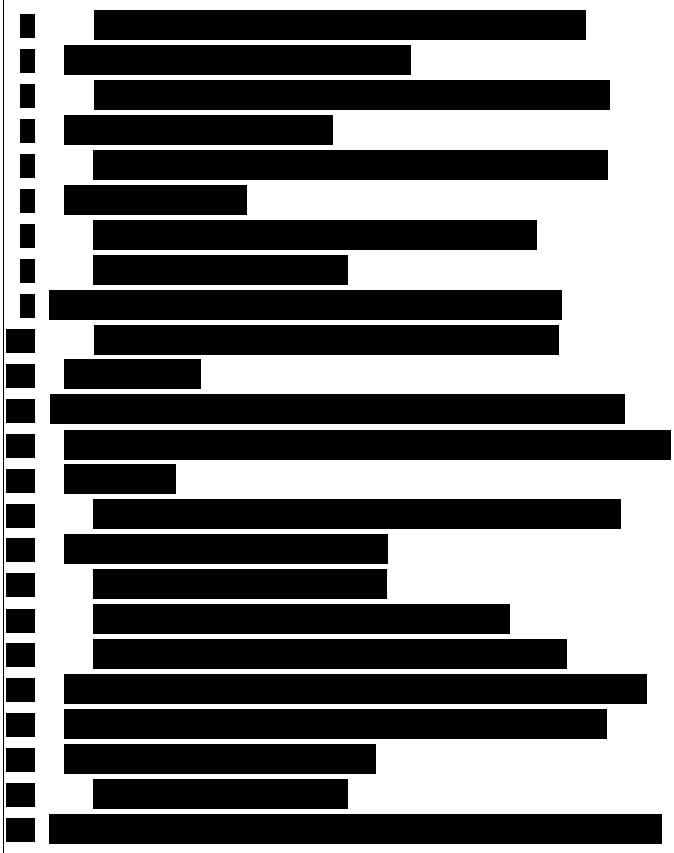

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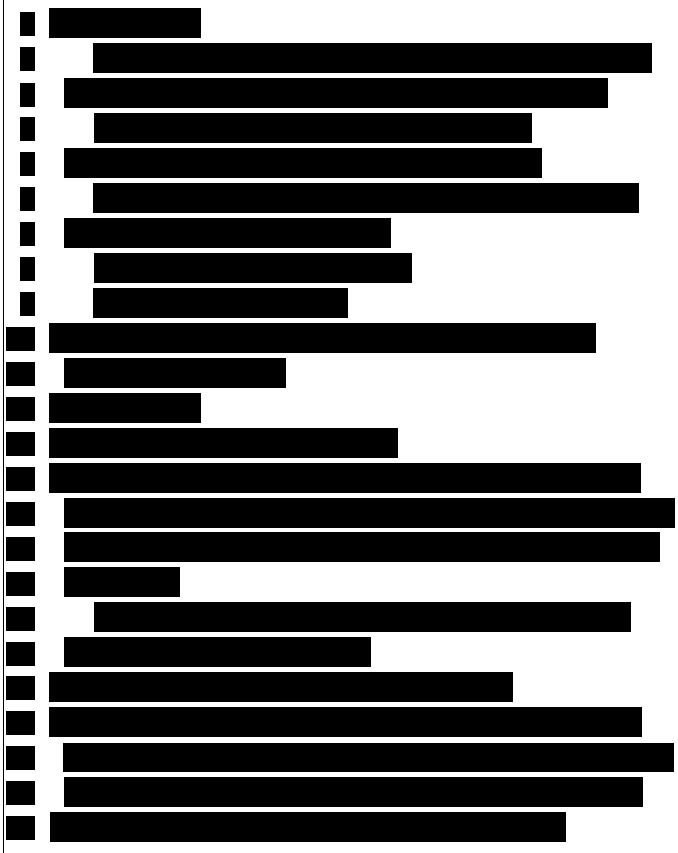

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association with Labaton?
A. Yes, sir.
Q. And what did you tell him that -- you know, at this first meeting that you were doing on behalf of Labaton?
A. Helping to introduce them to institutional investors.
Q. Okay. Now getting back to Paul Doane and Little Rock, after the RFP was submitted by Labaton and by yourself -- and I take it it was a joint proposal?
A. It was.
Q. How long was it before you heard of any progress?
A. I believe Eric called me within two to four weeks of that, told me that it had been kicked back. Said that the Arkansas Teachers wanted one firm on the form.
Q. Okay. So what did that mean?
A. I said go ahead and withdraw our firm and good luck.
Q. Okay. So you and your firm bowed out of the monitoring relationship? Is that what it was called?

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A. Yes, sir.
Q. Okay. But Labaton stayed in there, and Labaton was retained or offered that position, correct?
A. Yes, sir.
Q. Did you have any conversation with Paul Doane about this or with general counsel from Arkansas Teachers?
A. No, sir.
Q. All right. And was your understanding from Eric that you were not part of this successful proposal, correct?
A. If I could ask what do you mean not a part of the successful proposal?
Q. You were not retained --
A. Oh, yes.
Q. So Labaton was retained, and you weren't?
A. Yes. Correct.
Q. Okay, thank you. I don't think I was making myself clear.
So after that RFP and Labaton successfully being selected as monitoring counsel, what was your role with respect to Labaton?
A. Help introduce them to other pension funds

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or institutional investors as I am able to.
Q. Okay. And who were some of those other folks that you introduced them to, Damon?
A. Over the years, Texas Teachers Pension Fund, Houston Municipal Employees Pension Fund, the Houston Firefighters -- I don't think he was on the board, but he was prominent within Houston Firefighters, a gentleman.
And as far as institutional investors go, that's it.
Q. Okay. As a result of your having made this introduction of Labaton to Arkansas Teachers, did you come to an agreement or a 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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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 had helped to facilitate the relationship with?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Not limited to Arkansas?
THE WITNESS: Correct.
THE SPECIAL MASTER: And when did you begin having these discussions? This will be a compound question, but you can break it down.
THE WITNESS: Sure.
THE SPECIAL MASTER: Were the discussions with Eric Belfi or Chris Keller or both?
THE WITNESS: Good question.
When Eric Belfi and Chris Keller came down to Little Rock that first time that we'd already talked about --
THE SPECIAL MASTER: To meet with Senator Farris?

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THE WITNESS: No. I believe that was another occasion.
THE SPECIAL MASTER: Okay.
THE WITNESS: When they came to Little Rock to meet with myself, and I believe Tim was there as well --
THE SPECIAL MASTER: Oh, okay.
THE WITNESS: -- in our offices, they said here's what we're interested in. We would like to have a presence in Little Rock. We don't have one currently.
We'd like a presence in Houston because we don't have one currently. We like to work with local counsel. You're local counsel.
And they presented the arrangements I just told you about.
THE SPECIAL MASTER: So this was almost at the outset of the relationship then?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: And you began talking with any level of specificity about how the relationship would be managed and compensation for the relationship for you?
THE WITNESS: Yes, sir.

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THE SPECIAL MASTER: Okay.
MR. MARX: I think the record's clear now based on the followup questions, but your question earlier, Bill, was as a result of this RFP process and Little Rock what was the nature of the agreement between Damon's firm and Labaton.
I think it's clear now that that was an initial conversation about an overarching agreement which included --
THE SPECIAL MASTER: Correct me if I'm wrong. I don't want to misstate it, but it sounds like the commercial piece of the relationship between you and Labaton actually began almost at the outset of the relationship that there was some understanding about how you would be compensated -- I say "you," I mean your firm.
THE WITNESS: That's correct.
BY MR. SINNOTT:
Q. And with respect to Arkansas Teachers, Damon, how many other cases resulted from that introduction that you had made of Labaton to Arkansas?
And when I say Arkansas, I'm using that as shorthand for Arkansas Teachers.

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A. I understand. I understand.
Including State Street, I believe five -- four or five.
Q. Okay.
THE SPECIAL MASTER: Did you have ongoing contact with Arkansas at all during this period?
THE WITNESS: No, sir.
THE SPECIAL MASTER: Not with Paul Doane?
THE WITNESS: No, sir.
THE SPECIAL MASTER: George Hopkins?
THE WITNESS: I met him once at a hearing in San Francisco years later.
THE SPECIAL MASTER: A case -- on a case?
THE WITNESS: Yes. Um, [redacted] case.
I was going to San Francisco to visit my sister and brother-in-law, and Eric told me that there was a hearing that was taking place there. I said I'm going to come by. So I went by.
George Hopkins was there, and Eric introduced us. I said hi.
THE SPECIAL MASTER: You weren't local

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counsel on that case though?
THE WITNESS: I wasn't local counsel on that case or on any of these class action pension funds.
THE SPECIAL MASTER: I'm curious, Damon, what is your understanding of what a local counsel does?
THE WITNESS: More along the lines of what I did in the HCC Holdings case; that if there's a non-dispositive hearing or if there's something that needs to be filed under seal or if someone needs to be admitted under a pro hac vice motion, that's why you have local counsel.
THE SPECIAL MASTER: And you have to appear in the case?
THE WITNESS: Yes, sir. And you have to appear in the case.
THE SPECIAL MASTER: And you have to file an appearance in the case?
THE WITNESS: You have to file an appearance in the case.
THE SPECIAL MASTER: And be responsible to the Court to look to as the local lawyer.
THE WITNESS: Yes, sir.

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THE SPECIAL MASTER: If the Court wants to pick up the phone and call a local lawyer, you're the one, right?
THE WITNESS: Yes, sir.
Q. But that --
THE SPECIAL MASTER: You heard -- I'm sorry, Bill.
MR. SINNOTT: No.
THE SPECIAL MASTER: We've heard in the case there's another definition that lawyers have used for local counsel which is basically to be local to the client itself and either in addition to or only to be available to service the client -- professionally service the client. Is that a role you've ever played?
THE WITNESS: Not that I'm aware of.
THE SPECIAL MASTER: Okay. All right.
BY MR. SINNOTT:
Q. Is it fair to say that there was no expectation arising out of the Arkansas introduction that you had made that you would enter appearances in cases?
A. That's correct.
Q. No expectation that you would take a role in

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those cases?
A. That's correct.
Q. And that was apparent to Mr. Belfi?
A. Yes, sir.
Q. And to Mr. Keller?
A. Yes, sir.
Q. And to everyone at Labaton?
A. I don't know --
MS. LUKEY: Objection.
A. I don't know about everyone at Labaton.
Q. Okay. But you didn't encounter anyone that asked you what you were doing in those future cases, correct?
A. No, sir.
THE SPECIAL MASTER: Did anybody from Labaton ever ask you to perform services as what we've discussed a local counsel would do?
THE WITNESS: In a current case that is not a class action case, yes.
THE SPECIAL MASTER: But in these other cases?
THE WITNESS: No, sir.
BY MR. SINNOTT:
Q. And let me -- I know you said you thought

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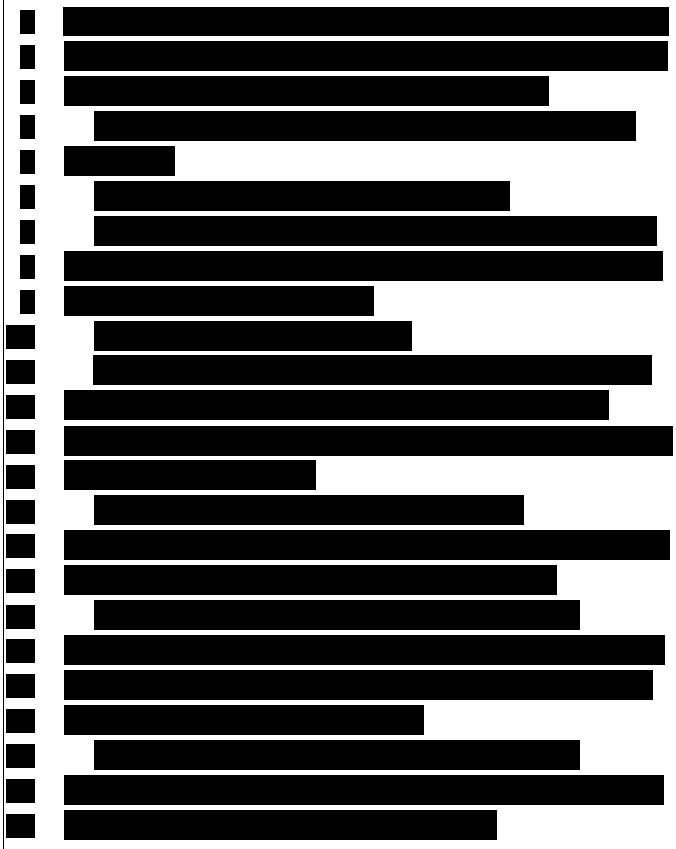

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THE WITNESS: Yes, sir.
THE SPECIAL MASTER: So Arkansas, for example, in which you did play the role as opening the door would fall under that rubric?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Okay. When did that relationship be reduced to writing?
THE WITNESS: Only e-mails. There's no four-corner document that -- in ceremony and signed or anything. It's just an e-mail relationship.
THE SPECIAL MASTER: Do you recall whether there had been drafts of agreements that had been circulated?
THE WITNESS: Yes. Fairly early on I believe I attempted to get something down in writing, and then time went by. And then I believe Chris Keller proposed something.
I may have proposed something before then, and then I believe Chris Keller proposed something that was way more involved than mine.
And I believe after that I may have made one or two attempts to talk with someone about it. But we just never finalized anything.
THE SPECIAL MASTER: So you don't

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believe there was ever a formal written contract agreement that reduced the relationship to a contract other than the e-mail relationship?
THE WITNESS: I think that's accurate.
BY MR. SINNOTT:
Q. Who brought up the 20 percent number? Was it you or Eric or Chris? Do you recall?
A. Chris Keller.
Q. Chris did?
A. Yes, sir.
Q. Okay. And did he indicate how he had arrived at that number?
A. No, sir.
Q. But that seemed fair to you?
A. It seemed very fair to me.
Q. Okay. Still seems fair to you?
A. Well, I don't know that I've ever actually received 20 percent of their fees. I think it's more like 10 percent or less or maybe a little more but --
Q. I was going to ask you that --
A. Whatever we arrived at seemed fair to me.
Q. Okay. Let me -- I'm going to circle back on this, but let me ask you about some cases to the

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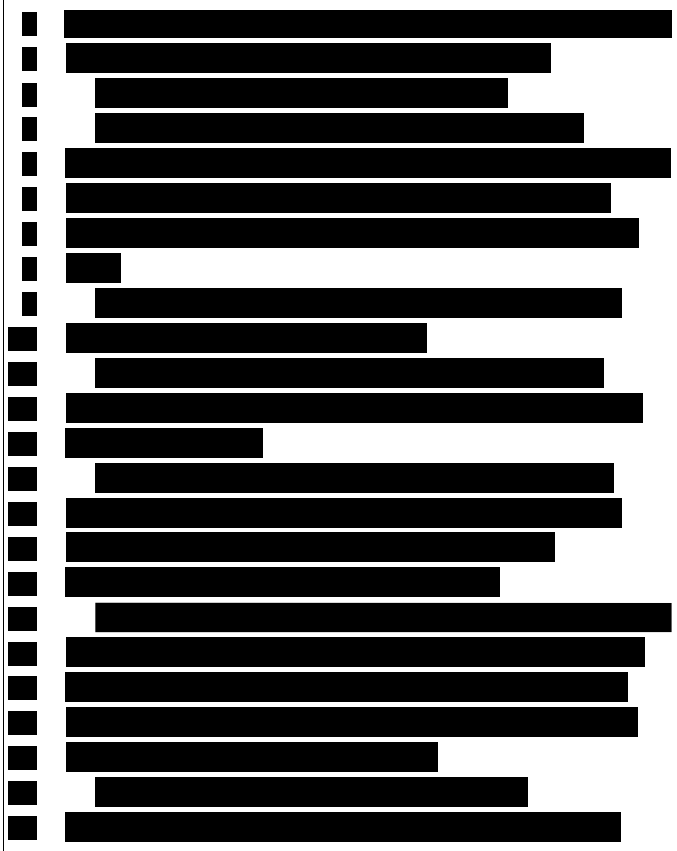

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forwarding relationship, a -- I may get this one -- a private fee arrangement. Was that the phrase?
MR. SINNOTT: Something like that, yeah.
MS. LUKEY: Objection on that one. I don't remember that one. It may have happened.
THE SPECIAL MASTER: It was there. I might have the phrase wrong, but it was sort of a private arrangement. Am I missing anything?
MR. SINNOTT: No. I think you got 'em.
THE SPECIAL MASTER: What is your understanding of the relationship?
And if it evolved from something to something else --
THE WITNESS: 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.
THE SPECIAL MASTER: As we understand it in our --
THE WITNESS: As we understand it talking today.
THE SPECIAL MASTER: -- in our discussion, yeah.

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BY MR. SINNOTT:
Q. And as you were in the HCC Holdings case?
A. Yes, and as I was in the HCC Holdings case. When Eric informed me that it 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...
Q. Okay.
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.

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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.
THE SPECIAL MASTER: Agreement. Okay.
BY MR. SINNOTT:
Q. Have you ever referred to it as an obligation?
A. An obligation? I don't think so.
Q. Do you ever recall hearing Labaton or other counsel refer to your agreement as an obligation?
A. Maybe. I don't recall.
Q. Okay.
THE SPECIAL MASTER: Have they ever referred to you in your conversations with them as referring counsel or referring attorney or referral fee? Anything --
THE WITNESS: No, sir.
THE SPECIAL MASTER: Okay. You've heard the phrase though a referral fee or a referring -- referring counsel?
THE WITNESS: I am familiar with that phrase.

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THE SPECIAL MASTER: Yep. To your understanding of that phrase, have you acted as referring counsel in any of these cases?
THE WITNESS: The capacitor case.
THE SPECIAL MASTER: The capacitor case.
THE WITNESS: Yes, sir. That did not involve Arkansas Teachers.
THE SPECIAL MASTER: Right. Any other cases?
THE WITNESS: I don't know if they came to fruition for them, but through the years they would periodically ask me if I had any connections or inroads into some of their antitrust investigations.
So if they're looking for someone in a particular industry, they would ask me. And sometimes I would have success. Sometimes I wouldn't.
THE SPECIAL MASTER: And -- but in terms of being referring counsel and receiving a referral fee, to your knowledge has that happened in any case other than the capacitor case?
THE WITNESS: I didn't receive a fee in that case. I don't know that it's resolved even.

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THE SPECIAL MASTER: Okay.
THE WITNESS: But other than that, no.
BY MR. SINNOTT:
Q. How about the Colonial case?
A. Colonial Bank, yes.
Q. Okay.
A. I received -- I'm guessing. Not to the penny. But I believe the -- it was in two parts. And I believe the attorneys' fees total for Labaton were around 4 million dollars.
And my firm received 90,000 plus $75,000.
THE SPECIAL MASTER: That's a far cry from 20 percent?
THE WITNESS: Yes, it is.
THE SPECIAL MASTER: Did you view that as a referral fee as you understand the term?
THE WITNESS: No, sir.
THE SPECIAL MASTER: I'm curious.
THE WITNESS: Yes.
THE SPECIAL MASTER: Your understanding of the agreement was 20 percent.
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Why didn't you get

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20 percent?
THE WITNESS: Great question.
Eric Belfi called me and explained that there were many variables and circumstances that they -- that they had not considered that affected the case and the risk that they took in the case and would I accept less. And I did.
THE SPECIAL MASTER: So it became a negotiation?
THE WITNESS: Each time.
THE SPECIAL MASTER: Each case.
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Or each payment --
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: -- in the Colonial Bank case?
THE WITNESS: Yes, sir. Sorry.
THE SPECIAL MASTER: I keep asking compound questions.
THE WITNESS: In each case --
MS. LUKEY: Each case -- I've lost the thread.
THE SPECIAL MASTER: Let me start again, Damon.

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THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Was the payment you would receive the product of a negotiation in each case?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: Okay.
BY MR. SINNOTT:
Q. And the Colonial case was an Arkansas Teachers case, correct?
A. Yes, sir.
Q. But you said the capacitors was not?
A. Yes, sir.
Q. So Labaton used you as an entree or a facilitator of introductions beyond Arkansas Teachers as testified earlier?
A. Yes, sir.
Q. And capacitors was one of those?
A. Yes, sir.
Q. How about Beckman Coulter securities litigation --
A. Not familiar with that one.
Q. -- 2010 Central District of California?
A. Not familiar with that one.
THE SPECIAL MASTER: Did you -- you

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don't remember receiving a payment from that case?
THE WITNESS: Beckman Coulter? I did not --
THE SPECIAL MASTER: Maybe it went by some other name. In re securities litigation --
BY MR. SINNOTT:
Q. In re Beckman Coulter securities litigation.
A. No, sir.
Q. Okay. Hewlett-Packard?
A. Yes, sir.
Q. All right. Tell us about that.
A. Labaton received a fee of 14-and-a-half million dollars, give or take. And our negotiated amount was $201,000. I remember the one.
THE SPECIAL MASTER: How did that case come -- what was your role in facilitating that case?
THE WITNESS: That was an Arkansas Teachers case.
THE SPECIAL MASTER: Oh, that was an Arkansas case?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: So that goes back to the initial relationship with Arkansas that you

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facilitated?
THE WITNESS: Yes, sir.
THE SPECIAL MASTER: But no separate additional facilitation in this case, correct?
THE WITNESS: That's correct.
BY MR. SINNOTT:
Q. How about the K12 case?
MS. LUKEY: I'm sorry?
MR. SINNOTT: K12.
THE SPECIAL MASTER: K12.
MS. LUKEY: Thank you.
A. K12 was an Arkansas Teachers case. It's going back a little bit, but I believe -- don't hold me to it, but I believe the attorneys fee that Labaton collected in that case was just shy of two million dollars, and our -- my firm's payment was around -- between 150 and $200,000. That was the negotiated figure.
Q. Spectrum Pharmaceuticals?
A. Yes, sir.
Q. Was that an Arkansas case?
A. Yes, sir.
Q. And tell us about that.
A. Well, Spectrum and another one called Vocera

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resolved around the same time. And, um, I belive -- so I've always viewed them together. I believe --
THE SPECIAL MASTER: Were they both Arkansas cases?
THE WITNESS: Yes, sir.
A. I believe the overall attorneys' fee for Labaton was around 4-and-a-half million dollars, maybe 4 -- 4-and-a-half million dollars, and my firm's negotiated fee was $105,000 for one and $240,000, give or take, for the other.
Q. Okay. How about in re A10 Networks shareholder litigation? Does that sound familiar?
A. No, sir.
Q. Okay. And you said earlier that you had a role or received payment for the Netflix case?
A. That was dismissed.
Q. It was dismissed. So you didn't get anything out of that?
A. No, sir.
Q. And Labaton didn't get anything out of that?
A. Not that I know of.
Q. How about the BP Oil matter?
A. Yes, sir.
Q. Did you receive any payments from that case?

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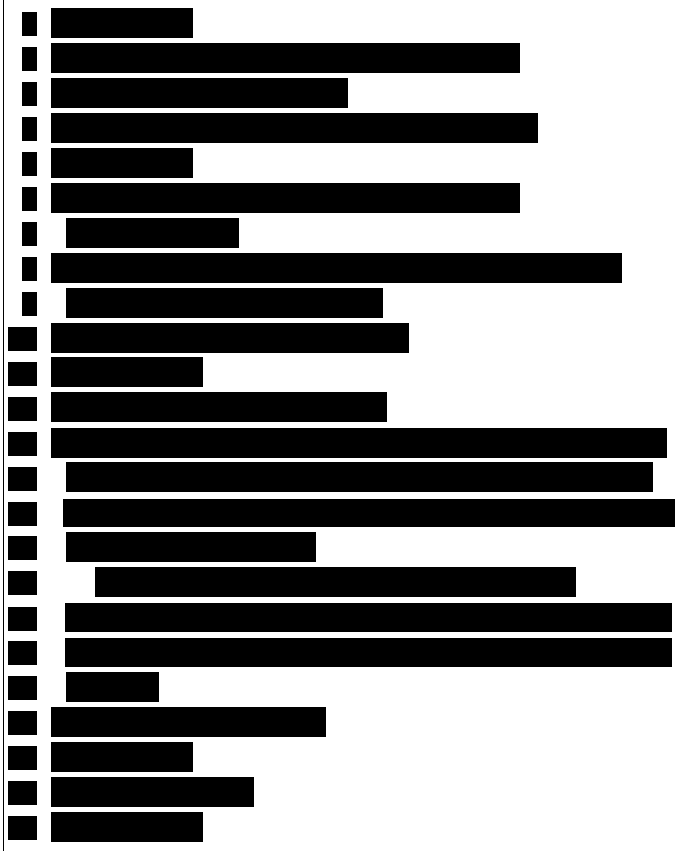

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A. I believe the end of 2012 or maybe beginning of 2013. Somewhere around there.
Q. Okay. And how did you learn about it?
A. I believe Eric Belfi told me that he and Garrett -- I believe that's when he and Garrett had filed it or were filing it or something like that.
Q. Okay. And was it just Eric, or was it Eric and Chris Keller, or Eric and Garrett Bradley? Who did you speak to about the case?
A. I really don't know. I believe it was just Eric letting me know what's going on.
Q. Okay. And did you receive periodic updates on what was happening in the case?
A. About once every year or two Eric would say here's what's going on.
Q. And what was your understanding of what was going on with that case?
A. They were working it.
Q. Okay.
A. It was progressing along.
Q. But there's no expectation that you were going to be strategizing, playing a role, local counsel or anything else, correct?
A. No, sir -- I mean correct. Correct.

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Q. All right. To your knowledge on anyone's part, correct?
A. Correct.
Q. And when you learned about the State Street case from Eric, did you and Eric discuss what your payment would be on any settlement or award in that case?
A. No, sir.
Q. Subsequently did you have discussions about what your payment would be?
A. Yes.
Q. All right. Tell us about those discussions.
A. Sometime around 2013 Garrett called me and said I wanted to talk to you about your deal with Labaton and changing it.
THE SPECIAL MASTER: Why Garrett?
THE WITNESS: He said that the case was his firm's idea or something like that, and he was working the case.
THE SPECIAL MASTER: By this time had you developed an independent relationship with Garrett Bradley?
THE WITNESS: I don't know if I would characterize it as independent, but I had come to

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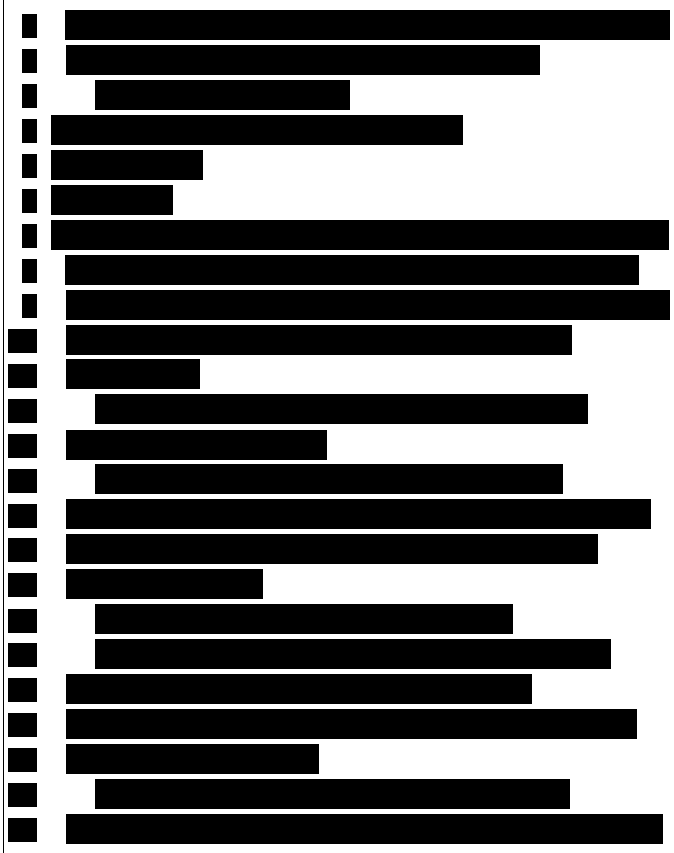

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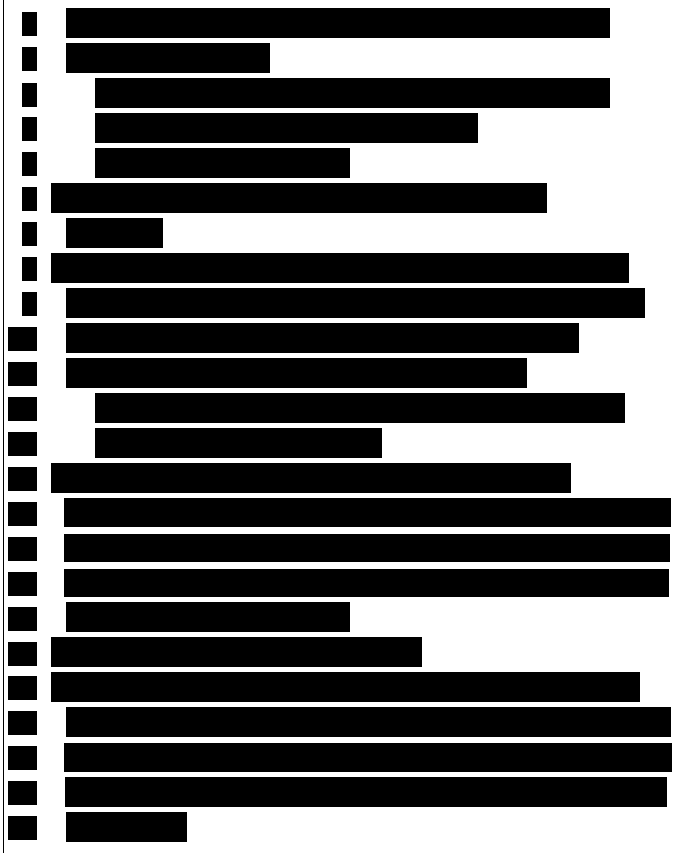

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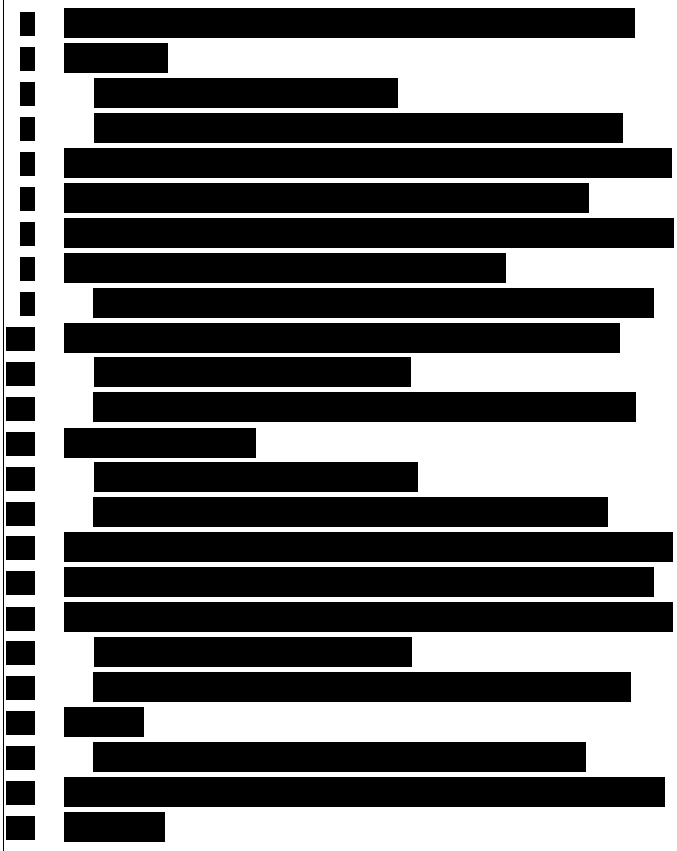

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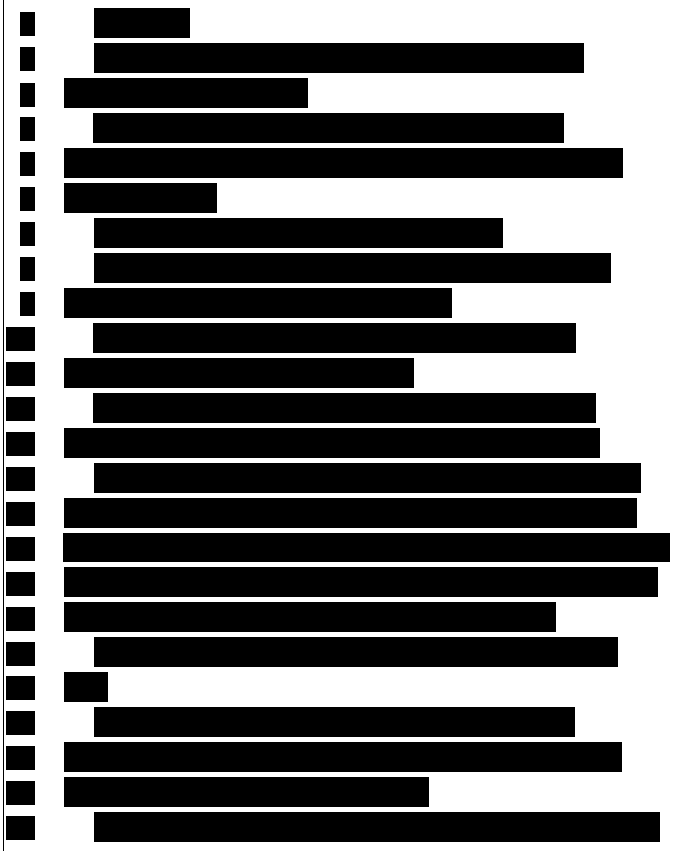

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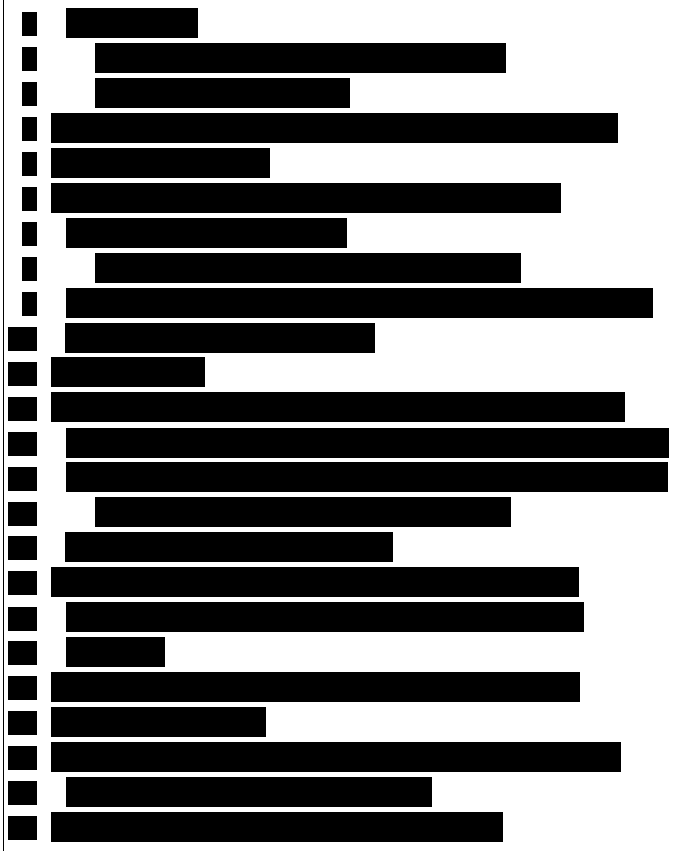

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Q. Okay, thank you.
Saturday, October 14, 2014 at 1:15 p.m. there's a message LBS 017593 and 594, and the title is concerning Eric in reviewing your text regarding HP it appears --
(Pause.)
Q. It would appear that there was a disagreement as to your payment in this case, but let me direct your attention to the bottom of the face page where you begin a message to Eric.
"Eric, the call kept dropping so I'm sending the e-mail. In reviewing your text regarding HP it appears Labaton is trying to use the fee calculation done as a special consideration for Garrett's 20 percent additional interest in the Colonial Bank settlement since both ATRS and clients via Garrett are in that case, as a precedent to change our fee agreement in all of the pension fund cases in which ATRS is a plaintiff. This is contrary to your express assurance to us that if we agree to that accommodation in Colonial Bank, it would not be used as a precedent in cases where Garrett isn't involved. I acknowledge that we had discussed in the past treating certain cases where

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Labaton has multiple fee split obligations to referring firms differently on a case-by-case basis but only after we both discuss and agree with you giving me advanced notice of your intentions so that I can handle it with my partners on my end, not what you have done here in the HP case.

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

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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."

Then Eric responds: "Damon, unlike Colonial, where there was a modification, here there is not a modification. Arkansas only represented 23 percent of the losses. So you are only entitled to receive 23 percent of the 20 percent or 4.6 percent. In Colonial after the fee split we asked you to reduce the percentage below the pro rata split because the case was a loss to us. We could not afford to pay out 20 percent in that case. In this case there were four different Labaton clients that we had obligations on all of them.

As indicated to you yesterday, we would not have been appointed lead without those three other clients and our relationship with Motley Rice because their client had a much larger loss. Going forward, you should know that Arkansas is almost never a sole lead so this is going to happen in almost every case. It is not a modification. It is just how the agreement works."

And you respond: "This isn't my

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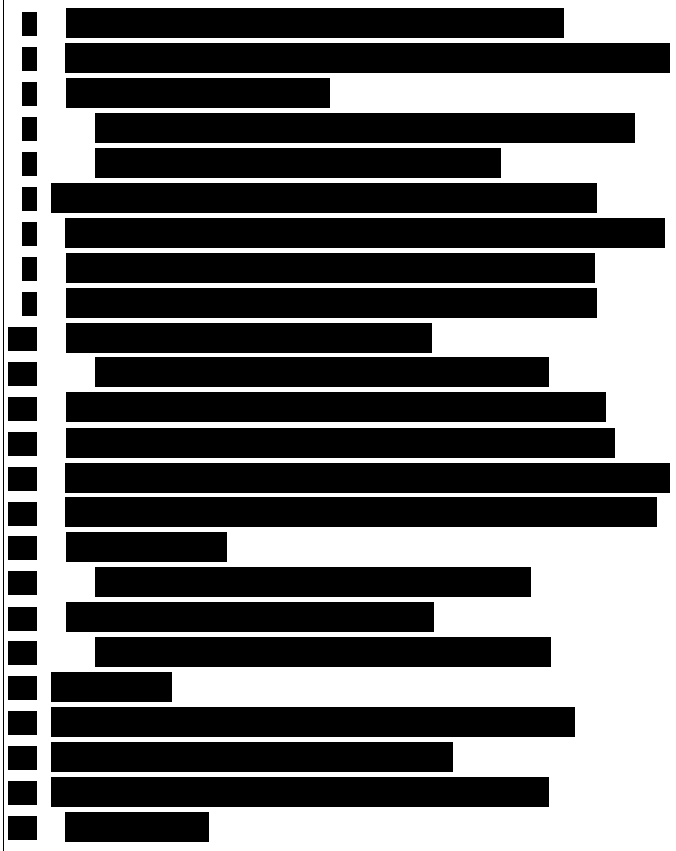

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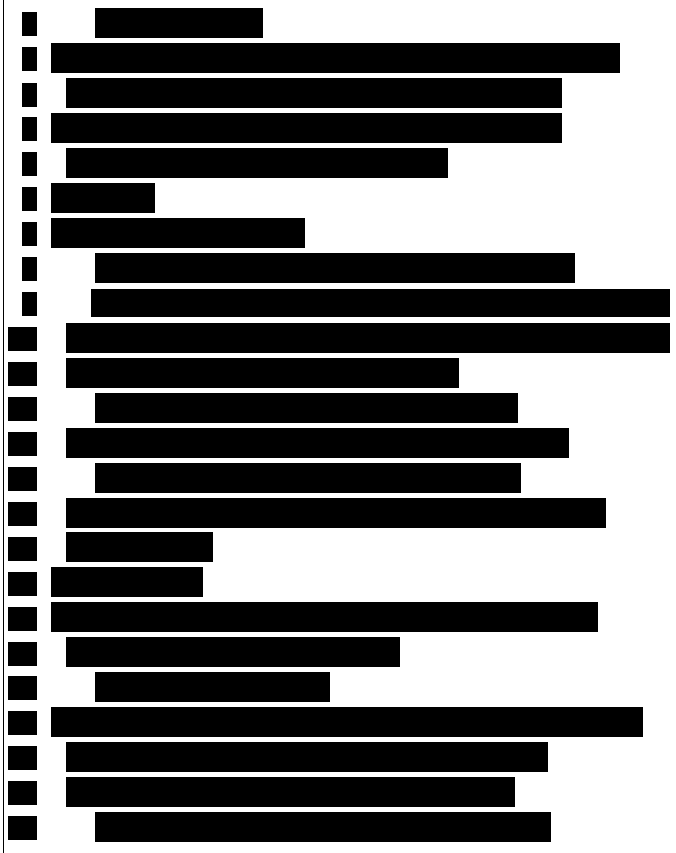

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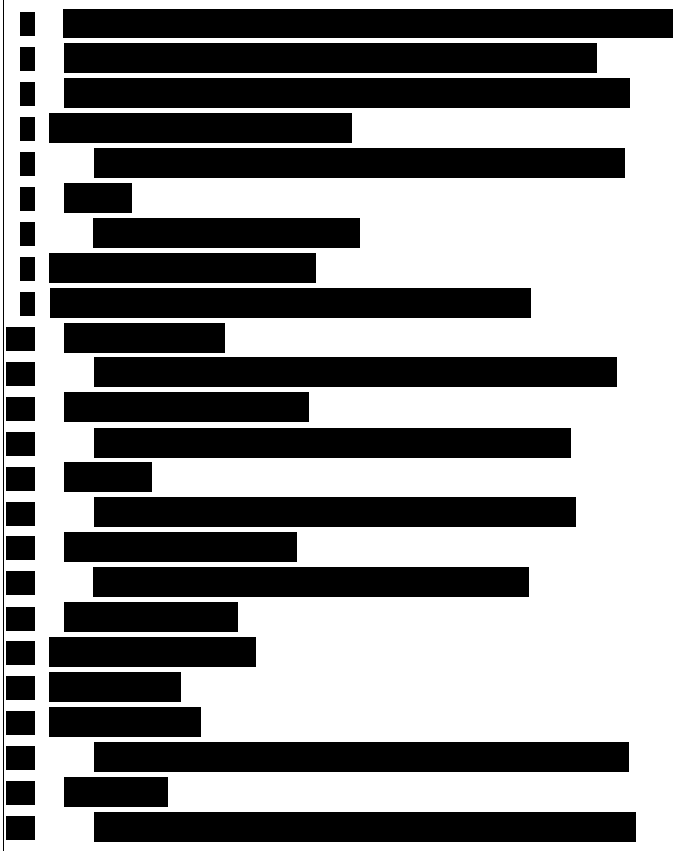

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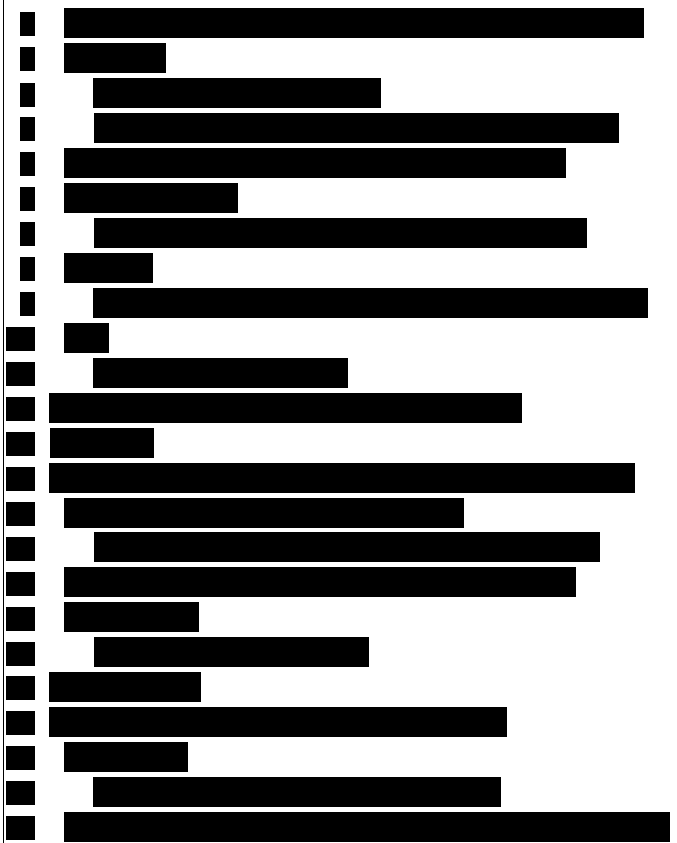

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6th writes -- and this goes onto page 4 -- "I spoke with David. Do you think we will have time to process his allocation once he wants it, or will it be a rush? If it will be a rush, then I want to tell accounting to bring the money into our IOLA. Otherwise, it can stay in the settlement fund, but it will take some hoops to get it out." Keller and Larry's signature.

You weren't part of those discussions about IOLA or non-IOLA?

A. No, sir.

Q. Okay.

THE SPECIAL MASTER: Didn't matter to you which account it came from?

THE WITNESS: It did not.

Q. And looking at the top middle of the third page on a message that began at the bottom half of the second page from Eric Belfi, do you see going onto the third page where it says, "He needs a new undertaking for Damon Chargois, esquire"?

And in the middle of page 2 Nicole responds: "David, Damon needs a new undertaking. If you send me a link, I can do it. Eric, does this mean he wants the money now or still wait? If wait,

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I need to know when he might want it in broad strokes and his turnaround expectations. Thanks."

Are you surprised to hear they were rushing this payment?

A. Yes.

Q. It wasn't at your urging or prompting or anything?

A. No.

Q. Okay.

A. None of this mattered.

Q. And then at the bottom of page 1 Eric writes: "He will want it now. Let me call you at 11 when I land so we can discuss."

I suppose it's not the worst thing in the world for people wanting to get you your money as fast as possible, is it?

A. I suppose.

Q. And then they indicate the issue -- Nicole Zeiss writes: "Name of person/entity giving undertaking must match payee name and wire instructions."

Eric responds: "When the undertaking is done, please send to me, and I will have Damon sign it."

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Bates number.
MR. MARX: The date is more helpful.
THE WITNESS: They aren't in chronological order.
MR. SINNOTT: They were at one time. They may be in reverse chronological order right now.
THE WITNESS: Do you have it?
MR. MARX: Yes.
MS. LUKEY: The second that will be going with it is September 23, 2016. The first bears the Bates number LBS 017593. The second bears the Bates number LBS 040084.
Please let me know when you have those in front of you.
MR. MARX: Give me the number on the first document again please, Joan.
MS. LUKEY: The first document front page is LBS 017593.
MR. MARX: Okay. We have it.
BY MS. LUKEY:
Q. Got 'em? Sir, if you would look at the second page of that document, the October 18, 2014 document at the page that is numbered LBS 017594 --

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A. Yes.
Q. -- in it you will see on the second page that you wrote to Mr. Belfi, and your second paragraph reads as follows: "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 then goes on to talk about circumstances of Labaton being lead counsel.
A. Yes.
Q. Do you see that?
A. Yes, ma'am.
Q. In the second of the documents -- I may have given you the wrong one. Oops, sorry. I gave you the wrong one. It would be September 2, 2016. LBS 031137.
MR. MARX: September 2, 2016?
MS. LUKEY: Sixteen. Yes.
THE SPECIAL MASTER: There's several of them with that.
MS. LUKEY: 1137 is the end of the Bates

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number. It's at 2:49 p.m. on second 2nd. It's your e-mail to Chris Keller, a one-page document.
MR. MARX: Okay.
THE SPECIAL MASTER: This is on Spectrum and Vocera, Damon.
MS. LUKEY: Correct.
THE WITNESS: Okay.
BY MS. LUKEY:
Q. Do you have that in front of you?
A. I do.
Q. In this document in the last paragraph in the penultimate sentence you write: "As you know, we dedicated a ton of money, energy, political favors time and effort to secure ATRS for..." -- I just lost my place -- "...for Labaton at the start of this thing based on the promise of 20 percent of Labaton's attorneys' fees."
A. Yes.
Q. These documents are approximately two years apart both referring to "a ton of money, energy, political favors, time and effort" to secure Arkansas.
A. Yes.
Q. Would you tell us please what ton of money

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you expended that you were representing at two year intervals to Labaton?
A. Each time that we went out to meet with or I went up to meet with Eric, that was out of my pocket. Our firm was losing money on the litigation. Money was extremely tight. I believe they were aware of that. But they had a goal. They wanted to meet people in Arkansas and establish their own presence and foothold there, and so I did it anyway.
Q. How many times did you go to visit Eric?
A. In Arkansas? Maybe three or four times.
Q. All right. So you went from Houston to Little Rock? Is that what you're saying?
A. Yes, ma'am.
Q. Did you drive or fly?
A. I flew.
Q. And three or four times; is that right?
A. That's about right.
Q. Would you tell us what you meant by expending energy?
A. Driving around Little Rock, Oklahoma, and when he came to Houston, doing the same.
Q. And what did you mean by political favors?

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A. Introducing him to prominent people that we knew.
Q. What did you mean by time and effort to secure Arkansas for Labaton?
A. Followup, trying to educate myself on what this litigation was, asking him for pointers. I think periodically he'd sort of reroute me and point me at different funds, things along those lines.
Q. Now you were paid a fee or agreed to a fee which you would be paid, and in several instances were paid for whatever the services were that you rendered to Labaton in connection with Arkansas, correct?
A. Correct.
MR. MARX: Objection.
A. I think.
Q. And I believe that you told us that you didn't consider it a referral fee; is that correct?
A. I did not say I didn't consider it. I said I take issue with the word "referral" because I, frankly, did not understand what this was.
Q. What did you consider this fee to be, sir?
A. An agreement.
Q. An agreement to be paid for what?

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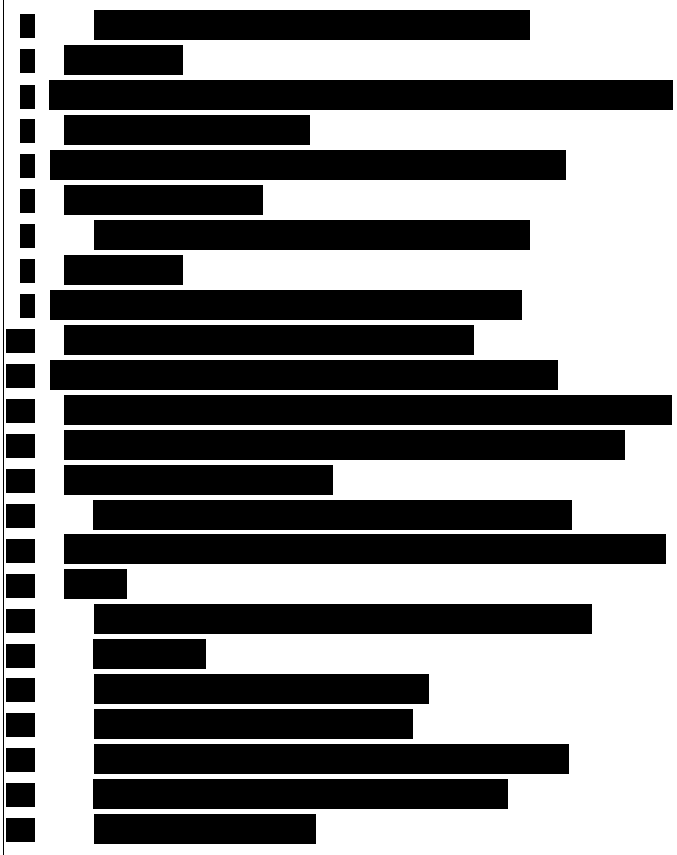

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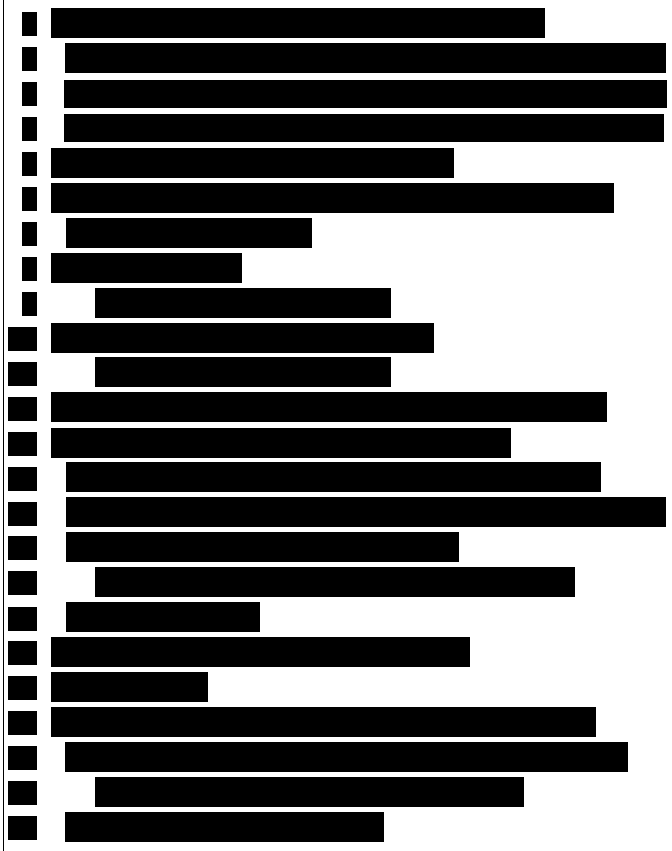

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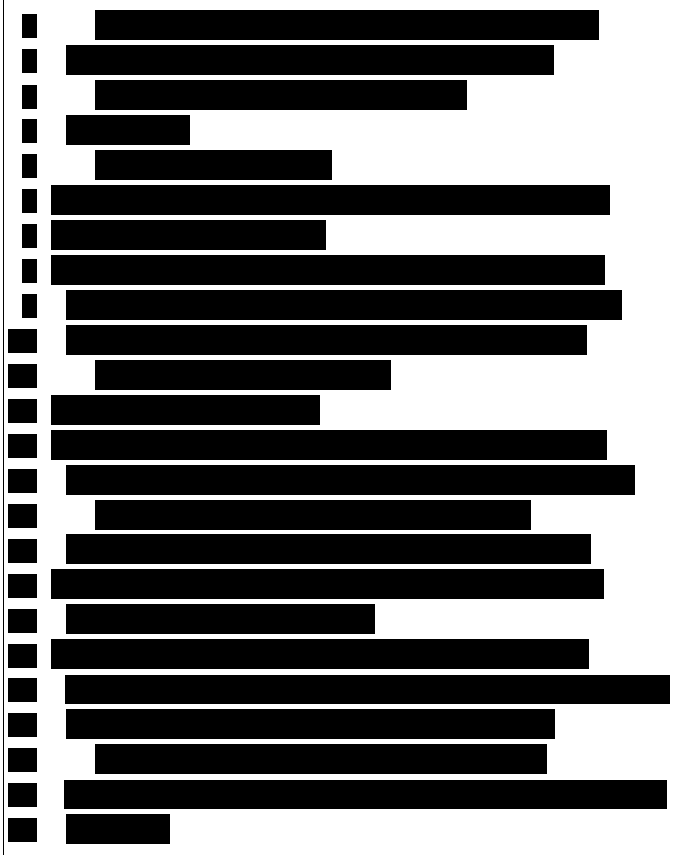

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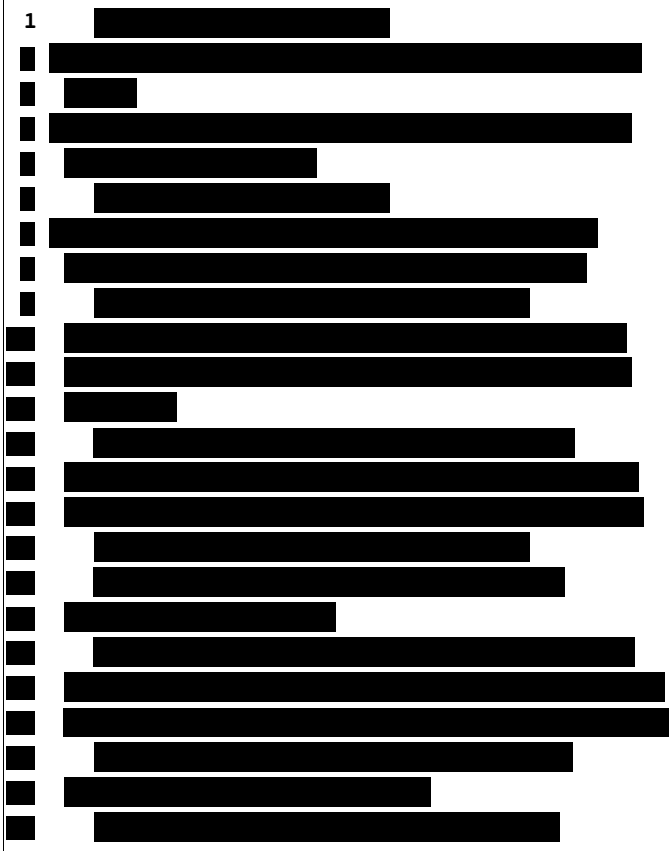

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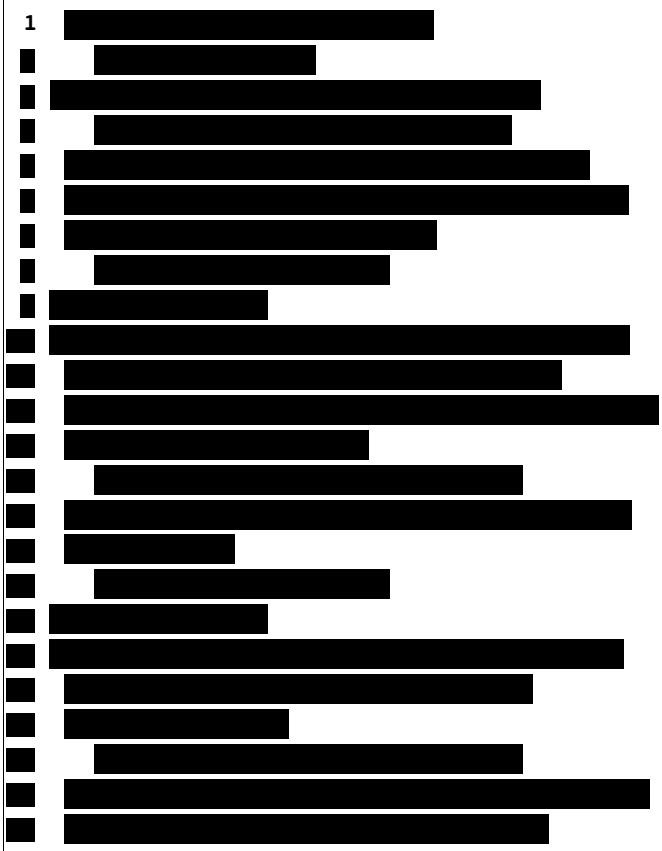

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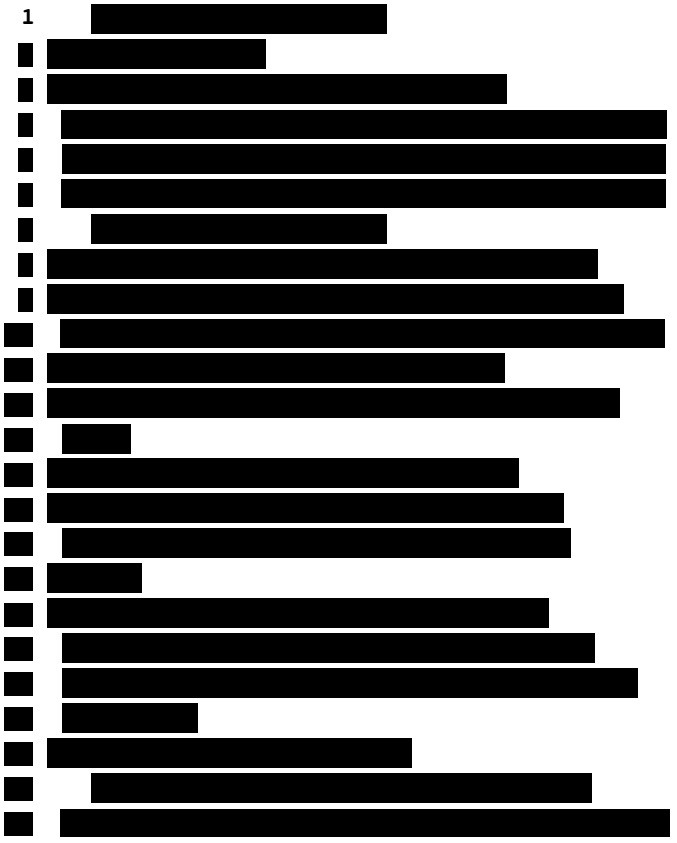

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a sunset provision. But I agreed in theory to have a sunset provision.

Q. What services, if any, have you provided since the initial introduction with regard to Arkansas?

Not in the case in which you are in fact their counsel in the BP matter but otherwise.

A. Just the BP matter as far as I can recall.

Q. Putting that case aside.

With regard to all other cases, what services is it that you contend that you have rendered since the introduction between Labaton and Arkansas?

MR. MARX: Objection.

A. Nothing else I can think of.

Q. Nothing further.

MS. LUKEY: Thank you.

MR. SINNOTT: Richard.

MR. HEIMANN: Yes.

CROSS-EXAMINATION

BY MR. HEIMANN:

Q. The payment that related to the State Street matter was made to whom? From Labaton to whom?

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A. To me.
Q. To you personally?
A. Yes, sir.
Q. Did you in turn share any portion of that payment with any other persons?
A. I did.
Q. Who?
A. Kamran Mashayekh, Elaine Doyal, the IRS, lots of debt service.
Q. Let's stick with the individuals.
Describe each of the individuals for me.
Who are they? Who were they?
A. Kamran Mashayekh, my law partner. Over the years he's loaned money to the firm. And Elaine Doyal, my legal assistant.
Those were throughout this time period --
Q. How much of the little over four million dollars did you pay to the first of those two people?
A. Kamran Mashayekh, a quarter million dollars.
Q. To the second, your legal assistant?
A. Elaine Doyal, $50,000.
Q. And what about to your former partner?

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A. Nothing.
Q. Nothing to him?
A. No, sir.
Q. And he's the one, from the documents we were looking at, who apparently had a significant amount of contact to the senator that was involved -- the state senator that was involved in the efforts to obtain a position for Labaton with the Arkansas fund, correct?
A. Yes. He was friends with the senator.
Q. And did he ever receive any portion of the payments that were made by Labaton over time relating to that agreement?
A. Maybe in the very beginning.
Q. But not otherwise?
A. No, sir.
Q. All right. Thank you.
MR. SINNOTT: Okay. On the -- did you have something, Joan?
MS. LUKEY: Just one question.
Does he know about these payments including the four plus million?
MR. MARX: Objection.
THE WITNESS: To my knowledge, he does not know about this payment.
MS. LUKEY: Thank you.
MR. SINNOTT: On the telephone, Jim Vallee, any questions?
(No response.)
MR. SINNOTT: Jim Johnson, are you there?
MS. LUKEY: He's mine.
MR. JOHNSON: Yes, I am, and I have no questions, your Honor.
MR. SINNOTT: Okay. Kim?
MS. KEEVERS PALMER: No questions.
MR. SINNOTT: Lynn?
(No response.)
MR. SINNOTT: Brian?
MR. McTIGUE: No questions.
MR. SINNOTT: Laura?
MS. GERBER: I have no questions. Thank you.
MR. SINNOTT: Is there anyone else on the line that hasn't been spoken for?
(No response.)
MR. SMITH: Smith here. No questions.
MR. SINNOTT: Okay. All right.

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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.	**FILED UNDER SEAL** 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 SECOND SUPPLEMENTAL OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

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Labaton Sucharow LLP ("Labaton") hereby submits its Second Supplemental Objections, in accordance with this Court's June 28, 2018 Memorandum and Order. ECF 356 at 34. Labaton incorporates its previously filed Objections to Special Master's Report and Recommendations ("Labaton's Objections") (redacted version at ECF 359) and its Supplemental Objections to Special Master's Report and Recommendations ("Labaton's Supplemental Objections") (ECF 379).

Prof. Gillers' rewritten opinions ignore both the Federal Rules of Civil Procedure and Massachusetts practice, and largely flow from his newly-discovered bias against referral fees. The Court should reject them. In turn, the Court should reject the Master's conclusions, for all the reasons stated in Labaton's prior Objections, and because the Master's conclusions rely and depend upon Prof. Gillers' incorrect and unfair opinions.

Finally, Labaton briefly responds to the "exceptions" recently filed by Keller Rohrback LLP (ECF 387), Zuckerman Spaeder LLP (ECF 392), and McTigue Law LLP (ECF 398). Their self-serving arguments are unsupported by the record.

I. BACKGROUND.

A. Prof. Gillers' Newly-Disclosed Animosity Toward Referral Fees.

Prof. Gillers disapproves of the practice of paying referral fees. His partiality was already apparent, given that his opinions regarding Labaton's disclosure obligations hinge on the fact that it paid a referral. However, any doubt about Prof. Gillers' bias against referral fees is now gone.

Shortly before Prof. Gillers' July 12, 2018 deposition, counsel for the Master revealed to Customer Class Counsel a previously-undisclosed opinion piece that Prof. Gillers wrote for the New York Times in 1979. The article – entitled "Lawyers: Paid for Doing Nothing?" – voiced

Prof. Gillers' adamant opposition to efforts by several bar associations to make referral fees permissible. Prof. Gillers' piece starts with the initial premise that referral fees are "wrong." *See* July 26, 2018 Transmittal Declaration of Stuart M. Glass, Supp. Ex. A at 1 ("But if referral fees are wrong, the answer is strict enforcement of the prohibition against them.").[1] It goes on to describe lawyers who pay or receive referral fees as predatory and opportunistic. *Id.* at 2 ("The example of referral fees and other rules devised under the aegis [of] self-regulation teach an important lesson: if the foxes are given the task of providing security for the chicken coop, they will be mightily tempted to keep an extra set of keys.").[2] In sum, the article demonstrates Prof. Gillers' opposition to the payment of referral fees – a perspective that he, unprompted, chose to inject into the public discourse. Simply put, he is a partisan.[3]

In his article, Prof. Gillers also attacks the policy justification for referral fees – specifically, "that they make it more likely that the client will get the best lawyer for his problem." *Id.* at 1. He derides this perspective as "a form of blackmail, unworthy of any profession." *Id.* at 2. Prof. Gillers' sermonizing about what is "worthy" of the legal profession runs directly counter to the positions of both Camille Sarrouf (former president of the Massachusetts Bar Association) and Hal Lieberman (former Assistant Bar Counsel at the Massachusetts Office of the Bar Counsel). R&R Ex. 239 (Sarrouf Decl.) at 7 ("In my view,

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[1] Exhibits attached to the Glass Declaration in support of these Second Supplemental Objections are designated with a letter as "Supp. Ex." These Second Supplemental Objections, like Labaton's Objections (ECF 359) and Supplemental Objections (ECF 379), also incorporate the exhibits attached to the June 28, 2018 Transmittal Declaration of Justin J. Wolosz (ECF 362), also designated with a letter, and the cited exhibits to the Master's Report and Recommendations, designated with a number.

[2] This is not the only time that Prof. Gillers has publicly compared lawyers to animals. *See* Benjamin Weiser, *Tobacco's Trials*, WASHINGTON POST (Dec. 8, 1996) ("They're like red ants at a picnic.").

[3] [redacted]

these arrangements benefit clients because they encourage attorneys to pass work along to attorneys who are better suited to handle the representation."); R&R Ex. 242 (Lieberman Rep.) at 18 ("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, like this one, are handled by the best, most experienced lawyer in the particular area of law. That is exactly what happened here, and the results speak for themselves."). And, the Supreme Judicial Court has described the dynamic that Prof. Gillers maligns as a "time-honored practice" in Massachusetts. *See Saggese v. Kelley*, 445 Mass. 434, 437, 442 (2005) ("Saggese told Doe he had little experience in the field for which Doe sought his representation, but that the Kelleys had such experience. Later that month he introduced Doe to Kathleen Kelley."). Thus, Massachusetts practitioners and Prof. Gillers hold fundamentally different views of whether referral fees are beneficial.

Prof. Gillers' pre-existing, and public, disdain for referral fees is significant, for several reasons. First, it calls his retention even further into question. As Labaton has detailed extensively, Prof. Gillers' role as a legal expert is inappropriate. *See* ECF 272; ECF 302 (and supporting memorandum). Now that his pre-existing disapproval of referral fees has come to light, his presence in this case as "the equivalent of a [FRE 706] court appointed expert" appears doubly improper. *See* R&R Ex. 233 at 2; *see also Womack v. GEO Group, Inc.*, No. CV-12-1524, 2013 U.S. Dist. LEXIS 77537 at *4-5 (D. Ariz. June 3, 2013) (citing cases for the proposition that Rule 706 "[o]nly allows a court to appoint a neutral expert," and it "does not contemplate the appointment of, and compensation for, an expert to aid one of the parties," but rather that "the principal purpose of a court-appointed expert is to assist the trier of fact, not to serve as an advocate" for one of the parties) (internal citations omitted); *In re Paiva Tej Bansal*,

C.A. NO. 10-179, 2011 U.S. Dist. LEXIS 45958 at *6 (D.R.I. Apr. 26, 2011) ("First, and most importantly, the purpose of Rule 706 is to assist the factfinding of the court, not to benefit a particular party."). The Master never should have appointed an expert to help him understand the law. Choosing an unabashed partisan to do so compounds his error.[4]

Second – and even more importantly – Prof. Gillers' animosity toward referral fees appears to drive his opinions regarding Labaton's disclosure obligations. As explained in § II, *infra*, the dispositive distinction that Prof. Gillers draws between the disclosure obligations of Labaton, on the one hand, and Lieff and Thornton, on the other, is the knowledge that the payment to Chargois was for a referral (rather than some work as local counsel). There is no basis in the law for this distinction. Thus, the singular weight that Prof. Gillers places upon this fact – viewed in the light of his stated opposition to the payment of referral fees – illustrates the unfairness of his retention and the biased nature of his opinions.

B. Prof. Gillers' Shifting View of Customer Class Counsels' Disclosure Obligations.

Prof. Gillers' core opinions have undergone a dramatic shift. In his Original Report, Prof. Gillers opined that "Labaton, Thornton, and Lieff" – who shared in the $4.1 million payment – were each required to disclose the Chargois Agreement to the Court and the class. R&R Ex. 232 at 74, 78.[5] Now, in his Supplemental Report, Prof. Gillers opines that only counsel who knew the "terms" or "nature" of the Chargois Agreement were required to disclose it to the Court and the class. R&R Ex. 233 at 97, 103. Prof. Gillers did not learn any new fact that sparked the transformation of his opinion. Indeed, in his Original Report, he acknowledged

[4] The recent disclosure of Prof. Gillers' partisanship is another reason to grant Customer Class Counsels' Motion for an Accounting, and For Clarification that the Master's Role has Concluded. *See* ECF 302.

[5] Labaton emphatically rejects the notion that any Customer Class firm was obligated to disclose the payment to Chargois. *See* Labaton's Objections at §§ IV-V.

that 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 is a co-lead counsel." R&R Ex. 232 at 42. [redacted]

Even after exploring Prof. Gillers' new opinions during his July deposition, his about-face remains inexplicable (if anything, it is now harder to understand). [redacted]

6 [redacted]

7 [redacted]

[redacted]

Prof. Gillers proffered a vague and subjective standard to justify his selective blaming of Labaton. [redacted] He did not (and cannot) identify any legal authority supporting his "criteria."

II. ARGUMENT.

A. Prof. Gillers' Selective Attack on Labaton in Connection With Counsels' Disclosure Obligations to the Court Lacks Any Legal Principle.

As Labaton details extensively in its Objections, Prof. Gillers' view of counsels' disclosure obligations – like the Master's – is squarely at odds with controlling law, particularly the Federal Rules of Civil Procedure. Labaton Obj. at §§ IV-V. But, ignoring the Federal Rules, Prof. Gillers claims that federal law requires that counsel ensure that the Court "has all the facts" in passing on a fee application. *See* R&R Ex. 233 at 79-84 (relying upon *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216, 223 (2d Cir. 1987) *and Lewis v. Teleprompter Corp.*, 88 F.R.D. 11, 18 (S.D.N.Y. 1980)); *see also id.* at 78 ("I do not rely on Rules 23 and 54 for my opinion."). Prof. Gillers is incorrect. *See, e.g.*, R&R Ex. 234 (Rubenstein Rep.) at 14 (explaining that Prof. Gillers' analysis "ignores the fact 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.").

However, an examination of Prof. Gillers' baseless legal framework makes clear just how arbitrary his ultimate conclusions are, because he does not even attempt to apply the purported authority that he describes. Stating the obvious, if counsel must disclose "all the facts," then Prof. Gillers would conclude that the three firms sharing the $4.1 million payment to Chargois were required to disclose it. But he does not. R&R Ex. 233 at 97. Instead, he concludes that other Customer Class Counsel had no disclosure obligations, despite being aware that they were paying $4.1 million to a lawyer who did not file an appearance in the case, did not attend any court hearings, and did not appear in any lodestar. *See id.* Even if Prof. Gillers' cherry-picked legal authority had any merit, it would offer no support for his inconsistent conclusion.

Disturbingly, the Master incorporates Prof. Gillers' arbitrary "analysis." 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."). Like Prof. Gillers, the Master describes a limitless interpretation of counsels' disclosure obligations: "[w]e agree with Professor Gillers that, in total, federal case law makes clear that counsel must be transparent in providing the court with *all available information* when seeking a fee award in class action cases." R&R at 304 n.248 (emphasis added). And, also like Prof. Gillers, the Master does not bother applying his own standard, instead choosing to focus on Labaton alone. See *id.* at 304.

For the avoidance of any doubt, the Court should reject Prof. Gillers' analysis of federal law. But his refusal to apply his own purported standard speaks volumes about the weakness of his opinions. There is simply no legal basis for singling out Labaton. The transparent factor motivating Prof. Gillers' (and the Master's) conclusions is their strong aversion to referral fees. [redacted] As a matter of law and fairness, the Court must reject their unprincipled conclusions.

B. Prof. Gillers' New Focus on Materiality Is Unavailing.

Perhaps recognizing that his argument regarding federal law is meritless – and perhaps cognizant that the Master needs support for his decision to single out Labaton – Prof. Gillers' new opinion pivots away from his prior "all the facts" approach, and toward a more malleable standard of "materiality." [redacted]

Prof. Gillers' reliance on his subjective "materiality" standard is misguided for several reasons:

First, Prof. Gillers' view of what is material is colored by his long-held animosity toward referral fees, and carries no weight in Massachusetts. His "judgment" regarding whether a referral fee must be disclosed differs substantially from that of Massachusetts lawyers, who – far from disdaining referral fees – know them to be a regular practice. *See, e.g.*, R&R Ex. 252 (Sarrouf 3/21 Dep.) at 35:23-36:7 ("90 percent of my law practice over the last 56 years . . . have

been referral cases . . . And in the hundreds that I've tried, I have never had a Court ask me what is your referral fee. Never. It never comes up."). These differing viewpoints are unsurprising: Prof. Gillers believes that referral fees are "wrong"; Massachusetts practitioners do not. *Id.*

Against that backdrop, finding a violation of MRPC 3.3(a) is wholly unjustified, because such a violation requires bad faith – i.e., it "would have to be based on Labaton *knowingly* engaging in impermissible conduct." *See* R&R Ex. 241 (Joy Rep.) at 43. It cannot be said that Labaton "knowingly" engaged in impermissible conduct when even the *former president of the Massachusetts Bar Association* does not believe Labaton's conduct was improper. *See, e.g.*, R&R Ex. 252 (Sarrouf 3/21 Dep.) at 35:23-36:7. Labaton's attorneys acted just as reasonable Massachusetts practitioners could have, and therefore, the Court should reject Prof. Gillers' (and the Master's) conclusion that they made a bad-faith omission sufficient to trigger MRPC 3.3(a). *See, e.g*., *In re Discipline of an Atty.*, 442 Mass. 660, 668 (2004) (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"); R&R Ex. 239 (Sarrouf Decl.) at 11 ("Referral fees, or origination fees, are very common in connection with plaintiffs-side litigation work. If the payment does not impact the total amount of a fee paid or awarded (which I understand to have been the case here), and if the court does not request this detail, in my experience referral or origination fee arrangements are not normally disclosed to the court.").

Second, Prof. Gillers' view of materiality is squarely contradicted by all objective evidence that was available to Labaton. The controlling Federal Rules of Civil Procedure do not require disclosure – a clear indication that fee-sharing agreements are not viewed as material by their drafters. *See* Fed. R. Civ. P. 23(h); *see also* R&R Ex. 234 (Rubenstein Rep.) at 10-11

("[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 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."). Moreover, as a matter of historical fact, judges in this District do not order disclosure of fee-sharing agreements when reviewing class action settlements – even though referral fees are permissible and frequently paid in the Commonwealth. *See* R&R Ex. 234 (Rubenstein Rep.) at 6.[8] Finally, in this specific case, this Court did not ask how fees were being shared among Customer Class Counsel. R&R Ex. 78 (11/2/16 Hr'g Tr.) at 22-38. [redacted]

Third, given the above, finding that Labaton violated MRPC 3.3 would offend due process. The Supreme Judicial Court has explained that "[d]ue 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. at 668. There are, respectfully, several layers of "random" decision-making in the conclusions reached by the Master and Prof. Gillers. The finding that the Chargois Agreement needed to be disclosed in this case – when no judge in this District had ordered disclosure in the previous 127 class action settlements – is random. *See* R&R Ex. 234 (Rubenstein Rep.) at 6. Similarly, the conclusion that Labaton was required to disclose the Chargois payment, while Lieff and Thornton were not (based on Prof. Gillers' subjective "judgment call"), is also random. *See, e.g.*, R&R Ex. 233 at 86-87 ("My opinion rests

[8] [redacted] He ignores Prof. Rubenstein's explanation that there are "a variety of situations in which the identities of counsel sharing in a fee award are routinely unknown to the class action court." R&R Ex. 234 (Rubenstein Rep.) at 11.

on the extraordinary nature of Chargois' compensation . . . . 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."). Prof. Gillers is not applying a rule; he is making an ad hoc judgment against Labaton.

Prof. Gillers' proposed standard also flouts the SJC's admonition against rules of "unclear meaning." *See In re Discipline of an Atty.*, 442 Mass. at 668. [redacted] If Prof. Gillers is unable to apply his own standard, it is absurd to expect that practicing attorneys could – and unjust to punish them after-the-fact if they do not.

C. Rule 11 Case Law Contradicts Prof. Gillers' Opinion.

Prof. Gillers' Supplemental Report adds a brand-new finding that Labaton violated Rule 11, [redacted] He included a Rule 11 opinion "purely" at the request of the Master and his counsel. *Id.* at 579:10-20. However, despite adding a new opinion, Prof. Gillers offers almost no analysis, and instead retreads his argument regarding MRPC 3.3(a). R&R Ex. 233 at 96 ("My reasons for concluding

the nondisclosure of the Chargois Arrangement violates Rule 11 are the same as my reasons for concluding that the fee petition did not comply with Rule 3.3(a).").

The absence of a Rule 11 finding against Labaton in Prof. Gillers' Original Report is telling. Prof. Gillers applied Rule 11 in his analysis of a different firm's conduct, but did not mention Rule 11 in connection with Labaton. R&R Ex. 232 at 84. [redacted] One obvious explanation for his initial reticence is that the First Circuit has never found a Rule 11 violation based on an omission, leaving Prof. Gillers with a single out-of-Circuit appellate decision supporting his view. *See* R&R Ex. 233 at 95. [redacted] *see also* R&R at 317 "[T]here is no First Circuit case, either appellate or district, holding that a material omission warrants the imposition of Rule 11 sanctions.").

Prof. Gillers' Rule 11 opinion is also incorrect because Labaton's conduct was objectively reasonable under the circumstances, and was not "culpably careless." *See Eldridge v. Gordon Bros. Grp., LLC*, 863 F.3d 66, 87-88 (1st Cir. 2017) (whether an attorney violated Rule 11 "depends on the objective reasonableness of the [attorney's] conduct under the totality of the circumstances.") (internal citations omitted). As described above, Rules 23 and 54 *do not require* disclosure of fee-sharing agreements; judges in this District historically do not order disclosure of fee-sharing agreements at the class action settlement stage; and this Court did not ask any questions about Customer Class Counsels' fee-sharing agreements. Simply stated, "there is nothing that the lawyers did here that was unusual." R&R Ex. 235 (Rubenstein Dep.) at

104:5-6. Prof. Gillers' subjective "judgment call," driven by his disapproval of referral fees, cannot convert reasonable and typical conduct into misconduct. *See Eldridge*, 863 F.3d at 87-88; *see also Kaplan v. DaimlerChrysler, A.G.*, 331 F.3d 1251, 1255 (11th Cir. 2003) (in the Rule 11 context, "courts determine whether a reasonable attorney in like circumstances *could believe* his actions were factually and legally justified.") (emphasis added).

D. Prof. Gillers' Rewritten Opinion Regarding Disclosure to the Class is Similarly Arbitrary and Inconsistent.

Prof. Gillers' new opinion regarding Customer Class Counsels' obligations to disclose the Chargois payment to the class is also devoid of any legal principle. In his revised opinion, Prof. Gillers states that "Labaton, Lieff Cabraser, and Thornton maintained attorney-client relationships with the certified settlement class and its members." R&R Ex. 233 at 98. He goes on to assert that, "[a]s 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." *Id.* at 102. Despite stating these broad principles, Prof. Gillers makes the illogical (and incorrect) leap that *only* "counsel who knew the nature of the Chargois Arrangement" had a duty to disclose it to class members. *Id.* at 103.

As with his new opinions regarding disclosure to the Court, Prof. Gillers' decision to single out Labaton as the only firm responsible for conveying information to the class regarding the Chargois payment is arbitrary. Assuming only for the sake of argument that Prof. Gillers' position regarding MRPC 1.2 and 1.4 has any merit,[9] there is nothing in either rule that supports

[9] As Labaton explained in its Objections, Prof. Gillers' opinion that any of Customer Class Counsel had a duty to disclose the Chargois payment to the class is incorrect. ECF 359 at 70-76; [redacted] R&R Ex.

his parsing of Labaton's disclosure obligations, on one hand, and Lieff's and Thornton's, on the other. Simply put, his conclusion does not make sense: to the extent that all three firms were "fiduciaries" and attorneys for the class – and if MRPC 1.2 and 1.4 required them to "give their clients information relevant to decisions that belonged to the client," including information about fee-sharing agreements – then each would have an obligation to disclose the fact that they were sharing $4.1 million of their fee award with another attorney. Yet, Prof. Gillers does not even attempt to explain how he differentiates the purported attorney-client obligations shared by Labaton, Lieff, and Thornton. *See* R&R Ex. 233 at 97-103.

Again, the distinction Prof. Gillers apparently draws (although his reasoning remains unclear) is that Labaton knew the payment was for a referral, whereas the other Customer Class Counsel did not. Taking Prof. Gillers' analysis at face value, the logical consequence is that class counsel need not disclose divisions of fees to their "clients" (the class), *unless* that fee division is for a referral. Although Prof. Gillers is incorrect in arguing that any of the Customer Class firms were required to disclose the Chargois payment to the class, his unsupported and unexplained decision to focus only on Labaton further magnifies the arbitrary nature of his opinions.

E. Prof. Gillers Ignores His Own Conclusion Regarding George Hopkins' Ratification.

During the period between completing his Original Report and writing his Supplemental Report, a new and powerful fact became available to Prof. Gillers: George Hopkins, acting on

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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"); [redacted]

behalf of ATRS, retroactively ratified the payment to Chargois. *See* R&R Ex. 130; *see also Saggese,* 445 Mass. at 442 ("Ratification is not the preferred method to obtain a client's consent to a fee-sharing agreement, but it is adequate."); [redacted]

During his March deposition, Prof. Gillers – bound by controlling precedent – testified that this ratification was effective consent to the Chargois Agreement on behalf of ATRS. R&R Ex. 253 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 . . . ? A: On behalf of Arkansas alone."). [redacted]

However, despite repeatedly testifying that Mr. Hopkins' ratification constitutes adequate consent on behalf of ATRS, Prof. Gillers does not meaningfully incorporate this fact into his Supplemental Report. *See* R&R Ex. 233 at 66-76. Instead, he brushes aside Mr. Hopkins' declaration, stating that Mr. Hopkins "purports to ratify" the Chargois Agreement. *Id.* at 43 n.52. Prof. Gillers provides no explanation for the marked inconsistency between his testimony, which acknowledges the significance of Mr. Hopkins' ratification, and his Supplemental Report, which largely ignores this crucial fact.

F. The Master's Report Is Undermined by His Reliance on Prof. Gillers' Misguided Opinions.

At every turn, the Master has emphasized that Prof. Gillers' opinions strongly influenced his own conclusions. [redacted]

[redacted] ECF 216-1 ("[I]n light of Professor Gillers' report, and its potential implications for the firms and the practicing bar in general, I believe that it is important that the firms be allowed the fullest opportunity to respond."); [redacted]; *see generally* R&R (citing Gillers' Supplemental Report 20 times). In fact, in at least one portion of his Report and Recommendations, the Master appears to have largely duplicated a paragraph written by Prof. Gillers. *Compare* R&R at 323 (discussing *United States v. Shaffer Equipment*) *and* R&R Ex. 233 at 89 (same).

But, at its core, the "expert" opinion that the Master relies upon reflects Prof. Gillers' simple and subjective view that referral fees are wrong and, therefore, nondisclosure of a referral fee is also wrong (despite the lack of any requirement to do so). The Master's Report and Recommendations – independently flawed for a variety of reasons – must be viewed through the lens of his reliance on Prof. Gillers' incorrect, unprincipled, and biased views.

III. THE COURT SHOULD REJECT ERISA COUNSELS' "EXCEPTIONS."

Finally, Labaton responds briefly to the "Notice of Exceptions" filed by Zuckerman Spaeder LLP ("Zuckerman"), Keller Rohrback L.L.P. ("Keller Rohrback"), and McTigue Law LLP ("McTigue").[10] If the Court accepts the Master's recommendation, then Zuckerman Spaeder, Keller Rohrback, and McTigue, together with the attorneys with which they have shared fees (collectively, "ERISA Counsel"), would be paid $3.4 million above what they

[10] *See* Keller Rohrback's Notice of Exceptions to ECF 359 and ECF 361 ("Keller Exception") (ECF 387); Zuckerman Spaeder LLP's Notice of Exception to ECF 359, ECF 361, and ECF 367 ("Zuckerman Exception") (ECF 392); McTigue Law LLP's Notice of Exceptions to the Objections of Labaton Sucharow LLP and the Thornton Law Firm LLP to the Special Master's Report and Recommendation ("McTigue Exception") (ECF 398).

negotiated and reasonably expected to receive for litigating this case. *See* R&R at 368. Given this posture, their motivation to shore up the Master's conclusions is unsurprising. What is surprising is how these law firms can advance their self-serving arguments, despite having identified and offered no authority in support.

[redacted] In making this claim, Keller Rohrback (i) admits that Mr. Sarko is not qualified to speak to the ethical requirements for Massachusetts, New York, Texas or Arkansas (*id.* at 4, n.1), [redacted] Zuckerman Spaeder's submission contains no more substance. That firm claims that it would have filed a separate fee petition if it was aware of the Chargois payment, because the payment raises "legal and ethical questions." Zuckerman Exception at 4. Yet, Zuckerman Spaeder cites no statute, rule, case or any other authority identifying or supporting the existence of such "questions." *Id.*[11] With all due respect, the allegations being directed at Labaton and Customer Class Counsel regarding the Chargois payment are far too serious to be based solely on self-serving, *ipse dixit* offered by law firms that are asking the Court to order Labaton to pay them $3.4 million.

Moreover, the spin that ERISA Counsel offers in seeking to justify an increase in their fees is contradicted by the record. Zuckerman Spaeder suggests that ERISA Counsel "produced" a "$60 million settlement . . . for the ERISA plans" who were members of the class, and that

[11] McTigue does not even attempt to link its complaint to any legal issue, opting instead to simply complain about the economics of the agreement it negotiated. McTigue Exception at 1-3.

ERISA Counsel's reasonable fee should be calculated against that settlement amount. *Id.* at 2; *see also id.* at 4 (claiming that ERISA Counsel would have sought "a reasonable attorney's fee from the $60 million common fund produced for the ERISA class members"). These statements ignore the fact that, although all parties negotiated the overall $300 million settlement, it was the DOL that pushed for the ERISA plans to receive an "exceptional premium." *See id.* at 3 n.1.

[redacted] There is no basis for ERISA Counsel's suggestion now that they were solely responsible for the allocation to ERISA plans, or that the Court should perform a new, standalone fee analysis as if that were a separate settlement.[12]

McTigue's complaints are no more persuasive. McTigue primarily argues that it should be paid more based on its lodestar (McTigue Exception at 2), but it offers no direct response to Labaton's explanation of why the share to ERISA Counsel should not be increased. *See* Labaton's Objections at 11-12. In any event, the Master never undertook to analyze and "value" each law firm's specific contribution, and despite the extensive record, there is no basis for the Court to engage in such an analysis now. McTigue's protest about the costs it has paid participating in the Special Master's bloated proceedings make a bit more sense (McTigue Exception at 2-3), but the conclusion it urges does not. Labaton has also shouldered significant burden and cost to participate in this unreasonably protracted process, including having to pay (along with other Customer Class Counsel) for the adversarial Special Master and his cadre of

[12] Notably, ERISA Counsel agree with Labaton that the Special Master is confused about what the $10.9 million term actually means. *See* Labaton's Objections at 10-11; Zuckerman Exception at 3 n.4; McTigue Exception at 3.

advisors and assistants to reach their novel, flawed conclusions. There is no justification (and McTigue offers no authority) to require Labaton, in addition, to subsidize McTigue because the Special Master asked to hear from that firm as well.

For all of these reasons, the Court should disregard the self-serving arguments set forth in ERISA Counsel's "exceptions," and decline to adopt the Master's recommendation that Labaton pay $3.4 million to ERISA counsel.

IV. CONCLUSION.

For the reasons described above, and those stated in Labaton's Objections to the Master's Report and Recommendations (ECF 359) and its Supplemental Objections (ECF 379), the Court should reject the Master's finding that Labaton engaged in misconduct and the Master's proposed remedies.

Dated: July 26, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

Joan A. Lukey (BBO No. 307340)
Justin J. Wolosz (BBO No. 643543)
Stuart M. Glass (BBO No. 641466)
Choate, Hall & Stewart LLP
Two International Place
Boston, MA 02110

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 26, 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.	**FILED UNDER SEAL** 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 STUART M. GLASS IN SUPPORT OF LABATON SUCHAROW LLP'S SECOND SUPPLEMENTAL OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

I, Stuart M. Glass, 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 Second Supplemental 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 a June 13, 1979 article authored by Prof. Stephen Gillers published in the New York Times, titled "Lawyers: Paid for Doing Nothing?".

4. Attached hereto as Exhibit B is a true and correct copy of excerpts from the July 12, 2018 deposition of Prof. Stephen Gillers.

5. Attached hereto as Exhibit C is a true and correct copy of excerpts from the March 20, 2018 deposition of Prof. Stephen Gillers.

6. Attached hereto as Exhibit D is a true and correct copy of excerpts from the March 21, 2018 deposition of Prof. Stephen Gillers.

7. Attached hereto as Exhibit E is a true and correct copy of excerpts from the September 20, 2017 deposition of David Goldsmith.

Signed under the penalties of perjury this 26th day of July 2018.

/s/ Stuart M. Glass
Stuart M. Glass

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 26, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

Exhibit A
Redacted

Exhibit B
Redacted

Exhibit C
Redacted

Exhibit D
Redacted

Exhibit E
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
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LABATON SUCHAROW LLP'S MOTION TO IMPOUND ITS SECOND SUPPLEMENTAL OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS AND THE TRANSMITTAL DECLARATION OF STUART M. GLASS IN SUPPORT OF LABATON'S SECOND SUPPLEMENTAL OBJECTIONS

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 Second Supplemental Objections to Special Master's Report and Recommendations ("Labaton's Second Supplemental Objections") and (2) the Transmittal Declaration of Stuart M. Glass in Support of Labaton Sucharow LLP's Second Supplemental Objections to Special Master's Report and Recommendations ("Labaton's Supporting Declaration").[1]

2. Labaton's Second Supplemental Objections and its Supporting Declaration discuss and attach: (1) information from portions of exhibits to the Master's Report and Recommendations that are not part of the public record (*see* ECF 401); (2) excerpts of deposition transcripts from the discovery record generated by the Master that were not included as exhibits to his Report and Recommendations; (3) excerpts from the July 12, 2018 deposition of Prof. Stephen Gillers; and (4) the June 28, 2018 Declaration of Peter A. Joy, attached as Exhibit S to the June 28, 2018 Transmittal Declaration of Justin J. Wolosz (ECF 362), which was filed under seal. Accordingly, these documents are subject to the protocol that the parties proposed for filing additional documents from the discovery record. *See* All Parties' Response to May 31, 2018 Order (ECF No. 237) Regarding Additional Documents From the Record. ECF 259 ¶ 2. 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. *See id*.

[1] This Motion to Impound is being filed via ECF. Redacted versions of Labaton's Second Supplemental Objections and Labaton's Supporting Declaration are also being filed via ECF. Labaton is filing non-redacted versions of those documents conventionally, consistent with this request that they be filed under seal.

3. Labaton's Second Supplemental Objections also includes discussion of sealed portions of Keller Rohrback's Notice of Exceptions to ECF 359 and ECF 361 (ECF 387). Therefore, Labaton requests that the portions of its Second Supplemental Objections that discuss the sealed portions of the foregoing pleading be temporarily impounded.

4. For the foregoing reasons, there is good cause pursuant to D. Mass. L.R. 7.2 to impound temporarily the non-redacted versions of Labaton's Second Supplemental Objections and Labaton's Supporting Declaration.

5. Labaton has filed via ECF redacted versions of Labaton's Second Supplemental Objections and Labaton's Supporting Declaration. In these redacted versions, the information discussed in Paragraphs 2-3 above has been blacked out or replaced with a sheet indicating the document is redacted.

WHEREFORE, for the reasons set forth herein, Labaton requests that the Court temporarily impound the non-redacted versions of (1) Labaton Sucharow LLP's Second Supplemental Objections to Special Master's Report and Recommendations and (2) the Transmittal Declaration of Stuart M. Glass in Support of Labaton Sucharow LLP's Second Supplemental Objections to Special Master's Report and Recommendations.

Dated: July 26, 2018

Respectfully submitted,

By: */s/ Joan A. Lukey*

Joan A. Lukey (BBO No. 307340)
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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 and The Thornton Law Firm do not oppose the request. McTigue Law LLP and the Special Master take no position on the request. State Street, Zuckerman Spaeder LLP, and Keller Rohrback LLP have not indicated their positions on the relief requested 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 26, 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.	**FILED UNDER SEAL** 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

[CORRECTED] TRANSMITTAL DECLARATION OF STUART M. GLASS IN SUPPORT OF LABATON SUCHAROW LLP'S SECOND SUPPLEMENTAL OBJECTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

I, Stuart M. Glass, 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 Second Supplemental 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 a June 13, 1979 article authored by Prof. Stephen Gillers published in the New York Times, titled "Lawyers: Paid for Doing Nothing?".

4. Attached hereto as Exhibit B is a true and correct copy of excerpts from the July 12, 2018 deposition of Prof. Stephen Gillers.

5. Attached hereto as Exhibit C is a true and correct copy of excerpts from the March 20, 2018 deposition of Prof. Stephen Gillers.

6. Attached hereto as Exhibit D is a true and correct copy of excerpts from the March 21, 2018 deposition of Prof. Stephen Gillers.

7. Attached hereto as Exhibit E is a true and correct copy of excerpts from the September 20, 2017 deposition of David Goldsmith.

Signed under the penalties of perjury this 26th day of July 2018.

/s/ Stuart M. Glass
Stuart M. Glass

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 27, 2018.

/s/ Joan A. Lukey
Joan A. Lukey

Exhibit A

ARCHIVES | 1979

Lawyers: Paid for Doing Nothing?

By STEPHEN GILLERS JUNE 13, 1979

June 13, 1979, Page 25
The New York Times Archives

Professional self-regulation enables the members of a profession to write the rules governing their behavior. Lawyers, including New York lawyers, have enjoyed more self-regulation than most other professionals. This experience confirms the proverbial danger in allowing foxes to design security for the chicken coop. It is time to stop it.

Lawyers have used self-regulation to introduce minimum-fee schedules, prohibitions on lawyer advertising and restrictions on legal insurance, all of which have inflated legal fees and all of which the courts have invalidated. Now lawyers have a new proposal. It might be called the right to get paid for no work.

The American Trial Lawyers Association, the California State Bar and other lawyer groups want lawyers to be able to charge for the service of sending a client to another lawyer. This service goes under many names: referral fees, forwarding fees and feesplitting are the most common. A provision of the Code of Professional Responsibility of the American Bar Association makes referral fees unethical. Most states have adopted this provision. It says that a lawyer has no right to part of a client's. fee unless he does part of the client's work.

What reasons do proponents of referral fees give to support a change in the Code? First, they argue that despite the provision against it, fee-splitting is rampant so we must be realistic and validate it. Fee-splitting is certainly rampant. A lawyer who refers client will often receive a check from another lawyer, even though no referral fee was even discussed. But if referral fees are wrong, the answer is strict enforcement of the prohibition against them. Indeed, one of the reasons referral fees are rampant is that lawyer disciplinary bodies routinely ignore them.

The second reason advanced for referral fees is that they make it more likely that the client will get the best lawyer for his problem. If referral fees are unethical, a lawyer who is offered a case he does not feel competent to handle may take it anyway because he does not want to

lose money. But if the lawyer can get a referral fee, he is likely to send the case on to a more qualified lawyer and the client will get better representation.

This argument is a form of blackmail, unworthy of any profession, and should be rejected. In effect, the bar is saying to the client: you must pay us if you want us to tell you honestly whether you have the right lawyer to handle your problem.

Underlying this arugument is an assumption that will come as a surprise to many clients. The feeling is pervasive among lawyers that the person who attracts the business is entitled to generous compensation for that reason alone. He need do no work. How many clients realize that merely by calling a lawyer they give him a financial "position" in their case whether or not he provides a legal service?

"So what?" say the supporters of referral fees. The money does not come out of the client's pocket. This third argument assumes that the receiving lawyer will charge the same amount whether or not he pays a referral fee. This would be true if referral fees were small, but they rarely are. Often they are a third of the entire fee. Sometimes they are a flat amount of $1,000 or $1,500. Obviously, the receiving lawyer will have more room to negotiate lower fee if he does not have to for the case.

I came across a clear example of this recently. A client went to see Lawyer A, who had been referred by Lawyer B, who accompanied the client to A's office. Lawyer A told the client that his fee would be one-third of the recovery. Lawyer B then explained that he was related to the client and not interested in a referral fee. Lawyer A then reduced his fee exactly onethird, the amount he was assuming he would have to pay Lawyer B.

The example of referral fees and other rules devised under the aegis self-regulation teach an important lesson: if the foxes are given the task of providing security for the chicken coop, they will be mightily tempted to keep an extra set of keys.

Exhibit B
Redacted

Exhibit C
Redacted

Exhibit D
Redacted

Exhibit E
Redacted

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

Dated: July 31, 2018

Respectfully submitted,

SPECIAL MASTER HONORABLE GERALD E. ROSEN (RETIRED),

By his attorneys,

/s/ William F. Sinnott

William F. Sinnott (BBO #547423)
Elizabeth J. McEvoy (BBO #683191)
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CERTIFICATE OF SERVICE

I hereby certify that this foregoing document was filed electronically on July 31, 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.	)	

MEMORANDUM AND ORDER

WOLF, D.J. July 31, 2018

The court has reviewed Customer Class Counsel's[1] Motion for Accounting, and Clarification that the Special Master's Role Has Concluded (Docket Nos. 302, 310)(the "Motion"), the Master's Response (Docket No. 377), and the Lawyers' Reply (Docket No. 397). Among other things, the Lawyers seek a ruling that the Master may not respond to the objections to his Report and Recommendation (Docket No. 357)(the "Report"). Neither the Lawyers nor the Master cited any cases concerning the court's authority to clarify or amend the Order appointing the Master to allow him to respond to objections to his Report.

The Report, with its Executive Summary, is more than 400 pages. The objections to it are comparably lengthy. The record to date, which is not complete, includes thousands of pages. Ordinarily in such matters the operation of an adversary process promotes well-informed decision-making.

When the Master was appointed the court took under advisement the Motion of the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") to participate as a guardian ad litem for the class or, alternatively, as an amicus to the court. See Mar. 8, 2017 Order (Docket No. 172), ¶1. That request is now relevant to the Motion. Accordingly, it is hereby ORDERED that:

---

[1] "Customer Class Counsel" are referred to in this Memorandum and Order as the "Lawyers."

1. The Lawyers are informed that the court may, if necessary, amend the Order appointing the Master to authorize him to respond to the objections to the Report and to address related issues. See Fed. R. Civ. P. 53(b)(4).

2. The Lawyers and the Master shall, by 12:00 noon on August 6, 2018, supplement their submissions to address the Court's authority to permit the Master to address objections to his Report and related issues.

3. CCAF shall, by 12:00 noon on August 6, 2018:

(a) State whether it remains willing and able to serve as a guardian ad litem or amicus;

(b) If so, the financial and other terms on which it proposes to serve;

(c) Supplement its motion to participate (Docket No. 126) to address the current circumstances of the case; and

(d) Respond to paragraph 2 hereinabove.

4. If CCAF still seeks a role in this case, any opposition to its request shall be filed by August 7, 2018.

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.	)	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. August 1, 2018

The court has received the Master's attached July 31, 2018 letter (Docket No. 411 under seal)(the "Letter"), stating that members and staff of the Arkansas legislature have contacted the

Master, through his staff, with requests for documents and information developed in his investigation that are not now part of the public Record.[1] The Letter states that the Master "referred" one such request "sent by an administrator at the Arkansas Bureau of Legislative Research," to the court. Id. at 1. The court, however, has not received any communication from the Arkansas Bureau of Legislative Research.

The Master moved to seal the Letter, but did not state any reasons for sealing that overcome the presumption of public access to judicial records and proceedings. See F.T.C. v. Standard Fin. Mgmt. Corp., 830 F.2d 414, 408 (1st Cir. 1987); June 28, 2018 Memorandum and Order (Docket No. 356) at 4-6. The court does not discern any reason the Letter should remain under seal.

In any event, the Master is not authorized to discuss or otherwise disclose information or documents developed in his investigation without an order of the court. Any request for such information or documents shall be made, in writing, to this court

---

[1] The "Record" includes: "(a) the exhibits to the Master's Report and Recommendation; (b) any additional documents or information the Master wishes to add; (c) any additional documents or information previously provided to the Master that any party wishes to add; and (d) any other documents that the court requests." May 31, 2018 Order, ¶12. It does not include all information provided to the Master during his investigation. The Master states he intends to supplement the present Record. The court may request that additional documents be made part of the Record.

and will be filed for the public record of this case unless good cause is shown to justify impoundment and/or an ex parte submission.

Accordingly, it is hereby ORDERED that:

1. The July 31, 2018 letter (Docket No. 411 under seal) is UNSEALED.

2. The Master shall provide this Order to anyone requesting documents or information from him.

UNITED STATES DISTRICT JUDGE

BARRETT & SINGAL

July 31, 2018

Honorable Mark L. Wolf
United States District Court
John Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210

Re: *Special Master's Request to the Court for Guidance in Responding to Requests for Information from the State of Arkansas*

Dear Judge Wolf:

Over the past several days, the Special Master has received requests from the State of Arkansas Legislature seeking documents under seal. We referred the first request, sent by an administrator at the Arkansas Bureau of Legislative Research, which asked for Labaton's 8/11/17 *Response to Special Master's Supplemental Interrogatory* and Damon Chargois' 10/2/17 Deposition, to the offices of this Court. The Master's case manager also received the following email from Arkansas State representative Mark Lowery, Co-Chair of the Arkansas Joint Performance Review Committee:

> From: Mark Lowery [mailto:markdlowery@mac.com]
> Sent: Wednesday, July 25, 2018 5:23 PM
> To: Sarah Nevins <snevins@jamsadr.com>
> Subject: Special Master work in State Street case
>
> Ms. Nevins,
> I am co-chair of the Arkansas Joint Performance Review Committee that has recently held a 3 hour hearing questioning Arkansas Teacher Retirement System director George Hopkins.
> We are extremely concerned about references to "political favors" in Arkansas that brought about the relationship between ATRS, Labaton Sucharow and the Chargois/Herren law firm.
>
> We are especially interested in the following excerpt from a Forbes article:
> Rosen was more circumspect in his report, only noting the questions raised by Chargois' 2014 e-mail discussing the "considerable favors" and "money spent" getting ATRS as a client.

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BARRETT & SINGAL

"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," the special master said in a footnote. "This investigation is beyond the scope of the Special Master's assignment."
Is it possible that Judge Rosen's work in the case has come to a point where he would be able to discuss with me findings about the Chargois/Herren relationship with Labaton that may not have been included in the Special Master report to the Court?
If so please let me know how I could go about discussing with him or a representative any information that may assist us in our investigation going forward.

Rep. Mark Lowery
District 39
Cell phone - 501-837-5221

In response, the Special Master indicated he would seek guidance from the Court as to any appropriate response to these inquiries, [1] and he will not, of course, conduct discussions or provide sealed documents to legislative, law enforcement or other requestors without the express direction of the Court. However, he does wish to alert the Court to these inquiries as they implicate access to matters of public concern. He also wishes to advise the Court that, in addition to the documents filed with his Report, he will shortly be submitting to the Court a number of additional documents prompted by objections and other motions filed by Customer Class Counsel. These documents, which will be filed in response to the Court's Order allowing an enlargement of the record, have a direct bearing upon the State of Arkansas inquiry, as well as to other critical issues in this phase of our case. As previously suggested by the Master, these documents should be of great utility to the Court in facilitating its review of the above-referenced objections filed by Customer Class Counsel.

We will await your guidance as to how we should respond to these inquiries.

Respectfully submitted,

William F. Sinnott
Counsel to the Special Master

[1] In response to this, the Special Master received an email today indicating as follows: "I have read parts of your report and recommendations with interest and our recent hearing focused on much of your findings. I hope you will be released by Judge Wolf to provide further insight to me as our committee continues its oversight authority."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

THE COMPETITIVE ENTERPRISE INSTITUTE'S CENTER FOR CLASS ACTION FAIRNESS'S MOTION FOR DISCLOSURE OF CERTAIN SEALED DOCUMENTS NECESSARY TO FULLY RESPOND TO THE COURT'S ORDER OF JULY 31, 2018 AND MEMORANDUM IN SUPPORT

In accordance with Local Rule 7.1, and in response to the Court's Order dated July 31, 2018, ordering the Competitive Enterprise Institute's Center for Class Action Fairness ("CCAF") "to address the Court's authority to permit the Master to address objections to his report," Order (Dkt. 401), at 3, CCAF moves this Court for an order requiring the Special Master to provide its counsel with complete and unredacted copies of the following filings from this case: Dkts. 302, 310, 329, 345-1, 353, 377, 381 (Ex. A), 397, and any other sealed filings that, in the Special Master's view, pertain to Class Counsel's pending motion.

In accordance with Local Rule 7.1(a)(2), counsel for CCAF requested counsel's position on this motion via email in a good faith attempt to resolve or narrow the issue. All three Class Counsel firms (Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, and the Thornton Law Firm) have advised they are opposed. Counsel for the Special Master, State Street Bank & Trust, McTigue Law LLP, Zuckerman Spaeder LLP, and Keller Rohrback L.L.P. advise they take no position on CCAF's motion. *See* Certificate of Compliance with Local Rule 7.1(a)(2) attached hereto.

MEMORANDUM IN SUPPORT OF MOTION

By order dated July 31, 2018, this Court ordered the Special Master, Class Counsel, and CCAF each "to address the Court's authority to permit the Master to address objections to his report and related issues," Order (Dkt. 401), at 3. This question pertains to Class Counsel's "Motion for Accounting, and Clarification that the Special Master's Role Has Concluded (Docket Nos. 302, 310) (the 'Motion'), the Master's Response (Docket No. 377), and the Lawyers' Reply (Docket No. 397)." Order at 2.

Consistent with the Order, CCAF hopes to assist the Court in addressing this question, but it is hobbled because it has access to *none* of the substantive filings the Court referenced. Only the two-paragraph motion itself is available (Dkt. 302), not the accompanying Memorandum, nor the Master's Response, nor the Lawyers' Reply.

Other filings that evidently pertain to the question are nearly entirely unavailable to CCAF. For example, the Special Master's letter of June 25, 2018 apparently pertains to whether the Master

may move "to remove Arkansas Teacher Retirement System as class representative and Labaton Sucharow, LLP as Lead Class Counsel." Dkt. 264 (characterizing letter) at 2. However, the public version of the letter includes only the letterhead, salutations, and six pages of redactions concluding with "We await the Court's guidance as to whether it wishes a full motion and briefing on these issues." Public Version of June 25, 2018 Letter (Dkt. 345-2), at 6.

In order to meaningfully respond to the Court's inquiry, CCAF must have access to the underlying Motion and other documents pertaining to it, including at least the following complete and unredacted filings:

- Dkt. 302 (Memorandum in support of Motion);
- Dkt. 310 (filing apparently related to the Motion);
- Dkt. 329 (June 21 letter from Special Master), redacted version at Dkt. 335;
- Dkt. 345-1 (June 25 letter from Special Master), redacted version at Dkt. 345-2;
- Dkt. 353 (Labaton response to June 25 letter), redacted version at Dkt. 353-1;
- Dkt. 377 (Special Master's Response in opposition to Motion);
- Dkt. 381, Ex. A (July 6 letter from Special Master);
- Dkt. 397 (Class Counsel's Reply in support of Motion).[1]

[1] Separately, redacted yet sealed versions of the Memorandum (Dkt. 302) and Response (Dkt. 377) apparently exist. *See* Dkt. 301 at 3 (indicating redacted Memorandum filed with motion); Dkt. 394 at 2 (suggesting redacted Response filed July 5). These redacted versions ought to be unsealed, as should Class Counsel's Reply (Dkt. 397). Class Counsel stated that the Memorandum in support of their Motion should "be kept under seal at least until this Court publicly releases a redacted version of the Master's Submission." Dkt. 301 at 2. It is unclear to CCAF why the Master's Response was filed under seal (*see* Dkt. 376), but Class Counsel represented they "do not believe that the Proposed Reply contains information that needs to be sealed," and moved for it to be sealed simply because it contains information from the sealed Response. Dkt. 394 at 2. Since the Special Master's Report and exhibits have been publicly filed in redacted form, the redacted Memorandum, redacted Response, and Reply may likewise be unsealed.

Therefore, CCAF moves that the Court order the Special Master to provide its counsel with the above filings and any other sealed filings that, in the Special Master's view, pertain to the Motion. The Court should also order that any CCAF attorneys with access to sealed filings in this case execute the undertaking required by the protective order. Dkt. 61.

Dated: August 1, 2018

/s/ M. Frank Bednarz
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Attorneys for Amicus Curiae
Competitive Enterprise Institute
Center for Class Action Fairness

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(A)(2)

I certify that on August 1, 2018, CCAF emailed counsel for the parties and counsel for the Special Master in a good faith effort to narrow or resolve the issues raised in this motion. At the time of filing, all three Class Counsel firms (Labaton Sucharow LLP, Lieff Cabraser Heimann & Bernstein, and the Thornton Law Firm) have advised they are opposed to CCAF's motion. Counsel for the Special Master, State Street Bank & Trust, McTigue Law LLP, Zuckerman Spaeder LLP, and Keller Rohrback L.L.P. advised they take no position on CCAF's motion at this time.

Dated: August 1, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz

CERTIFICATE OF SERVICE

I certify that on August 1, 2018, I served a copy of the forgoing on all counsel of record by filing a copy via the ECF system.

Dated: August 1, 2018

/s/ M. Frank Bednarz
M. Frank Bednarz